UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
LabMD, Inc., a corporation, Respondent.	)	DOCKET NO. 9357

ORDER DENYING MOTIONS TO QUASH SUBPOENAS *AD TESTIFICANDUM*

I.

There are currently pending two motions regarding certain subpoenas issued by Respondent to procure trial testimony (collectively, "Motions"). Specifically, on May 9, 2014, M. Eric Johnson filed a Motion to Quash Respondent's trial subpoena ("Johnson Motion") and on May 12, 2014, Robert Boback filed an Emergency Motion to Quash or Limit Respondent's trial subpoena ("Boback Motion"). On May 15, 2014, Respondent filed an opposition to each Motion ("Oppositions"). Federal Trade Commission ("FTC") Complaint Counsel did not file a response to either Motion.[1] Because the Motions present substantially the same issues, they are addressed together in this consolidated Order.

Having fully reviewed and considered the Motions and the Oppositions, the Motions are DENIED, as explained below.

II.

A.

Mr. Johnson argues that the trial subpoena should be quashed because he previously provided deposition testimony in this matter and because being required to appear and give live testimony at the hearing, which commences May 20, 2014, will disrupt certain professional obligations and personal obligations, including a weeklong family vacation beginning on or about May 23, 2014. Mr. Johnson further asserts that his deposition testimony was truthful and, while Mr. Johnson does not contend that his testimony is not relevant to the case, he states his role is "limited."

[1] On the record at the Final Prehearing Conference, Complaint Counsel stated that it takes no position on the Johnson Motion and that, as to the Boback Motion, it was willing to consent to Mr. Boback's request to testify by video rather than in person. (May 15, 2014 Final Prehearing Conference transcript at 7-8).

Respondent counters that FTC Rule 3.43 permits issuance of a trial subpoena compelling Mr. Johnson to give live testimony; that Mr. Johnson's testimony is relevant; and that Mr. Johnson has failed to demonstrate that complying with the subpoena will impose an undue burden. Respondent further states that Respondent has made, and is continuing to make, every effort to accommodate Mr. Johnson's schedule in order to minimize the asserted disruptions to Mr. Johnson's professional and personal plans.

Respondent further argues that deposition testimony is not intended to substitute for live testimony and that the language of Rule 3.34, authorizing the issuance of subpoenas to appear and give trial testimony, is not qualified with regard to prior deposition testimony. In addition, Respondent argues that FTC Rules clearly contemplate that a witness may be deposed in discovery and then subsequently also be called as a live witness at trial. Moreover, Respondent states, Respondent expects to examine Mr. Johnson regarding information gathered in discovery conducted after Mr. Johnson's deposition was concluded on February 18, 2014. Respondent also contends that live testimony is appropriate to enable the fact finder to assess Mr. Johnson's demeanor for the purpose of determining credibility. Thus, Respondent concludes, the fact that Mr. Johnson gave deposition testimony previously in this matter is not a basis for quashing the subpoena.

B.

Mr. Boback argues that the trial subpoena should be quashed, or he should be permitted to satisfy the subpoena by testifying via video conference, because as Chief Executive Officer of Tiversa Holding Company ("Tiversa"), he has "several critical, previously scheduled meetings that make in-person testimony burdensome." Boback Motion at 1. These include a series of client meetings in New York from May 19 through May 22, 2014, and additional internal and customer meetings in Pittsburgh from May 23, 2014 through the following week. Mr. Boback urges that allowing testimony via video conference will not impose any costs on the parties, and that Respondent's refusal to consent to video testimony is based upon LabMD's desire to harass Mr. Boback, with whom LabMD is involved in litigation. Citing FTC Rule 3.31(c)(2) regarding the scope of discovery, Mr. Boback further argues that live testimony will be unreasonably cumulative or duplicative, given that he has already provided deposition testimony, and that live testimony is more burdensome, expensive, and inconvenient than testimony via video conference.

In its Opposition, Respondent argues that the subpoena to Mr. Boback was properly issued and served pursuant to FTC Rule 3.34, and that Mr. Boback has failed to show that the subpoena should be quashed or limited. Respondent asserts that Mr. Boback's testimony is critical to the issues in the case, noting that Complaint Counsel's case relies heavily on Mr. Boback's deposition testimony, including as support for the opinions of Complaint Counsel's proffered experts. Furthermore, Respondent contends, it is not unduly burdensome to require Mr. Boback to testify live, rather than by video, when Pittsburgh is a short flight or several-hour drive from the hearing location in Washington, D.C.; Respondent will reimburse the cost pursuant to FTC Rules; and Respondent remains willing to accommodate Mr. Boback's schedule. Regarding Mr. Boback's asserted scheduling conflicts, Respondent states it has no

objection to Mr. Boback appearing during the week of May 27, or the following week, if necessary.

III.

The issuance of trial subpoenas is governed by Rule 3.34, which states in pertinent part:

> (a) Subpoenas *ad testificandum*. Counsel for a party may sign and issue a subpoena, on a form provided by the Secretary, requiring a person to . . . attend and give testimony at an adjudicative hearing.

16 C.F.R. § 3.34(a).

Contrary to Mr. Boback's argument, the limitations of Rule 3.31(c)(2) govern discovery and the plain language of Rule 3.34(a) allowing issuance of trial subpoenas does not contain those limitations. Thus, the limitations regarding discovery do not govern the issues presented.

It should be noted that neither witness contends that he has no relevant information to provide. Instead, the Motions focus on alleged burdens arising from having to appear and present live testimony. In this regard, "[t]he fact that appearance at trial presents some burden on an individual does not protect him from providing testimony." *In re McWane, Inc.*, 2012 FTC LEXIS 150, at *4 (Sept. 5, 2012). Neither Motion describes the type of burden that cannot be mitigated through cooperation between Respondent and each witness to arrange a convenient date for the witness's appearance. Accordingly, the subpoenas may not be quashed on the ground of burden, although Respondent will be required to work cooperatively with the witnesses to arrange a convenient date for their appearances.

Furthermore, the fact that both Mr. Johnson and Mr. Boback have previously given deposition testimony is not a valid basis for quashing a trial subpoena. "A party is 'entitled to require [a non-party's] attendance at the trial despite his previous deposition since the purpose of depositions is to prepare for trial, not to serve as a substitute for live testimony in court.' *In re Coca-Cola Co.*, 1990 FTC LEXIS 204, *1 (June 12, 1990)." *In re McWane, Inc.*, 2012 FTC LEXIS 150, at *3 (denying motion to quash subpoena *ad testificandum* for trial).

Finally, Mr. Boback's claim that Respondent seeks live trial testimony in order to harass Mr. Boback, because he and LabMD are involved in litigation, is speculative and unpersuasive. Pursuant to a validly issued subpoena, Respondent is legally entitled to procure Mr. Boback's live testimony, and Respondent has no obligation to consent to substituting video testimony. Respondent's refusal to do so is not evidence of an intent to harass.

IV.

Having fully considered the arguments in the Motions and Oppositions, and for all the foregoing reasons, the Motion of M. Eric Johnson to Quash Respondent's trial subpoena and the Emergency Motion of Robert Boback to Quash or Limit Respondent's trial subpoena are

DENIED. However, Respondent shall work cooperatively with each witness to arrange a date for appearance that will, to the extent practicable, accommodate each witness's schedule.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: May 16, 2014