

BACKGROUND

Professor Eric Johnson is a central witness to the allegations contained in the complaint filed by the Federal Trade Commission (FTC), which alleges that LabMD's data-security practices violated Section 5 of the Federal Trade Commission Act. 15 U.S.C. § 45(a),(n). Specifically, the professor has unique firsthand personal knowledge of the facts underlying how LabMD's 1,718 file came into the possession of Dartmouth College, the FTC, and Tiversa, Inc., as well as the extent to which the 1,718 file was "available" on Limewire, which, *inter alia*, is highly relevant to the question whether LabMD's PHI data-security practices "caused or were likely to cause substantial injury to consumers" pursuant to 15 U.S.C. § 45(n). Accordingly, his testimony is critical to LabMD's ability to defend against the allegations in the Complaint, and LabMD has the right to call him as a witness at trial and examine him before the Court.

On May 2, 2014, LabMD properly served a subpoena *ad testificandum* upon Professor Johnson to appear live as a fact witness in the adjudicative hearing, attached hereto as Exhibit 1. On May 9, 2014, Professor Johnson filed a motion to quash that subpoena, essentially arguing that the subpoena should be quashed because requiring Professor Johnson to testify would allegedly disrupt a week-long family vacation and would allegedly disrupt Professor Johnson's "professional obligations" without explaining how.¹ See Mot. to Quash ¶¶ 5, 8-9. With the sole exception of an excerpt from Professor Johnson's February 14, 2014, deposition transcript, the motion is unsupported by any evidence, such as a declaration or affidavit from Professor Johnson regarding his vacation plans and work schedule. *Cf.* 16 C.F.R. § 3.34(c) (contemplating that

¹ It is unclear when Professor Johnson's vacation is set to begin, as the motion is internally inconsistent and unsupported by any affidavit or declaration from Professor Johnson. Compare Johnson Mot. to Quash ¶ 5 ("weeklong family vacation scheduled to start on Monday, May 26, 2014), with ¶ 9 ("Mr. Johnson is scheduled to leave on a family vacation beginning on Friday, May 23, 2014").

motions to quash be supported by “affidavits and other supporting documentation”). For that matter, the motion cites *no* authority whatsoever in support of its apparent argument that the subpoena should be quashed, with the sole exception of Rule 3.34(c), which, if anything, only demonstrates that the motion should be denied as it is unsupported by evidence.

ARGUMENT

I. Professor Johnson Cannot Meet His Burden of Showing the Subpoena Is Unreasonable.

Professor Johnson’s testimony is relevant and material to LabMD’s case, and his motion to quash fails to show that LabMD’s subpoena is unreasonable or otherwise improper. A party seeking to quash a subpoena bears the heavy burden to show the request is unreasonable. *In re OSF Healthcare Sys.*, 2012 FTC LEXIS 31, *3-4 (F.T.C. Feb. 14, 2012). That burden “is not easily met where . . . [the] inquiry is pursuant to a lawful purpose and the request[] . . . is relevant to that purpose.” *Id.* at *4 (citation omitted). Further, “[e]ven where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and costs, that will not excuse [complying with a subpoena] that appears generally relevant to the issues in the proceeding.” *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 41, at *9-10 (Jan. 15, 2009) (citing *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976)).

Here, Professor Johnson has not demonstrated that compliance with LabMD’s subpoena will impose a material degree of burden, inconvenience, and cost, let alone a substantial burden.²

² In fact, under the Commission’s Rules, Professor Johnson will not incur *any* costs in connection with this matter, as LabMD is required to reimburse him for the costs of attendance and travel.

Cf. id. Professor Johnson has not shown that any “disruption” to his vacation plans or work schedule imposes the type of severe hardship that would warrant relief and thus cannot meet his heavy burden of establishing that the subpoena should be quashed.

Conversely, Professor Johnson’s testimony is not only “generally relevant to the issues in the proceeding,” *see id.*, but is highly relevant to this proceeding. Both LabMD and Complaint Counsel recognize the importance of Professor Johnson’s testimony to these proceedings. LabMD included Professor Johnson on its Final Proposed Witness List. *See* Exhibit 2 ¶ 3 (LabMD’s Final Proposed Witness List); Exhibit 3 ¶ 33 (Complaint Counsel’s Final Proposed Witness List). Complaint Counsel went so far as to attempt to name the professor as a lay expert to testify about “the consequences of inadvertent disclosures of consumers’ personal information.” *See* Order Granting Motion *In Limine* To Limit The Testimony of Eric Johnson, *In the Matter of LabMD, Inc.*, FTC Dkt. 9357 (May 8, 2014) (granting LabMD’s motion *in limine* to limit the testimony of Eric Johnson).

In its proposed witness list, LabMD indicated that it intended to have Professor Johnson:

testify live to the facts underlying his study entitled “Data Hemorrhages in the Health-Care Sector”; communications with the FTC, Tiversa, and/or Health and Human Services regarding LabMD, the 1718 file and his research methodology in general and specifically in relation to locating and downloading the 1718; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

Exhibit 2 ¶ 3. In response, Complaint Counsel echoed LabMD’s position that Professor Johnson’s testimony is highly relevant. *See* Exhibit 2 ¶ 33.³ Thereafter, Complaint Counsel further acknowledged that the professor, as a percipient witness, possesses important and unique

³ On May 8, 2014, this Court granted LabMD’s motion *in limine* prohibiting Complaint Counsel from offering Mr. Johnson’s opinion testimony regarding “the consequences of inadvertent disclosures of consumers’ personal information.”

firsthand personal knowledge regarding the 1,718 file based upon his personal use of the file in writing an academic study at Dartmouth. Order at 4-5 (precluding expert testimony).

II. Professor Johnson's Deposition Transcript Does Not Excuse Him from Giving In-Person Testimony At The Evidentiary Hearing.

Although the Professor's motion to quash suggests that he should not have to testify "live" because he already has been deposed, Mot. to Quash ¶ 3, the Commission's Rules and case law are clear that witnesses may need to testify more than just once.⁴ *See, e.g.*, Rule 3.33(b), 16 C.F.R. § 3.33(b). Rule 3.34 does not qualify LabMD's right to subpoena witnesses to testify at the evidentiary hearing. Rather, Commission Rule 3.34(a), 16 C.F.R. § 3.34(a), provides that "[c]ounsel for a party may sign and issue a subpoena . . . requiring a person to . . . attend and give testimony at an adjudicative hearing."⁵

This is because pretrial depositions are meant to serve as a discovery device and to better understand a witness's potential testimony. They are not meant to (and cannot) serve as a substitute for live trial testimony.⁶ This holds true with respect to Professor Johnson for at least two reasons.

First, Professor Johnson was deposed on February 18, 2014. Here, given the extensive discovery that has followed Professor Johnson's testimony, LabMD fully expects to examine the professor regarding matters that have only come to light *after* his deposition, which LabMD could not examine him about then.

⁴ In fact, under Commission Rules, it is permissible to depose a witness twice in the same matter. *See In re Polypore Int'l*, 2008 FTC LEXIS 155, *9-10 (F.T.C. Nov. 14, 2008).

⁵ Rule 3.34 governs subpoenas issued for both discovery depositions and adjudicative hearings.

⁶ Further, Additional Provision 12 of the Court's Scheduling Order generally limits each deposition to a "single, seven-hour day."

Second, unless Professor Johnson is required to testify at the evidentiary hearing, this Court will have no opportunity to observe Professor Johnson's demeanor and make a fully informed determination as to his credibility as a witness and the veracity of his testimony.⁷ *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1070-71 (11th Cir. 2005) ("The Supreme Court has noted the importance of an examiner's determination of credibility," emphasizing importance of "experienced examiner who has observed the witnesses" to fact-finding process.); *see also Rodriguez del Carmen v. Gonzales*, 441 F.3d 41, 43 (1st Cir. 2006) ("Matters of witness credibility and demeanor are peculiarly for the fact-finder."). Because fact-finders such as this Court "ma[k]e credibility findings based upon . . . [the Court's] observations of the witnesses' demeanor and the testimony given at trial," *Schering-Plough*, 402 F.3d at 1070, deposition transcripts simply cannot substitute for "live" testimony.

Accordingly, we respectfully request that the Court order Professor Johnson to appear before the trier of fact, as envisioned by the Court's Rules.

III. LabMD Is Flexible And Willing To Accommodate Professor Johnson's Schedule And We Intend To Inquire The Professor Regarding Additional Matters.

In his motion, Professor Johnson argues that his schedule does not permit him to testify. *See Johnson Mot. to Quash* ¶¶ 5-9. Even though it has no duty to do so, LabMD has, and is making, every effort to accommodate Professor Johnson's schedule. In LabMD's May 2, 2014 letter accompanying the subpoena, LabMD informed Professor Johnson that "the date and time on the Subpoena are placeholders" and LabMD is "available to coordinate . . . the actual date and time [Professor Johnson] will be needed." Exhibit 1. During the May 5th telephonic meet &

⁷ Additionally, Commission Rule 3.41(c), 16 C.F.R. § 3.41(c), provides that LabMD "shall have the right to . . . cross-examin[e] [witnesses], present[] evidence, . . . and all other rights essential to a fair hearing." *See also* Fed. R. Civ. P. 43(a) (providing the right to take witness testimony in open court).

confer, LabMD advised Professor Johnson's attorney that LabMD is amenable to having Professor Johnson testify on either May 22nd or 23rd, two dates Professor Johnson's attorney indicated Professor Johnson was available to testify and is willing to discuss with Complaint Counsel the possibility of permitting Professor Johnson to testify out of order during Complaint Counsel's case in chief.

Professor Johnson anticipated as early as April 11, 2014, that he would likely be called as a witness. Exhibit 4 (Email from Professor Johnson's counsel to Complaint Counsel stating: "Hypothetically, if a non-party witness was not available to testify at an FTC hearing because it conflicted w/ travel plans, how would that issue be brought to the attention of the ALJ?"). Yet, Professor Johnson did not contact counsel for LabMD to confirm his suspicions and apparently made no alternative arrangements. Professor Johnson's claim that requiring him to testify before the fact-finder would impose a substantial hardship by "disrupting" his vacation and professional life in unspecified ways does not meet the burden of showing that the subpoena is unreasonable and therefore should be rejected.

CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Court deny Professor Johnson's motion to quash the subpoena *ad testificandum*.

/s/ William A. Sherman, II
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Reed D. Rubinstein, Esq.
Sunni R. Harris, Esq.
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Counsel for Respondent

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

In the Matter of)
)
LabMD, Inc.,)
a corporation.)
)
)
_____)

DOCKET NO. 9357

**[PROPOSED] ORDER DENYING M. ERIC JOHNSON’S MOTION TO QUASH
LabMD’s SUBPOENA AD TESTIFICANDUM**

Upon consideration of M. Eric Johnson’s Motion to Quash Lab MD’s Subpoena *Ad Testificandum* and Respondent LabMD’s Opposition thereto, IT IS HEREBY ORDERED that M. Eric Johnson’s Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

Kevin O'Leary
Associate General Counsel
Dartmouth College
63 South Main Street, Suite 301
Hanover, NH 03755
E-Mail: Kevin.D.O'Leary@dartmouth.edu

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
Margaret Lassack, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8122
Washington, D.C. 20580

CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: May 14, 2014

By: /s/William A. Sherman, II
William A. Sherman, II

EXHIBIT 1



Legal Counsel.

DINSMORE & SHOHL LLP
801 Pennsylvania Avenue, N.W. ^ Suite 610
Washington, DC 20004
www.dinsmore.com

William A. Sherman, II
(202) 372-9117 (direct) ^ (202) 372-9141 (fax)
william.sherman@dinsmore.com

May 2, 2014

VIA ELECTRONIC MAIL AND U.S. MAIL
(Kevin.D.O'Leary@dartmouth.edu)

Kevin D. O'Leary
Associate General Counsel
Dartmouth College
63 South Main Street
Suite 301
Hanover, New Hampshire 03755

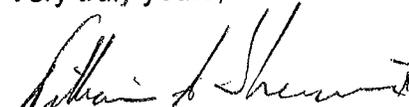
RE: LabMD, Inc. and FTC Docket No. 9357

Dear Mr. O'Leary:

Please find enclosed a courtesy copy of the hearing Subpoena which we will serve upon Professor Eric Johnson. Please note that the date and time on the Subpoena are placeholders. I am available to coordinate with you the actual date and time your client will be needed. As you will note, the Subpoena will go directly to Vanderbilt University as I was unsure as to whether or not you would accept service on his behalf.

Should you have any questions please do not hesitate to contact me.

Very truly yours,



William A. Sherman, II

WAS/jb
Enclosure

cc: Counsel for FTC

2971751v1



**SUBPOENA AD TESTIFICANDUM
ADJUDICATIVE HEARING**

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

<p>1. TO M. Eric Johnson Vanderbilt Owen Graduate School of Management Management Hall 401 21st Avenue, South Nashville, TN 37203</p>	<p>2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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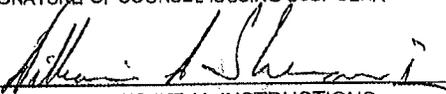
This subpoena requires you to attend and give testimony at an adjudicative hearing, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF ADJUDICATIVE HEARING FTC Courtroom Room 532 Federal Trade Commission Building 600 Pennsylvania Ave., NW Washington, DC 20580</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE D. Michael Chappell, Chief Administrative Law Judge</p> <hr/> <p>5. DATE AND TIME OF ADJUDICATIVE HEARING May 20, 2014 at 10:00 a.m.</p>
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6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc. Docket No. 9357

<p>7. ADMINISTRATIVE LAW JUDGE Chief Judge D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA William A. Sherman II, Respondent Counsel Dinsmore & Shohl, LLP 801 Pennsylvania Avenue, NW Suite 610 Washington, DC 20004 202-372-9100</p>
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<p>DATE SIGNED May 1, 2014</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA </p>
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GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://ftl.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

EXHIBIT 2

- 2. Robert Boback, Chief Executive Officer of Tiversa Holding Corporation (“Tiversa”)**
We expect that Mr. Boback will testify live, as Tiversa’s corporate designee, about Tiversa’s technology and its use on peer-to-peer file sharing protocols and networks; Tiversa’s communications with the FTC, Eric Johnson and Dartmouth; facts relating to the “P2P insurance aging file” referenced in Paragraph 17 of the Complaint; and other facts relating to the security incident alleged in Paragraphs 17-20 of the Complaint. We also expect that Mr. Boback will testify about facts relating to the documents produced in response to Complaint Counsel’s subpoena *duces tecum* to the organization that produced Tiversa’s document to the FTC in this action and the admissibility of those documents into evidence in the hearing in this action. We also expect that Mr. Boback will testify about any Civil Investigative Demands which resulted in the production of documents from Tiversa to FTC.
- 3. Eric Johnson, former Associate Dean of the Tuck School of Business at Dartmouth**
We expect that Mr. Johnson will testify live to the facts underlying his study entitled “Data Hemorrhages in the Health-Care Sector”; communications with the FTC, Tiversa, and/or Health and Human Services regarding LabMD, the 1718 file and his research methodology in general and specifically in relation to locating and downloading the 1718; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.
- 4. Allen Truett, former Chief Executive Officer of Automated PC Technologies, Inc.**
We expect that Mr. Truett will testify live about LabMD’s computer networks, including, but not limited to, remote access thereto; the products and/or services that he and his company, Automated PC Technologies, Inc., provided to LabMD, including but not limited to the security features of those products and/or services; the communications between LabMD and Mr. Truett or Automated PC Technologies, Inc.; the facts underlying and set forth in the affidavit that Mr. Truett executed on May 20, 2011, which LabMD submitted to Commission staff during the Part II investigation; and the facts relating to affirmative defenses asserted in the Answer.
- 5. Karina Jestes, Detective, Sacramento, CA Police Department**
We expect that Detective Jestes will testify by designation about facts relating to the security incident alleged in Paragraphs 10 and 21 of the Complaint; those consumers affected by the security incident alleged in Paragraphs 10 and 21 of the Complaint; facts relating to meetings and communications between her and the FTC; facts relating to the documents produced in response to Complaint Counsel’s subpoena *duces tecum* to the Custodian of Records of the Sacramento, CA Police Department in this action and the admissibility of those documents into evidence in the hearing in this action.
- 6. Robert Hyer, former LabMD IT Manager and former LabMD contractor**
We expect that Mr. Hyer will testify live about LabMD’s computer networks, including, but not limited to, hard ware and soft ware, remote access thereto; LabMD’s security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; and facts relating to affirmative defenses asserted in the Answer.

EXHIBIT 3

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

_____)	
In the Matter of)	
)	
LabMD, Inc.,)	Docket No. 9357
a corporation,)	
Respondent.)	
_____)	

COMPLAINT COUNSEL'S FINAL PROPOSED WITNESS LIST

Pursuant to the Court's Revised Scheduling Order, dated October 22, 2013, Complaint Counsel hereby provides its Final Proposed Witness List to Respondent LabMD, Inc. ("LabMD" or "Respondent"). This list identifies the witnesses who may testify for Complaint Counsel at the hearing in this action by deposition and/or investigational hearing transcript, affidavit, declaration, or orally by live witness.

Subject to the limitations in the Scheduling Order and Revised Scheduling Order entered in this action, Complaint Counsel reserves the right:

- A) To present testimony by deposition and/or investigational hearing transcript, affidavit, declaration, or orally by live witness, from the custodian of records of any party or non-party from whom documents or records have been obtained—specifically including, but not limited to, those parties and non-parties listed below—to the extent necessary to demonstrate the authenticity or admissibility of documents in the event a stipulation cannot be reached concerning the authentication or admissibility of such documents;

to Complaint Counsel's subpoena *duces tecum* to the Custodian of Records of the Sacramento, CA Police Department in this action, and the admissibility of those documents into evidence in the hearing in this action.

33. M. Eric Johnson, Dean of Owen Graduate School of Management, Vanderbilt University

Dean Johnson will testify about facts related to his study entitled "Data Hemorrhages in the Health-Care Sector," including his research methodology and findings; the "P2P insurance aging file" referenced in Paragraph 17 of the Complaint; facts relating to the security incident alleged in Paragraphs 17-20 of the Complaint; peer-to-peer file sharing applications and networks and the consequences of inadvertent disclosures of consumers' personal information; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel as to which he has knowledge; or any other matters as to which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

34. Roger Jones, Records Section Supervisor, Sandy Springs, GA Police Department

Mr. Jones will testify about facts related to the admissibility of documents that were produced in response to Complaint Counsel's subpoena *duces tecum* to the Sandy Springs, GA Police Department into evidence in the hearing in this action.

35. David Lapidés, Detective, Sandy Springs, GA Police Department

Detective Lapidés will testify about his communications with LabMD and other facts relating to the security incident alleged in Paragraph 21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel as to which he has knowledge; or any other matters as to which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative

EXHIBIT 4

From: VanDruff, Laura Riposo </O=FTCEXCHANGE/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=L.VANDRUFF>
Sent: Friday, April 11, 2014 8:56 PM
To: 'Kevin D. O'Leary' <Kevin.D.O'Leary@dartmouth.edu>
Subject: RE: LabMD

Thank you for your message, Kevin.

I regret that I am not able to provide you with advice regarding practice before the Commission or the Administrative Law Judge.

Best regards,

Laura

From: Kevin D. O'Leary [mailto:Kevin.D.O'Leary@dartmouth.edu]
Sent: Friday, April 11, 2014 9:37 AM
To: VanDruff, Laura Riposo
Subject: LabMD

Laura, Hypothetically, if a non-party witness was not available to testify at an FTC hearing b/c it conflicted w/ travel plans, how would that issue be brought to the attention of the ALJ? Kevin

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