

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



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

PUBLIC

ORIGINAL

Docket No. 9357

**COMPLAINT COUNSEL’S MOTION FOR ORDER REQUIRING RESPONDENT’S
COUNSEL TO FILE A RULE 3.39 REQUEST OR RESUMING THE EVIDENTIARY
HEARING**

INTRODUCTION

Pursuant to Federal Trade Commission Rule of Practice 3.22, Complaint Counsel respectfully moves for an order requiring Respondent’s counsel to file a request under Rule 3.39 for an order requiring Richard Wallace to testify before this Court and granting immunity.

If Respondent’s counsel fails to file a request for such an order within fourteen days of this Court granting Complaint Counsel’s motion, Complaint Counsel respectfully moves that this Court resume the evidentiary hearing so Respondent can complete its case and this Court can proceed toward rendering a decision in this matter.

Complaint Counsel met and conferred with counsel for Respondent on the subject of this motion, but was unable to reach agreement. *See* Meet and Confer Statement (attached as Exhibit A).

BACKGROUND

The Complaint alleges that Respondent LabMD, Inc. (“Respondent”) engaged in unfair practices in violation of Section 5 of the FTC Act by failing to take reasonable and appropriate

measures to prevent unauthorized access to consumers' personal information. Compl. ¶¶ 6-11, 17-21. The Complaint alleges that these practices caused or are likely to cause harm to consumers, including exposure to identity theft and disclosure of sensitive, private medical information. Compl. ¶¶ 12, 17-21.

Trial commenced on May 20, 2014. Complaint Counsel rested its case on May 23, 2014. On May 27, 2014, Respondent issued a trial subpoena to Richard Wallace, a former employee of Tiversa, Inc. ("Tiversa"), to testify at the evidentiary hearing in this matter on May 30, 2014.

During the evidentiary hearing on May 30, 2014, counsel for Mr. Wallace appeared in court. Trial Tr. at 1243. After revealing a pending Congressional investigation of Tiversa by the United States House of Representatives Committee on Oversight and Government Reform ("Oversight Committee"), counsel for Mr. Wallace stated that Mr. Wallace would be invoking his Fifth Amendment rights against self-incrimination in response to any substantive questions if called to testify in this matter. Trial Tr. at 1243-45. The Court informed Respondent's counsel that Rule 3.39 applies in situations where a witness invokes the Fifth Amendment and that Rule 3.39 requires counsel requesting testimony from that witness to file a motion. Trial Tr. at 1248.

Counsel for Mr. Wallace then stated that Mr. Wallace was seeking immunity from the Oversight Committee in exchange for his testimony. Trial Tr. at 1249. The court ordered a recess until June 12, 2014 to allow Mr. Wallace to obtain Congressional immunity for his testimony. Trial Tr. at 1251-53.

On June 12, 2014, Respondent called Mr. Wallace, Respondent's final witness. Trial Tr. at 1290. Counsel for Mr. Wallace appeared and reiterated that Mr. Wallace would invoke his

Fifth Amendment rights in response to any substantive questions. Trial Tr. at 1269. During an *in camera* bench conference, Respondent's counsel made a proffer of Mr. Wallace's expected testimony.

Thereafter, Respondent called Mr. Wallace to testify, and Mr. Wallace invoked his Fifth Amendment rights. Trial Tr. at 1301-02. The Court ordered a recess to allow Mr. Wallace to continue his effort to obtain Congressional immunity for his testimony. Trial Tr. at 1303-07. The Court ordered the parties to provide the Court with a weekly status update on Mr. Wallace's immunity effort. Trial Tr. at 1304.

Since the parties last appeared before this Court nearly two months ago, Respondent's counsel has provided this Court seven status updates regarding Mr. Wallace's immunity efforts. Each of these updates indicates that the Oversight Committee has not granted Mr. Wallace the requested immunity.

The House of Representatives recessed on August 1, 2014 and reconvenes on September 8, 2014. *See* House Calendar, 113th Congress, Second Session, *available at* <http://majorityleader.gov/Calendar/>.

As of the filing of this motion, Respondent's counsel has not filed a request under Rule 3.39 for an order requiring Mr. Wallace to testify before this Court and granting immunity.

ARGUMENT

I. RESPONDENT'S COUNSEL MUST FILE A RULE 3.39 REQUEST FOR MR. WALLACE TO TESTIFY AND BE GRANTED IMMUNITY IN THIS PROCEEDING

If Mr. Wallace were to secure a grant of immunity from the Oversight Committee, such a grant would not immunize his testimony before this Court. Nothing in 18 U.S.C. § 6005, the

provision through which Mr. Wallace would seek Congressional immunity, extends to any testimony by Mr. Wallace in this proceeding, which Rule 3.39 explicitly states is governed by 18 U.S.C. § 6002. Rule 3.39, which implements 18 U.S.C. § 6002, requires Respondent's counsel to make a request to the Administrative Law Judge for an order requiring Mr. Wallace to testify and granting immunity. 16 C.F.R. § 3.39(b).

If it intends to seek immunity for one of its witnesses in this proceeding, Respondent's counsel must request an order under Rule 3.39. Indeed, Respondent's counsel acknowledged at the June 12, 2014 evidentiary hearing that it intended to file a request under Rule 3.39 requiring Mr. Wallace to testify and granting immunity. Trial Tr. at 1302-03. Respondent's counsel should therefore be required to file a request for an order under Rule 3.39, and if Respondent's counsel does not do so, the evidentiary hearing should be resumed so that Respondent may complete its case and this Court can move toward issuing a decision.

II. IT IS APPROPRIATE FOR RESPONDENT'S COUNSEL TO REQUEST AN ORDER UNDER RULE 3.39 NOW GIVEN MR. WALLACE'S STALLED EFFORTS TO OBTAIN IMMUNITY

To date, Respondent's counsel has not filed a request for an order under Rule 3.39, ostensibly on the belief that the Oversight Committee would grant Mr. Wallace immunity "in short order." Trial Tr. at 1279. This has not happened.

Indeed, Mr. Wallace's efforts to obtain immunity from the Oversight Committee have stalled. Over two months have elapsed since Mr. Wallace's scheduled testimony before this Court. Congress is now in recess and will not reconvene until September 8, 2014. Therefore, at least another month will pass before the Oversight Committee could consider an immunity vote for Mr. Wallace.

At this juncture, it remains unclear whether the Oversight Committee will approve an order granting Mr. Wallace immunity. The uncertain and unresolved status of Mr. Wallace's immunity discussions with the Oversight Committee is another reason for Respondent's counsel to request an order under Rule 3.39.

In any event, the immunity requests run along separate tracks and a request by Respondent's counsel under Rule 3.39 for an order requiring Mr. Wallace to testify and granting immunity in no way precludes Mr. Wallace from continuing his immunity discussions with the Oversight Committee.

III. RULES GOVERNING THIS PROCEEDING CALL FOR COUNSEL TO AVOID DELAY AND FOR HEARINGS TO PROCEED EXPEDITIOUSLY

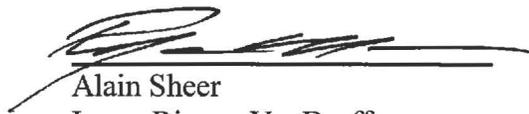
Almost sixty days have passed since the parties last appeared in Court and this proceeding is now recessed indefinitely because of uncertainty regarding whether Mr. Wallace — Respondent's last witness — will (or will not) be granted immunity for his testimony. A request by Respondent's counsel under Rule 3.39 for an order requiring testimony and granting immunity would be a step towards securing the testimony of Mr. Wallace and drawing this matter to a conclusion.

Each day that Respondent's counsel fails to file under Rule 3.39 further delays any potential testimony by Mr. Wallace and the conclusion of this litigation. This result runs counter to Rule 3.1, which provides that "counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." 16 C.F.R. § 3.1. It also is inconsistent with Rule 3.41, which provides that "[h]earings shall proceed with all reasonable expedition, and, insofar as practicable . . . shall continue . . . without suspension until concluded." 16 C.F.R. § 3.41(b).

If Respondent's counsel is not prepared to make a request under Rule 3.39 within fourteen days of entry of an order granting Complaint Counsel's motion, this Court should resume the evidentiary hearing so Respondent may conclude its case and this Court can proceed toward rendering a decision in this matter.

Dated: August 5, 2014

Respectfully submitted,



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Complaint Counsel

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

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In the Matter of)	PUBLIC
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LabMD, Inc.,)	Docket No. 9357
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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S
MOTION FOR ORDER REQUIRING RESPONDENT'S COUNSEL TO FILE A RULE
3.39 REQUEST OR RESUMING THE EVIDENTIARY HEARING**

Upon consideration of Complaint Counsel's Motion, it is hereby ORDERED, that Respondent's counsel is required to file a request under Rule 3.39 for an order requiring Richard Wallace to testify and granting immunity. If Respondent's counsel fails to file a request within fourteen days of service of this order, this Court shall resume the evidentiary hearing.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-113
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be delivered *via* electronic mail and by hand to:

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

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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Counsel for Tiversa Holding Corp.

CERTIFICATE FOR 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.

August 5, 2014

By: 
Ryan Mehm
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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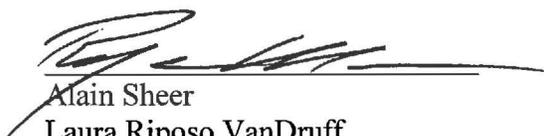
**STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)
AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to F.T.C. Rule 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion for Order Requiring Respondent’s Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hearing, Complaint Counsel met and conferred with counsel for Respondent, in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach an agreement.

Complaint Counsel Laura Riposo VanDruff, Ryan Mehm, Megan Cox, and Jarad Brown engaged in a meet-and-confer by phone with William Sherman, counsel for Respondent, and Prashant Khetan of Cause of Action, on August 5, 2014 at approximately 9 am. Despite good faith efforts, Complaint Counsel has been unable to reach agreement with counsel for Respondent regarding Respondent’s counsel filing a Rule 3.39 request.

Dated: August 5, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Alain Sheer', is written over a horizontal line.

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