

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



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

)

PUBLIC
Docket No. 9357

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

In response to Complaint Counsel’s motion, requesting that the Court either order LabMD, Inc. (“LabMD”) to file a Rule 3.39 Request or resume the evidentiary hearing, LabMD states that it would agree to file such a motion, but respectfully requests that it not be ordered to do so until October 1, 2014. In support thereof, LabMD notes:

- It is presumed that Richard Wallace (a former Tiversa, Inc. employee at the center of the FTC’s allegations against LabMD) will provide important testimony for this Court’s consideration.¹ Indeed, during the pending recess, Complaint Counsel has made efforts to re-open discovery (which the Court denied (*see* Order Denying Complaint Counsel’s Motion for Leave to Issue Subpoenas for Rebuttal Evidence (July 23, 2014)) and “supplement” its initial disclosures, both times with documents intended to impeach Mr. Wallace. Thus, resuming the hearing without resolving the immunity issue and allowing for Mr. Wallace’s testimony would obstruct the fair resolution of this case.
- The process for resolving Mr. Wallace’s immunity already is underway before the House’s Committee on Oversight and Government Reform (“OGR”). In that proceeding, Mr. Wallace and his counsel already have met with OGR staff. To the best of LabMD’s knowledge, all that is left is a vote and, if affirmative, then the focus shifts to the Attorney General. Complaint Counsel appears to ignore this process – regardless of whether the grant of immunity moves forward under 18 U.S.C. § 6004 (administrative proceeding) or 18 U.S.C. § 6005 (Congressional proceeding), the Attorney General must be involved.² Complaint Counsel offers no authority, nor has LabMD found any,

¹ The June 12, 2014 session before this Court revolved around Mr. Wallace’s testimony, including but not limited to a grant of immunity. During that session, LabMD made a proffer of Mr. Wallace’s expected testimony, *in camera*. Trial Tr. at 1290-98 (June 12, 2014).

² Admittedly, there is little precedent for the process of obtaining immunity in this context. However, contrary to Complaint’s Counsel’s interpretation, it appears that 18 U.S.C. § 6002 provides how immunity affects a witness’

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indicating that once the Attorney General is involved, the grant of immunity can proceed only under § 6004 *or* § 6005, but not both. In fact, such a strict interpretation would waste resources given that both proceedings are pending at the same time and involve the same issue of immunity as to the same witness. Thus, it would make sense to allow OGR time to vote after returning from Congressional recess; though, in an effort to balance the desire to move this proceeding forward, and recognizing that at some point, the November elections likely will preempt a vote on immunity, LabMD suggests providing OGR with one month – September – to move forward on Mr. Wallace’s immunity.

- Allowing OGR to complete the process – which is already underway – rather than have the parties begin the process in this proceeding will not prejudice the FTC, nor has the FTC proffered to this Court any alleged prejudice. Indeed, it is curious why Complaint Counsel *now* wishes to speed up this matter, when previously it took three and one-half years to bring this under-investigated enforcement action.

For these reasons, LabMD respectfully requests that the Court deny Complaint Counsel’s Motion, but if the Court believes that a deadline ought to be set for LabMD to file an unopposed Rule 3.39 request, that LabMD requests that the deadline for doing so be October 1, 2014.

Dated: August 15, 2014

Respectfully submitted,



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Cause of Action

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Counsel for Respondent

invocation of his privilege against self-incrimination; §§ 6004 and 6005 provide the relevant process for obtaining immunity in the first instance, both of which necessarily involve the Attorney General.

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DOCKET NO. 9357

**[PROPOSED] ORDER DENYING 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 for Order Requiring Respondent’s Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hearing, and Respondent LabMD, Inc.’s Response thereto, and in consideration of the entire Record in this matter, it is hereby

ORDERED, that Complaint Counsel’s Motion for Order Requiring Respondent’s Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hearing be and the same is hereby **DENIED**.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2014, I filed the foregoing document electronically using 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 on August 15, 2014, 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 on August 15, 2014, I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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

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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: August 15, 2014

By: /s/ Patrick J. Massari
Patrick J. Massari