

ORIGINAL

PUBLIC

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

**I.**

Federal Trade Commission ("FTC") Complaint Counsel, on August 5, 2014, filed a Motion for Order Requiring Respondent's Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hearing ("Motion"). Respondent LabMD, Inc. ("Respondent" or "LabMD") filed a Response to the Motion on August 15, 2014 ("Response"). For the reasons set forth below, Complaint Counsel's Motion is DENIED IN PART and GRANTED IN PART.

**II.**

Trial in this matter commenced on May 20, 2014. On May 23, 2014, Complaint Counsel rested its case. Respondent began presenting its defense on May 27, 2014. On May 30, 2014, Respondent's counsel stated in court that it had served a subpoena for trial testimony on Mr. Richard Wallace of Tiversa Holding Company, Inc. ("Tiversa") and intended to call Mr. Wallace to provide testimony in this matter that day. (Trial transcript, May 30, 2014, p. 1230, *in camera*<sup>1</sup>).

Counsel for Mr. Wallace appeared at the proceedings on May 30, 2014, and stated on the record that Mr. Wallace was in Washington, D.C., and prepared to take the stand, but that he would not be willing or able to answer any substantive questions regarding Tiversa's role or the activities in which they have been engaged in connection with the FTC's action against LabMD, as Mr. Wallace would invoke his Fifth Amendment right against self-incrimination in response to any substantive questions. (Trial transcript, May 30, 2014, p. 1231, *in camera*). Counsel for

<sup>1</sup> Although some of the representations of counsel were made during an *in camera* session, the information revealed in this Order does not in fact require *in camera* treatment and may be publicly disclosed. 16 C.F.R. § 3.45(a) (the ALJ "may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding").

Mr. Wallace presented a May 29, 2014 letter from the Chairman of the Committee on Oversight and Government Reform of the House of Representatives, U.S. Congress (“Oversight Committee”), which was entered into the record in this proceeding as JX-3. (Trial transcript, May 30, 2014, pp. 1232, *in camera*, 1241-1242). The May 29, 2014 letter to Mr. Wallace informed Mr. Wallace that the Oversight Committee was investigating activities of Mr. Wallace’s former employer, Tiversa, in conjunction with federal government agencies, and directed Mr. Wallace to make himself available for a transcribed interview by Oversight Committee staff on June 5, 2014. JX-3. Counsel for Mr. Wallace further stated that he was in discussions with the Oversight Committee, seeking immunity for Mr. Wallace’s testimony, and that his plan would be to allow Mr. Wallace to testify in this proceeding if the immunity granted to Mr. Wallace through the Oversight Committee covers the testimony Mr. Wallace would provide in this proceeding as well. (Trial transcript, May 30, 2014, p. 1249).

A recess in this trial was then allowed until June 12, 2014, to enable Mr. Wallace to obtain Congressional immunity. In addition, Respondent was directed to review Rule 3.39 of the FTC’s Rules of Practice for Adjudicative Proceedings (“Rules”), which governs orders requiring witnesses to testify or provide other information and the granting of immunity in connection therewith. (Trial transcript, May 30, 2014, pp. 1248, 1252-1253; 16 C.F.R. § 3.39).

Trial reconvened on June 12, 2014. Mr. Wallace’s counsel stated that Mr. Wallace had not yet received Congressional immunity for his testimony. (Trial transcript, June 12, 2014, p. 1261). Respondent called Mr. Wallace to the stand. After answering questions regarding his name, and place and length of employment, Mr. Wallace stated his intent to not answer any further questions, invoking his right against self-incrimination under the Fifth Amendment. (Trial transcript, June 12, 2014, pp. 1301-1302).

Thereafter, Respondent’s counsel was advised that if Respondent intends to seek an order requiring Mr. Wallace to testify under a grant of immunity pursuant to Commission Rule 3.39, Respondent will need to file a written motion demonstrating that the testimony of Mr. Wallace may be necessary to the public interest. (Trial transcript, June 12, 2014, p. 1302). Respondent’s counsel stated that Respondent did intend to make such motion at such time that is in the best interest of justice in this case. (Trial transcript, June 12, 2014, pp. 1302-1303). Complaint Counsel stated that the government does not intend to oppose such a motion, but that it believes that the appropriate time to file such motion was at present. (Trial transcript, June 12, 2014, p. 1303). The parties were then directed to provide a weekly status report on Mr. Wallace’s request for immunity through the Oversight Committee. (Trial transcript, June 12, 2014, p. 1304).

Since the parties last appeared in Court in this proceeding, Respondent’s counsel has provided ten status updates regarding Mr. Wallace’s efforts to obtain immunity. Each of these updates indicates that the efforts continue, but that the Oversight Committee has not yet 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://www.majorityleader.gov/Calendar/113thCongressSecondSession.pdf>.

### III.

Complaint Counsel now moves, pursuant to Rule 3.22 of the FTC’s Rules of Practice, for

an order requiring Respondent's counsel to file a request under Rule 3.39 for an order requiring Mr. Wallace to testify in this matter and granting immunity. Complaint Counsel further urges, if Respondent fails to file a request for such an order within fourteen days of an order granting Complaint Counsel's Motion, that this Court resume the evidentiary hearing so that Respondent can complete its case and the matter can proceed to conclusion.

Complaint Counsel asserts that if Mr. Wallace were to secure a grant of immunity from the Oversight Committee, such a grant would not immunize his testimony in this proceeding, and that if Respondent intends to seek immunity for one of the witnesses it seeks to call, Respondent's counsel must request an order under Rule 3.39 (hereafter, "Rule 3.39 Request"). Complaint Counsel further asserts that because Congress is now in recess and will not reconvene until September 8, 2014, at least another month will pass before the Oversight Committee could consider an immunity vote for Mr. Wallace; that it remains unclear whether the Oversight Committee will approve an order granting Mr. Wallace immunity; and that 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 this proceeding. Lastly, Complaint Counsel charges that each day Respondent's counsel fails to file a Rule 3.39 Request further delays presentation of testimony from Mr. Wallace and the conclusion of this litigation, 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," and to 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. §§ 3.1; 3.41(b).

In its Response to the Motion, Respondent states that it is willing to file a Rule 3.39 Request, but asks that it not be ordered to do so prior to October 1, 2014. In support thereof, Respondent states that it is presumed that Mr. Wallace will provide important testimony, based on the proffer of Mr. Wallace's expected testimony made on June 12, 2014, and notes that Complaint Counsel has made efforts to re-open discovery to impeach Mr. Wallace. *See* July 23, 2014 Order Denying Complaint Counsel's Motion For Leave To Issue Subpoenas For Rebuttal Evidence. Respondent further states that the process for resolving Mr. Wallace's immunity is already underway before the Oversight Committee; that, to the best of Respondent's knowledge, all that is left is a vote and, if affirmative, the focus then shifts to the attorney general of the United States ("attorney general"); and that it makes sense to allow the Oversight Committee time to vote after returning from Congressional recess. Respondent argues that allowing the Oversight Committee time to complete the process, rather than having the parties begin the process in this proceeding under Rule 3.39, will not prejudice the FTC.

#### IV.

##### **A. Relevant provisions from the FTC's Rules of Practice for Adjudicative Proceedings**

Rule 3.39(b), "Orders requiring witnesses to testify or provide other information and granting immunity," provides:

Requests by counsel other than Commission complaint counsel for an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6002 may be made to the Administrative Law Judge and may be

made *ex parte*. When such requests are made, the Administrative Law Judge is authorized to determine:

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest, and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of his or her privilege against self-incrimination; and, upon making such determinations, to request, through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity; and, after the Attorney General (or his or her designee) has granted such approval, to issue such order when the witness or deponent has invoked his or her privilege against self-incrimination and it cannot be determined that such privilege was improperly invoked.

16 C.F.R. § 3.39(b). In addition, the Commission, in defining the privilege against self-incrimination in its Rules, specifically incorporates sections 6002 and 6004 of Title 18 of the United States Code. 16 C.F.R. § 4.16.

#### **B. Relevant provisions from the United States Code**

Title 18, section 6002, of the United States Code states:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to --

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002.

Further, Title 18, section 6004, of the United States Code provides:

(a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United

States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

(b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment - -

- (1) the testimony or other information from such individual may be necessary to the public interest; and
- (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

18 U.S.C. § 6004.

Finally, Title 18, section 6005, of the United States Code states as follows:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to either House of Congress, or any committee, or any subcommittee of either House, or any joint committee of the two Houses, a United States district court shall issue, in accordance with subsection (b) of this section, upon the request of a duly authorized representative of the House of Congress or the committee concerned, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title [18 USCS § 6002].

(b) Before issuing an order under subsection (a) of this section, a United States district court shall find that --

- (1) in the case of a proceeding before or ancillary to either House of Congress, the request for such an order has been approved by an affirmative vote of a majority of the Members present of that House;
- (2) in the case of a proceeding before or ancillary to a committee or a subcommittee of either House of Congress or a joint committee of both Houses, the request for such an order has been approved by an affirmative vote of two-thirds of the members of the full committee; and
- (3) ten days or more prior to the day on which the request for such an order was made, the Attorney General was served with notice of an intention to request the order.

(c) Upon application of the Attorney General, the United States district court shall defer the issuance of any order under subsection (a) of this section for such period, not longer than twenty days from the date of the request for such order, as the Attorney General may specify.

18 U.S.C. § 6005.

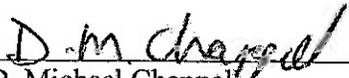
V.

Regardless of whether the immunity request moves forward under 18 U.S.C. § 6004 (administrative proceeding) or 18 U.S.C. § 6005 (Congressional proceeding), the attorney general will be involved. In addition, the request for immunity made by Mr. Wallace before the Oversight Committee may, depending on the process, also cover any testimony provided by Mr. Wallace in this proceeding. Furthermore, the Oversight Committee process for resolving Mr. Wallace's immunity request is already underway and has been underway since at least May 30, 2014, according to Mr. Wallace's counsel. Separate, yet simultaneous, immunity requests for Mr. Wallace, involving the attorney general, would be imprudent and are unnecessarily excessive. For these reasons, Complaint Counsel's Motion urging that Respondent be required to file a Rule 3.39 Request *at this time* is DENIED.

In the event that the immunity request made by Mr. Wallace before the Oversight Committee is not granted or is granted and does not cover his testimony in this proceeding, then Respondent shall file a Rule 3.39 Request, by written motion, within five days of such action, or by October 1, 2014, whichever occurs first. Respondent's motion in support of its Rule 3.39 Request shall include a proffer of the expected testimony from Mr. Wallace<sup>2</sup> and shall demonstrate that the testimony sought from Mr. Wallace may be necessary to the public interest. In the event that Mr. Wallace is granted immunity through the Oversight Committee that also covers his testimony in the instant proceeding, Respondent shall immediately notify Complaint Counsel and file a status report with the Office of Administrative Law Judges so that this proceeding may be scheduled to resume. Accordingly, Complaint Counsel's Motion urging that the Respondent be required to file a Rule 3.39 Request is GRANTED as detailed herein.

For all the above stated reasons, Complaint Counsel's Motion is DENIED IN PART and GRANTED IN PART.

ORDERED:

  
D. Michael Chappell  
Chief Administrative Law Judge

Date: August 22, 2014

<sup>2</sup> In the event that Respondent's motion includes information that was revealed during any *in camera* session of the trial, or includes other information that should be protected from public disclosure, Respondent shall follow the procedures set forth in Commission Rule 3.45(e). 16 C.F.R. § 3.45(e).