

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



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

ORIGINAL

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S
MOTION TO STRIKE TIVERSA HOLDING CORP.’S NOTICE OF INFORMATION**

Respondent’s Motion to Strike Tiversa Holding Corp.’s (“Tiversa”) Notice of Information Pertinent to Richard Edward Wallace’s Request for Immunity (“Notice of Information”) fails because the Motion is procedurally improper, the relief it seeks is premature, and the information contained within the Notice of Information is relevant to the determination of whether Mr. Wallace’s testimony and a grant of immunity are in the public interest.

BACKGROUND

On May 27, 2014, Respondent issued a trial subpoena to Richard Wallace, a former employee of 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 advised the Court that Mr. Wallace would invoke 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. Counsel for Mr. Wallace stated that Mr. Wallace was seeking immunity from the United States House of Representatives Committee on Oversight and Government Reform (“Oversight Committee”) for testimony before that Committee. Trial Tr. at 1249. When Mr. Wallace appeared on June 12, 2014 and invoked his Fifth Amendment rights, Complaint Counsel requested that Respondent

submit an application under Rule 3.39 for immunity for his testimony in this proceeding. *E.g.*, Trial Tr. at 1303. Respondent's counsel responded that such an application would be premature while the Oversight Committee was considering a related request. *See, e.g.*, Trial Tr. at 1280. However, in the weeks that followed, the Oversight Committee did not grant Mr. Wallace immunity for his testimony.

On August 5, 2014, Complaint Counsel renewed its application for Respondent to be required to file a Rule 3.39 request. On August 22, 2014, the Court ordered that Respondent file such a request within five days of a decision of the Oversight Committee declining to grant immunity that would cover Mr. Wallace's testimony in this proceeding, or by October 1, 2014, whichever occurred first.

On October 1, 2014, Respondent filed a motion under Rule 3.39(b) requesting an order requiring Mr. Wallace to testify in person in this proceeding and granting immunity to Mr. Wallace with regard to such testimony. On October 6, 2014, Complaint Counsel filed its response to Respondent's motion. On October 9, 2014, the Court issued an Order requesting approval by the Attorney General for the issuance of an order requiring Mr. Wallace to testify and granting immunity. On October 14, 2014, Tiversa filed its Notice of Information. Respondent's counsel and Complaint Counsel received service copies on October 28, 2014. Email from J. Shaw to W. Sherman and L. VanDruff (Oct. 28, 2014) (attached as Ex. A). Respondent filed its Motion to Strike on November 4, 2014.¹

¹ Respondent's Motion contains a litany of unsupported assertions regarding the factual background for its Motion. Complaint Counsel disputes Respondent's spurious characterizations. To promote judicial economy and because Respondent's mischaracterizations are not determinative of the Motion, Complaint Counsel's Opposition responds only to Respondent's insufficient legal arguments.

ARGUMENT

Respondent's Motion to Strike fails because the Motion is procedurally improper, the relief it seeks is premature, and the information contained within the Notice of Information is relevant to the determination of whether Mr. Wallace's testimony and a grant of immunity are in the public interest.

I. RESPONDENT'S MOTION IS PROCEDURALLY IMPROPER

A motion to strike is not a means by which a party may obtain the relief Respondent seeks. To the contrary, unlike a pleading, "[m]otions, briefs or memoranda, objections, or affidavits may not be attacked by the motion to strike." *Alston v. United Collections Bureau, Inc.*, 2014 U.S. Dist. LEXIS 27124, at *40-41 (D. Md. Mar. 4, 2014) (citing Fed. R. Civ. P. 12(f) and *Lowery v. Hoffman*, 188 F.R.D. 651, 653 (M.D. Ala. 1999)); *see also In re LabMD, Inc.*, 2014 FTC LEXIS 2, at *5 n.3 (Jan. 16, 2014) ("[S]ince many adjudicative rules are derived from the Federal Rules of Civil Procedure, the latter may be consulted for guidance and interpretation of Commission rules where no other authority exists." (quoting FTC Op. Manual § 10.7)). In addition, the Commission's Rules of Practice provide that "motions to strike . . . shall be directly referred to the Commission." Rule 3.22(a), 16 C.F.R. § 3.22(a). Further, the Federal Rules of Evidence contemplate that counsel may make motions to strike evidence to preserve a claim of error for appeal. Fed. R. Evid. 103(1)(A). Because the Notice of Information is not a pleading, the Motion to Strike was not properly filed before the Commission, and the Notice has not been submitted as evidence, Respondent's Motion to Strike is procedurally improper and should be denied.

Respondent's argument that the Notice of Information is improper because Tiversa did not seek leave of Court or move to intervene before filing, Resp't Motion at 5, fails because the Commission's Rules of Practice do not require Tiversa to have sought leave or to have

intervened before submitting its filing.² Respondent cites no authority in support of its contention and Respondent's Motion should be denied.

II. RESPONDENT'S MOTION IS PREMATURE

Respondent's Motion also requests that the Court strike the Notice of Information based on a number of arguments related to the production and admissibility of the exhibits attached to the Notice of Information. Resp't Motion at 5-6. Respondent's arguments in this regard are unavailing because no party has sought to admit the Notice of Information or its exhibits into evidence under Rule 3.43. 16 C.F.R. § 3.43. Therefore, the relief Respondent seeks is inappropriate and premature.

III. NOTICE OF INFORMATION IS RELEVANT TO PUBLIC INTEREST ANALYSIS

The Notice of Information is relevant to the determination of whether Mr. Wallace's testimony is "necessary to the public interest." Rule 3.39(b)(1), 16 C.F.R. § 3.39(b)(1). The emails contained in Exhibit J to the Notice of Information contradict Respondent's proffer of Mr. Wallace's testimony, which is relevant to the public interest analysis. Further, public records documenting Mr. Wallace's repeated interactions with criminal law enforcement are similarly relevant to this analysis. Therefore, it is appropriate for Tiversa to have presented its Notice of Information and accompanying exhibits.

² Respondent further argues that because Tiversa did not serve the Notice of Information on Respondent until two weeks after filing it, the Notice of Information is an *ex parte* communication with the ALJ and that the appropriate sanction is to strike the filing. Resp't Motion at 5 n.4. Rule 4.7(a) defines an *ex parte* communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 16 C.F.R. § 4.7(a). Tiversa filed the Notice of Information on the public record with the Office of the Secretary on October 14, 2014. Therefore, the filing does not fall under the definition of an *ex parte* communication. As noted in Respondent's Motion, Respondent's counsel received its service copy of Tiversa's filing on October 28, 2014. Resp't Motion at 1. Likewise, Complaint Counsel received its service copy on October 28, 2014. (Ex. A). Respondent's argument is, therefore, also unavailing because the service delay did not prejudice either party. In addition, Respondent's argument fails because Rule 4.7(d) does not contemplate the relief Respondent seeks for the conduct alleged in the Motion.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's Motion to Strike the Notice of Information.

Dated: November 14, 2014

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2014, I caused the foregoing document to be filed 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 transmitted *via* electronic mail and delivered 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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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.

November 14, 2014

By:


Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection