

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



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

**RESPONDENT LABMD, INC.’S AMENDED¹ OPPOSITION
TO COMPLAINT COUNSEL’S MOTION FOR LEAVE
TO SUBPOENA RICHARD WALLACE**

Complaint Counsel seeks discovery denied by this Court on July 23, 2014. *See* Order dated July 23, 2014 (Exhibit 1). Yet, save for Richard Wallace’s immunity grant, and the failed attempt by Tiversa, Inc. (“Tiversa”) and Complaint Counsel to manipulate the immunity review process by impugning Mr. Wallace’s credibility, nothing has changed. *See* Tiversa Holding Corp.’s “Notice of Information” (Oct. 14, 2014); Complaint Counsel’s Opposition to Respondent’s Motion to Strike (Nov. 14, 2014); Order dated November 19, 2014 (Exhibit 2), at 3 (“[T]he Notice of Information was wholly ineffective to place Tiversa’s unsworn assertions and documents into the evidentiary record...[and]an improper attempt to place evidence on the public record, unilaterally, with the transparent purpose of impugning the credibility of Mr. Wallace’s anticipated testimony and/or influencing the immunity process.”).

Discovery closed long ago and “the record is what it is.” *See* Trial Tr., at 1229:2-15 (May 30, 2014). Complaint Counsel has long known that Mr. Wallace was a critical witness. Robert Boback testified in Complaint Counsel’s very first deposition that Mr. Wallace allegedly “found” the 1718 File and prepared CX-19. Christopher Gornley testified that Mr. Wallace

¹ This Opposition was timely filed on December 2, 2014. After that filing and based upon a concern raised by Complaint Counsel, and in order to prevent further filings so that this matter can be expeditiously decided, counsel for the parties agreed to an amended filing that removes the issue raised.

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carried out “special projects” for Mr. Boback. *See* Christopher Gormley Dep. Tr. (Exhibit 3), at 82:22-83:4 (Mar, 31, 2014). Yet, despite filing over 65 subpoenas of Respondent LabMD, Inc. (“LabMD”), former LabMD employees and LabMD customers, among others, Complaint Counsel did not subpoena Mr. Wallace.

No case or Commission Rule justifies the proposed subpoena. Instead, it is time for Mr. Wallace to testify in person before the Court.² For these reasons, and as set forth in greater detail below, LabMD respectfully requests that the Court deny the motion.

Argument

On July 8, 2014, Complaint Counsel filed a “Motion for Leave to Issue Subpoenas for Rebuttal Evidence” seeking discovery of Mr. Wallace. The Court denied this motion, holding:

Complaint Counsel’s assertion that further discovery into “how, when, and where” Tiversa found the 1718 file on P2P networks is designed to rebut Mr. Wallace’s expected testimony is questionable at best. Complaint Counsel elicited substantial evidence on this issue, over the objections of Respondent’s counsel, at the trial deposition of Mr. Boback on June 7, 2014, which took place days before June 12, 2014 - the date that Complaint Counsel asserts it first learned of Mr. Wallace’s expected testimony. Moreover, evidence regarding “how, when, and where” Tiversa found the 1718 File on P2P networks is part of Complaint Counsel’s case-in-chief, which has concluded.

Ex. 1, at n.1 (citations omitted); *accord In re McWane, Inc.*, No. 9351, 2012 FTC LEXIS 151, at *8-12, *14 (F.T.C. Sept. 7, 2012) (denying motion for further discovery based on lack of notice, where unexpected evidence was encompassed by claims in case and, moreover, parties had taken partial discovery on issue).³

² Based on the Court’s October 9, 2014 Order and the Department of Justice’s recent immunity approval for Mr. Wallace, LabMD was prepared to move for an appropriate Rule 3.39 order. During a meet and confer on November 21, 2014, Complaint Counsel advised that it “does not oppose resuming the evidentiary hearing” but only *after* Complaint Counsel has the opportunity to take discovery of Mr. Wallace. *See* Exhibit 4 (redacted).

³ *See also* Tr. Trans., at 1227–28 (May 30, 2014) (in rejecting Complaint Counsel’s similar attempt to re-open its case for a second deposition of Robert Boback, Court stating “[t]hat’s not

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Complaint Counsel again insists that it first learned of Mr. Wallace's importance and the nature of his expected testimony on June 12, 2014. *Mtn.*, at 4 (Nov. 21, 2014). However, on September 24, 2013, Mr. Wallace was identified *by FTC* as an individual likely to have discoverable information. *See* Complaint Counsel's Initial Disclosures, Appendix A, at 5 (Sept. 24, 2013). During the very first deposition, Mr. Boback testified that Mr. Wallace was the person who "found" the 1718 File and created CX-19, the exhibit of typewritten IP addresses Complaint Counsel says proves that the 1718 File was found on peer-to-peer networks outside of LabMD. *See* Boback Dep. (CX0703), at 72-74, 85, 123 (Nov. 21, 2013). And, LabMD has repeatedly argued for years that Tiversa stole the 1718 File from LabMD's computers. *See, e.g.*, Pretrial Conference, at 27-30 (Sept. 25, 2013) (LabMD aimed "to investigate why the Government knowingly commenced an investigation using a stolen file"); LabMD's Motion to Dismiss, at 4-5 (Nov. 12, 2013). Thus, the record belies Complaint Counsel's claim that it only recently learned that Mr. Wallace was an important witness.

Moreover, on January 30, 2013, LabMD subpoenaed Mr. Wallace for deposition. Tiversa eventually agreed to a deposition on March 5, 2014, and then cancelled, claiming that Mr. Wallace was ill. *See* Exhibit 5 (emails between counsel), at 3-4. Tiversa's counsel refused to provide the customary doctor's letter substantiating this claim. *Id.* at 2-4. Complaint Counsel stated that no doctor's letter was necessary and that Tiversa's representation was all that LabMD needed. *Id.* at 1-2. On April 7, 2014, Tiversa advised LabMD's counsel that Mr. Wallace no longer worked for Tiversa and Tiversa would not make him available to testify. *Id.* at 1. Complaint Counsel's position was that no deposition was needed. *See id.*; *Mtn.*, at n.4 (admitting that it declined deposition).

going to happen[,]" "[w]e're in the middle of trial here[,]" and "That's long gone. The time for that has passed. Look behind you. That's where it is. What's next?").

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Complaint Counsel also improperly recycles Tiversa’s rejected Notice, stating that “Tiversa has at least two e-mails in his [sic] possession that it claims demonstrate the falsity of Mr. Wallace’s claim that he fabricated CX0019” – presumably the same two emails that Tiversa attempted and failed to introduce. Mtn., at 4. Complaint Counsel fought to keep these emails in the record, but this Court held:

Although filing the Notice of Information was wholly ineffective to place Tiversa’s unsworn assertions and documents into the evidentiary record, *the filing was nevertheless an improper attempt to place evidence on the public record, unilaterally, with the transparent purpose of impugning the credibility of Mr. Wallace’s anticipated testimony and/or influencing the immunity process.* On July 23, 2014, an Order was issued rejecting Complaint Counsel’s request to develop evidence to rebut Mr. Wallace’s anticipated testimony, on the ground that Mr. Wallace had yet to testify. Tiversa’s attempt at anticipatory rebuttal, through the Notice of Information, is similarly improper.

Ex. 2 at 3 (emphasis added). Yet, FTC still carries Tiversa’s water.

The primary pretext for Complaint Counsel’s motion is rebuttal evidence regarding Mr. Wallace’s termination and sale of stock. *See* Mtn., at n.3, 6. The Court has held that rebuttal discovery is premature. Ex. 1, at 2. Ignoring this holding, FTC relies on a Pennsylvania state court complaint filed by Tiversa against Mr. Wallace, LabMD, Michael J. Daugherty, and LabMD’s counsel to re-open discovery.⁴

⁴ Much as Tiversa’s filing the Notice of Information was “an improper attempt to place evidence on the public record...and/or influencing the immunity process,” so also is Tiversa’s complaint an improper attempt to influence this proceeding. Tiversa filed the state court complaint after voluntarily dismissing its circa-2013 federal court defamation case against LabMD and Mr. Daugherty. To defeat federal diversity jurisdiction, and to avoid a sanctions motion, it added Mr. Wallace, a Pennsylvania resident, as a defendant. It also sued LabMD’s counsel “on information and belief” for allegedly conspiring with Mr. Wallace to violate a non-disclosure agreement, apparently because Mr. Wallace testified under a Congressional subpoena and will also testify in this case. *See* Mtn., Ex. D, at ¶¶ 122–129 & 134–140. Tiversa’s counsel seems to make threatening and suing opposing counsel a key part of its litigation strategy. For example, in June 2014, after Congress’s interest in Mr. Wallace became known, Tiversa’s counsel, Jarrod Shaw, threatened to subpoena undersigned counsel and Dinsmore & Shohl, LLP. *See* Exhibit 6 (redacted).

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To begin with, Complaint Counsel does not demonstrate that the complaint’s allegations mean that the Court’s prior holding prohibiting anticipatory rebuttal discovery is now wrong. Even assuming both that Mr. Wallace’s termination and sale of stock are facts that can be appropriately addressed outside the context of Mr. Wallace’s actual testimony, and that Tiversa’s complaint is more reliable than either the prior testimony of its CEO or the representations of its counsel to this Court, FTC’s argument fails. FTC apparently aims to argue that Mr. Wallace’s termination and stock sale mean that his testimony will be untruthful. But Mr. Wallace was terminated in late February 2014, and sold his stock in April and May 2014. *See* Mtn., Ex. D, at ¶¶ 45, 48, 50. In other words, Mr. Wallace was terminated only *after* he was subpoenaed to testify by LabMD. Furthermore, anticipatory impeachment is improper, as the Court has already ruled, and unless Mr. Wallace was terminated for lying, then the fact that he lost his job and sold stock is not relevant at all. *See* Fed. R. Evid. 608(b). Complaint Counsel has therefore offered no “new facts” to overturn this Court’s holding that rebuttal discovery is premature.

Finally, Complaint Counsel’s citation to the Commission’s Rules of Procedure, taken almost verbatim from its denied prior motion, is unavailing once more. *Compare* Mtn. at 5, with Motion for Leave to Issue Subpoenas for Rebuttal Evidence, at 5; Ex. 1, at 2. First, Rule 3.21(c)(2) addresses extension of deadlines set forth in the scheduling order, not requests for discovery at the end of trial, and, in any event, rests on a showing of “good cause.” FTC does not mention this standard much less make the requisite showing. Second, Rule 3.41(b)(1)

Tiversa’s complaint, its conduct in this case, and certain of its other actions against Mr. Wallace and his family, all because of Mr. Wallace’s testimony before Congress and his impending appearance before this Court, could implicate 18 U.S.C. §1513. *See United States v. McLeod*, 53 F.3d 322, 324 (11th Cir. 1995) (holding that section 1513 applies to civil federal proceedings). Nevertheless, Complaint Counsel continues to stand by Tiversa, perhaps to justify both its failure to check whether Tiversa had broken the law and conducting what a U.S. District Court judge called an almost “unconscionable” investigation. *See* Hearing Tr., at 77:9-15 (*LabMD v. FTC*, Case No. 1:14-cv-00810-WSD, N.D. Ga.) (May 9, 2014).

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addresses discovery “deferred during the prehearing procedure,” irrelevant here since Complaint Counsel admits that it never before sought to take Mr. Wallace’s deposition. *See* Mtn., at n.4. Third, Rule 3.42(c) authorize subpoenas only “to avoid delay in the disposition of the proceedings,” a showing Complaint Counsel again fails to make. FTC seeks, among other things, “all documents related to Tiversa, LabMD, the 1718 File, etc.” from Mr. Wallace. *See* Mtn., Ex. E. Yet, Complaint Counsel offers no meaningful justification for making this broad demand now, well over one year after the complaint was filed and five years after its LabMD investigation commenced. Far from avoiding delay, the FTC aims to wedge open discovery and then re-litigate its case-in-chief.

CONCLUSION

For the reasons discussed above, this Court should deny Complaint Counsel’s Motion for Leave to Issue Subpoenas to Richard Wallace.

Dated: December 5, 2014

Respectfully submitted,

/s/ Prashant K. Khetan
Prashant K. Khetan, Esq.
Patrick J. Massari, Esq.
Cause of Action
1919 Pennsylvania Ave., NW Suite 650
Washington, DC 20006
Phone: (202) 499-4232
Facsimile: (202) 330-5842
Email: prashant.khetan@causeofaction.org

/s/ Reed D. Rubinstein
Reed D. Rubinstein, Esq.
William A. Sherman, II, Esq.
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW Suite 610
Washington, DC 20004
Phone: (202) 372-9100
Facsimile: (202) 372-9141
Email: reed.rubinstein@dinsmore.com

Counsel for Respondent, LabMD, Inc.

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**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 COMPLAINT COUNSEL’S MOTION
FOR LEAVE TO ISSUE SUBPOENAS TO RICHARD WALLACE**

Upon consideration of Complaint Counsel’s Motion for Leave to Issue Subpoenas to Richard Wallace, LabMD’s Opposition thereto, and in consideration of the entire Record in this case,

IT IS HEREBY ORDERED that Complaint Counsel’s Motion for Leave to Issue Subpoenas to Richard Wallace 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 December 5, 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 December 5, 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 additionally certify that on December 5, 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.
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 further 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: December 5, 2014

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

EXHIBIT 1

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

In the Matter of)	
)	
LabMD, Inc.,)	DOCKET NO. 9357
a corporation,)	
Respondent.)	

**ORDER DENYING COMPLAINT COUNSEL’S MOTION FOR LEAVE
TO ISSUE SUBPOENAS FOR REBUTTAL EVIDENCE**

I.

On July 8, 2014, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion for Leave to Issue Subpoenas for Rebuttal Evidence (“Motion”). Respondent filed an opposition to the Motion on July 18, 2014 (“Opposition”).

Having fully considered the Motion and Opposition, the Motion is DENIED, as explained below.

II.

Under the Revised Scheduling Order in this case, the deadline for the completion of fact discovery was March 5, 2014. Trial commenced on May 20, 2014. Complaint Counsel rested its case on May 23, 2014.

Complaint Counsel asks for leave to take further discovery, as follows: (1) to issue deposition subpoenas to Tiversa Holding Corporation (“Tiversa”) and its employee, Keith Tagliaferri, and (2) to issue a document subpoena to Tiversa. The proposed deposition subpoena to Tiversa, attached to the Motion, requests testimony as to the “times, dates, Internet Protocol [‘IP’] addresses, geographic locations, and networks” on which, or from which, Tiversa located and/or obtained copies of an “insurance aging report” of LabMD’s, referred to herein as the “1718 file,” and how Tiversa obtained and maintained that information. Motion Exhibit D at 2. Complaint Counsel’s proposed document subpoena to Tiversa requests “all documents” pertaining to the above, as well as Tiversa’s “personnel files” and other documents relating to Mr. Richard Wallace, a former employee of Tiversa and a designated fact witness for Respondent, and/or relating to Mr. Wallace’s termination from Tiversa. Motion Exhibit E at 5. Complaint Counsel argues that information regarding “how, when, and where” Tiversa found the 1718 file on P2P networks is for the purpose of rebutting proffered testimony of Mr. Wallace, as to which Complaint Counsel claims it had no knowledge until June 12, 2014 when Respondent’s counsel made a proffer in court. Motion at 3-4.

Respondent counters that the Motion should be denied because Mr. Wallace has not yet testified, and therefore, what constitutes rebuttal cannot be determined at this time. In addition, Respondent argues that discovery ended months ago, that there is no authority for “rebuttal discovery,” and that Complaint Counsel should have sought discovery related to Mr. Wallace much earlier in the proceedings, given that Complaint Counsel itself identified Mr. Wallace in its Initial Disclosures as a “person with knowledge,” and that Mr. Wallace was included on Respondent’s final witness list.

III.

On June 12, 2014, after Complaint Counsel had closed its case-in-chief and during Respondent’s case, Respondent proposed to call Mr. Wallace. However, counsel for Mr. Wallace appeared and stated that, due to a pending Congressional investigation of Tiversa, including Tiversa’s work with government agencies, JX3, Mr. Wallace would be invoking his Fifth Amendment rights against self-incrimination in response to any substantive questions. Counsel for Mr. Wallace also stated that Mr. Wallace was seeking immunity in exchange for his testimony regarding Tiversa’s activities. In an *in camera* bench conference, Respondent’s counsel made a proffer of Mr. Wallace’s expected testimony. Thereafter, Mr. Wallace was called to testify, and invoked his Fifth Amendment rights. A recess was ordered to allow Mr. Wallace to continue his effort to obtain immunity for his testimony, including immunity for any testimony to be provided for the instant case.

Complaint Counsel’s Motion is based on the assumption that Mr. Wallace will testify in this case and, also, on the additional assumption that Mr. Wallace will testify as asserted in the Motion. However, Mr. Wallace has not yet testified and, indeed, he may not testify if he is unable to obtain the desired immunity or for other unknown reasons. It cannot be assumed that Mr. Wallace will testify, or that his testimony will be in accordance with that proffered by Respondent’s counsel and cited by Complaint Counsel in the Motion. Thus, on the present record, it cannot properly be determined what might constitute permissible rebuttal or impeachment evidence, much less whether there is good cause to reopen discovery, at this late stage of proceedings, to obtain such evidence. The issues presented by the Motion, to the extent they become relevant and valid, could only be appropriately addressed in the context of Mr. Wallace’s actual testimony, if any.¹ Accordingly, for these reasons, Complaint Counsel’s Motion is DENIED.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: July 23, 2014

¹ Notwithstanding the foregoing, it must be noted that Complaint Counsel’s assertion that further discovery into “how, when, and where” Tiversa found the 1718 file on P2P networks is designed to rebut Mr. Wallace’s expected testimony is questionable at best. Complaint Counsel elicited substantial evidence on this issue, over the objections of Respondent’s counsel, at the trial deposition of Mr. Boback on June 7, 2014, which took place days before June 12, 2014 – the date that Complaint Counsel asserts it first learned of Mr. Wallace’s expected testimony. Moreover, evidence regarding “how, when, and where” Tiversa found the 1718 File on P2P networks is part of Complaint Counsel’s case-in-chief, which has concluded. *See, e.g.*, Complaint ¶¶ 17-19, 22; Complaint Counsel’s Pre-hearing Brief at 49 (asserting that the 1718 File has been found on a public P2P network as recently as November 2013 and has been downloaded from four different IP addresses), citing CX0742 (Report of Complaint Counsel’s proffered expert Rick Kam) at 19; CX0703 (Tiversa Dep.) at 9, 52, 58, 61-64.

EXHIBIT 2

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

In the Matter of)	
LabMD, Inc.,)	
a corporation,)	DOCKET NO. 9357
Respondent.)	
)	

ORDER ON RESPONDENT’S MOTION TO STRIKE

On November 4, 2014, Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed a Motion to Strike Tiversa Holding Corp.’s “Notice of Information” (Motion). Federal Trade Commission (“FTC”) Complaint Counsel filed an opposition to the Motion on November 14, 2014 (“Opposition”). As set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

I. Relevant procedural background

On October 14, 2014, Tiversa Holding Corp. (“Tiversa”), a non-party, filed with the FTC’s Office of the Secretary a document titled, “Tiversa Holding Corp.’s Notice of Information Pertinent to Richard Edward Wallace’s Request for Immunity” (“Notice of Information” or “Notice”). Certain Tiversa documents and the testimony of Tiversa’s Robert Boback have been introduced by Complaint Counsel at the trial of this matter. Tiversa’s Notice of Information is ostensibly in response to the Order issued on October 9, 2014, which, based on Respondent’s unopposed motion and pursuant to FTC Rule 3.39, requested that the Attorney General authorize the Administrative Law Judge to enter an order requiring Mr. Wallace, a former Tiversa employee, to testify and granting immunity (the “October 9 Order”). *See* 16 C.F.R. § 3.39. According to Respondent’s proffer, Mr. Wallace, who was subpoenaed by Respondent, is expected to testify that (1) a key piece of evidence upon which Complaint Counsel relies in this case, an insurance aging file of LabMD referred to by the parties as the “1718 file,” was not found anywhere outside LabMD; (2) Mr. Wallace fabricated CX 19, which was introduced by Complaint Counsel in its case-in-chief as evidence that the 1718 file was found at four internet protocol (“IP”) addresses; and (3) Mr. Wallace created CX 19 because an attorney from the FTC told Tiversa that finding the 1718 file only on a LabMD workstation was insufficient. *See* Trial transcript, June 12, 2014, p. 1293, *in camera*. The Notice of Information argues that Mr. Wallace’s anticipated testimony is “false,” makes numerous assertions concerning Mr. Wallace’s “background,” and attaches documents purporting to support Tiversa’s assertions.

On November 14, 2014, the Attorney General approved the request for authority to issue an order requiring Mr. Wallace's testimony and granting immunity.

II. Arguments of the parties

Respondent argues that Tiversa's Notice of Information is improper and should be stricken. Respondent asserts that Tiversa, which is not a party or an intervenor, failed to seek leave of court to file the Notice of Information, and that the FTC's Rules of Practice do not allow Tiversa's filing as of right. Respondent further asserts that no rule allows a non-party to anticipatorily impeach the credibility of another witness. Moreover, Respondent argues, the Notice of Information attaches emails that were within the scope of subpoenas *duces tecum* that Complaint Counsel and Respondent each issued to Tiversa during the discovery phase of this case, but which were not produced by Tiversa or referred to in Tiversa's deposition testimony. Respondent also asserts that the documents attached to the Notice of Information are unauthenticated, constitute unreliable hearsay, and have not been demonstrated to be relevant.

In addition, Respondent states that Tiversa filed the Notice of Information with the FTC's Office of the Secretary, provided a copy to the Administrative Law Judge, and made the Notice public via email, all on October 14, 2014, but that Tiversa failed to serve a copy of the Notice on Respondent until October 28, 2014, notwithstanding Tiversa's certificate of service to the contrary.

Complaint Counsel argues that Respondent's Motion is procedurally improper because a motion to strike may be used only to strike a "pleading," and not to strike motions, briefs, or memoranda. Further, Complaint Counsel argues, the Commission's Rules do not require that Tiversa be an intervenor, or to obtain leave of court, before submitting its filing. Complaint Counsel also argues that the Motion is premature because the Notice has not been offered into evidence. Finally, Complaint Counsel contends that the Notice is relevant to whether Mr. Wallace's testimony is "necessary to the public interest" under Rule 3.39.

III. Analysis

The Notice of Information was improperly filed and will not be considered as a "response" to any previous Order issued in this case, including the October 9 Order. Tiversa is not a party to this action, nor has it sought to intervene in the action pursuant to FTC Rule 3.14. 16 C.F.R. § 3.14. Under the FTC Rules, only parties are entitled to offer evidence in an adjudicative proceeding. 16 C.F.R. §§ 3.41(c) ("Every party, except intervenors, whose rights are determined under § 3.14, shall have the right of . . . presentation of evidence [and] objection . . ."); 3.43(d)(1) ("A party is entitled to present its case or defense by sworn oral testimony and documentary evidence, [and] to submit rebuttal evidence . . ."). Furthermore, under the Rules, the authority to accept or reject offered evidence is vested in the Administrative Law Judge. 16 C.F.R. § 3.42(c)(5) (Pursuant to duty to conduct fair and impartial hearings, the Administrative Law Judge has power to "rule upon offers of proof and receive evidence").

Although filing the Notice of Information was wholly ineffective to place Tiversa's unsworn assertions and documents into the evidentiary record, the filing was nevertheless an improper attempt to place evidence on the public record, unilaterally, with the transparent purpose of impugning the credibility of Mr. Wallace's anticipated testimony and/or influencing the immunity process. On July 23, 2014, an Order was issued rejecting Complaint Counsel's request to develop evidence to rebut Mr. Wallace's anticipated testimony, on the ground that Mr. Wallace had yet to testify. Tiversa's attempt at anticipatory rebuttal, through the Notice of Information, is similarly improper. Complaint Counsel is not correct that the Notice was justified as relevant to whether Mr. Wallace's testimony "may be necessary to the public interest" under Rule 3.39. That determination had already been made, in the course of granting Respondent's Rule 3.39 motion. *See* October 9 Order at 6 ("Accordingly, pursuant to Rule 3.39(b), it is hereby determined that the testimony sought from Mr. Wallace may be necessary to the public interest."). For these reasons as well, the Notice of Information was improperly filed.

To the extent that Respondent improperly designated its Motion as a Motion "to Strike" the filing, the Motion is DENIED; however, because the Notice was improperly filed, the assertions and documents included therein will be disregarded and will not be considered for any purpose. In this regard, Respondent's Motion is GRANTED.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: November 19, 2014

EXHIBIT 3

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

In the Matter of:

DOCKET NO. 9357

Lab MD, Inc, a Corporation,

DEPOSITION OF: CHRISTOPHER GORMLEY

DATE: March 31, 2014

Monday, 9:30 a.m.

LOCATION: DINSMORE & SHOHL

2800 One Oxford Centre

301 Grant Street

Pittsburgh, PA 15219

TAKEN BY: LabMD, Inc.

REPORTED BY: G. Donavich, RPR, CRR

Notary Public

Ref. No. 34281

1 A. I don't recall precisely

2 Q. I'm going to show you what has been marked as
3 RX 5. Take a look at that and let me know
4 when you're ready to respond to questions
5 about it.

6 - - - -

7 (Exhibit No. RX 5 marked for identification.)

8 - - - -

9 (The witness reviewed the document.)

10 - - - -

11 THE WITNESS: Okay. I'm ready to
12 respond.

13 BY MR. SHERMAN:

14 Q. Can you describe what this is.

15 A. It appears to be an E-mail describing the
16 contents of a file labeled subject, LabMD
17 disclosure, categorizing how many social
18 security numbers and other identifying
19 information.

20 Q. Is this E-mail typical of the E-mails that
21 would come from --

22 Let me back up. What was Rick

1 Wallace's position at Tiversa at that time?

2 A. Rick was an information analyst. He used that
3 expression. He also did special projects for
4 the CEO.

5 Q. And is this the type of E-mail that Rick
6 Wallace as an information analyst would send
7 to yourself and the CEO, Robert Boback, and
8 Griffin Schultz and Katy Everett

9 MS. ORLANDO: Objection.

10 THE WITNESS: Typical --

11 It could be. It depends on the
12 scenario that the customer or the situation
13 called out.

14 BY MR. SHERMAN:

15 Q. Does this E-mail contain information that
16 would be shared with Tiversa's customers?

17 A. It could depending on who it is.

18 Q. Do you know why this E-mail was sent or the
19 circumstances under which this E-mail was
20 sent?

21 A. I don't know the specific reason why this
22 particular E-mail was sent.

EXHIBIT 4

[REDACTED]

[REDACTED]

From: Brown, Jarad [<mailto:jbrown4@ftc.gov>]
Sent: Friday, November 21, 2014 3:39 PM
To: Prashant Khetan
Subject: FTC Docket No. 9357 - Meet and Confer on Respondent's Motion to Issue Order for Mr. Wallace to testify and resume evidentiary hearing

Good afternoon Prashant,

In response to your request for Complaint Counsel's position on the motion Respondent intends to file, asking the Court to resume the evidentiary hearing and issue an order for Mr. Wallace to testify, Complaint Counsel's position is as follows:

Complaint Counsel does not oppose the issuance of an order requiring Mr. Wallace to testify in this matter. Also, Complaint Counsel does not oppose resuming the evidentiary hearing after Complaint Counsel has the opportunity to take discovery of Mr. Wallace, if granted leave by the Court.

Best,
Jarad Brown

Jarad Brown
Federal Trade Commission | Bureau of Consumer Protection
Division of Privacy and Identity Protection
600 Pennsylvania Ave. NW, CC-8232
Washington, DC 20580
jbrown4@ftc.gov | (202) 326-2927

EXHIBIT 5

VanDruff, Laura Riposo

From: Shaw, Jarrod D. <JShaw@ReedSmith.com>
Sent: Monday, April 07, 2014 8:28 AM
To: 'Sherman, William'; VanDruff, Laura Riposo
Cc: Harris, Sunni; Sheer, Alain; Rubinstein, Reed
Subject: RE: FTC Docket No. 9357 - Wallace deposition

William,

Mr. Wallace no longer is employed by Tiversa. Accordingly, Tiversa nor its counsel can coordinate his deposition or require him to appear.

Jarrold

From: Sherman, William [mailto:william.sherman@dinsmore.com]
Sent: Thursday, April 03, 2014 10:33 AM
To: 'VanDruff, Laura Riposo'; Shaw, Jarrod D.
Cc: Harris, Sunni; Sheer, Alain; Rubinstein, Reed
Subject: RE: FTC Docket No. 9357 - Wallace deposition

Jarrold,

We have several deadlines approaching in the LabMD matter according to the scheduling order. Particularly we are required to designate all witnesses by April 9th and have all expert witness depositions concluded by April 18. I am inquiring as to the condition of Mr. Wallace and whether his medical condition has improved sufficiently enough for him to sit for his deposition. Please advise.

Regards,

William

Dinsmore

William A. Sherman, II
Partner

Dinsmore & Shohf LLP • Legal Counsel
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004
T (513) 977-8494 • F (202) 372-9141
E william.sherman@dinsmore.com • dinsmore.com

From: VanDruff, Laura Riposo [mailto:lvandruff@ftc.gov]
Sent: Friday, February 28, 2014 2:20 PM
To: Sherman, William; 'Shaw, Jarrod D.'
Cc: Harris, Sunni; Sheer, Alain
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Good afternoon, counsel.

Complaint Counsel accepts Mr. Shaw's representations regarding Mr. Wallace's medical issue.

Best regards,

Laura

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 28, 2014 1:56 PM
To: 'Shaw, Jarrod D.'
Cc: Harris, Sunni; VanDruff, Laura Riposo
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

My reading of the FTC's letter is that they will consider it, which is different than they have no objection. If they object later I want to be able to show the ALJ that it was not through some fault of mine that this deposition was not taken within the discovery deadline, and that I vigorously pursued the deposition until.

William

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Friday, February 28, 2014 1:30 PM
To: Sherman, William
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

I guess my question is to whom do you need to make that showing? If the FTC does not have an objection, then what is the issue?

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 28, 2014 1:29 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

I'm not asking for a diagnosis just something to indicate that he is not avoiding the subpoena. I need to demonstrate that I made reasonable efforts to take and or preserve his testimony prior to the close of discovery. An Affidavit from him would suffice.

William

Dinsmore
William A. Sherman, II
Partner

Dinsmore & Shohl LLP • Legal Counsel
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004

T (202) 372-9117 • F (202) 372-9141
E william.sherman@dinsmore.com • dinsmore.com

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Friday, February 28, 2014 1:22 PM
To: Sherman, William
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

I am unclear from your email below why you "anticipate" needing information to preserve your right to depose Mr. Wallace. Is this a condition the FTC has requested to preserve that right? As you know, Mr. Wallace has a right to privacy and I am unwilling to disclose any additional information based on some perceived anticipated need.

Please clarify when you have a moment.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 28, 2014 8:47 AM
To: Shaw, Jarrod D.
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

Please forward some documentation that Mr. Wallace is unable to comply with the subpoena *ad testificandum* due to a medical condition. I anticipate that I will need this information in order to preserve my right to depose Mr. Wallace prior to the hearing in this matter which is scheduled to begin on May 15, 2014. I have informed Complaint Counsel of your email and you have received their latest communication to me regarding same. Thank you

William

Dinsmore

William A. Sherman, II
Partner

Dinsmore & Shohl LLP • Legal Counsel
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004
T (202) 372-9117 • F (202) 372-9141
E william.sherman@dinsmore.com • dinsmore.com

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Wednesday, February 26, 2014 4:07 PM
To: Sherman, William
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Unfortunately, Mr. Wallace is no longer available to appear for the deposition on March 4 as a result of an unexpected medical issue. I am uncertain when he will become available, but at this time he is unable to appear and I will let you know when his condition changes.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 21, 2014 7:50 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

See attached letter regarding deposition of Rick Wallace. Call if you have questions.

Regards,

William

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Monday, February 17, 2014 9:07 AM
To: Sherman, William
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Either day works for the deposition.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Sunday, February 16, 2014 1:23 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

Is it possible to schedule Mr. Wallace's deposition during the first week of March (4th or 5th)?

William

Dinsmore

William A. Sherman, II
Partner

Dinsmore & Shohl LLP • Legal Counsel
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004

T (202) 372-9117 • F (202) 372-9141
E william.sherman@dinsmore.com • dinsmore.com

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Saturday, February 15, 2014 1:53 PM
To: Sherman, William
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Please confirm the status of the Wallace deposition.

Thanks,

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 07, 2014 4:54 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

Thank you for your letter of Feb. 4, 2014. I am in the process of confirming Feb. 27th as the Wallace depo date. Apparently the Hopkins subpoena was delivered to Tiversa. Please arrange to have it returned to me at my address below. Thank you.

William

Dinsmore

William A. Sherman, II
Partner

Dinsmore & Shohl LLP • Legal Counsel
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004
T (202) 372-9117 • F (202) 372-9141
E william.sherman@dinsmore.com • dinsmore.com

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Tuesday, February 04, 2014 3:02 PM
To: Sherman, William
Subject: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Please see attached.

Jarrold

Jarrold D. Shaw

jshaw@reedsmith.com

+1 412 288 3013

Reed Smith LLP

Reed Smith Centre

225 Fifth Avenue

Pittsburgh, PA 15222-2716

T: +1 412 288 3131

F: +1 412 288 3063

reedsmith.com

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EXHIBIT 6

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: "Shaw, Jarrod D." <JShaw@ReedSmith.com<<mailto:JShaw@ReedSmith.com>>>
Date: June 3, 2014 at 2:25:09 PM EDT
To: "'Sherman, William'" <william.sherman@dinsmore.com<<mailto:william.sherman@dinsmore.com>>>
Cc: "Liben, Lucas" <LLiben@ReedSmith.com<<mailto:LLiben@ReedSmith.com>>>
Subject: Tiversa v. LabMd

Mr. Sherman,

We are currently preparing to serve a subpoena on both you and Dinsmore Shohl. Please advise whether you will voluntarily agree to accept service of the subpoena on behalf of both.

Jarrod

Jarrod D. Shaw
jshaw@reedsmith.com<<mailto:jshaw@reedsmith.com>>
+1 412 288 3013

Reed Smith LLP
Reed Smith Centre
225 Fifth Avenue
Pittsburgh, PA 15222-2716
T: +1 412 288 3131
F: +1 412 288 3063
reedsmith.com<<http://reedsmith.com>>

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