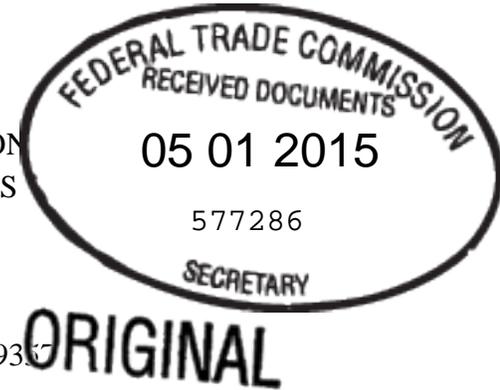


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

Respondent.)

MOTION FOR LEAVE TO PARTICIPATE IN HEARING

Counsel for Richard Wallace, a non-party witness in this action, respectfully moves the Court, pursuant to Rule 3.21(c)(2) and 3.22 of the Commission’s Rules of Practice, for leave to question Mr. Wallace at hearing, as needed, to preserve his testimony and his grant of immunity.

Background

After claiming his Fifth Amendment right against self-incrimination, Mr. Wallace was granted immunity for his testimony and document production in this action, pursuant to Rule 3.39(b)(2). (*See* Order Granting in Part and Denying in Part Motion for Order Requiring Testimony Under Grant of Immunity Pursuant to Commission Rule 3.39, October 9, 2014 (“Immunity Order”); Order on Complaint Counsel’s Motion for Leave, December 8, 2014.) He is now scheduled to testify at the resumed hearing of this matter on May 5, 2015, and in deposition, both pursuant to this grant of immunity. Mr. Wallace’s anticipated testimony centers on his actions while employed by Tiversa Holding Corp. (“Tiversa”), a self-described provider of cyber-intelligence and security services. *See* www.tiversa.com.

Tiversa’s actions, including those about which Mr. Wallace is expected to testify, are also the subject of an investigation by the United States House of Representative’s Committee on Oversight and Government Reform (“House Oversight Committee”) and a civil litigation,

Tiversa Holding Corp., et al., v. LabMD, Inc., et al., currently pending in the Court of Common Pleas of Allegheny County, Pennsylvania, G.D. No. 14-016497 (“Allegheny County Action”).

Argument

Counsel for Mr. Wallace respectfully requests that this Court grant them the opportunity to re-direct Mr. Wallace at the conclusion of his direct testimony and cross-examination at the hearing of this action, in order to avoid misuse or misinterpretation in future matters. This Court has discretion to “exercise reasonable control over the mode and order of interrogating witnesses” in order to “(i) Make the interrogation and presentation effective for the ascertainment of the truth; (ii) Avoid needless consumption of time; and (iii) Protect witnesses from harassment or undue embarrassment.” (Rule 3.43(d)(2)).

The immunity granted Mr. Wallace pursuant to Rule 3.39(b)(2) does not extend to pre-trial interviews with Complaint Counsel or Respondent’s Counsel, making substantive pre-trial preparation with the witness impossible. The Court has recognized this limitation, and the importance of Mr. Wallace’s testimony to the public interest in this matter, and is allowing Complaint Counsel to conduct a discovery deposition after Respondent Counsel’s direct examination, so that Complaint Counsel can prepare its cross-examination. (*See* December 8, 2014 Order).

Mr. Wallace’s anticipated testimony, and the subject matter of this litigation – namely, the storage, handling, and mis-handling of computer records from peer-to-peer networks – are complex and may require detailed explanation. Because of immunity concerns, only Mr. Wallace’s counsel has had the ability to meet with him in advance and confer with him about the facts and events underlying his testimony. Although Complaint Counsel will have the opportunity of a brief discovery deposition, counsel for Mr. Wallace has spent substantial time

learning about and understanding the full scope of his actions and anticipated testimony. Allowing Mr. Wallace's counsel the opportunity to re-direct following his testimony and cross-examination at hearing would assist the Court and the parties in obtaining clear and thorough testimony from Mr. Wallace.

Allowing Mr. Wallace's counsel the opportunity for re-direct would also help protect Mr. Wallace against mis-characterizations of his testimony that could jeopardize his immunity. Mr. Wallace's immunity is contingent upon truthful testimony, *see* 18 U.S.C. § 6002, and there is some risk here that confusion or uncertainty arising from examination of a witness, without prior preparation on complex matters, could be misconstrued.

This is particularly important as counsel in both the Allegheny County Action and the House Oversight Committee investigation are likely to review, if not rely upon, Mr. Wallace's testimony in this action. Mr. Wallace has not yet obtained immunity in those actions and may again be required to claim his Fifth Amendment right against self-incrimination. Additionally, Plaintiffs' counsel in the Allegheny County Action has already cited orders and filings in this action in its Amended Complaint against Mr. Wallace.

Given the gravity of Mr. Wallace's immunity in this action, the likelihood that his testimony will be cited in other actions, and in the interest of effective presentation of evidence and the search for truth, counsel for Mr. Wallace respectfully requests leave to briefly re-direct Mr. Wallace at the conclusion of his direct testimony and cross-examination at hearing. Counsel is not seeking to expand the scope of Mr. Wallace's testimony; rather, counsel seeks to ensure his testimony is clear and complete, in light of the immunity concerns and the importance of the issues at hand.

Meet and Confer

Counsel for Mr. Wallace has met and conferred with Complaint Counsel and Respondent's Counsel with regard to the filing of this Motion. Respondent's Counsel and Complaint Counsel have indicated that they do not oppose this Motion, provided that the parties may have an opportunity to re-examine Mr. Wallace within the scope of his counsel's examination.

Conclusion

For the reasons set forth above, counsel for Mr. Wallace respectfully requests the Court to grant leave for counsel to question Mr. Wallace, as needed to clarify his testimony and preserve his immunity, after his direct testimony and cross-examination at the hearing of this action.

Respectfully submitted, this 1st day of May 2015.

/s/ Mary Beth Buchanan

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Notice of Electronic Service

I hereby certify that on May 01, 2015, I filed via hand a paper original and electronic copy of the foregoing Motion for Leave to Re-Direct Mr. Wallace at Hearing, with:

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I hereby certify that on May 01, 2015, I filed via E-Service of the foregoing Motion for Leave to Re-Direct Mr. Wallace at Hearing, with:

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I hereby certify that on May 01, 2015, I filed via other means, as provided in 4.4(b) of the foregoing Motion for Leave to Re-Direct Mr. Wallace at Hearing, with:

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