

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

I.

On November 21, 2014, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion for Leave to Issue Subpoenas to Richard Wallace (“Motion”). Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed an opposition to the Motion on December 2, 2014, and filed a revised Opposition on December 5, 2014 (“Opposition”). As set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

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. Mr. Wallace is a fact witness that was subpoenaed by Respondent to testify at the hearing on this matter, but whose testimony was delayed by efforts to obtain immunity for Mr. Wallace’s testimony. On November 14, 2014, the Attorney General approved the request by the Administrative Law Judge for authority to issue an order requiring Mr. Wallace’s testimony and granting immunity. Respondent has yet to file a motion seeking such order requiring Mr. Wallace to testify, pursuant to FTC Rule 3.39 (b)(1). *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; *see also* Opposition at 2 n.2 (stating that Respondent is prepared to move for order under Rule 3.39).

Complaint Counsel seeks to depose Mr. Wallace in advance of his anticipated testimony, and also to obtain document discovery from Mr. Wallace as follows:

1. All Documents related to Tiversa.
2. All Documents related to LabMD, Inc. and/or the 1718 File.
3. All Documents related to the IP Address List.
4. For the period from February 28, 2014 through the present, all Documents related to Communications, including proffered testimony, with any third party

- related to the Federal Trade Commission, including the Federal Trade Commission's employees or agents, or Tiversa, including its employees or agents.
5. All Documents, including personnel files, that relate to your duties, formal or informal performance evaluations, disciplinary records, and promotion, demotion, or termination from Tiversa.
 6. All Documents related to the sale or offer of sale of your stock in Tiversa.

Complaint Counsel states that it is "requesting this discovery to facilitate the cross-examination of Mr. Wallace, not to develop its rebuttal case." Motion at 4 n.3.¹ Complaint Counsel contends that the discovery is necessary to enable Complaint Counsel to prepare a meaningful cross-examination of Mr. Wallace, which is in the interest of justice. In addition, Complaint Counsel asserts, permitting discovery in advance of Mr. Wallace's testimony is not premature because it is for the purpose of facilitating cross-examination and will enable Complaint Counsel to cross-examine Mr. Wallace immediately upon conclusion of his direct testimony, which will prevent requiring Mr. Wallace to return for another court appearance.

Complaint Counsel argues that good cause exists to reopen discovery for the purpose of obtaining discovery from Mr. Wallace because, according to Complaint Counsel, it "could not reasonably have anticipated the need to depose Mr. Wallace before the March 5, 2014 close of discovery or the start of the evidentiary hearing in this matter." Motion at 6. Complaint Counsel asserts that it had no notice of, could not have foreseen, and did not in fact learn of, the substance of Mr. Wallace's anticipated testimony until Respondent's counsel made a proffer of that testimony during the evidentiary hearing on June 12, 2014. Complaint Counsel further asserts that, given that proceedings in this matter have already been delayed to facilitate obtaining Mr. Wallace's testimony, Respondent will not be prejudiced by a brief additional delay for limited discovery from Mr. Wallace.

Respondent argues that Complaint Counsel has long known of Mr. Wallace's importance to this case and the nature of his expected testimony, stating that: Complaint Counsel identified Mr. Wallace in its Initial Disclosures in this case; at the deposition of Tiversa, Tiversa's designee and president Mr. Robert Boback identified Mr. Wallace in November 2013 as the Tiversa employee that allegedly found the insurance aging file at issue in this case (the "1718 file") on peer-to-peer networks, and created the document purporting to evidence the peer-to-peer networks at which the 1718 file was allegedly found (CX 19); Respondent identified Mr. Wallace on its Final Proposed Witness list in advance of the trial; and Complaint Counsel has long been aware that Respondent claims that Tiversa took the 1718 file from a LabMD workstation. Notwithstanding the foregoing, Respondent argues, Complaint Counsel declined the opportunity to depose Mr. Wallace during the discovery period, and also confirmed at trial that it would not seek to obtain Mr. Wallace's deposition in advance of his testimony.

Respondent also argues that Complaint Counsel is seeking anticipatory rebuttal discovery, which effort was previously denied by Order dated July 23, 2014. Finally, Respondent contends that some of the requested discovery, including details regarding Mr.

¹ Complaint Counsel's Motion for Leave to Issue Subpoenas for the purpose of obtaining rebuttal evidence for Mr. Wallace's anticipated testimony was denied as premature by Order dated July 23, 2014.

Wallace's February 28, 2014 termination by Tiversa, and regarding Mr. Wallace's subsequent sale of Tiversa stock in April and May 2014 are not relevant.

III.

FTC Rule 3.21(c)(2) states in pertinent part: "The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing. . . . In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner." 16 C.F.R. § 3.21(c)(2).

Having considered all the arguments and contentions of the parties, and based on the record presented, Complaint Counsel erred in failing to take Mr. Wallace's deposition during the discovery period. Complaint Counsel does not deny that Mr. Wallace was closely involved with the discovery of the 1718 file or the creation of CX 19, but asserts that it had no reason to believe that Mr. Wallace would say anything contrary to the testimony of Mr. Boback. However, a deposition would have enabled Complaint Counsel to test its assumptions about Mr. Wallace's testimony.

Complaint Counsel also erred in failing to seek leave to take Mr. Wallace's deposition (or take any other discovery from Mr. Wallace), after the close of discovery, even after Respondent on April 9, 2014 designated Mr. Wallace as a defense witness for trial. Respondent's designation stated:

We expect that Mr. Wallace will testify live about Tiversa's technology and its use with peer-to-peer file sharing applications and networks; Tiversa's communications with the Federal Trade Commission ("FTC") and Dartmouth College; facts relating to the "P2P insurance aging file" as referenced in Paragraph 17 of the Complaint; Mr. Wallace's and Tiversa's participation and role in Dartmouth's research for the article by Eric Johnson, titled; "Data Hemorrhages in the Health-Care Sector."

Respondent's Final Proposed Witness List at 4-5.

Indeed, Complaint Counsel expressly declined to seek a deposition of Mr. Wallace in advance of his testimony, notwithstanding the foregoing summary of testimony. During preliminary proceedings at trial on May 22, 2014, Respondent advised it would call approximately 9 witnesses, at which time the following exchange occurred:

JUDGE CHAPPELL: Have all of these witnesses been deposed?

MR. SHERMAN: All except for maybe one.

MS. VANDRUFF: . . . I'm concerned about Mr. Sherman's representation that one

witness may not have been deposed because I'm not aware of a witness on their witness list who has not been deposed.

MR. SHERMAN: Rick Wallace is on our witness list and he was not deposed.

MS. VANDRUFF: And I didn't -- okay. That is true, Your Honor.

JUDGE CHAPPELL: So that's not a concern.

MS. VANDRUFF: To the extent --

JUDGE CHAPPELL: That was your choice not to depose him. He was on the list.

MS. VANDRUFF: Your Honor, we're not concerned about the fact that he hasn't been deposed, that's correct.

Trial Tr., at 438-439.

Complaint Counsel contends that it had no notice that Mr. Wallace's testimony would include assertions of misconduct by Complaint Counsel and the fabrication of evidence until June 12, 2014, when Respondent made a proffer of Mr. Wallace's testimony in court. However, Respondent's summary of Mr. Wallace's anticipated testimony included "Tiversa's communications with the Federal Trade Commission ("FTC") . . . [and] facts relating to the 'P2P insurance aging file.'" Complaint Counsel's failure to know the specifics of Mr. Wallace's testimony until June 12, 2014, is a function of having decided not to seek Mr. Wallace's deposition.

The failure to take discovery from Mr. Wallace earlier was a strategic error. However, the public interest and the search for truth are served by facilitating meaningful cross-examination. In addition, Respondent has not demonstrated that it would be prejudiced by allowing limited discovery to facilitate cross-examination. Nonetheless, Complaint Counsel has not demonstrated that the entirety of its requested discovery is relevant to an effective cross-examination, including the request for documents relating to Mr. Wallace's sale of Tiversa stock in the months after his termination, and the requested discovery is narrowed, as addressed below.

IV.


For all the foregoing reasons, Complaint Counsel's Motion is GRANTED IN PART. No earlier than the date upon which an order is issued, after a request for such order under Rule 3.39(b)(2) and the Order of October 9, 2014, *supra*, requiring Mr. Wallace to testify under a grant of immunity, Complaint Counsel may issue a subpoena to Mr. Wallace for documents limited to the following:

1. All Documents related to LabMD, Inc. and/or the 1718 File.

2. All Documents related the IP Address List introduced at trial as CX 19.
3. All Documents, including personnel files, that relate to your duties, formal or informal performance evaluations, disciplinary records, and promotion, demotion, or termination from Tiversa.

In addition, no earlier than the date upon which an order is issued under Rule 3.39(b)(2) requiring Mr. Wallace to testify under a grant of immunity, Complaint Counsel may subpoena Mr. Wallace for a deposition. Because Complaint Counsel has asserted that the late-requested deposition is needed "to facilitate the cross-examination of Mr. Wallace," the deposition shall take place on the day of Mr. Wallace's appearance in this matter to testify, during a recess that will take place immediately upon completion of Mr. Wallace's direct testimony. The deposition shall not exceed 2 hours without further order. Except as set forth herein, Complaint Counsel's Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: December 8, 2014