

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 RESPONDENT’S UNOPPOSED MOTION FOR
AN ORDER REQUIRING RICHARD WALLACE TO TESTIFY IN PERSON
UNDER A GRANT OF IMMUNITY PURSUANT TO COMMISSION RULE 3.39**

I.

Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed an Unopposed Motion for an Order Requiring Richard Wallace to Testify in Person under a Grant of Immunity Pursuant to Commission Rule 3.39 (“Motion”) on October 1, 2014.¹ Respondent states that Federal Trade Commission (“FTC”) Complaint Counsel has confirmed to Respondent’s counsel that Complaint Counsel does not oppose this Motion.² On October 6, 2014, Complaint Counsel filed a Response to Respondent’s Rule 3.39 Motion (“Response”). Although Complaint Counsel does not oppose the relief sought in Respondent’s Motion, Complaint Counsel submitted its Response to identify assertions made by Respondent with which Complaint Counsel disagrees.

For the reasons set forth below, the Unopposed Motion is GRANTED in part and DENIED in part.

II.

This trial commenced on May 20, 2014. During the presentation of Respondent’s defense, Respondent’s counsel stated that he had served a subpoena for trial testimony on Mr. Richard Wallace, a former employee of Tiversa Holding Company, Inc. (“Tiversa”) and intended to call Mr. Wallace to provide testimony in this matter that day. (Trial transcript, May

¹ Subsequent to its timely filing of the Motion, based on a concern raised by Complaint Counsel, Respondent filed a Revised Motion, reflecting additional redactions of material in footnote 3 considered to be *in camera*.

² See also Trial transcript, June 12, 2014, p. 1303 (Complaint Counsel stating that the government does not intend to oppose a motion to be filed by Respondent pursuant to Commission Rule 3.39(b)).

30, 2014, p. 1230, *in camera*³).

Mr. Wallace's attorney 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. The attorney further stated, however, that Mr. Wallace would not be willing or able to answer any substantive questions regarding Tiversa's role or the activities in which Tiversa had been engaged in connection with the FTC's action against LabMD, because Mr. Wallace would invoke his Fifth Amendment right against self-incrimination. (Trial transcript, May 30, 2014, p. 1231, *in camera*). Mr. Wallace's attorney offered a letter from the Chairman of the Committee on Oversight and Government Reform of the House of Representatives, U.S. Congress ("Oversight Committee"), dated May 29, 2014, 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 informed Mr. Wallace that the Oversight Committee was investigating activities of Mr. Wallace's former employer, Tiversa, in connection with Tiversa's work for 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. Mr. Wallace's attorney stated that he was in discussions with the Oversight Committee, seeking immunity for Mr. Wallace's testimony, and that he intended to allow Mr. Wallace to testify in the FTC proceeding if the immunity granted to Mr. Wallace through the Oversight Committee were to also include Mr. Wallace's testimony in this proceeding. (Trial transcript, May 30, 2014, p. 1249).

Trial was then recessed until June 12, 2014, to enable Mr. Wallace to obtain Congressional immunity. 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).

On June 12, 2014, trial reconvened. Mr. Wallace's attorney represented that Mr. Wallace had not yet received Congressional immunity. (Trial transcript, June 12, 2014, p. 1261). Respondent then called Mr. Wallace to the stand. After answering questions regarding his name, and place and length of employment, Mr. Wallace invoked his Fifth Amendment right against self-incrimination and stated his intent not to answer any further questions. (Trial transcript, June 12, 2014, pp. 1301-1302). Thereafter, Respondent's counsel was advised that if Respondent wished to seek an order requiring Mr. Wallace to testify under a grant of immunity pursuant to Rule 3.39, Respondent would 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).

³ Although many of the representations of counsel were made during an *in camera* session, the information that is 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 Administrative Law Judge "may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding").

The parties were 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 fifteen 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.

On August 5, 2014, Complaint Counsel filed a Motion for Order Requiring Respondent's Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hearing. By Order dated August 22, 2014, that motion was denied in part, stating that it would be inefficient and potentially duplicative to require Respondent to file a Rule 3.39 Request at that point in time because the request for immunity made by Mr. Wallace before the Oversight Committee was then pending. That motion was granted in part, to require Respondent to file a Rule 3.39 Request by October 1, 2014, if the immunity request made by Mr. Wallace before the Oversight Committee had not been not granted or if the request was granted but did not include his testimony in this proceeding. Pursuant to the August 22, 2014 Order, Respondent filed the instant Unopposed Motion.

III.

A.

Rule 3.39(b) of the Commission's Rules of Practice, "Orders requiring witnesses to testify or provide other information and granting immunity," states:

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). *See also* 16 C.F.R. § 4.16 (in defining the privilege against self-incrimination in its Rules, specifically incorporating sections 6002 and 6004 of Title 18 of the United States Code).

B.

In evaluating the first requirement of Rule 3.39(b), that the testimony of Mr. Wallace “may be necessary to the public interest,” according to the U.S. Attorneys’ Manual, some of the factors relevant to a decision to request immunity based on the public interest are “the importance of the [case]” and the “value of the person’s testimony or information to the [case.]” U.S. Attorneys’ Manual, Title 9, Ch. 9-23.210 (1997). Respondent argues that the testimony of Mr. Wallace may be necessary to the public interest and Complaint Counsel states that it does not take a position on this issue. Motion at 4; Response at 1.

In its press release announcing the issuance of the Complaint in this matter, the FTC announced that this case “is part of an ongoing effort by the Commission to ensure that companies take reasonable and appropriate measures to protect consumers’ personal data.” <http://www.ftc.gov/news-events/press-releases/2013/08/ftc-files-complaint-against-labmd-failing-protect-consumers>. Furthermore, the Commission has stated in its Order Denying Respondent LabMD’s Motion to Dismiss, “this case presents fundamental questions about the authority of the Federal Trade Commission . . . to protect consumers from harmful business practices in the increasingly important field of data security.” *In re LabMD, Inc.*, 2014 FTC LEXIS 2, at *1 (Jan. 16, 2014).⁴ Thus, the importance of this case to the FTC is evident.

The importance of Mr. Wallace’s testimony to this case is also clear. The Complaint charges that Respondent, a lab that provides doctors with cancer detection services, committed an unfair trade practice under Section 5(a) of the FTC Act by failing to use “reasonable and appropriate” data security measures to prevent unauthorized access to confidential patient information, Complaint ¶¶ 21-22, including by making an “insurance aging report” containing confidential patient information (the “1718 File”) available for sharing via a peer-to-peer, or “P2P,” file sharing application placed on a LabMD computer workstation. Complaint ¶¶ 18-19. As stated by Complaint Counsel, Tiversa found the 1718 File in the course of performing unrelated searches of P2P networks on behalf of one of Tiversa’s clients and, according to Complaint Counsel, Tiversa eventually found the 1718 File at four separate IP addresses. Complaint Counsel’s Pre-Trial Brief, May 2, 2014, at 45-46, 49, citing deposition testimony and expert report relying on CX 19. According to testimony provided by Robert J. Boback, Chief Executive Officer of Tiversa, Tiversa provided information to an entity formed by Tiversa called the Privacy Institute, and the Privacy Institute provided the information to the FTC in response to a Civil Investigative Demand (“CID”). (RX 541 (Deposition of Robert Boback, June 7, 2014) at pp. 38-42). In response to a request for admission asking Complaint Counsel to admit that the FTC obtained the 1718 File from Tiversa, Complaint Counsel admitted that, as part of Complaint Counsel’s Part II investigation of LabMD, it issued a CID to the Privacy Institute and received the 1718 File. (Complaint Counsel’s Amended Responses to LabMD’s First Set of Requests for Admission, Response No. 20).

⁴ The Commission’s Rules of Practice provide that a motion to dismiss filed prior to the evidentiary hearing is to be referred directly to the Commission for decision, rather than to the Administrative Law Judge assigned to hear the case. 16 C.F.R. § 3.22(a).

According to Respondent, “Mr. Wallace is expected to testify regarding how the FTC obtained the 1718 File from LabMD” Motion at 1. Respondent asserts that the only document produced by the government “proving” that the 1718 File was found somewhere other than a LabMD workstation is CX 19, a one-page document containing four typed Internet Protocol (“IP”) addresses, which was created by Mr. Wallace sometime in or about October 2013, after the FTC issued its Complaint against LabMD. *Id.* Respondent further asserts that Mr. Wallace is expected to testify that an attorney from the FTC told Tiversa that finding the 1718 File on a LabMD workstation was insufficient, so Mr. Wallace created CX 19 after the fact to make it appear as if the 1718 File had been found on four separate IP addresses outside of LabMD. Trial transcript, June 12, 2014, p. 1293, *in camera*.

Respondent’s proffer includes the following:

MR. SHERMAN: Here’s what we expect to get out of this, Your Honor. The question will be whether or not in fact [an attorney for Complaint Counsel] . . . was present at Tiversa in Pittsburgh, Pennsylvania, on or about October of 2013, which was shortly before Mr. Boback’s deposition took place. When [the FTC attorney] was at Tiversa in Pittsburgh in October, he was told that the 1718 File, as we refer to it, was only found at LabMD in Atlanta, Georgia, that [the FTC attorney] then indicated, well, it’s got to be found someplace else. Given that information, Mr. Wallace basically wrote four IP addresses, four dates and four times at which the 1718 File was never found. He then gave that information to [the FTC attorney], and that has been the linchpin really of this case as documented in CX 19, which contains the four IP addresses which the government alleges is where the 1718 File was found on peer-to-peer networks at various times.

JUDGE CHAPPELL: Mr. Wallace was the person who was told to do something and he did something; is that what you’re saying?

MR. SHERMAN: Yes, sir.

Trial transcript, June 12, 2014, p. 1293, *in camera*.

Respondent asserts that the proffered testimony would refute a necessary element of the FTC’s case that LabMD’s data security practices were inadequate and likely to cause substantial consumer injury or harm. Motion at 1. Complaint Counsel argues that Respondent’s Motion includes proffered testimony that is “demonstrably untrue” and “categorically false.” Response at 1.⁵

The allegations by Respondent regarding: possible misconduct by an FTC attorney; where the 1718 File was found; how the FTC obtained the 1718 File; and an alliance between

⁵ Complaint Counsel’s Response includes various arguments and assertions as to why Mr. Wallace’s proffered testimony should not be believed and/or is legally immaterial. These arguments and assertions are premature and not material to, or dispositive of, the issue of whether Respondent’s request to seek immunity for Mr. Wallace’s testimony should be granted, which request Complaint Counsel clearly does not oppose.

Tiversa and the FTC, all require further inquiry to determine the facts. However, no determination can be made about the veracity or lack thereof of this proffered witness testimony without hearing Mr. Wallace's testimony.

Respondent has demonstrated that Mr. Wallace's testimony is crucial to Respondent's defense. At this point in the proceedings, without knowing what Mr. Wallace will or will not say, but based on the serious nature of the allegations and the proffered testimony, fundamental fairness and determining the truth require that the testimony of this witness be heard. 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.

In evaluating the second requirement of Rule 3.39(b), that the individual has refused or is likely to refuse to provide information on the basis of his privilege against self-incrimination, Mr. Wallace invoked his Fifth Amendment right at trial on June 12, 2014. (Trial transcript, June 12, 2014, pp. 1301-1302). Accordingly, pursuant to Rule 3.39(b), it is hereby determined that Mr. Wallace has refused to testify on the basis of his privilege against self-incrimination.


IV.

Commission Rule 3.39(b) states, upon making the above determinations, the Administrative Law Judge is authorized "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[.]" 16 C.F.R. § 3.39(b).

To the extent that the Unopposed Motion requests that the Administrative Law Judge officially request, through the Commission's liaison officer, approval by the Attorney General for the issuance of an order requiring Mr. Wallace to testify and granting immunity, as provided by Rule 3.39, the Unopposed Motion is GRANTED. This Order will be forwarded, by the Office of the Secretary, to the Commission's liaison officer to request such approval by the Attorney General. The parties shall cooperate and provide any information necessary to allow this process to proceed.

To the extent that the Unopposed Motion requests that the Administrative Law Judge issue an order requiring Mr. Wallace to testify under a grant of immunity, the Unopposed Motion is DENIED WITHOUT PREJUDICE. Pursuant to Commission Rule 3.39(b), the Administrative Law Judge is authorized to issue such order "after the Attorney General (or his or her designee) has granted such approval[.]" 16 C.F.R. § 3.39(b). Once such approval is granted, upon proper motion by the Respondent, an appropriate order shall be issued.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: October 9, 2014