

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

In the Matter of)

LabMD, Inc.,)
a corporation,)
Respondent.)

DOCKET NO. 9357

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.

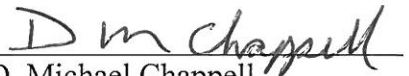
III. Analysis

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