

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



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In the Matter of )  
 )  
LabMD, Inc., )  
a corporation, )  
Respondent. )  
\_\_\_\_\_

DOCKET NO. 9357

**ORDER GRANTING JOINT MOTION FOR *IN CAMERA* TREATMENT OF  
FRAUD SURVEY QUESTIONS OF EXPERT JAMES VAN DYKE**

**I.**

Pursuant to Rule 3.45(b) of the Federal Trade Commission’s (“FTC”) Rules of Practice and the Revised Scheduling Order entered in this matter on October 22, 2013, FTC Complaint Counsel and Respondent filed a joint motion seeking *in camera* treatment for 2013 Fraud Survey questions produced by Complaint Counsel’s proffered expert, James Van Dyke, which Respondent requested in discovery and may offer as evidence at the evidentiary hearing in this matter (“Motion”). As set forth below, the Motion is GRANTED.

**II.**

Under Rule 3.45(b) of the Rules of Practice, the Administrative Law Judge may order that material offered into evidence “be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment or after finding that the material constitutes sensitive personal information.” 16 C.F.R. § 3.45(b). Applicants for *in camera* treatment must “make a clear showing that the information concerned is sufficiently secret and sufficiently material to their business that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 1980 FTC LEXIS 99, at \*10 (Mar. 10, 1980). “[R]equests for *in camera* treatment must show ‘that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.’” *In re Kaiser Aluminum & Chem. Corp.*, 103 F.T.C. 500, 500 (1984), quoting *In re H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961). If the applicants for *in camera* treatment make this showing, the importance of the information in explaining the rationale of decisions at the Commission is “the principal countervailing consideration weighing in favor of disclosure.” *In re General Foods Corp.*, 1980 FTC LEXIS 99, at \*10.

The Federal Trade Commission recognizes the “substantial public interest in holding all

aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *Hood*, 1961 FTC LEXIS 368, at \*6-7. A full and open record of the adjudicative proceedings promotes public understanding of decisions at the Commission. *In re Bristol-Myers Co.*, 90 F.T.C. 455, 458 (1977). A full and open record also provides guidance to persons affected by its actions and helps to deter potential violators of the laws the Commission enforces. *Hood*, 58 F.T.C. at 1186. The burden of showing good cause for withholding documents from the public record rests with the party requesting that documents be placed *in camera*. *Id.* at 1188.

The Commission has recognized that it may be appropriate to provide *in camera* treatment for certain business records. *In re Champion Spark Plug Co.*, 1982 FTC LEXIS 85, at \*2 (April 5, 1982); *see Hood*, 58 F.T.C. at 1188-89; *Kaiser Alum.*, 103 F.T.C. at 500. Where *in camera* treatment is granted for business records, such as business strategies, marketing plans, pricing policies, or sales documents, it is typically provided for two to five years. *E.g.*, *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at \*2 (Nov. 22, 2004); *Conference Interpreters*, 1996 FTC LEXIS 298, at \*13-14; *Champion Spark Plug*, 1982 FTC LEXIS 85 at \*2 and 1982 FTC LEXIS 92, at \*2 (March 4, 1982).

In order to sustain the burden for withholding documents from the public record, an affidavit or declaration is required, demonstrating that a document is sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury. *See In re North Texas Specialty Physicians*, 2004 FTC LEXIS 109, at \*2-3 (Apr. 23, 2004). To overcome the presumption that *in camera* treatment will not be granted for information that is more than three years old, applicants seeking *in camera* treatment for such documents must also demonstrate, by affidavit or declaration, that such material remains competitively sensitive. In addition, to properly evaluate requests for *in camera* treatment, applicants for *in camera* treatment must provide a copy of the documents for which they seek *in camera* treatment to the Administrative Law Judge for review.

### III.

Complaint Counsel’s proffered expert, Mr. James Van Dyke, produced a set of survey questions created by Mr. Van Dyke and Javelin Strategy & Research (“Javelin”), the company of which he is founder and president (“Survey Questions”). The Survey Questions are a series of questions and available answers, organized into a particular order used by Javelin’s vendor to solicit responses from representative consumers on identity theft and related experiences.

The parties’ Motion is supported by the declaration of Mr. Van Dyke (“Van Dyke declaration”), who reviewed the Survey Questions and averred that such document is a data collection mechanism that is integral to Javelin’s research. *Id.* at ¶¶ 3, 4. According to the Van Dyke declaration, disclosure of the Survey Questions would result in serious competitive injury to Javelin. *Id.* The Van Dyke declaration further avers that the unique combination of questions, available answers, and the flow of questions are valuable as a proprietary research tool that provide a valuable competitive advantage to Javelin, the disclosure of which would be highly valuable to its competitors. *Id.* Additionally, the Van Dyke declaration avers that the Survey Questions are the result of more than a decade of Mr. Van Dyke’s work, as well as that of other

research methodologists and professionals that could not be re-created without a duplication of the years of work that Mr. Van Dyke and Javelin have put into them. *Id.*


Commission Rule 3.45 requires an order granting *in camera* treatment to include the date upon which *in camera* treatment will expire. The parties state that because Javelin's study captures experiences over time and tracks participants longitudinally, the Survey Questions must be kept confidential for the period of six years over which information is captured by the study. According to Mr. Van Dyke, the date after which the Survey Questions could no longer be used to capture responses is April 17, 2021. *Id.*

IV.

The parties have met their burden of demonstrating that the Survey Questions should be given *in camera* protection. Accordingly, the Motion is GRANTED. *In camera* treatment, for a period of six years, to expire on April 17, 2021, is GRANTED for the Survey Questions.

In the event the Survey Questions are offered into evidence, the offering party shall prepare a proposed order identifying the Survey Questions by exhibit number.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: May 6, 2014