

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



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

PUBLIC
Docket No. 9357

**RESPONDENT LABMD, INC'S OPPOSITION TO COMPLAINT COUNSEL'S
MOTION TO COMPEL PRODUCTION OF DAUGHERTY AFFIDAVIT**

Recently, Complaint Counsel sought to keep open the possibility that documents provided by third-party Tiversa, Inc. ("Tiversa") to the House Committee on Oversight and Government Reform ("OGR") in connection with an investigation conducted by OGR, remain confidential. Respondent LabMD, Inc. ("LabMD") also has reason to believe that Complaint Counsel has not yet produced in this case all documents that FTC provided to OGR in connection with that same investigation. Yet, Complaint Counsel files the instant motion seeking to compel LabMD to produce an affidavit provided by its CEO, Michael Daugherty (the "Daugherty Affidavit"), to OGR in connection with that same investigation. Putting aside the hypocrisy in this approach, LabMD, pursuant to FTC Rule 3.38 and 16 C.F.R. § 3.38, files the instant Opposition to Complaint Counsel's Motion.

As a preliminary matter, in the interest of judicial economy, this Court should reserve its ruling pending the outcome of a related issue in the U.S. District Court for the Western District of Pennsylvania. Specifically, the Pennsylvania court is addressing whether any work product associated with the Daugherty Affidavit (inadvertently e-filed as an exhibit by LabMD in that case and promptly removed from the e-docketing system) has been waived. If the Pennsylvania

court rules that it has been waived, then the Daugherty Affidavit may be made public and this Motion likely is moot. And if the Pennsylvania court finds that that the Daugherty Affidavit remains protected, such ruling should be informative as this Court rules on the instant Motion.

In this regard, LabMD maintains that it had no duty to disclose the existence of the Daugherty Affidavit, let alone produce it, since it was created after the close of discovery and was not responsive to any document request issued by FTC under FTC Rule 3.37. Moreover, LabMD had no duty to disclose, let alone produce, the Daugherty Affidavit as part of its ongoing initial disclosures under FTC Rule 3.31 since the Daugherty Affidavit constitutes work product under both FTC Rules and blackletter law. Indeed, the Daugherty Affidavit contains the mental impressions of LabMD and its attorneys, and was disclosed only to OGR confidentially for use in its investigation into the unlawful conduct of Tiversa.

For these reasons, and as set forth in greater detail below, this Court should deny Complaint Counsel's Motion to Compel Production of the Daugherty Affidavit.

BACKGROUND

There is no dispute (or, at the least, no evidence offered to the contrary) that the Daugherty Affidavit was prepared by undersigned counsel and executed by Mr. Daugherty during the pendency of this proceeding. *See* Mot. at 3. Notwithstanding Complaint Counsel's attempt to characterize the Daugherty Affidavit as "fact-laden" (despite, according to the Motion, never having seen it), LabMD has represented that it contains work product. *See* Mot. to Compel, Ex. F (Letter from Sherman to VanDruff (Mar. 26, 2015)). LabMD has further represented that the Daugherty Affidavit was provided to OGR as a part of its investigation, and necessarily was cloaked with confidentiality when submitted. *See id.* Complaint Counsel has never suggested that the Daugherty Affidavit was otherwise made public. *See generally* Mot.

LabMD attached the Daugherty Affidavit to a filing in a separate lawsuit involving LabMD, Tiversa, and others, pending in the U.S. District Court for the Western District of Pennsylvania. *See* Mot. to Compel, Ex. B (Op. and Order, *LabMD v. Tiversa et al.*, No. 2:15-cv-00092-MRH-MPK (W.D. Pa. Mar. 17, 2015)), at 3. Within hours of such filing, LabMD sought to claw-back the inadvertent filing of the Daugherty Affidavit. *Id.* at 3-5, 7. On a motion filed by Tiversa in the Pennsylvania case, Chief Magistrate Judge Kelly found that the materials did qualify as work product, but that LabMD had waived such protection by filing the materials. *Id.* at 14-15. However, and importantly, Judge Kelly stayed her order: “the Court will require that the documents at issue remain sealed from public view until the expiration of the appropriate time for an appeal from this Order to a District Judge.” *Id.* Accordingly, on March 31, 2015, LabMD timely appealed Judge Kelly’s decision, which is set for hearing on April 15, 2015. *See* Mot. to Compel, Ex. D (Pl.’s Objections to Op. and Order., No 2:15-cv-00092-MRH-MPK (W.D. Pa. Mar. 31, 2014)).

STANDARD

FTC Rule 3.38 governs the instant motion to compel and allows a party to move for the production of documents where such disclosure is required under FTC Rule 3.31 or FTC Rule 3.37. *See* FTC Rule 3.38 (stating that “[a] party may apply by motion...for an order compelling disclosure...[of] mandatory initial disclosures required by §3.31(b)...[or the] production of documents...under §3.37”). However, the Rule is clear that where a party’s objections to productions are “justified,” as they are here, the Court must deny the motion. *See* FTC Rule 3.38 (where Administrative Law Judge determines the objections are justified, it shall not require disclosure).

ARGUMENT

This Court should deny Complaint Counsel's Motion to Compel production of the Daugherty Affidavit.¹

I. The Court Should Not Yet Rule On This Motion

First, as a preliminary matter, this Court should delay ruling on this matter pending the outcome of the April 15, 2015 hearing in the U.S. District Court for the Western District of Pennsylvania. In this regard, if the Pennsylvania court upholds the Magistrate Judge's ruling and unseals the RICO Statement, the Daugherty Affidavit will be a public document and readily accessible to the public, making this Motion likely moot. Waiting for such ruling will not prejudice the parties, and no judicial resources will be utilized in resolving the instant Motion prematurely. In other words, the Daugherty Affidavit would be "obtainable from some other source that is more convenient...[and] less burdensome" to the Court and the parties. FTC Rule 3.31(b)(2).

II. LabMD Was Under No Obligation To Produce The Document under FTC Rule 3.37

If the Court proceeds to rule on this Motion, it should deny the Motion because LabMD never had a duty to disclose, let alone produce, the Daugherty Affidavit, which was created after the close of discovery and is not responsive to any document request.

In its Motion to Compel, Complaint Counsel argues that the Daugherty Affidavit is responsive to its discovery requests. However, contrary to Complaint Counsel's reading, the Daugherty Affidavit is clearly not responsive to Request 31. Mot. to Compel, Ex. H, Second

¹ FTC previously filed a motion requesting provisional *in camera* treatment of documents from OGR, purportedly in an effort to allow third-party Tiversa to assert confidentiality over the documents. If Complaint Counsel truly is concerned about maintaining the confidentiality of documents, then its motion to compel should have been filed under seal. Given the Pennsylvania court's decision to keep the Daugherty Affidavit under seal, at the least, Complaint Counsel should not have sought to characterize the document in its public filing.

Reqs. For Prod. at 9 (“[a]ll documents relating to any steps taken or investigation conducted by or on behalf of LabMD in connection with the Security Incident described in Paragraphs 17-19 of the Complaint”). Nothing in the record indicates that the Daugherty Affidavit was created as part of an investigation or any “steps taken” by or on behalf of LabMD. It is, therefore, outside the scope of this Request.

Furthermore, the Court established March 5, 2014 as the close of discovery. Am. Scheduling Order, *In re LabMD, Inc.*, FTC Dkt. No. 9357, at 1 (Oct. 22, 2013). The Daugherty Affidavit was executed on April 17, 2014 and, therefore, is outside of the discovery period.²

III. Production Was Not Required By Initial Disclosure Requirements because the Daugherty Affidavit Constitutes Work Product

Finally, while Complaint Counsel argues that LabMD had a duty to supplement its initial disclosures with the Daugherty Affidavit under Rule 3.31(b), this Rule specifically exempts documents which constitute work product. *See* FTC Rule 3.31.

A. FTC Could Have Discovered All Facts “About the Source of the 1718 File” Itself

First, LabMD is not required to do Complaint Counsel’s work. Complaint Counsel could have easily obtained the factual information purportedly contained in the Affidavit from interviews and depositions of LabMD, Tiversa, and/or Mr. Daugherty, rendering access to the Daugherty Affidavit unnecessary. *See* 16 C.F.R. § 3.31(b)(2); § 3.31(c)(2)(i).

According to Complaint Counsel, the Daugherty Affidavit pertains to “the source of the 1718 File.” Mot. to Compel at 3. Had the FTC exercised even minimal due diligence in investigating the origin of the 1718 File, it could have and should have interviewed Tiversa employees about “the source of the 1718 File.” If Complaint Counsel’s argument holds, then *any* evidence acquired by *any* party via interview, subpoena, or other method must also be

² As the Affidavit is plainly out of the scope of discovery, no *in camera* inspection is necessary.

disclosed with *no limitations*, which is contrary to the intent of the rules. 16 C.F.R. § 3.31(b)(2); 16 C.F.R. § 3.31(c)(2).

B. The Daugherty Affidavit is Privileged Work Product

The Daugherty Affidavit constitutes attorney work product under FTC Rule 3.31(c)(4) and 3.31(c)(5)³ and, again, was subject neither to disclosures requirements nor production. *See* FTC Rule 3.31 (incorporating privilege common law protecting mental impressions and legal theories of a party); *see also Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

Documents are within the scope of the work product rule if “the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” *United States v. Adlman*, 134 F.3d 1194, 1202-1203 (2d Cir. 1998). LabMD has represented that the Daugherty Affidavit was created during this litigation, and provided to OGR as a part of its investigation of Tiversa. The logical inference is that Mr. Daugherty was asked for the Affidavit *because of* his involvement in this litigation, the most significant challenge to FTC enforcement linked to Tiversa’s practices. Clearly, the Daugherty Affidavit would not have been executed in the course of normal business and would not have been created absent this litigation. *See id.* This conclusion applies with equal force even where the document is not prepared for use in that litigation. *Rodgers v. United States Steel Corp.*, No. 71-793, 1975 U.S. Dist. LEXIS 12775, at *3 (W.D. Pa. Apr. 20, 1975) (work product doctrine shields a document prepared because of litigation regardless of whether the document is used in that litigation).

Contrary to Complaint Counsel’s arguments, courts around the country have advocated for a “case by case” approach to determine whether executed affidavits remain protected work product. *See Robertson v. City of Arkansas City*, No. 10-1431, 2012 U.S. Dist. LEXIS 23806, at

*47 n. 133 (D. Kan. Feb. 24, 2012) (“[T]his Court is not convinced that formal witness declarations are automatically excluded from work product protection.”); *see also Lamer v. Williams Comm’ns, LLC*, No. 04-CV-847, 2007 U.S. Dist. LEXIS 8585, at *6 (N.D. Okla. Feb. 6, 2007) (producing affidavits would be “intruding into the heart of attorney trial preparation.”); *Stokes v. City of New York*, No. 2005-0007, 2006 U.S. Dist. LEXIS 50480, at *4 (E.D.N.Y. July 24, 2006) (“Affidavits...prepared...in anticipation of litigation are generally entitled to protection under Rule 26(b)(3)[.]”).

Importantly, courts draw a distinction between *party* affidavits and *non-party* affidavits, finding that *party* affidavits are protected work product. *See, e.g., Bell v. Lackawanna Cnty*, 892 F. Supp. 2d 647, 661 (M.D. Pa. 2012) (stating that many cases “involve affidavits or declarations obtained from third-party witnesses, not parties to the litigation itself...[t]he court finds this distinction relevant and concludes that plaintiffs were not required to disclose the declarations”). Here, unlike a third-party affidavit which just recites a series of facts, the Daugherty Affidavit undoubtedly reflects the mental impressions, litigation strategy, and product of discussions between a party and its counsel. *See* FRCP 26(b)(3)(A) (protecting not only documents produced in anticipation of litigation by counsel, but also by the party itself); *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981); *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (holding notes of conversations “are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure”).

Complaint Counsel ignores this distinction, citing to cases that pertain to a third-party affidavit. *See Murphy v. Kmart Corp.*, 259 F.R.D. 421, 425 (D.S.D. 2009) (“Kmart filed a motion to compel Mr. Murphy to produce the disputed *third-party* witness affidavits[.]”)

(emphasis added); *Walker v. George Koch Sons, Inc.*, No. 2:07cv274, 2008 U.S. Dist. LEXIS 81919, at *11 (S.D. Miss. Sept. 18, 2008); *Lamer v. Williams Commc'ns, LLC*, No. 04-CV-8472007, 2007 U.S. Dist. LEXIS 8585, at *1 (N.D. Okla. Feb. 6, 2007); *Intel Corp. v. VIA Techs., Inc.*, 204 F.R.D. 450, 451 (N.D. Cal. 2001). The work product doctrine protects an executed affidavit, where, as here, it was executed by a party-litigant rather than a third-party.

C. LabMD Did Not Waive the Work Product Privilege

Finally, Complaint Counsel asserts there is no work product protection for the Daugherty Affidavit once it has been submitted for “its intended purpose—here, submission to the Oversight Committee.” *See* Mot. at 5. Disclosing work product to a third-party does not waive this privilege unless that disclosure substantially increases the opportunity for potential adversaries to obtain the information. *Lavatec Laundry Tech., GmbH v. Lavatec, Inc.*, No. 3:13cv00056, 2014 U.S. Dist. LEXIS 57771, at *6-7 (D. Conn. Apr. 25, 2014) (citing *United States v. Deloitte LLP*, 610 F.3d 129, 391 (D.C. Cir. 2010)).

Here, disclosure to OGR did not “substantially increase” FTC’s opportunity to obtain the Daugherty Affidavit.⁴ The Daugherty Affidavit was never made public, was submitted to a congressional Committee investigating the FTC and Tiversa, and was necessarily cloaked with confidentiality.⁵ LabMD did not waive work product protection by submitting the document to OGR.

⁴ If Complaint Counsel is taking the position that disclosure to OGR constitutes waiver and subjects all documents to discovery, then FTC should disclose to LabMD all documents it shared with the Committee in connection with the same investigation (which LabMD requested).

CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Court deny Complaint Counsel's Motion to Compel.

Dated: April 14, 2015

Respectfully submitted,

/s/ Reed D. Rubinstein - ERB

Reed D. Rubinstein
William A. Sherman, II
Dinsmore & Shohl, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20006
Telephone: 202.372.9120
Fax: 202.372.9141
Email: reed.rubinstein@dinsmore.com

/s/ Prashant K. Khetan - ERB

Daniel Z. Epstein
Prashant K. Khetan
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842

Counsel for Respondent, LabMD

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

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a corporation,)	
Respondent.)	
)	
_____)	

**[PROPOSED] ORDER DENYING MOTION TO
COMPEL PRODUCTION OF DAUGHERTY AFFIDAVIT**

Upon consideration of Complaint Counsel’s Motion to Compel Production of Daugherty Affidavit,

IT IS HEREBY ORDERED that Complaint Counsel’s Motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2015, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and caused to be delivered via overnight mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff
Megan Cox
Ryan Mehm
John Krebs
Jarad Brown
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8122
Washington, D.C. 20580

Dated: April 14, 2015

By: /s/ Hallee K. Morgan

CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: April 14, 2015

By: /s/ Hallee K. Morgan

Notice of Electronic Service

I hereby certify that on April 14, 2015, I filed via hand a paper original and electronic copy of the foregoing LabMD's Opposition to Motion to Compel Production of Daugherty Affidavit, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on April 14, 2015, I filed via E-Service of the foregoing LabMD's Opposition to Motion to Compel Production of Daugherty Affidavit, with:

John Krebs
Attorney
Federal Trade Commission
jkrebs@ftc.gov
Complaint

Hallee Morgan
Cause of Action
hallee.morgan@causeofaction.org
Respondent

Jarad Brown
Attorney
Federal Trade Commission
jbrown4@ftc.gov
Complaint

Kent Huntington
Counsel
Cause of Action
kent.huntington@causeofaction.org
Respondent

Sunni Harris
Esq.
Dinsmore & Shohl LLP
sunni.harris@dinsmore.com
Respondent

Daniel Epstein
Cause of Action
daniel.epstein@causeofaction.org
Respondent

Patrick Massari
Counsel
Cause of Action
patrick.massari@causeofaction.org
Respondent

Prashant Khetan
Senior Counsel
Cause of Action
prashant.khetan@causeofaction.org
Respondent

Alain Sheer
Federal Trade Commission
asheer@ftc.gov
Complaint

Laura Riposo VanDruff
Federal Trade Commission
lvandruff@ftc.gov
Complaint

Megan Cox
Federal Trade Commission
mcox1@ftc.gov
Complaint

Ryan Mehm
Federal Trade Commission
rmehm@ftc.gov
Complaint

I hereby certify that on April 14, 2015, I filed via other means, as provided in 4.4(b) of the foregoing LabMD's Opposition to Motion to Compel Production of Daugherty Affidavit, with:

Reed Rubinstein
Dinsmore & Shohl LLP
Respondent

William Sherman, II
Attorney
Dinsmore & Shohl, LLP
william.sherman@dinsmore.com
Respondent

Hallee Morgan
Attorney