



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 MEMORIALIZING BENCH RULINGS ON PENDING MOTIONS

On April 7, 2015, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion to Compel Production of Daugherty Affidavit (“Motion to Compel”). Respondent opposed the Motion to Compel, asserting, among other grounds, that the Daugherty Affidavit was protected by the work product doctrine. By Order dated April 21, 2015, Complaint Counsel’s Motion to Compel was granted in part, to allow Complaint Counsel’s alternative request that the Administrative Law Judge undertake an *in camera* review of the Daugherty Affidavit prior to determining the merits of the Motion to Compel (“April 21 Order”). The April 21 Order directed Respondent to produce the Daugherty Affidavit to the Administrative Law Judge only, for examination in connection with determining the merits of the parties’ discovery dispute.

Subsequent to the April 21 Order, the House Oversight and Government Reform Committee (“OGR”) asserted that it regarded the Daugherty Affidavit “as a legislative document subject to the protections of the Speech or Debate Clause of the Constitution, U.S. Const. art. I, § 6, cl. 1, including, in particular, the Clause’s absolute protections against compelled disclosure” (“OGR Letter”). On April 23, 2015, Respondent filed a Motion to Reconsider the April 21 Order on the basis of the OGR Letter.

On April 30, 2015, Complaint Counsel filed an Unopposed Motion for *In Camera* Treatment of the Daugherty Affidavit, stating that OGR had agreed not to assert the privilege in these proceedings, provided that the Daugherty Affidavit was given *in camera* status, and further asserting that, as a result of OGR’s position, Respondent’s Motion to Reconsider the April 21 Order had been rendered moot.

During trial in this matter, on May 5, 2015, Complaint Counsel’s Motion to Compel Production of the Daugherty Affidavit and the Unopposed Motion for *In Camera* Treatment of the Daugherty Affidavit were both GRANTED (*see* Trial transcript, May 5, 2015, pp. 1316-1318, 1396-1397). Further, on May 14, 2015, Respondent filed a Notice of Withdrawal of its Motion to Reconsider.

Indefinite *in camera* treatment is granted in those unusual cases where the sensitivity of the information will not diminish with the passage of time, including information that is privileged. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157, at *6-7 (Nov. 22, 2000); *In re Textron, Inc.*, 1991 FTC LEXIS 135 (April 26, 1991). It is hereby ORDERED that the Daugherty Affidavit, which has been produced to Complaint Counsel, shall receive indefinite *in camera* treatment, under the conditions explained on the record.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: May 15, 2015