

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



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

PUBLIC
Docket No. 9357

ORIGINAL

**RESPONDENT LABMD, INC.’S OPPOSITION TO
COMPLAINT COUNSEL’S MOTION FOR IN CAMERA TREATMENT OF
CERTAIN DOCUMENTS PRODUCED BY RICHARD WALLACE**

LabMD, Inc. (“LabMD”) opposes Complaint Counsel’s Motion For In Camera Treatment Of Certain Documents Produced By Richard Wallace (the “Motion”). Respondent opposes the Motion on the ground that Complaint Counsel seeks over-inclusive, blanket *in camera* treatment of all documents it believes it *may* use at the hearing or in its rebuttal case. Moreover, Complaint Counsel does not address the public interest in accessing information about the adjudication, which will be unnecessarily abridged by the Motion.

As a preliminary matter, it is not clear that Complaint Counsel’s motion is procedurally appropriate at this time. Under the FTC’s Rules of Practice, as a prerequisite for *in camera* treatment, the movant must “seek to *use* material . . . subject to confidentiality restrictions.” 16 C.F.R. § 3.45(b) (emphasis added). As this Court has explained, while sensitive personal information is protected as confidential, the parties cannot actually move it *in camera* until it is offered into evidence. *See* Order Granting in Part and Denying in Part Joint Motion for Provisional In Camera Treatment, *In the Matter of LabMD, Inc.*, Docket No. 9357 (Apr. 9, 2013) (*citing In re North Carolina Board of Dental Examiners*, 2011 FTC LEXIS 94, at *8 (May 16, 2011); *In re Crown Cork & Seal Co.*, 71 F.T.C. 1669, 1967 FTC LEXIS 115, at *6 (1967); *In re*

Bristol-Myers Co., 90 F.T.C. 455, 1977 FTC LEXIS 25, at *6 (1977) (ruling that ALJ can “grant *in camera* treatment for information at the time it is offered into evidence.”); *In re Lehigh Portland Cement Co.*, 74 F.T.C. 1629, 1968 FTC LEXIS 287, at *7, n.6 (1968) (holding that it is premature to grant *in camera* treatment where there is a possibility that none of the information will be offered into evidence). Here, Complaint Counsel has not stated that it actually seeks to offer into evidence any particular material provided by Mr. Wallace. To the contrary, it has stated that it “cannot be certain which, if any documents produced by Mr. Wallace will be used by Complaint Counsel in the evidentiary hearing.” Motion at 3.

After Complaint Counsel has identified any documents it actually intends to offer into evidence, then, if warranted, Complaint Counsel should seek *in camera* treatment of those specific portions of the documents that contain the sensitive personal material. At that time, it will be appropriate to determine whether that material is in fact entitled to *in camera* treatment and LabMD may agree that the particular documents at issue contain specific *in camera* material – e.g., IP addresses or the sensitive personal information in the 1718 File, which can be redacted.¹ However, at this time, Complaint Counsel has not met its burden of showing that all of the material it has moved for *in camera* treatment has met the high standard for such treatment.² See *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, at *10 (1961). For example, for

¹ Indeed, a motion seeking *in camera* status for the sensitive personal information in the 1718 File appears to be unnecessary given that this information already has been granted *in camera* status. See e.g. RX072, CX0008-CX0011, CX0166.

² For *in camera* treatment, 16 C.F.R. §3.45(b) requires a showing that either: (1) the information’s “public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment . . .”; or, (2) “the material constitutes sensitive personal information . . . includ[ing], but . . . not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), any sensitive health information identifiable by individual, such as an individual’s medical records.” 16 C.F.R. §3.45(b).

provisional exhibits CX0982, CX0983, CX09085, CX0987, CX0988, CX0995-CX0997, CX1000-CX1004, CX1006, Complaint Counsel has not shown that the mere names of individuals and businesses on the documents constitute “sensitive personal information” akin to social security numbers and account numbers, or how they are “likely” to cause a “clearly defined, serious injury.” 16 C.F.R. §3.45(b). To the contrary, some of the information contained in the documents – e.g., who Tiversa has targeted – is information that the public has a right to know.

There is a powerful public interest in granting access to as much of the record as possible. The Federal Trade Commission has recognized the “substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons.” *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184, at *5-6 (1961). This interest is so strong that a decision on a motion for *in camera* treatment should “consider the strength of the policies favoring disclosure in the particular factual context” in light of the “fundamental policy favoring government decisions based on publicly available facts.” *In the Matter of Bristol-Myers Company, et al.*, 1977 FTC LEXIS 25, at *6 (1977). Complaint Counsel has not demonstrated that the material is sensitive enough to outweigh the public’s strong interest in disclosure.

CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Court deny Complaint Counsel's Motion For In Camera Treatment Of Certain Documents Produced By Richard Wallace.

Dated: February 26, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 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
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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:

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Dated: February 26, 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: February 26, 2015

By: /s/ Hallee K. Morgan

Notice of Electronic Service for Public Filings

I hereby certify that on February 26, 2015, I filed via hand a paper original and electronic copy of the foregoing Opposition to Motion for In Camera Treatment of Wallace Documents, with:

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