

ORIGINAL

PUBLIC

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 COMPLAINT COUNSEL’S MOTION FOR *IN CAMERA* TREATMENT

I.

By Order dated February 19, 2015, the parties were directed: “If a party or non-party has material that has been or will be offered into evidence, the deadline for filing a motion for *in camera* treatment is February 24, 2015.” (February 19 Order). The February 19 Order further directed the parties to provide the Order to all affected non-parties.¹

Pursuant to the February 19 Order and Rule 3.45(b) of the Federal Trade Commission’s (“FTC”) Rules of Practice, FTC Complaint Counsel, on February 24, 2015, filed a Motion for *In Camera* Treatment of Certain Documents Produced by Richard Wallace, which Complaint Counsel revised on February 27, 2015 (“Motion”). Respondent filed an Opposition to Complaint Counsel’s Motion on February 26, 2015 (“Opposition”). For the reasons set forth below, Complaint Counsel’s Motion is GRANTED IN PART AND DENIED IN PART WITHOUT PREJUDICE.

II.

Complaint Counsel requests that *in camera* treatment be granted to “certain documents produced by Richard Wallace that Complaint Counsel may use in the evidentiary hearing.” Complaint Counsel explains that when Wallace produced documents, in response to a subpoena *duces tecum* issued by Complaint Counsel, counsel for Wallace redacted sensitive and confidential information about consumers that appeared on many of the documents, consisting of usernames and passwords for various accounts, but did not redact all of the names, usernames, and other sensitive personal information. Complaint Counsel also states that the sensitive

¹ With respect to exhibits that were previously offered into evidence, for which no party or non-party filed a motion for *in camera* treatment, including those exhibits that were granted provisional *in camera* treatment status at the time that they were introduced, *in camera* treatment will not be granted unless a party or non-party demonstrates that such exhibit contains sensitive personal information, as defined by 16 C.F.R. § 3.45(b).

personal information contained in two copies of the 1718 File produced by Wallace had not been redacted.

Complaint Counsel states that it cannot be certain which, if any, documents produced by Wallace will be used by Complaint Counsel in the evidentiary hearing, but further states that, in an abundance of caution, and to avoid unnecessary delays or closure of the hearing to the public, it seeks *in camera* treatment for the documents it foreseeably could use in the evidentiary hearing or seek to introduce into the record. Complaint Counsel also states that it may need to introduce documents it has not yet identified and, if necessary, seek *in camera* treatment when additional documents are identified.

Respondent opposes Complaint Counsel's 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. Respondent further states that Complaint Counsel has not demonstrated that these materials are sensitive enough to outweigh the public's interest in disclosure.

III.

Under Rule 3.45(b) of the Rules of Practice, after finding that material constitutes "sensitive personal information," the Administrative Law Judge *shall* order that such material be placed *in camera*. 16 C.F.R. § 3.45(b) (emphasis added). "Sensitive personal information" is defined as including, but not 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), and any sensitive health information identifiable by individual, such as an individual's medical records." 16 C.F.R. § 3.45(b). "[S]ensitive personal information . . . shall be accorded permanent *in camera* treatment unless disclosure or an expiration date is required or provided by law." 16 C.F.R. § 3.45(b)(3).

In addition to these listed categories of information, in some circumstances, individuals' names and addresses, and witness telephone numbers have been found to be "sensitive personal information" and accorded *in camera* treatment. *In re LabMD, Inc.*, 2014 FTC LEXIS 127 (May 6, 2014); *In re McWane, Inc.*, 2012 FTC LEXIS 156 (September 17, 2012). *See also In re Basic Research, LLC*, 2006 FTC LEXIS 14, at *5-6 (Jan. 25, 2006) (permitting the redaction of information concerning particular consumers' names or other personal data where it was not relevant). Because sensitive personal information *shall* be placed *in camera*, the party seeking *in camera* treatment is not held to the same burden of showing that public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment and thus the interest of the public in a full and open record is not weighed. 16 C.F.R. § 3.45(b); *In re Jerk, LLC*, 2015 FTC LEXIS 39 (Feb. 23, 2015).

IV.

Complaint Counsel has grouped the documents for which it seeks *in camera* treatment into four categories. The first category is a set of provisional exhibits that contain the names of

consumers, records of consumers' private account credentials, filenames that appear to be IP addresses, and financial account information of consumers. Second is a set of provisional exhibits that list usernames and passwords. Complaint Counsel's third category of documents is a set of provisional exhibits consisting of foreign language documents which, Complaint Counsel states, instruct readers how to obtain consumers' passwords for various email providers. The final category consists of two provisional exhibits, each of which is a copy of the 1718 File produced by Wallace. Multiple other copies of the 1718 File have been received into evidence and have been granted *in camera* treatment.

The documents for which Complaint Counsel seeks *in camera* treatment contain sensitive personal information and thus shall be placed *in camera*. Under the FTC's *in camera* rules, *in camera* treatment is accorded to material "offered into evidence." 16 C.F.R. § 3.45(b). Complaint Counsel states that it is not certain that it will offer these documents into evidence, but has moved for *in camera* treatment for documents it has labeled as "provisional exhibits," in an abundance of caution and in response to the February 19 Order. Under the circumstances presented, Complaint Counsel's request for *in camera* treatment for the provisional exhibits listed in its motion is appropriate. Thus, *in camera* treatment is GRANTED to the provisional exhibits identified by Complaint Counsel in its motion. However, Complaint Counsel's blanket request for *in camera* treatment for "documents it has not yet identified," is not appropriate at this time. In the event that Complaint Counsel identifies additional documents that contain sensitive personal information and seeks to introduce such documents into evidence, Complaint Counsel may, at that time, seek a provisional *in camera* ruling pursuant to 16 C.F.R. § 3.45(g).²

V.

As set forth above, Complaint Counsel Motion is GRANTED IN PART. Permanent *in camera* treatment is granted to: CX0981, CX0982, CX0985, CX0987-CX0991, CX0994-CX0997, CX0999-CX1006.

To the extent that Complaint Counsel' motion seeks a blanket, prospective ruling of documents not yet identified, Complaint Counsel's motion is DENIED WITHOUT PREJUDICE.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 12, 2015

² After any provisional grant of *in camera* status to materials, within 20 days, the party offering the evidence or an interested third party must present a motion to the Administrative Law Judge for a final ruling on whether *in camera* treatment of the material is appropriate pursuant to § 3.45(b). 16 C.F.R. § 3.45(g)