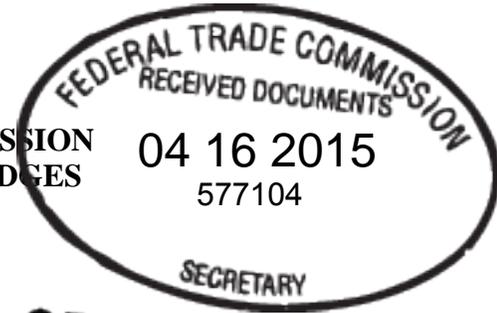


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

PUBLIC

Docket No. 9357

ORIGINAL

**COMPLAINT COUNSEL’S MOTION FOR LEAVE TO FILE A REPLY**

Pursuant to Rule 3.22(d) of the Commission’s Rules of Practice, Complaint Counsel respectfully requests leave to file a Reply in response to Respondent LabMD, Inc.’s Opposition to Complaint Counsel’s Motion to Compel Production of Daugherty Affidavit. This Reply is necessary to bring to the Court’s attention issues that could not have been raised in Complaint Counsel’s opening motion: recent developments in LabMD’s lawsuit against Tiversa and others in a Pennsylvania district court (“Pennsylvania litigation”), as well as Respondent’s misstatements of law and fact. *See* 16 C.F.R. § 3.22(d) (reply permitted where issue “could not have been raised earlier in the party’s principal brief”).

Since Complaint Counsel filed its Motion to Compel Production of Daugherty Affidavit, developments in the Pennsylvania litigation have raised the prospect that the Affidavit will not be unsealed before the resumption of the evidentiary hearing. Additionally, Respondent’s Opposition misstates the rules governing discovery in this proceeding, as well as both the law regarding work product protection and the facts relevant to determining whether such protection exists for the Affidavit. Complaint Counsel met and conferred with counsel for Respondent on this Motion, but was unable to reach agreement. *See* Meet and Confer Statement (attached as Exhibit A). Complaint Counsel would be prejudiced if it were not permitted to address the

recent developments in the Pennsylvania litigation and correct the misstatements of law and fact in Respondent's brief, which could not have been anticipated at the time the principal brief was filed.

For the foregoing reasons, Complaint Counsel requests that this Motion be granted. A conditional copy of Complaint Counsel's Reply has been attached hereto as Exhibit B for the Court's convenience.

Dated: April 16, 2015

Respectfully submitted,



---

Jarad Brown  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room CC-8232  
Washington, DC 20580  
Telephone: (202) 326-2927 - Brown  
Facsimile: (202) 326-3062  
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*Complaint Counsel*

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

_____	)	
In the Matter of	)	<b>PUBLIC</b>
	)	
LabMD, Inc.,	)	Docket No. 9357
a corporation,	)	
Respondent.	)	
	)	
_____	)	

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S  
MOTION FOR LEAVE TO FILE A REPLY**

Upon consideration of Complaint Counsel’s Motion for Leave to File a Reply,

IT IS HEREBY ORDERED, that Complaint Counsel is granted leave to file a Reply.

ORDERED:

\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date:

**CERTIFICATE OF SERVICE**

I hereby certify that on April 16, 2015, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-113  
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be transmitted *via* electronic mail and delivered by hand to:

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

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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Daniel Epstein  
Patrick Massari  
Prashant K. Khetan  
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sunni.harris@dinsmore.com  
*Counsel for Respondent LabMD, Inc.*

**CERTIFICATE FOR 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.

April 16, 2015

By:

  
\_\_\_\_\_  
Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection

# Exhibit A

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

In the Matter of	)	
	)	<b>PUBLIC</b>
LabMD, Inc.,	)	
a corporation,	)	Docket No. 9357
Respondent.	)	
	)	
	)	
	)	

**STATEMENT REGARDING MEET AND CONFER PURSUANT TO  
RULE 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion for Leave to File a Reply, Complaint Counsel Jarad Brown and attorney Amanda Koulousias of the Federal Trade Commission met and conferred with counsel for Respondent Prashant Khetan by teleconference on April 16, 2015 in a good faith effort to resolve by agreement the issues raised by the motion. Despite good faith efforts, Complaint Counsel has been unable to reach agreement with counsel for Respondent regarding seeking leave to file a reply to Respondent's Opposition to Complaint Counsel's Motion to Compel Production of Daugherty Affidavit.

Dated: April 16, 2015

Respectfully submitted,



---

Jarad Brown  
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*Complaint Counsel*

# Exhibit B

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

In the Matter of	)	
	)	<b>PUBLIC</b>
	)	
LabMD, Inc.,	)	Docket No. 9357
a corporation,	)	
Respondent.	)	
	)	
	)	
	)	

**COMPLAINT COUNSEL’S REPLY IN SUPPORT OF  
MOTION TO COMPEL PRODUCTION OF DAUGHERTY AFFIDAVIT**

Complaint Counsel files this Reply in support of its April 7, 2015 Motion to Compel Production of Daugherty Affidavit (“Motion”) to address misstatements of law and fact made by LabMD, Inc. (“LabMD”) in its Opposition (“Opp.”), and to provide an update that relates to LabMD’s arguments.

**I. COURT SHOULD NOT DELAY ITS RULING**

The Court should not delay its ruling on Complaint Counsel’s Motion pending developments in LabMD’s lawsuit against Tiversa Holding Corporation (“Tiversa”) and others in a Pennsylvania district court (“Pennsylvania Litigation”). On April 15, 2015, that court upheld the magistrate judge’s finding that LabMD waived work product protection for its original RICO Case Statement, which attached as an exhibit an affidavit executed by Michael Daugherty on April 17, 2014 (“Affidavit”). Order, No. 2:15-cv-00092-MRH-MPK (W.D. Pa. Apr. 15, 2015) (attached as Exhibit C); *see also* Motion Ex. B at 14-15. The court ordered that the original RICO Case Statement, including the Affidavit, be unsealed. Ex. C. But the court stayed its order until April 23, 2015 to allow LabMD to appeal. *Id.* If LabMD appeals again, the

Affidavit will not be unsealed before the May 5, 2015 resumption of the evidentiary hearing. Delaying ruling on this Motion will therefore amplify the prejudice to Complaint Counsel.

## **II. AFFIDAVIT SHOULD HAVE BEEN PRODUCED AS DISCOVERY SUPPLEMENT**

LabMD incorrectly asserts that the close of discovery shields documents created after that date from production. Opp. at 5. Parties must supplement responses to requests for production “in a timely manner” with “information thereafter acquired[,] . . . if the party learns that the response is in some material respect incomplete or incorrect.” 16 C.F.R. § 3.31(e), (e)(2). LabMD is well aware of the obligation to supplement discovery. Complaint Counsel has supplemented its responses to discovery seven times with thereafter-acquired documents. And counsel for LabMD has acknowledged this duty by reminding Complaint Counsel of it. *See* Letter from Khetan to Brown (Jan. 7, 2015) (attached as Exhibit D).

The Court can reasonably infer that the Affidavit is responsive to Complaint Counsel’s Request for Production from the filings in the Pennsylvania Litigation. *See* Motion at 3, 6.<sup>1</sup> If the record is insufficient for the Court to decide whether the Affidavit is responsive, or if it is privileged, *in camera* inspection will efficiently resolve the competing claims.

## **III. AFFIDAVIT WAS NOT PREPARED IN ANTICIPATION OF LITIGATION**

In evaluating whether the Affidavit was prepared in anticipation of litigation, this Court should not ignore LabMD’s statements. But LabMD asks the Court to do so, instead making

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<sup>1</sup> LabMD misstates that Complaint Counsel filed a motion for *in camera* treatment of documents from the Oversight Committee, and claims that Complaint Counsel should therefore not have “sought to characterize” the Affidavit in a public filing. *See* Opp. at 4 n.1. Complaint Counsel requested provisional *in camera* treatment for documents bearing indicia of confidentiality. If there is any basis for the Affidavit’s confidentiality, LabMD should have invoked the protective order when producing its privilege log or sought other relief.

“[t]he logical inference . . . that Mr. Daugherty was asked for the Affidavit because of his involvement in this litigation.” Opp. at 6.<sup>2</sup> LabMD’s privilege log belies that argument. According to the log, LabMD created the Affidavit for the Oversight Committee’s “unrelated investigation of Tiversa.” See Motion Ex. G. Mr. Daugherty was “asked for the Affidavit” because of his involvement in underlying events related to the investigation, not because of this litigation. LabMD has failed to establish any alternative, litigation-related purpose for creating the Affidavit, and that failure obliges the Court to reject LabMD’s work product claim. See *Robinson v. City of Ark. City*, 2012 U.S. Dist. LEXIS 23806, at \*52-54 (D. Kan. Feb. 24, 2012) (rejecting work product objection for affidavits for which counsel failed to provide sufficient information in declaration to establish anticipation of litigation). Regardless, as discussed below, LabMD waived any privilege by producing it to the Oversight Committee.

#### **IV. EXECUTED AFFIDAVITS ARE NOT WORK PRODUCT**

LabMD misleads the Court regarding the law on executed witness affidavits. First, LabMD and Mr. Daugherty are not parties to the Oversight Committee investigation, and thus the Affidavit is not a party affidavit as understood in the authority on which LabMD relies. See *Bell v. Lackawanna Cnty.*, 892 F. Supp. 2d 647, 661 (M.D. Pa. 2012). The *Bell* court found work product protection for affidavits created by a party *to that litigation* for the purpose of submission *in that litigation, prior to* their filing in support of summary judgment. *Id.* That is not the situation here. See Motion Exs. F, G.

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<sup>2</sup> LabMD continues to take the position that the Affidavit is not work product in the Pennsylvania Litigation.

Second, LabMD's reference to a "case by case" approach, and misleading accompanying citations, are red herrings.<sup>3</sup> The majority of courts have found that factual, executed affidavits by witnesses do not warrant work product protection because they are statements of fact. Motion at 5 (authorities cited); *see also, e.g., Tuttle v. Tyco Elecs. Installation Servs., Inc.*, 2007 WL 4561530, at \*2 (S.D. Ohio Dec. 21, 2007). The same reasoning applies to the Affidavit: Mr. Daugherty is a witness in this matter, and he created the Affidavit for an investigation in which he is a witness, not a party. To the extent LabMD disputes that the Affidavit is factual,<sup>4</sup> rather than the "the mental impressions of LabMD and its attorneys," Opp. at 2, the Court can resolve that dispute by *in camera* inspection.

## **V. WORK PRODUCT PROTECTION HAS BEEN WAIVED**

LabMD suggests that it did not waive any work product protection for the Affidavit by producing it the Oversight Committee. Opp. at 8.<sup>5</sup> If LabMD is arguing that it has a common interest with the Oversight Committee, it has not made the required showing for such a remarkable proposition. *See United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003) (describing common interest; rejecting common interest in voluntary disclosure to government

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<sup>3</sup> LabMD cites cases from the minority of courts who found work product protection for executed witness affidavits. Opp. at 6-7. But those affidavits were only for internal trial preparation. *Id.* (authorities cited). The Court should not apply that reasoning to the Affidavit because, as addressed in the Motion and below, even if had it been drafted for trial preparation, which LabMD has not asserted, LabMD waived protection by producing it the Oversight Committee. *See* Motion at 5 n.1 and accompanying text.

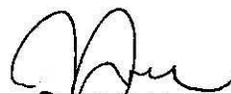
<sup>4</sup> The magistrate judge in the Pennsylvania Litigation—not Complaint Counsel—characterized the Affidavit as "fact-laden." Motion Ex. B at 3, 8 n.2. Complaint Counsel based its descriptions of the Affidavit on public filings and LabMD's privilege log and letter.

<sup>5</sup> Contrary to LabMD's accusation, Complaint Counsel has fully complied with its discovery obligations. The fact that the Commission may have produced other documents to the Oversight Committee does not obligate additional production by Complaint Counsel. If LabMD truly has "reason to believe" Complaint Counsel has not complied with discovery, it can seek appropriate relief. *See* Opp. at 1.

agency). Producing the Affidavit to a government investigatory body is not maintaining its secrecy from potential disclosure to adversaries. *See, e.g., Bank of America v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 172-73 (S.D.N.Y. 2002) (voluntary disclosure to the government “in the hope that they will attack an adversary” results in work product waiver). If LabMD wished to maintain the Affidavit’s work product protection, it needed to obtain a confidentiality agreement. *See id.* at 173.

Dated: April 16, 2015

Respectfully submitted,



---

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*Complaint Counsel*

# Exhibit C

LABMD, INC.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 2:15-cv-00092
v.	)	
	)	Judge Mark R. Hornak
TIVERSA HOLDING CORP., et al,	)	
	)	
Defendants.	)	

**ORDER**

AND NOW, this 15<sup>th</sup> day of April, 2015, upon consideration of Plaintiff's Objections to Opinion and Order [ECF No. 39], all related filings, oral argument before the Court on April 15, 2015, and for the reasons stated at length on the record in open court, Plaintiff's Objections are hereby OVERRULED and the designation of the filings at ECF No. 18 as Sealed shall be lifted in accordance with Chief Magistrate Judge Kelly's Opinion and Order dated March 17, 2015 [ECF No. 30].

The effect of this Order shall be stayed until 11:59 p.m. on April 22, 2015. If on or before that time and date, Plaintiff has not filed a Notice of Appeal or a Request to this Court under 28 U.S.C. § 1292(b) to certify a question for appeal, this Order will take full effect on April 23, 2015.

  
\_\_\_\_\_  
Mark R. Hornak  
United States District Judge

cc: All counsel of record

# Exhibit D



**VIA: E-MAIL**

January 7, 2015

Mr. Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection  
jbrown4@ftc.gov

**RE: Docket No. 9357, *In the Matter of LabMD, Inc***

Mr. Brown:

Thank you for your letter of December 23, 2014. We are currently in the process of determining what, if any, supplemental documents are in LabMD's possession, and will be in touch regarding the same.

LabMD reminds Complaint Counsel that any duty to supplement applies to Complaint Counsel's disclosures and discovery responses in equal measure. For example, we direct Complaint Counsel to the following:

1. Initial Disclosures (documents relevant to allegations or defenses).
2. Request for Production No. 5 (FTC external communications relating to LabMD or the 1718 File).
3. Request for Production No. 7 (FTC internal communications relating to LabMD or the 1718 File).
4. Request for Production No. 11 (companies whose files Tiversa downloaded).
5. Interrogatory No. 6, First Set (evidence supporting allegation that LabMD's data security violated Section 5).
6. Interrogatory No. 10, First Set (FTC communications with Dartmouth).
7. Interrogatory No. 11, First Set (FTC communications with Tiversa).
8. Interrogatory No. 12, First Set (FTC communications with Eric Johnson).
9. Interrogatory No. 14, First Set (companies whose files Tiversa downloaded).
10. Interrogatory No. 15, First Set (FTC's non-investigation of above companies).
11. Interrogatory No. 18, First Set (companies FTC investigated on data security grounds).
12. Interrogatory No. 2, Second Set (how the Sacramento Documents left LabMD).

Jarad Brown  
January 7, 2015  
Page 2

13. Interrogatory No. 3, Second Set (date 1718 File and Sacramento Documents left LabMD).

Responsive documents may include, but are not limited to: communications with the Committee on Oversight and Government Reform, communications with Tiversa, or documents related to LimeWire and other peer-to-peer networks. Please respond by January 16, 2015, that Complaint Counsel will supplement its discovery responses.

In addition, LabMD requests that Complaint Counsel provide us with copies of any documents it may obtain from Mr. Rick Wallace.

Thank you for your attention to this matter.

Sincerely,

January 7, 2015

Prashant Khetan *HKM*  
Prashant K. Khetan  
Chief Counsel, Cause of Action

CC VIA EMAIL: Alain Sheer  
Laura Riposo VanDruff  
Meghan Cox  
John Krebs  
Ryan Mehm