



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 GRANTING IN PART COMPLAINT COUNSEL’S MOTION
TO COMPEL PRODUCTION OF DAUGHERTY AFFIDAVIT**

I.

On April 7, 2015, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion to Compel Production of Daugherty Affidavit (“Motion”). Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed an opposition on April 14, 2015 (“Opposition”). On April 16, 2015, Complaint Counsel filed a Motion for Leave to Reply to Respondent’s Opposition (“Motion for Leave”), along with its proposed Reply (“Reply”). The Motion for Leave is GRANTED.

Based upon the filings of the parties, Complaint Counsel seeks to compel Respondent to produce an affidavit executed by LabMD president Michael Daugherty on or about April 17, 2014, which was prepared and submitted for an investigation by the House Oversight and Government Reform Committee (“OGR”) into the activities of Tiversa Holding Company (“Tiversa”), a non-party witness in this matter (“Daugherty Affidavit”). The Motion to Compel is GRANTED IN PART, as explained below.

II.

Complaint Counsel argues that the Daugherty Affidavit is relevant, and that Respondent should have provided the Daugherty Affidavit to Complaint Counsel, as supplementation to Respondent’s Initial Disclosures and/or Respondent’s production of documents in response to Complaint Counsel’s Second Request for Production of Documents No. 31. *See* 16 C.F.R. § 3.31(e) (setting forth duty to supplement or correct discovery responses that become materially inaccurate or incomplete). Complaint Counsel further argues that the Daugherty Affidavit does not constitute protected work product, as asserted by Respondent, and cannot be withheld by Respondent on that basis. Accordingly, Complaint Counsel states, an order should issue compelling Respondent to produce the Daugherty Affidavit, or at a minimum, an order should

issue requiring Respondent to produce the Daugherty Affidavit for *in camera* inspection by the Administrative Law Judge.

Respondent asserts that it has no obligation to produce the Daugherty Affidavit because it is not responsive to Complaint Counsel's discovery requests, and that even if it were, the Daugherty Affidavit constitutes privileged hearing preparation materials that are protected from discovery under FTC Rules 3.31(c)(4) and (5). Moreover, Respondent argues, the Daugherty Affidavit might become publicly available as a result of a March 17, 2015 magistrate ruling in federal district court litigation between LabMD and Tiversa, and others, that Respondent waived work product protection for the Affidavit by filing the document in the case, and that the filing containing the Affidavit would be unsealed. *See LabMD v. Tiversa et al.*, No. 2:15-cv-00092-MRH-MPK (W.D. Pa. Mar. 17, 2015) (attached as Exhibit B to the Motion).

Complaint Counsel replies that, although the magistrate's ruling was appealed and then affirmed on April 15, 2015, the order to unseal the document is not final, and that if Respondent seeks an interlocutory appeal of the ruling, the Daugherty Affidavit will not be publicly available until after the May 5, 2015 date set for resumption of the evidentiary hearing in this matter. Such delay, Complaint Counsel argues, will be prejudicial to Complaint Counsel.

III.

Having reviewed the arguments of the parties, under the circumstances presented it is necessary to examine the content of the Daugherty Affidavit in order to properly determine the merits of the parties' discovery dispute. *E.g., In re R.J. Reynolds Tobacco Co.*, 1998 FTC LEXIS 177 (July 31, 1998) (after reviewing two withheld documents that were provided to ALJ for *in camera* review, ALJ directed that documents be produced to respondent). *See also In re Harper & Row*, 1990 FTC LEXIS 213, at *17 (June 27, 1990) (in dispute over applicability of informants privilege, noting that Administrative Law Judge could examine documents *in camera* to evaluate contents before ordering disclosure). Accordingly, Complaint Counsel's request in the Motion for an *in camera* review of the Daugherty Affidavit by the Administrative Law Judge is GRANTED, and it is hereby ORDERED that Respondent shall transmit a copy of the Daugherty Affidavit, as described in this Order, to the undersigned Administrative Law Judge, either by e-mail to OALJ@FTC.gov, or by hand-delivery to Room 110, 600 Pennsylvania Avenue, NW, Washington, D.C., no later than 5:00 p.m. on April 23, 2015.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: April 21, 2015