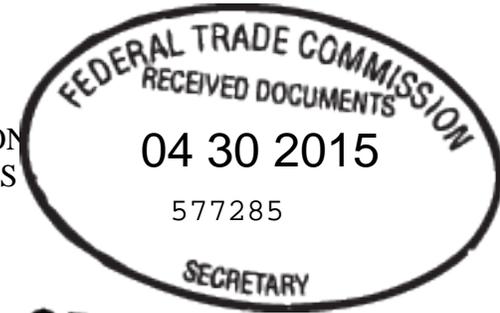


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

ORIGINAL

**COMPLAINT COUNSEL’S UNOPPOSED MOTION FOR
IN CAMERA TREATMENT OF DAUGHERTY AFFIDAVIT**

Pursuant to Rule 3.45 of the Commission’s Rule of Practice, 16 C.F.R. § 3.45, Complaint Counsel respectfully requests that the Court grant *in camera* treatment to the Daugherty Affidavit to avoid needless litigation on the applicability of the privilege under the Speech or Debate Clause and prevent any additional delay in this matter. Complaint Counsel has conferred on the subject of this motion with counsel for LabMD and counsel for the Committee on Oversight and Government Reform of the U.S. House of Representatives, and they do not object to the relief sought. Meet and Confer Statement (attached as Exhibit A).

BACKGROUND

In February 2015, Complaint Counsel became aware of the existence of an affidavit related to this matter executed by Michael Daugherty, CEO of LabMD, Inc. (“LabMD”). Mr. Daugherty executed this affidavit (“Affidavit”) on April 17, 2014. LabMD filed the Affidavit as an exhibit to a RICO Case Statement in a proceeding in federal court in the Western District of Pennsylvania against Tiversa Holding Corporation (“Tiversa”) and others (“Pennsylvania Litigation”). LabMD shortly thereafter requested that the RICO Case Statement and its exhibits be removed from the public docket, asserting that the statement and its exhibits constituted work

product. In this proceeding, LabMD has maintained that the executed Affidavit is immune from production under the work product doctrine. Complaint Counsel moved to compel production of the Affidavit on April 7, 2014, or in the alternative for the Court to examine the Affidavit *in camera* for a determination of the validity of LabMD's work product claim and its responsiveness to discovery and disclosure obligations. Compl. Counsel's Mot. to Compel Produc. of Daugherty Aff. (Apr. 7, 2014) ("Motion to Compel").

On April 15, 2015, the court in the Pennsylvania Litigation overruled LabMD's objections to a magistrate judge's opinion finding that LabMD waived any work product protection for the RICO Case Statement and Affidavit. *See* Ex. B to Motion to Compel at 14-15. The court ordered that the Affidavit be unsealed on April 23, 2015. *Id.*

On April 21, 2015, this Court granted in part Complaint Counsel's Motion to Compel, and ordered LabMD to deliver a copy of the Affidavit to the Court for *in camera* examination by 5 PM on April 23, 2015. Order Granting in Part Compl. Counsel's Mot. to Compel Produc. of Daugherty Aff. (Apr. 21, 2015) ("April 21, 2015 Order") at 2.

Also on April 21, 2015, counsel for the Committee on Oversight and Government Reform of the U.S. House of Representatives ("Oversight Committee") sent letters to counsel for LabMD in the Pennsylvania Litigation and counsel for Tiversa, stating that the Oversight Committee "regards the 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." Letters from Eleni Roumel to LabMD, Tiversa (Apr. 21, 2015) (attached as Exhibit B). Counsel for the Oversight Committee provided copies of the letters to the Federal Trade Commission's Office of Congressional Relations.

On April 22, 2015, the court in the Pennsylvania Litigation continued the stay of its April 15, 2015 Order, preventing the Affidavit from being unsealed on April 23, 2015 as originally ordered. The court ordered in part that:

The United States House of Representatives shall file a notice, on or before April 29, 2015, as to whether it intends to intervene or otherwise formally take a position as to whether this Court's Order directing that [LabMD's original RICO Case Statement attaching the Affidavit] be unsealed on the docket of this Court should be stayed, reconsidered or otherwise modified. Should it do so, such notice should in summary set forth the position of the House of Representatives, and it shall thereafter set forth its position formally in a legal memorandum filed on the docket of this Court on or before May 12, 2015. Among other things, any such memorandum shall set forth the factual basis by which it is asserted that any portion of [LabMD's original RICO Case Statement] is cloaked by the protections of the Speech and Debate Clause of the Constitution.

LabMD, Inc. v. Tiversa Holding Corp., 2:15-cv-00092-MRH-MPK, Dkt. No. 50 (W.D. Pa. Apr. 22, 2015) (docket order).

On April 23, 2015 in this proceeding, LabMD filed a motion asking the Court to reconsider its April 21, 2015 Order, stating that LabMD was unable to produce the Affidavit to the Court as ordered because of the Speech or Debate Clause privilege invoked by the Oversight Committee. Resp't's Mot. to Recons. Order Granting in Part Compl. Counsel's Mot. to Compel Produc. of Daugherty Aff. (Apr. 23, 2015) ("Motion to Reconsider") at 4.

On April 29, 2015 in the Pennsylvania Litigation, counsel for the Oversight Committee asserted the Speech or Debate Clause privilege over the Affidavit during a status conference. *See LabMD, Inc. v. Tiversa Holding Corp.*, 2:15-cv-00092-MRH-MPK, Dkt. No. 54 (W.D. Pa. Apr. 29, 2015) (docket order) (calling status conference). The court continued the stay of its

previous order maintaining the original RICO Case Statement and exhibits under seal.¹ The parties agreed to a move for a consent protective order covering the Affidavit. *Id.*

Complaint Counsel conferred with counsel for the Oversight Committee Eleni M. Roumel on the Committee's position with regard to Speech or Debate Clause privilege for the Affidavit on April 24, 28, and 29. Ex. A; Email from Eleni Roumel to Jarad Brown (Apr. 29, 2015) (attached as Exhibit C). The Oversight Committee's position is that:

(i) the Daugherty affidavit is the Committee's confidential legislative document ("Legislative Document"), which is protected by the Speech or Debate Clause privilege, U.S. Const., art. I, § 6, cl. 1; (ii) the Legislative Document is part of a Committee investigation conducted pursuant to Article I; and (iii) the Legislative Document is [a] confidential Committee document that was not authorized to be publicly disclosed.

Ex. C. Ms. Roumel represented to Complaint Counsel, however, that the Oversight Committee would "refrain from formally asserting the Speech or Debate Clause privilege over the [Affidavit], provided that the affidavit receives *in camera* treatment in this proceeding." *Id.*²

ARGUMENT

The Court should grant *in camera* treatment to the Affidavit that LabMD produces to the Court to facilitate its submission in this matter without the need to litigate whether it is privileged

¹ "ORDER Continuing [sic] Stay of Previous Order. As to the Order of this Court [50] staying its Orders at [45], [47], such stay shall continue in force until further Order of this Court. Based on the representation of counsel for the House of Representatives made on the record at a telephone conference of this date, its obligation to file on this date a notice of of [sic] position as set forth in [50] is deemed fulfilled. The parties shall file their joint motion for the entry of a consent protective order on or before May 8, 2015. Such motion shall be accompanied by a proposed order in a form consistent with Circuit precedent, and such motion shall set forth the appropriate legal support for the relief sought. Signed by Judge Mark R. Hornak on 04/29/2015. Text-only entry; no PDF document will issue. This text-only entry constitutes the Order of the Court or Notice on the matter. (Hornak, Mark)." *LabMD, Inc. v. Tiversa Holding Corp.*, 2:15-cv-00092-MRH-MPK, Dkt. No. 55 (W.D. Pa. Apr. 29, 2015) (docket order).

² Complaint Counsel has served Ms. Roumel with a copy of this Motion.

under the Speech or Debate Clause, and thereby avoid unnecessary delay in this proceeding. *See* 16 C.F.R. § 3.45(b).

LabMD has asserted that it is unable to provide the Affidavit to the Court or Complaint Counsel because it is protected from disclosure by the privilege under the Speech or Debate Clause. Motion to Reconsider at 4. However, the privilege under the Speech or Debate Clause belongs to the Oversight Committee in this case. *See Gravel v. United States*, 408 U.S. 606, 621-622 (1972) (stating that the Speech or Debate privilege belongs to the member of Congress and can only be invoked by the member or on their behalf). It is therefore the Oversight Committee's decision whether to seek the protections of the privilege under the Speech or Debate Clause.

Counsel for the Oversight Committee, Ms. Roumel, represented to Complaint Counsel that the Oversight Committee would not "formally assert" the Speech or Debate Clause privilege over the Affidavit in this proceeding, provided that the Affidavit that is the subject of this Court's April 21, 2015 Order receives *in camera* treatment. Ex. C. If the Oversight Committee does not assert the privilege under the Speech or Debate Clause, there is no need to litigate its application to the Affidavit LabMD is required to produce. Therefore, to avoid additional needless litigation on this issue and potential delay in resuming the hearing, Complaint Counsel has no objection to the Court granting *in camera* treatment to the Affidavit that LabMD must produce to the Court, and potentially thereafter Complaint Counsel. With the agreement of the Oversight Committee to not assert the privilege under the Speech and Debate Clause if the

Affidavit is granted *in camera* treatment, there is also no reason for the Court to reconsider its April 21, 2015 Order on the Motion to Compel.³

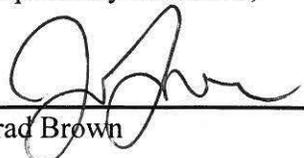
The Court previously ordered LabMD to provide the Affidavit to the Court *in camera* for resolution of Complaint Counsel's Motion to Compel. *See* April 21, 2015 Order at 2. The Court should grant the Affidavit LabMD produces permanent *in camera* protection to address the concerns of the Oversight Committee and facilitate its submission without delay. Then, in accordance with its April 21, 2015 Order, the Court should order LabMD to produce the Affidavit to the Court immediately for *in camera* determination of whether LabMD must produce the Affidavit to Complaint Counsel.

If the Court ultimately rules that LabMD must produce the Affidavit to Complaint Counsel, the parties may need to use the Affidavit in the remainder of the proceeding. For that reason, the Court should permit the parties to disclose the Affidavit produced by LabMD to any witness and his or her counsel during an *in camera* session of the hearing or deposition, even though such a witness will not be "counsel for other parties." *See* 16 C.F.R. § 3.45(b)(3). To preserve the *in camera* status of the Affidavit produced by LabMD, however, the Court should further order that the witness may not retain a copy of the Affidavit.

Finally, Complaint Counsel respectfully requests the Court provided expedited treatment to this request given the resumption of the hearing next week.

Dated: April 30, 2015

Respectfully submitted,


Jarad Brown

³ Complaint Counsel files this motion without prejudice to its ability to oppose LabMD's Motion to Reconsider if the Court does not grant *in camera* treatment for the Affidavit.

PUBLIC

Federal Trade Commission
600 Pennsylvania Ave., NW
Room CC-8232
Washington, DC 20580
Telephone: (202) 326-2927
Facsimile: (202) 326-3062
Electronic mail: jbrown4@ftc.gov

Complaint Counsel

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

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

**[PROPOSED] ORDER GRANTING MOTION FOR
IN CAMERA TREATMENT OF DAUGHERTY AFFIDAVIT**

Upon consideration of the Complaint Counsel’s Motion for *In Camera* Treatment of Daugherty Affidavit, it is hereby

ORDERED, that the Affidavit LabMD produces to the Court pursuant to this Order and the Court’s April 21, 2015 Order is granted permanent *in camera* treatment.

IT IS FURTHER ORDERED, that LabMD shall produce a copy of the affidavit executed by Michael Daugherty on April 17, 2014 to the Court upon receipt of this Order, and no later than 5 PM on the day it receives service of this Order, for *in camera* evaluation.

IT IS FURTHER ORDERED, that the parties may disclose to a witness, and to any counsel for the witness, the Affidavit that LabMD produces only during an examination of such a witness by deposition or in the evidentiary hearing.

IT IS FUTHER ORDERED, that a witness to whom the Affidavit is disclosed, and counsel for that witness, shall not retain a copy of the Affidavit after the conclusion of the witness's examination.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 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:

Daniel Epstein
Patrick Massari
Prashant K. Khetan
Erica Marshall
Cause of Action
1919 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20006
daniel.epstein@causeofaction.org
patrick.massari@causeofaction.org
prashant.khetan@causeofaction.org
erica.marshall@causeofaction.org

Reed Rubinstein
William A. Sherman, II
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801 Pennsylvania Avenue, NW, Suite 610
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reed.rubinstein@dinsmore.com
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sunni.harris@dinsmore.com
Counsel for Respondent Lab MD, Inc.

PUBLIC

Eleni M. Roumel
U.S. House of Representatives
Office of General Counsel
219 Cannon House Office Bldg.
Washington, DC 20515
eleni.roumel@mail.house.gov
*Counsel for the U.S. House of Representatives Committee on Oversight and
Government Reform*

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 30, 2015

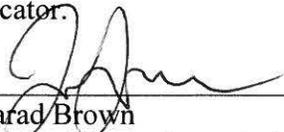
By: 
Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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

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

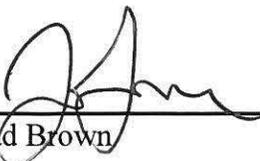
**STATEMENT REGARDING MEET AND CONFER PURSUANT TO
RULE 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

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 *In Camera* Treatment of Daugherty Affidavit, Complaint Counsel Jarad Brown and Ryan Mehm met and conferred with counsel for Respondent Reed Rubinstein on Thursday, April 30, 2015 by teleconference and email, in a good faith effort to resolve by agreement the issues raised by the Motion. Counsel for Respondent stated that respondent does not object to the motion.

Complaint Counsel Jarad Brown and Laura VanDruff conferred with counsel for the Committee on Oversight and Government Reform of the U.S. House of Representatives, Eleni Roumel, on April 24 and 28-30, 2015 on the subject of this motion by teleconference and email. Ms. Roumel stated that the Oversight Committee consents to the relief sought by this motion. *See Ex. C to Motion.*

Dated: April 30, 2015

Respectfully submitted,



Jarad Brown

Federal Trade Commission
600 Pennsylvania Ave., NW
Room CC-8232
Washington, DC 20580
Telephone: (202) 326-2927
Facsimile: (202) 326-3062
Electronic mail: jbrown4@ftc.gov
Complaint Counsel

Exhibit B

KERRY W. KIRCHER
GENERAL COUNSEL

WILLIAM PITTARD
DEPUTY GENERAL COUNSEL

U.S. HOUSE OF REPRESENTATIVES
OFFICE OF GENERAL COUNSEL
219 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6532
(202) 225-9700
FAX: (202) 226-1360

TODD B. TATELMAN
SENIOR ASSISTANT COUNSEL

ELENI M. ROUMEL
ASSISTANT COUNSEL

ISAAC B. ROSENBERG
ASSISTANT COUNSEL

KIMBERLY HAMM
ASSISTANT COUNSEL

KYLE T. JONES
STAFF ATTORNEY

SARAH E. CLOUSE
STAFF ATTORNEY

April 21, 2015

BY FIRST CLASS MAIL & EMAIL (mross@taylorenchish.com)

Michael E. Ross, Esq.
Taylor English Duma LLP
1600 Parkwood Circle
Suite 400
Atlanta, GA 30339

Re: *LabMD, Inc. v. Tiversa Holding Corp.*, No. 2:15-cv-00092 (W.D. Pa.)

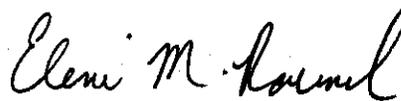
Dear Mr. Ross:

I write on behalf of the Committee on Oversight and Government Reform of the U.S. House of Representatives concerning an affidavit authored by LabMD, Inc.'s Chief Executive Officer, which the Committee had requested and received expressly as part of its congressional investigation into Tiversa Holding Corp.'s business practices ("Affidavit").

Please be advised that the Committee regards the 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. *See, e.g., Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988); *Tavoulareas v. Piro*, 93 F.R.D. 11 (D.D.C. 1981).

Accordingly, please advise me if anyone or any entity seeks to compel LabMD, Inc. to produce the Affidavit. Thank you for your attention to this matter.

Sincerely,



Eleni M. Roumel
Assistant Counsel

cc: Honorable Jason Chaffetz, Chairman
Committee on Oversight and Government Reform

KERRY W. KIRCHER
GENERAL COUNSEL

WILLIAM PITTARD
DEPUTY GENERAL COUNSEL

U.S. HOUSE OF REPRESENTATIVES
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TODD B. TATELMAN
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ELENI M. ROUMEL
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ISAAC B. ROSENBERG
ASSISTANT COUNSEL

KIMBERLY HAMM
ASSISTANT COUNSEL

KYLE T. JONES
STAFF ATTORNEY

SARAH E. CLOUSE
STAFF ATTORNEY

April 21, 2015

BY FIRST CLASS MAIL & EMAIL (jshaw@reedsmith.com)

Jarrold D. Shaw, Esq.
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222-2716

Re: *LabMD, Inc. v. Tiversa Holding Corp.*, No. 2:15-cv-00092 (W.D. Pa.)

Dear Mr. Shaw:

I write on behalf of the Committee on Oversight and Government Reform of the U.S. House of Representatives concerning an affidavit authored by LabMD, Inc.'s Chief Executive Officer, which the Committee had requested and received expressly as part of its congressional investigation into Tiversa Holding Corp.'s business practices ("Affidavit").

Please be advised that the Committee regards the 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. *See, e.g., Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856 (D.C. Cir. 1988); *Tavoulareas v. Piro*, 93 F.R.D. 11 (D.D.C. 1981).

Thank you for your attention to this matter.

Sincerely,



Eleni M. Roumel
Assistant Counsel

cc: Honorable Jason Chaffetz, Chairman
Committee on Oversight and Government Reform

Exhibit C

Brown, Jarad

From: Roumel, Eleni <Eleni.Roumel@mail.house.gov>
Sent: Wednesday, April 29, 2015 6:12 PM
To: Brown, Jarad
Cc: VanDruff, Laura Riposo
Subject: Speech or Debate Clause

Jarad,

It was a pleasure speaking with you this afternoon. As discussed, it is the position of the Committee on Oversight and Government Reform of the U.S. House of Representatives (“Committee”) that: (i) the Daugherty affidavit is the Committee’s confidential legislative document (“Legislative Document”), which is protected by the Speech or Debate Clause privilege, U.S. Const., art. I, § 6, cl. 1; (ii) the Legislative Document is part of a Committee investigation conducted pursuant to Article I; and (iii) the Legislative Document is confidential Committee document that was not authorized to be publicly disclosed.

We understand that the FTC is moving on consent in this action (Docket No. 9357) for *in camera* treatment of the Daugherty affidavit, with an allowance for temporary disclosure of the affidavit to a witness and his/or her counsel under certain circumstances. As discussed, the Committee will refrain from formally asserting the Speech or Debate Clause privilege over the Legislative Document, provided that the affidavit receives *in camera* treatment in this proceeding. To that end, the Committee consents to the FTC’s motion for such *in camera* treatment of the Committee’s Legislative Document.

If the Committee’s Legislative Document does not receive *in camera* treatment, we would appreciate if you would immediately let us know so the Committee may take appropriate action. Should you need further information from the Committee on this issue, please do not hesitate to contact me.

Best regards,
Eleni

Eleni M. Roumel
Assistant Counsel
Office of General Counsel
U.S. House of Representatives
219 Cannon House Office Building, Washington, DC 20515
202.225.9700 | fax: 202.226.1360 | Eleni.Roumel@mail.house.gov