

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



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

**PUBLIC**

Docket No. 9357

**ORIGINAL**

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION TO RECONSIDER ORDER GRANTING IN PART COMPLAINT COUNSEL’S MOTION TO COMPEL PRODUCTION OF DAUGHERTY AFFIDAVIT**

The Court should deny Respondent’s Motion to Reconsider because the basis for which the Motion seeks reconsideration is moot: The Committee on Oversight and Government Reform of the U.S. House of Representatives (“Oversight Committee”) has consented to the use in this proceeding of the affidavit executed by Mr. Daugherty (“Affidavit”), provided that it receives *in camera* treatment.

**BACKGROUND**

Respondent LabMD, Inc. (“LabMD”) filed the Affidavit as an exhibit to its RICO Case Statement in a proceeding in federal court in the Western District of Pennsylvania (“Pennsylvania Litigation”) against Tiversa Holding Corporation (“Tiversa”) and others. LabMD shortly thereafter requested that the Affidavit be removed from the public docket. Complaint Counsel moved to compel production of the Affidavit on April 7, 2015, 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. Compl. Counsel’s Mot. to Compel Produc. of Daugherty Aff. (Apr. 7, 2015) (“Motion to Compel”). On April 21, 2015,

this Court granted in part Complaint Counsel’s Motion to Compel, ordering 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) (“Order”) at 2.

On April 23, 2015, LabMD filed a Motion to Reconsider Order Granting in Part Complaint Counsel’s Motion to Compel Production of Daugherty Affidavit (“Motion to Reconsider”), asserting that LabMD could not produce the Affidavit to the Court as ordered because of the Speech or Debate Clause privilege invoked by the Oversight Committee in its letters to the parties in the Pennsylvania Litigation. Motion to Reconsider at 4.

Over April 23-30, 2015, Complaint Counsel reached an agreement with the Oversight Committee that the Committee would not formally assert a Speech or Debate Clause privilege over the Affidavit if the Affidavit was provided *in camera* treatment in the proceeding. See Complaint Counsel’s Unopposed Motion for *In Camera* Treatment of Daugherty Affidavit (“*In Camera* Motion”), Exs. A, C. Counsel for LabMD represented that their client did not object to the motion. See *id.*, Ex. A. Accordingly, on April 30, 2015, Complaint Counsel filed an Unopposed Motion for *In Camera* Treatment of Daugherty Affidavit. See *id.* That motion is pending before the Court.

### **ARGUMENT**

The sole basis for LabMD’s motion to reconsider is that the Affidavit cannot be provided to the Court or Complaint Counsel because it is privileged 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

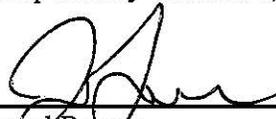
only be invoked by the member or on their behalf). It is therefore the Oversight Committee's decision whether to assert the privilege under the Speech or Debate Clause.

The Oversight Committee has agreed that the Affidavit can be used in this proceeding if the Court grants it *in camera* treatment. See Motion for *In Camera* Treatment, Ex. C. And Complaint Counsel has filed an unopposed motion seeking such treatment. *Id.* The basis for LabMD's motion is therefore moot. If the Court denies *in camera* treatment to the Affidavit, the Oversight Committee can formally assert its privilege in response to the Court's Order on the Motion to Compel at that time.

The Court previously ordered LabMD to provide the Affidavit to the Court *in camera* for resolution of Complaint Counsel's Motion to Compel. See Order at 2. Because the Oversight Committee has agreed to the Affidavit's use in this proceeding if granted *in camera* treatment, the Court should deny LabMD's Motion to Reconsider. Instead, the Court should grant *in camera* treatment to the Affidavit, and order LabMD to produce the Affidavit immediately for *in camera* examination, pursuant to its Order, to determine whether LabMD must produce the Affidavit to Complaint Counsel.

Dated: May 4, 2015

Respectfully submitted,



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*Complaint Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 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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**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

May 4, 2015

By:   
Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection