

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

ORIGINAL



In the Matter of)

LabMD, Inc.,)
a corporation,)
Respondent.)

DOCKET NO. 9357

**ORDER GRANTING IN PART AND DENYING IN PART
JOINT MOTION FOR PROVISIONAL *IN CAMERA* TREATMENT**

I.

The Commission issued an administrative complaint in this matter on August 28, 2013. (“Complaint”). The Commission further stated that it was not, at that time, “publicly releasing its complaint until the process for resolving . . . claims of confidentiality [of documents provided to the Commission] is completed and items in the complaint deemed confidential, if any, are redacted.” News Release Describing Issuance of Part 3 Administrative Complaint, <http://www.ftc.gov/opa/2013/08/labmd.shtm>.

On September 9, 2013, the parties filed a Joint Motion for Provisional *In Camera* Treatment of Certain Information in Appendix A to the Nonpublic Complaint. (“Joint Motion”). As set forth below, the Joint Motion is GRANTED in part and DENIED in part. In short, although the request for provisional *in camera* treatment pursuant to 16 C.F.R. § 3.45(g) is procedurally incorrect, the designated information will be treated as confidential material pursuant to the August 29, 2013 Protective Order and in accordance with 16 C.F.R. § 3.45(d).

II.

The parties request provisional *in camera* treatment of the following information (collectively, hereinafter “Payment Information”) contained in documents included as Appendix A to the Nonpublic Complaint issued in this matter on August 28, 2013:

- The dollar amounts listed in the “Amount” column of each of the “Day Sheets” located on pages 1 – 40 of Appendix A to the Nonpublic Complaint;
- The dollar amounts listed in the “Report Summary” of each of the “Day Sheets” located on pages 1 – 40 of Appendix A to the Nonpublic Complaint; and
- The dollar amounts of the checks and money order written to Respondent located on pages 41 – 44 of Appendix A to the Nonpublic Complaint.

The parties filed their Joint Motion pursuant to Commission Rule 3.45(g) which provides:

The Administrative Law Judge may make a provisional grant of *in camera* status to materials if the showing required in § 3.45(b) cannot be made at the time the material is offered into evidence but the Administrative Law Judge determines that the interests of justice would be served by such a ruling. Within 20 days of such a provisional grant of *in camera* status, 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). If no such motion is filed, the Administrative Law Judge may either exclude the evidence, deny *in camera* status, or take such other action as is appropriate.

16 C.F.R. § 3.45(g). By its clear terms, a request for a provisional grant of *in camera* status is appropriate: (a) only when there is not sufficient time in advance of its introduction to file a proper motion for *in camera* treatment – as often occurs when evidence is introduced during trial; and (b) only for material that is being “offered into evidence.” 16 C.F.R. § 3.45(g). The material for which the parties seek *in camera* treatment is not being “offered into evidence,” but rather is material contained in the Nonpublic Complaint.

“A document that contains information asserted by a party or non-party to contain confidential information cannot be evaluated for determination of whether it should be ‘*in camera*’ until it is ‘offered into evidence.’” *In re North Carolina Board of Dental Examiners*, 2011 FTC LEXIS 94, *8 (May 16, 2011). The Commission has explained, “the need for [*in camera* treatment] . . . does not arise until the material is about to be submitted in evidence. It is an extraordinary device when applied as provided in the Commission’s Rules to material about to be submitted.” *In re Crown Cork & Seal Co.*, 71 F.T.C. 1669, 1967 FTC LEXIS 115, *6 (1967). *See also In re Bristol-Myers Co.*, 90 F.T.C. 455, 1977 FTC LEXIS 25, *6 (1977) (“Commission Rule 3.45(a) allows . . . [the ALJ to] grant *in camera* treatment for information at the time it is offered into evidence . . .”); *In re Lehigh Portland Cement Co.*, 74 F.T.C. 1629, 1968 FTC LEXIS 287, at *7, n.6 (1968) (premature to grant *in camera* treatment where there is a possibility that none of the information will be offered into evidence). Accordingly, the parties’ request in this case for provisional *in camera* treatment of material contained in the Nonpublic Complaint is procedurally improper.

However, because of the parties’ need, on occasion, to disclose confidential information in filings before materials have been “offered into evidence,” Rule 3.45(d) allows parties to redact confidential information from such filings. Rule 3.45(d) of the Commission’s Rules of Practice provides:

Parties shall not disclose information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in the public version of proposed findings, briefs, or other documents

16 C.F.R. § 3.45(d) (emphasis added). In addition, Rule 3.45(e) of the Commission’s Rules of Practice further provides:

If a party includes specific information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order in any document filed in a proceeding under this part, the party shall file 2 versions of the document. A complete version shall be marked “*In Camera*” or “Subject to Protective Order,” as appropriate, on every page and shall be filed with the Secretary and served by the party on the other parties in accordance with the rules in this part. Submitters of *in camera* or other confidential material should mark any such material in the complete versions of their submissions in a conspicuous matter, such as with highlighting or bracketing. . . . An expurgated version of the document, marked “Public Record” on every page and omitting the *in camera* and confidential information and attachment that appear in the complete version, shall be filed with the Secretary within 5 days after the filing of the complete version, unless the Administrative Law Judge or the Commission directs otherwise The expurgated version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the *in camera* version.

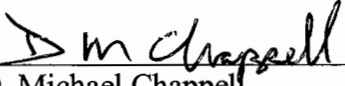
16 C.F.R. § 3.45(e) (emphasis added).

On August 29, 2013, a Protective Order was entered in this case, pursuant to Commission Rule 3.31(d), stating:

Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order.

16 C.F.R. § 3.31(d) Appendix A ¶ 2. The Payment Information that the parties seek to redact is on its face competitively sensitive revenue information that is entitled to confidentiality and, thus, shall be treated as confidential material in accordance with the Protective Order. Accordingly, pursuant to Commission Rule 3.45(d), the parties shall not disclose the Payment Information in the public version of the Complaint. In this respect, the parties’ Joint Motion is GRANTED.

ORDERED:


D. Michael Chappell
Chief Administrative Law Judge

Date: September 10, 2013