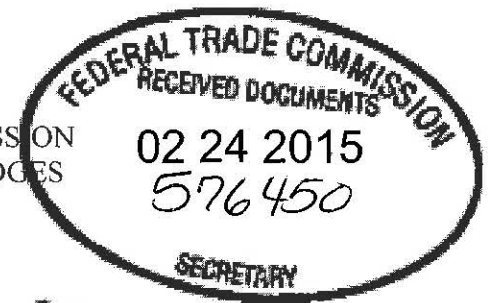


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

PUBLIC.
Docket No. 9357

ORIGINAL

COMPLAINT COUNSEL'S MOTION FOR *IN CAMERA*
TREATMENT OF CERTAIN DOCUMENTS PRODUCED BY RICHARD WALLACE

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 certain documents produced by Richard Wallace that Complaint Counsel may use in the evidentiary hearing, and which are listed and described herein.

BACKGROUND

On February 2, 3, and 13, 2015, Complaint Counsel received productions of documents from Richard Wallace in response to a subpoena *duces tecum*. The documents produced by Mr. Wallace were marked confidential in accordance with the Protective Order. Counsel for Mr. Wallace redacted sensitive and confidential information about consumers that appeared on many of the documents, consisting of usernames and passwords for various accounts. However, the names and usernames of some consumers and other sensitive information are not redacted. The sensitive personal information contained in two copies of the 1718 File produced by Mr. Wallace is also not redacted.

On February 19, 2015, the Court issued an order setting the deadline for motions for *in camera* treatment as February 24, 2015, and directing the parties to provide a copy of the order

to “entities that have provided materials that the parties have or intend to offer into evidence.” Order Setting Deadline for Motions for *In Camera* Treatment (Feb. 19, 2015). On February 20, 2015, Complaint Counsel provided the Court’s Order to counsel for Mr. Wallace. Complaint Counsel also provided counsel for Mr. Wallace with notice of the standards for *in camera* treatment, and a list of documents produced by Mr. Wallace that Complaint Counsel might use in the evidentiary hearing. Complaint Counsel met and conferred with counsel for Respondent on the subject of this motion, but was unable to reach agreement. *See* Meet and Confer Statement (attached as Exhibit A).

ARGUMENT

Under Rule 3.45(b), the Administrative Law Judge may order that material be placed *in camera* if the material constitutes sensitive personal information, or “after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting in camera treatment.” 16 C.F.R. § 3.45(b).

“Sensitive personal information” shall include . . . an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records.

Id. However, the definition of sensitive personal information “shall not be limited to” the types of information listed in Rule 3.45(b). *Id.* Sensitive personal information “shall be accorded permanent in camera treatment unless disclosure or an expiration date is required and provided by law.” 16 C.F.R. § 3.45(b)(3).

For material that is not sensitive personal information, “requests for in camera treatment must show that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *In re Kaiser Aluminum*

& Chem. Corp., 103 F.T.C. 500, 500 (1984) (quoting *In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1961 FTC LEXIS 368 (Mar. 14, 1961)).

I. COMPLAINT COUNSEL CANNOT FULLY ANTICIPATE WHICH DOCUMENTS IT WILL USE IN THE EVIDENTIARY HEARING

The evidentiary hearing in this matter is set to resume on March 18, 2015, at which time Mr. Wallace is expected to testify. As the Court has noted, Complaint Counsel cannot formulate the scope of its cross-examination of Mr. Wallace, or of any permitted rebuttal case, until Mr. Wallace testifies. *See* Order Denying Complaint Counsel's Motion for Leave to Issue Subpoenas for Rebuttal Evidence at 2 (July 23, 2014). As such, Complaint Counsel cannot be certain which, if any, documents produced by Mr. Wallace will be used by Complaint Counsel in the evidentiary hearing. In an abundance of caution, and to avoid unnecessary delays or closure of the hearing to the public, Complaint Counsel has made a good faith effort to identify the documents it foreseeably could use in the evidentiary hearing or seek to enter into the record, depending on Mr. Wallace's testimony and whether Complaint Counsel is permitted to present a rebuttal case. Complaint Counsel hereby moves for *in camera* treatment of these documents as described herein. However, Complaint Counsel cannot be certain of the full scope of the documents it might use in the hearing or seek to enter into the record. Thus Complaint Counsel may need to introduce documents it has not yet identified and if necessary, seek *in camera* treatment when additional documents are identified. For purposes of identification, the documents that are the subject of this motion have been assigned provisional exhibit numbers.

II. COPIES OF THE 1718 FILE PRODUCED BY WALLACE SHOULD BE GRANTED *IN CAMERA* TREATMENT

The first provisional exhibits for which the Court should grant *in camera* treatment are CX0981 and CX1005, two versions of the 1718 file produced by Mr. Wallace.¹ These exhibits include the sensitive personal information of thousands of individuals, including names, dates of birth, Social Security numbers, Current Procedure Terminology codes (“CPT” codes, which identify diagnostic tests performed), and health insurance company names, addresses, and policy numbers. The CPT codes are sensitive health information because they reveal diagnostic tests performed on consumers. Similarly, health insurance company names, addresses, and policy numbers are sensitive health information because they may be used to perpetrate medical identity theft. The Court granted permanent *in camera* status to multiple other copies of the 1718 File in its May 6, 2014 Order Granting Joint Motions for *In Camera* Treatment of Certain Exhibits Containing Sensitive Personal Information (“May 6, 2014 Order”). Because of the inclusion of sensitive personal information, the Court should grant permanent *in camera* treatment that covers CX0981 and CX1005 if they are introduced in the evidentiary hearing.

III. PROVISIONAL EXHIBITS CONTAINING NAMES OF IDENTITY THEFT VICTIMS SHOULD BE GRANTED *IN CAMERA* TREATMENT

Many of the documents produced by Mr. Wallace that Complaint Counsel may use in the evidentiary hearing contain personal information that is not listed in Rule 3.45’s definition of

¹ Multiple other copies of the 1718 File have been received into evidence. *See, e.g.*, CX0008–CX0011. The two copies of the 1718 File produced by Mr. Wallace, like those for which the parties previously moved for *in camera* treatment, are too voluminous and replete with sensitive information to attach as exhibits. CX0981 is Bates-labeled Wallace_00000100 through Wallace_00001818, and CX1005 is Bates-labeled Wallace_00001868 through Wallace_00003586. *See* Table of Provisional Exhibits for *In Camera* Motion (attached as Exhibit B). Complaint Counsel can provide pages from the exhibits or full documents upon request.

sensitive personal information, but that nonetheless should be treated as sensitive personal information. *See* 16 C.F.R. § 3.45(b) (definition of sensitive personal information “shall not be limited to” the types of information listed). Complaint Counsel’s provisional exhibits CX0982, CX0985, CX0987–CX0988, CX0995–CX0997, CX1000–CX1004, and CX1006 (attached collectively as Exhibit C) contain the names of consumers who may be victims of identity theft and may experience further harm in the future.²

Information about the files and their contents support this conclusion. First, the documents’ filenames suggest that they are records of consumers’ private account credentials, such as “[68.107.85.250]! BANK PASSWORDS(2).doc” (CX0983). *See* Exhibit B.³ Second, the filenames associated with these documents include what appears to be an IP address, 64.107.85.250, indicating that the documents may derive from the same source. *See* Exhibit B.⁴ If, as it appears, these documents in fact derive from the same source, this aggregation of multiple consumers’ lists of account credentials may indicate that the source is associated with identity theft. Finally, some of the documents include statements providing information on the personal finances of two consumers, giving instructions on how to defraud them, or making disparaging statements about the consumers. *See* Exhibit C at CX0987–CX0988, CX0996. Based on the above facts, there is sufficient reason to believe the documents reveal the names of consumers who are, and may continue to be, victims of identity theft.

² Other sensitive information appearing on the documents, such as account credentials, was redacted by counsel for Mr. Wallace prior to production.

³ Complaint Counsel is only moving for *in camera* treatment of the documents that include unredacted names of consumers, other financial or sensitive information, or usernames that may be traceable to an individual consumer. Several other documents produced by Mr. Wallace bear similar filenames alluding to passwords, etc. However, these other documents are either completely redacted, do not contain consumers’ names, or do not include any text at all.

⁴ CX1005, one copy of the 1718 File discussed *supra*, also includes this IP address in its filename.

Because they reveal the names of continuing victims of identity theft, these provisional exhibits warrant *in camera* treatment. They contain consumers' unredacted names and some account usernames. *See, e.g.*, Exhibit C at CX0982 page 1. They also indicate names of banks, services, and institutions where those consumers have accounts, expiration dates of payments cards, and in some cases, other information about consumers' financial portfolios. *See, e.g.*, Exhibit C at CX0982 page 1, CX0996. Moreover, a few documents referencing the same consumer include disparaging accusations of criminal behavior. *See* Exhibit C at CX0987-CX0988, CX0996. This information should be treated as sensitive personal information because disclosure of this information—in conjunction with the consumers' sensitive personal information that has already been disclosed without authorization—makes this information sensitive in this context, and may expose these individuals to further harm, targeting, or embarrassment. *See* May 6, 2014 Order (conferring *in camera* treatment consumers' names and addresses, for consumers who had experienced the disclosure of their personal information); Order on Motions for *In Camera* Treatment, *In re Jerk, LLC* at 4 (Feb. 23, 2015) (shielding consumer profiles from disclosure “in light of substantial privacy interest of protecting consumers from abuse, harassment, and embarrassment”).

The Court should therefore grant permanent *in camera* treatment to cover CX0982, CX0985, CX0987, CX0988, CX0995–CX0997, CX1000–CX1004, and CX1006 if they are used in the evidentiary hearing. These provisional exhibits should be granted *in camera* treatment in their entirety, because further redaction will render them nearly unrecognizable by the Court or for identification by witnesses.

IV. PROVISIONAL EXHIBITS CONTAINING OTHER SENSITIVE INFORMATION SHOULD BE GRANTED *IN CAMERA* TREATMENT

The Court should also grant permanent *in camera* treatment to CX0994 and CX0999 (attached collectively as Exhibit D). CX0994 is a list of usernames and passwords associated with what appears to be the name of a business, pertaining to Active Directory, firewalls, or routers. *See* Exhibit D at CX0994. The usernames are unredacted, and the business is identified by what may be a domain path. This information should be treated as sensitive personal information because its further publication could expose the business to malicious attacks on its systems.

CX0999 is a consumer's list of websites or services and that consumer's login credentials for those services. *See* Exhibit D at CX0999. The credentials have been redacted, but two usernames associated with a consumer are unredacted. *See id.* This information could be used to target the consumer, and thus expose the consumer to further harm.

Furthermore, both CX0994 and CX0999 include the IP address 68.107.85.250 in their filenames, indicating they may derive from the same source as the documents that may be associated with identity theft described in Part III, *supra*. *See* Exhibit B. Similarly, the consumers associated with these documents may be exposed to further harm if CX0994 and CX0999 are made public in this proceeding. The Court should therefore find this information to be sensitive personal information, and confer permanent *in camera* treatment to cover CX0994 and CX0999 if they are used in the evidentiary hearing. These provisional exhibits should also be granted *in camera* treatment in their entirety, because further redaction will render them nearly unrecognizable by the Court or for identification by witnesses.

V. PROVISIONAL EXHIBITS CONTAINING INSTRUCTIONS ON PERPETRATING IDENTITY THEFT SHOULD BE GRANTED *IN CAMERA* TREATMENT

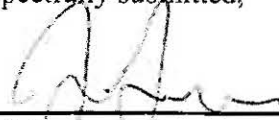
The Court should also grant permanent *in camera* treatment to CX0989–CX0991, (attached as Exhibit E), foreign language documents that instruct readers how to obtain consumers' passwords for various email providers. Although these documents do not fall squarely under Rule 3.45(b), their disclosure is likely to increase the harm to consumers by further publicizing ways to perpetrate identity theft. Complaint Counsel cannot represent the extent to which documents such as these are confidential or publicly available, but any increase in their availability has the potential to result in serious injury to consumers in the form of identity theft. *See* 16 C.F.R. § 3.45(b). Accordingly, the Court should grant permanent *in camera* treatment to cover CX0989–CX0991 if they are used in the evidentiary hearing.

CONCLUSION

Because each of the proposed exhibits discussed above contains sensitive personal information under Rule 3.45, the Court should grant Complaint Counsel's Motion for *In Camera* Treatment of Certain Documents Produced by Richard Wallace and confer permanent *in camera* treatment to the exhibits addressed herein if they are used in the evidentiary hearing or entered into the record in this matter.

Dated: February 24, 2015

Respectfully submitted,



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PUBLIC

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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 CERTAIN DOCUMENTS PRODUCED BY RICHARD WALLACE

Upon consideration of the Complaint Counsel’s Motion for *In Camera* Treatment of Certain Documents Produced by Richard Wallace, it is hereby

ORDERED, that Complaint Counsel’s provisional exhibits CX0981, CX0982, CX0985, CX0987–CX0991, CX0994–CX0997, CX0999–CX1006 are granted permanent *in camera* treatment if they are used in the evidentiary hearing or become a part of the record in this matter.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 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.

February 24, 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 Certain Documents Produced by Richard Wallace, Complaint Counsel conferred with counsel for Respondent in a good faith effort to resolve by agreement the issues raised by the motion. Complaint Counsel Laura Riposo VanDruff and Jarad Brown conferred by teleconference with counsel for Respondent William Sherman on February 24, 2015 at 1:30 PM. Despite good faith efforts, the parties have been unable to reach agreement on the subject of the motion.

Dated: February 24, 2015

Respectfully submitted,



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Complaint Counsel

Exhibit B

Exhibit B - Table of Provisional Exhibits for *In Camera* Motion

PROVISIONAL EXHIBIT NUMBER	FILENAME	BEGINNING BATES	END BATES
CX0981	[64.190.82.42]insuranceaging_6.05.071.pdf	Wallace_0000100	Wallace_00001818
CX0982	[68.107.85.250]! ROD BANK PASSWORDS.doc	Wallace_00001819	Wallace_00001834
CX0985	[68.107.85.250]! ROD BANK PASSWORDS.doc	Wallace_00001837	Wallace_00001837
CX0987	[68.107.85.250](1) info on MASTERCARD CREDIT CARDS NUMBERS - AMERICAN EXPRESS - VISA - WITH SOCIAL SECURITY NUMBER2008 2007(1).doc	Wallace_00001840	Wallace_00001840
CX0988	[68.107.85.250](1) info on MASTERCARD CREDIT CARDS NUMBERS - AMERICAN EXPRESS - VISA - WITH SOCIAL SECURITY NUMBER2008 2007.doc	Wallace_00001841	Wallace_00001842
CX0989	[68.107.85.250](Crack) Password Sniffer For Hotmail, Msn & Yahoo (Italiano)(1).doc	Wallace_00001843	Wallace_00001843
CX0990	[68.107.85.250](CRACK) Password Sniffer for Hotmail, Msn & Yahoo (italiano)(2).doc	Wallace_00001844	Wallace_00001844
CX0991	[68.107.85.250](Crack) Password Sniffer For Hotmail, Msn & Yahoo (Italiano).doc	Wallace_00001845	Wallace_00001845
CX0994	[68.107.85.250](secure) Passwords.doc	Wallace_00001849	Wallace_00001849
CX0995	[68.107.85.250]++ SS NUMBER 2008 VISA CREDIT CARDS NUMBERS AND INFORMATION.doc	Wallace_00001850	Wallace_00001850
CX0996	[68.107.85.250]++ SS NUMBER 4 OCTOBER 2007 xx VISA CREDIT CARDS NUMBERS AND INFORMATION.doc	Wallace_00001851	Wallace_00001851
CX0997	[68.107.85.250]0 - Household Accounts.doc	Wallace_00001852	Wallace_00001852
CX0999	[68.107.85.250]01 Created Passwords.doc	Wallace_00001856	Wallace_00001857
CX1000	[68.107.85.250]01-02-2008 RESUME .doc	Wallace_00001858	Wallace_00001861
CX1001	[68.107.85.250]01Usernames and passwords.doc	Wallace_00001862	Wallace_00001863
CX1002	[68.107.85.250]02 Passwords.doc	Wallace_00001864	Wallace_00001864
CX1003	[68.107.85.250]020916 account.doc	Wallace_00001865	Wallace_00001865
CX1004	[68.107.85.250]020918 account response.doc	Wallace_00001866	Wallace_00001867
CX1005	[68.107.85.250]insuranceaging_6.05.071.pdf	Wallace_00001868	Wallace_00003586
CX1006	[68.107.85.250]-pac contact list updated june 07.doc	Wallace_00003587	Wallace_00003588

Exhibit C

PUBLIC

EXHIBIT C

CONFIDENTIAL - REDACTED IN ENTIRETY

Exhibit D

EXHIBIT D

CONFIDENTIAL – REDACTED IN ENTIRETY

Exhibit E

PUBLIC

EXHIBIT E

CONFIDENTIAL – REDACTED IN ENTIRETY