UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE SURREPLY

Pursuant to Rule 3.22(d) of the Commission's Rules of Practice, Complaint Counsel respectfully requests leave to file a Surreply in response to Respondent LabMD, Inc.'s Reply to Complaint Counsel's Opposition to Respondent's Application for Stay of Final Order Pending Review by a United States Court of Appeals ("Respondent's Reply Brief"). A Surreply is necessary to address two issues in Respondent's Reply Brief that could not have been raised in Complaint Counsel's Opposition to Respondent's Application for Stay: (1) Respondent's unfounded allegations of attorney misconduct; and (2) Respondent's improper attempt to supplement its Application for Stay in violation of Rule 3.56(d), 16 C.F.R. § 3.56(d). Rule 3.32(d) permits the filing of a Surreply under such circumstances where, as here, an issue "could not have been raised earlier in the party's principal brief." 16 C.F.R. § 3.22(d).

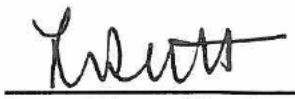
Complaint Counsel met and conferred with counsel for Respondent on this Motion, but was unable to reach agreement. *See* Meet and Confer Statement (attached as Exhibit A). Complaint Counsel would be prejudiced if it were not permitted to address the misstatements of

fact and the supplemental declaration that Respondent improperly included with its Reply Brief, which could not have been anticipated at the time Complaint Counsel filed its Opposition.

For the foregoing reasons, Complaint Counsel requests that this Motion be granted. A conditional copy of Complaint Counsel's Surreply has been attached hereto as Exhibit B for the Commission's convenience.

Dated: September 19, 2016

Respectfully submitted,



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Complaint Counsel

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
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Terrell McSweeny

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

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE A SURREPLY

Upon consideration of Complaint Counsel's Motion for Leave to File a Surreply,

IT IS HEREBY ORDERED, that Complaint Counsel is granted leave to file a Surreply in the form of Exhibit B to its Motion for Leave to File a Surreply.

By the Commission

Donald S. Clark
Secretary

Date:

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, 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:

Patrick J. Massari
Erica Marshall
Cause of Action
1875 I Street NW, Suite 800
Washington, DC 20006
patrick.massari@causeofaction.org
erica.marshall@causeofaction.org

Counsel for Respondent LabMD, Inc.

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.

September 19, 2016 By: _____

Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

STATEMENT REGARDING MEET AND CONFER

Prior to filing the attached Motion for Leave to File Surreply, Complaint Counsel Laura Riposo VanDruff met and conferred with counsel for Respondent Patrick Massari by telephone on September 16 and 19, 2016, and further by email on September 19, 2016, in a good faith effort to resolve by agreement the issues raised by this motion and the conditionally-attached Surreply. Despite good faith efforts to do so, Complaint Counsel has been unable to reach agreement with counsel for Respondent on the subject of the attached motion.

Dated: September 19, 2016

Respectfully submitted,

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Complaint Counsel

Exhibit B

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Maureen K. Ohlhausen
Terrell McSweeny

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

COMPLAINT COUNSEL'S SURREPLY
IN RESPONSE TO RESPONDENT'S REPLY BRIEF

Complaint Counsel files this Surreply in response to Respondent LabMD, Inc.'s Reply to Complaint Counsel's Opposition to Respondent's Application for Stay of Final Order Pending Review by a United States Court of Appeals ("Respondent's Reply Brief"). This Surreply is necessary to address two issues in Respondent's Reply Brief that could not have been raised in Complaint Counsel's response brief: (1) Respondent's unfounded allegations of attorney misconduct; and (2) Respondent's improper attempt to supplement its Application for Stay in violation of Rule 3.56(d), 16 C.F.R. § 3.56(d).

I. RULES DEMAND BETTER THAN UNSUPPORTED *AD HOMINEM* ATTACKS ON COUNSEL

Throughout this litigation, Respondent through its counsel has hurled specious, unfounded, and irresponsible allegations regarding the character, motives, and conduct of members of the Complaint Counsel team. *See, e.g.*, Resp't's Mot. for Sanctions (Aug. 14, 2014) (alleging misconduct by Complaint Counsel for its prosecution of the Complaint); Resp't's

Reply in Supp. of Mot. for Sanctions (Sep. 2, 2014) (same); Order on Resp't's Unopp. Mot. for Order Req. Richard Wallace to Testify Under Grant of Immunity Pursuant to Rule 3.39 (Oct. 9, 2014) at 5 (repeating Respondent's counsel's proffer of anticipated—but never realized—testimony regarding Complaint Counsel's putative misconduct); Resp't's Corrected Proposed Findings of Fact ¶ 58 (Aug. 11, 2015) (deliberately suggesting, contrary to the record, that Commission staff participated in a meeting with Tiversa staff that related to falsifying evidence).

Respondent's Reply Brief is the latest and most egregious example of Respondent's tactic, leveling not only unsupported allegations of general misconduct, but specifically charging that a member of the Complaint Counsel team "importun[ed] Tiversa to provide fraudulent evidence of 'spread' regarding the 1718 File." Reply Br. at 1 n.2. Respondent cites no record evidence for this proposition because there is none. Respondent's assertion is, in fact, belied by the absence of any suggestion of such "importuning" in the testimony of Respondent's witness, Richard Wallace, who testified under a grant of prosecutorial immunity. *See generally* Wallace, Tr. 1386-1388 (testifying that discussion of creating false evidence of the 1718 File's spread took place during a car ride with Mr. Boback).[1]

The Rules of Practice of the Federal Trade Commission demand better than unsupported, *ad hominem* attacks on counsel. *See* Rule 4.1(e), 16 C.F.R. § 4.1(e) (permitting reprimand or disbarment of an attorney who "[h]as knowingly or recklessly given false or misleading

[1] Even Mr. Wallace disputes Respondent's characterization of his testimony, as demonstrated by Mr. Wallace's filing in a separate proceeding. *See* Richard E. Wallace's Prelim. Objs. to Pls.' 2d Am. Verified Compl. ¶ 28 n.6, *Tiversa Holding Co. v. LabMD, Inc.*, No. GD-14-016497 (Allegheny Cty., Pa. Ct. of Common Pleas Oct. 23, 2015) ("Plaintiffs also quote a proffer given by William Sherman, counsel for LabMD in the FTC Action. . . . Mr. Sherman does not claim to have spoken with Mr. Wallace (nor has he); rather, he is providing the Court with his personal belief as to Mr. Wallace's anticipated testimony. Counsel for Mr. Wallace disputes his *characterization* of Wallace's testimony . . . .") (emphasis in original) (attached hereto as **Surreply Exhibit 1**).

information, or has knowingly or recklessly participated in the giving of false information to the Commission or any officer or employee of the Commission")[2]; *accord* D.C. R. Prof. Conduct 3.3(a) ("A lawyer shall not knowingly [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ."). No evidence adduced during the Evidentiary Hearing—including through the testimony of Respondent's witness, Mr. Wallace, who received prosecutorial immunity for his testimony—supports these allegations.

II. COMMISSION SHOULD DISREGARD THE SEPTEMBER 15TH DAUGHERTY DECLARATION

Respondent attaches to its Reply a second self-serving declaration executed by LabMD's CEO, Michael Daugherty (Ex. 10 to Resp't's Reply Br. ("September 15th Daugherty Declaration")) which parrots the hearsay statements of Cliff Baker, a putative "expert" who was never disclosed as a witness, much less cross-examined, in this proceeding.[3]

The September 15th Daugherty Declaration purports to document Respondent's anticipated compliance costs associated with Part I of the Commission's Order, information that was not included in Mr. Daugherty's August 30, 2016 declaration, which was submitted in support of Respondent's Application for Stay ("August 30th Daugherty Declaration"). *Compare* Aug. 30th Daugherty Decl. ¶ 22(a), *with* Sept. 15th Daugherty Decl. ¶¶ 8, 10. Accordingly, the

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[2] Through this filing by Complaint Counsel, the Director of the Bureau of Consumer Protection is not availing herself of the provisions of Rule 4.1(e)(2)-(4).

[3] Mr. Baker's 2014 declaration, which is unrelated to compliance costs and which is attached as Exhibit A to Mr. Daugherty's September 15, 2016 declaration, was excluded from the evidentiary record in this proceeding by the July 15, 2015 Order of Chief Administrative Law Judge D. Michael Chappell. In a separate proceeding, as noted in Paragraph 13 to Exhibit A to Mr. Daugherty's September 15, 2016 declaration, Mr. Baker acknowledged that he never determined whether LabMD ever complied with the rules with which he purports to be an expert.

substance of Respondent's evidence regarding Part I compliance costs was not addressed in Complaint Counsel's Opposition to Respondent's Application for Stay.[4] The Commission's Rules of Practice require that Respondent's Reply be "limited to new matters raised by the answer." 16 C.F.R. § 3.56(d). Similarly, the Commission may disregard arguments that are made for the first time in reply. *See Stillwagon v. City of Delaware*, No. 2:14-CV-807, 2016 WL 1337292, at *7 (S.D. Ohio Mar. 31, 2016); *POM Wonderful LLC*, 2011 FTC LEXIS 42, at *9 n.3 (Mar. 16, 2011) ("Where the Federal Rules of Civil Procedure are similar to the Commission's Rules of Practice, those rules and case law interpreting them may be useful, though not controlling, in adjudicating a dispute"). Furthermore, to prevail, Respondent must provide any "affidavits or other sworn statements" in support of a stay *in its application*—not in reply. 16 C.F.R. § 3.56(c).

[4] To the contrary, Complaint Counsel's Opposition noted Respondent's failure to provide any specific facts regarding the costs associated with Part I compliance, *see* Compl. Counsel Opp. at 10, an evidentiary failure Respondent cannot cure through its Reply.

Because Mr. Daugherty's September 15th Declaration and the hearsay statements contained therein do not address issues raised by Complaint Counsel's Opposition to the Application for Stay, but instead make new arguments for the first time in reply, the Commission should disregard the September 15th Daugherty Declaration.

Dated: September 19, 2016

Respectfully submitted,

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Complaint Counsel

Surreply Exhibit 1

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

TIVERSA HOLDING CORP. and ROBERT J. BOBACK, Plaintiffs, v. LABMD, INC., MICHAEL J. DAUGHERTY, and RICHARD EDWARD WALLACE, Defendants.	CIVIL DIVISION No. GD-14-016497 **PRELIMINARY OBJECTIONS TO PLAINTIFFS' SECOND AMENDED VERIFIED COMPLAINT** Filed On Behalf of Defendant Richard Edward Wallace Counsel of Record: Mary Beth Buchanan, PA ID # 50254 MBuchanan@bryancave.com Jacquelyn N. Schell, NY ID # 5281837 Jacquelyn.Schell@bryancave.com *Admitted Pro Hac Vice* **BRYAN CAVE LLP** 1290 Avenue of the Americas New York, NY 10104 Telephone: (212) 541-2000 Facsimile: (212) 541-4630 *For Richard Edward Wallace*

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

TIVERSA HOLDING CORP. and ROBERT J. BOBACK,	)	CIVIL DIVISION
	)	No. GD-14-016497
Plaintiffs,	)	
v.	)	
LABMD, INC.; MICHAEL J. DAUGHERTY; and RICHARD EDWARD WALLACE,	)	
Defendants.	)	

PRELIMINARY OBJECTIONS TO
PLAINTIFFS' SECOND AMENDED VERIFIED COMPLAINT

Pursuant to Pa.R.C.P. 1028(a)(2) and Pa.R.C.P. 1028(a)(4), Defendant Richard Edward Wallace asserts Preliminary Objections to the new counts and allegations in Plaintiffs' Second Amended Verified Complaint ("Complaint"). The Complaint adds two new claims, for Slander *Per Se* (Count VII) and Commercial Disparagement/Trade Libel (Count VIII) along with new factual allegations against Mr. Wallace. The new factual allegations impermissibly publish information protected by court orders and should be stricken. The new claims are barred by the statute of limitations and should be dismissed on this ground alone. The new claims should also be dismissed because they fail to allege the elements of a viable claim against Mr. Wallace or are barred by absolute legal privileges.

SUMMARY OF NEW CLAIMS IN THE COMPLAINT

1. Plaintiffs' Complaint adds allegations that Mr. Wallace contacted Mr. Daugherty by telephone on April 2, 2014, and on April 3, 2014, and informed Mr. Daugherty, *inter alia*, that Boback lied about the source of the LabMD file that later became the basis of the FTC

Action (as defined in the Complaint, the "File"), that the File was never found in locations other than a LabMD computer, and that Boback had given Wallace instructions to fabricate information. (Compl. ¶¶ 57-58.) These allegations are lifted from an affidavit filed under seal in two actions and barred from use or disclosure in any other actions.

2. Plaintiffs allege two new claims against Wallace: Slander *Per Se* (Count VII) and Commercial Disparagement/Trade Libel (Count VIII). Both claims rely on the statements above, which should be stricken, and the conclusory statements that Wallace provided unspecified "false and disparaging information regarding Tiversa" to unnamed individuals or representatives of Defendants or the House Oversight Committee,[1] *see* Compl. ¶ 46, and/or that, as part of the Oversight Investigation and/or the FTC Action, "Wallace told [one or some of his co-Defendants] that, during his employment at Tiversa, he, at Tiversa's behest, engaged in various [again, unspecified] nefarious activities," *id.* at ¶ 52.[2]

3. The Complaint also makes clear that any statements made by Wallace were in furtherance of the FTC Action or the Oversight Committee Investigation or part of LabMD and Daugherty's protected efforts to petition the government for redress and are privileged as a matter of law and based on the face of the Complaint. (Compl. ¶¶ 46, 53-58.) Any statements relevant and pertinent to these actions are privileged under Pennsylvania law and the *Noerr-Pennington* Doctrine.

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed in Defendant Wallace's earlier Preliminary Objections.

[2] Defendant Richard Wallace does not admit to the veracity of any of the allegations in the Complaint, but simply acknowledges that such allegations were made. Mr. Wallace disputes the propriety of these allegations on legal grounds, as explained in these preliminary objections, and expressly reserves his right to avail himself of any and all rights against self-incrimination, as provided in the Fifth Amendment to the United States Constitution and under Pennsylvania law, if called to answer the Complaint.

ARGUMENT AND CITATION OF AUTHORITY

4. Wallace's preliminary objections to the Second Amended Complaint are proper because Wallace's objects only to the new allegations and errors appearing for the first time in the present Complaint. *Delgrosso v. Gruerio*, 255 Pa. Super. 560, 564, 389 A.2d 119, 121 (Pa. Super. Ct. 1978) ("If, as here, the amendment reveals a new error not appearing in the original complaint, the defendant may file a new preliminary objection in order to raise the matter."); *Wudkwych v. Borough of Canonsburg*, 111 Pa. Commw. 322, 326, 533 A.2d 1104, 1106 (Pa. Commw. Ct. 1987) (affirming granting of preliminary objections to amended complaint that raised damages questions not included in original).

I. Preliminary Objections Pursuant to Pa.R.C.P. 1028(a)(2): The Court Should Strike Paragraphs 57 and 58 for Inclusion of Information in Violation of Two Court Orders.

5. Paragraphs 57 and 58 of the Complaint should be stricken, pursuant to Pa.R.C.P. 1028(a)(2) for "failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter."

6. Striking or dismissal is appropriate where a Complaint violates the law, including procedural rules or rules imposed by another court. *E.g., Cibula v. Pennsylvania Bd. of Prob. & Parole*, No. 315 M.D. 2014, 2015 WL 5448231, at *1 (Pa. Commw. Ct. Apr. 10, 2015) (sustaining objections to unverified petition); *Ferrari v. Antonacci*, 456 Pa. Super. 54, 59, 689 A.2d 320, 323 (Pa. Super. Ct. 1997) (affirming dismissal under Pa.R.C.P. 1028(a)(2) where plaintiff failed to timely re-file after jurisdiction-based dismissal in federal court).

7. This is true even where the material is potentially relevant. *See Triage, Inc. v. Com., Dep't of Transp.*, 113 Pa. Commonwealth of Pa., 348, 353, 537 A.2d 903, 906 (Pa.

Commw. Ct. 1988) (striking appendix that should have been included through amended complaint, despite relevance to claims).

8. The information in paragraphs 57 and 58 is drawn from an affidavit (also the subject of Plaintiffs' June 10, 2015, Motion for Protective Order; the "Affidavit") that was unintentionally disclosed by separate counsel for LabMD in another matter.[3]

9. Both that Court, and the FTC Action, where the FTC later considered introducing the Affidavit, reviewed the Affidavit *only* under relevant protective orders, noting concerns of attorney-client privilege, accidental disclosure, and Congressional privilege under the Speech and Debate Clause. (Federal Action Docket No. 61; the "Federal Order"; Order Memorializing Bench Rulings, May 5, 2015, FTC Docket No. 9357 (granting *in camera* treatment to the Affidavit; "FTC Order")).[4]

10. Both the Order in the Federal Action and the "under seal" designation in the FTC Action bar use or disclosure of the Affidavit in any other action.

11. The Federal Order specifically states that "Docket Entry 18-17 [the Affidavit] shall remain sealed unless otherwise ordered by this Court;" that "[t]he Parties will not publicly disclose or file the Affidavit;" and that parties may display the Affidavit to third parties only "in connection with [that] litigation," after "advance notice to, and approval by, the [House Oversight] Committee," and upon the third party's written acknowledgement of the terms of the Protective Order. (*Id.* at ¶¶ 3, 6-7.)

12. So too, the FTC rules prohibit disclosure of *in camera* materials or the

[3] *LabMD, Inc. v. Tiversa Holding Corp., et al.*, Civil Action No. 2:15-cv-92, in the United States District Court for the Western District of Pennsylvania ("Federal Action").

[4] Copies of the Federal Order and the FTC Order are attached as Exhibit A for the Court's convenience. The Court may take judicial notice of the Orders and properly consider them at this stage because they are incorporated into the Complaint by reference and go to the compliance of the Complaint with rule of law. *See Guarrasi v. Scott*, 25 A.3d 394, 408 (Pa. Commw. Ct. 2011); *Ferrari*, 456 Pa. Super. at 59, 689 A.2d at 323 (reviewing related federal docket in considering objections under Pa.R.C.P. 1028(a)(2)).

information contained therein to the public. 16 C.F.R. § 3.45(d).

13. Pennsylvania law requires that, when referencing a written document, a party either attaches the document or identify its source, so that the parties can obtain a full copy. *See* Pa.R.C.P. 1019(i). Plaintiffs did not do either, and, as is clear from the Federal and FTC Orders, Wallace cannot obtain a copy of the Affidavit at issue.

14. This use of an unidentified portion of the Affidavit, without attaching the Affidavit, avoids both the protections of the FTC Action and the Order and those portions of the Affidavit that would immediately invalidate their claims.[5]

15. Plaintiffs have not attempted to obtain the other tribunals' approval, as required by the protective orders, or attached the Affidavit, as required by Pennsylvania law. Their use of portions of the Affidavit and information contained in the Affidavit is in violation of Pennsylvania law, the Federal Order, and the FTC Order. Therefore, under Pa.R.C.P. 1028(a)(2), Wallace requests that the Court strike paragraphs 57 and 58 from the Complaint.

II. Preliminary Objections Pursuant to Pa.R.C.P. 1028(a)(4): Plaintiffs' New Claims are Barred by the One-Year Statute of Limitations.

16. The Complaint's own allegations demonstrate that both of Plaintiffs' new claims are barred by the one-year statute of limitations for claims for slander and related claims. 42 Pa.C.S.A. § 5523; *Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co.*, 570 Pa. 242, 247, 809 A.2d 243, 246 (2002) (applying one year SOL to slander of title/trade disparagement).

17. The statute of limitations bars new causes of action added to an amended pleading more than one year after the cause of action accrued, even where the new cause of action relies on the same or similar acts already alleged. *Sanchez v. City of Phila.*, 302 Pa. Super. 184, 188,

[5] Specifically, Plaintiffs strategically omit the portion of the Affidavit counsel understands to state that Wallace's supposed statements were made *before* execution of Wallace Separation Agreement on April 6, 2014. *See Banks v. Hanoverian, Inc.*, No. 2807 Jan. Term 2005, 2005 WL 1522012, at *1 (Pa. Commpl. Ct.. June 23, 2005) (dismissing breach of contract action where contract was not alleged at time of actions).

448 A.2d 588, 590 (Pa. Super. Ct. 1982) (affirming refusal to add new causes of actions to amended pleading after statute of limitations, even though existing and new claims relied on same negligent acts).

18. The Complaint, which was filed on September 8, 2015, alleges claims for slander and trade libel based on statements allegedly made on April 2, 2014, and April 3, 2014. (Compl. ¶¶ 57, 58 (identifying dates); ¶¶ 134, 141 (citing these dates as the source of the claims).) Plaintiffs are attempting to add new causes of action one year and five months after the date of the supposed statements, without alleging any exception or tolling that would permit this.

19. It is clear from the face of the Complaint that Plaintiffs' new causes of action are barred by the one-year statute of limitations, and so these new claims should be dismissed. *See Sanchez*, 302 Pa. Super. at 188, 448 A.2d at 590.

III. Preliminary Objections Pursuant Pa.R.C.P. 1028(a)(4): Plaintiffs Fail to Allege Facts Sufficient to State a Claim for Slander *Per Se* or Trade Libel.

20. Plaintiffs' Complaint is legally insufficient and should be dismissed, pursuant to Pa.R.C.P. 1028(a)(4), because it fails to plead facts necessary to the claims alleged. Without the impermissible allegations in paragraphs 57 and 58, Plaintiffs fail to identify any specific statement by Mr. Wallace that could give rise to a claim for slander or trade libel. Or, in the alternative, any statements alleged are, based on the Complaint's own allegations, protected by Pennsylvania law and the *Noerr-Pennington* Doctrine.

A. Legal Standard

21. When ruling on preliminary objections in the form of a demurrer, "the court must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." *Mazur v. Trinity Area Sch. Dist.*, 599 Pa. 232, 241, 961 A.2d 96, 101 (2008) (affirming dismissal of complaint on preliminary objections);

Chem v. Horn, 725 A.2d 226, 228 (Pa. Commw. Ct. 1999) ("The question presented by a demurrer is whether, in the facts averred, the law says with certainty that no recovery is possible."); *see also Milliner v. Enck*, 709 A.2d 417, 418 (Pa. Super. Ct. 1998).

22. "[A] court need not accept as true conclusions of law, unwarranted inferences, allegations, or expressions of opinion." *Bayada Nurses, Inc. v. Commonwealth of Pa., Dep't of Labor & Indus.*, 607 Pa. 527, 558, 8 A.3d 866, 884 (2010).

23. Where, as here, "plaintiff's complaint or pleading shows on its face that his claim cannot be sustained, preliminary objections are an appropriate remedy." *Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 518, 235 A.2d 576, 579 (1967) (affirming dismissal and rejecting plaintiffs' argument that absolute immunity could not be raised on preliminary objections); *see also Wurth by Wurth v. City of Phila.*, 136 Pa. Commw. 629, 637, 584 A.2d 403, 407 (Pa. Commw. Ct. 1990) (dismissal is appropriate "when the complaint is clearly insufficient on its face," because "if the law or the rule were otherwise, it would mean long and unnecessary delays in the law.").

B. Elements of the Claims

24. Slander *per se* and trade libel are both variations of defamation claims. A claim for slander *per se* requires a defamatory statement, published by the defendant, applicable to the plaintiff, understood by the recipient to be defamatory, and imputing "(1) criminal offense, (2) loathsome disease, (3) business misconduct, or (4) serious sexual misconduct." *Clemente v. Espinosa*, 749 F. Supp. 672, 677 (E.D. Pa. 1990); *see also* 42 Pa.C.S.A. § 8343.

25. Trade libel, also called injurious falsehood, commercial disparagement, or slander of goods, is (1) publication of a false and disparaging statement; (2) intending (or with reason to expect) pecuniary loss; (3) from which pecuniary loss does in fact result; and (4) knowing of the falsity or acting with reckless disregard for the falsity of the statement." *Maverick Steel Co. v.*

Dick Corp./Barton Malow, 2012 Pa. Super. 173, 173, 54 A.3d 352, 354 (Pa. Super. Ct. 2012); *see also Triester v. 191 Tenants Ass'n*, 272 Pa. Super. 271, 277, 415 A.2d 698, 701 (Pa. Super. Ct. 1979).

C. The Complaint Fails to Identify a Statement That Could Create a Claim for Slander Per Se *or Trade Libel.*

26. Plaintiffs fail to allege any statement which could be the basis of a claim for slander or trade libel. *See Clemente*, 749 F. Supp. at 677; *Maverick Steel Co.*, 2012 Pa. Super. at 173, 54 A.3d at 354.

27. Either claim must identify the specific words with which Plaintiffs take issue, as well as the specific listener, so that the Court can determine if the statements could be defamatory, as a matter of law. *See Carescience, Inc. v. Panto*, No. 04583 Sept. Term 2003, 2003 WL 22266101, at *1 (Pa. Commpl. Ct. Sept. 23, 2003); *see also Walker v. Grand Cent. Sanitation, Inc.*, 430 Pa. Super. 236, 243, 634 A.2d 237, 240 (Pa. Super. Ct. 1993).

28. Other than the impermissible statements, which, as discussed above, should be stricken from the Complaint, Plaintiffs allege only that Mr. Wallace made unspecified "disparaging statements about Tiversa and Mr. Boback," and/or told unspecified parties that Tiversa encouraged him to "engage[] in various nefarious activities." (Compl. ¶¶ 52, 118).[6]

29. Plaintiffs ask the Court to determine that these unspecified statements could, as a matter of law, be defamatory, based only on their opinion and legal conclusion. This is insufficient to state a claim, *See Bayada Nurses, Inc.*, 607 Pa. at 558, 8 A.3d at 884 (opinions

[6] Plaintiffs also quote a proffer given by William Sherman, counsel for LabMD in the FTC Action. (Compl. ¶ 53). This quote is simply not a statement by Mr. Wallace. Mr. Sherman does not claim to have spoken with Mr. Wallace (nor has he); rather, he is providing the Court with his personal belief as to Mr. Wallace's anticipated testimony. Counsel for Mr. Wallace disputes his *characterization* of Wallace's testimony because it is just that – a characterization.

and legal conclusions need not be taken as fact for purposes of a motion to dismiss). Without an identifiable statement by Wallace that is demonstrably defamatory, these claims cannot stand.

D. Plaintiffs Fail to Allege Any Damages Resulting from the Alleged Slander or Trade Libel.

30. Trade libel requires specific allegations of pecuniary loss, resulting from the statements at issue. *Maverick Steel Co.*, 2012 Pa. Super. at 173, 54 A.3d at 354.

31. Slander requires allegations of general damages, unless the plaintiff alleges *both* status as a private figure plaintiff and actual malice, that is, "with knowledge that the statement was false or with reckless disregard of whether it was false or not." *Joseph v. Scranton Times, L.P.*, 2014 Pa. Super. 49, 49, 89 A.3d 251, 261 (Pa. Super. Ct. 2014), *appeal granted*, 105 A.3d 655 (2014); *Walker*, 430 Pa. Super. at 250, 634 A.2d at 244 (slander *per se* claim could not succeed without evidence that the hearer of the statement thought less of the plaintiff or that the statements had any adverse affect on plaintiff).

32. Plaintiffs do not allege any facts demonstrating general damages or any facts demonstrating specific pecuniary loss. Plaintiffs do not identify any potential or existing contract lost or impaired or even any potential or existing client who *heard* the alleged statements, directly or indirectly, from which damages could be inferred. *See Walker*, 430 Pa. Super. at 250, 634 A.2d at 244. The conclusory statements that they suffered general or specific pecuniary loss, without facts in support, are insufficient to state a claim. *See id.* (requiring general damages for slander claim); *Maverick Steel Co.*, 2012 Pa. Super. at 173, 54 A.3d at 354 (requiring specific allegations of pecuniary loss for trade libel claim).

33. Plaintiffs also do not allege any facts demonstrating that Wallace acted with actual malice, such that they could claim presumed damages and avoid the pleading requirements for the slander claim. (Presumed damages are not available in trade libel claims.) Plaintiffs

allege only similar conclusory statements that need not be taken as true for purposes of a demurrer. *See* Compl. ¶ 138; *Bayada Nurses, Inc.*, 607 Pa. at 558, 8 A.3d at 884 (opinions and legal conclusions need not be taken as fact for purposes of a motion to dismiss).

34. Even if Plaintiffs had alleged facts demonstrating actual malice, Plaintiffs are, at a minimum, limited-purpose private figures, who are not entitled to presumed damages. *See Joseph v. Scranton Times, L.P.*, 2014 Pa. Super. at 49, 89 A.3d at 269; *Weber v. Lancaster Newspapers, Inc.*, 2005 Pa. Super. 192, 878 A.2d 63, 75 (Pa. Super. Ct. 2005), *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (a public figure is one who "uses purposeful activity to thrust his personality into a public controversy" or "invites and merits attention and comment").

35. The Complaint alleges on its face that Plaintiffs interact with the FTC with sufficient frequency to create a separate entity, ¶¶ 23-24; are the subject of the Book and several related news and television appearances, ¶¶ 28-34; is involved in Congressional hearings, ¶¶ 64-67; and testified before Congress regarding Marine One, ¶¶ 57, 65 (incorporating by reference Congressional hearing). At a minimum, Plaintiffs are limited-purpose public figures on the matters at issue in this case, and presumed damages are unavailable as a result.

36. As Plaintiffs have not alleged the specific pecuniary loss required for a claim of trade libel, that claim should be dismissed. As Plaintiffs also have not alleged any facts showing general damages or, alternatively, actual malice with private figure status to support presumed damages, this claim should also be dismissed.

E. Plaintiffs Have Not Stated a Claim for Punitive Damages.

37. Plaintiffs have not alleged facts supporting their claim for punitive damages. To state a viable claim for punitive damages, any tort complaint must allege facts demonstrating

"conduct that is outrageous because of the defendant's evil motives or his reckless indifference to the rights of others." *Arbor Associates, Inc. v. Aetna U.S. Healthcare*, No. 03976 Aug. Term 2002, 2003 WL 1847497, at *2 (Pa. Commpl. Ct. Feb. 28, 2003) (dismissing punitive damages claims and striking references to same); *see also Carescience, Inc.*, 2003 WL 22266101, at *2.

38. In the slander or trade libel context, both of which implicate the First Amendment, a claim for punitive damages must also allege that the defendant spoke with "actual malice." *Joseph v. Scranton Times, L.P.*, 2014 Pa. Super. at 49, 89 A.3d at 272. As discussed above, Plaintiffs have not alleged facts suggesting that Wallace acted with actual malice, and the claim for punitive damages should be barred on that ground alone.

39. Plaintiffs' conclusory statements that Wallace "acted maliciously" or in a way that "demonstrates intentionally willful, wanton, and reckless behavior," Compl. §§ 61, 139, without facts supporting this conclusion, are insufficient. *See Carescience, Inc.*, 2003 WL 22266101, at *2 (dismissing punitive damages claim unsupported by factual allegations showing wanton, willful misconduct). Plaintiffs have not stated a claim for punitive damages under either new claim, and therefore the request should be dismissed and any references stricken.

IV. Preliminary Objection Pursuant to Pa.R.C.P. 1028(a)(4): Plaintiffs' Complaint is Barred as a Matter of Law by the *Noerr-Pennington* Doctrine and Pennsylvania Law.

40. Plaintiffs' new claims are legally insufficient and should be dismissed, pursuant to Pa.R.C.P. 1028(a)(4), because the face of the Complaint makes clear that Wallace's actions are protected by the *Noerr-Pennington* Doctrine and Pennsylvania law. *See Greenberg*, 427 Pa. at 517, 235 A.2d at 579; *Wurth by Wurth*, 136 Pa. Commw. at 637, 584 A.2d at 407.[7]

[7] The list of decisions applying *Noerr-Pennington* and judicial privilege protections at the preliminary objection or motion to dismiss stage is extensive. *E.g.*, *Smolsky v. Pennsylvania Gen. Assembly*, 34 A.3d 316, 322 (Pa. Commw. Ct. 2011), *aff'd sub nom., Smolsky v. Pennsylvania Gen. Assembly & Legislatures of the Com. of Pa.*, 616 Pa. 475, 50 A.3d 1255 (2012) (sustaining preliminary objections where legislative immunity was clear from the face of the

A. Wallace's Statements, to the Extent Alleged, Were Part of Co-Defendants' Efforts to Petition the Government and are Protected by the Noerr-Pennington *Doctrine.*

41. The act of petitioning the government is fully protected by the First Amendment of the U.S. Constitution, as recognized by Pennsylvania courts and the U.S. Supreme Court. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961); *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (providing *Noerr-Pennington* protections to statements to motivate public action as part of such efforts); *Sudarkasa v. Glanton*, 57 Pa. D. & C.4th 472, 508 (Pa. Commpl. Ct. 2002), *aff'd sub nom., Sudarkas v. Glanton*, 855 A.2d 146 (Pa. Super. Ct. 2004); *see also* 5 U.S.C.A. § 7211; *see also Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 160 (3d Cir. 1988).

42. The only statements allegedly made by Wallace were to Mr. Daugherty, in April 2014, when Daugherty was involved in litigation with the FTC, *see* Compl. ¶ 41, discussed below, and taking actions to lobby government and public opinion for assistance in that action, *see id.* at ¶¶ 34, 46. This is unquestionably the type of petitioning activity protected by the *Noerr-Pennington* Doctrine. *See Sudarkasa*, 57 Pa. D. & C. 4th at 500; *see also N.A.A.C.P.*, 458 U.S. at 915.

43. Communications among the Defendants were part and parcel of a direct appeal to Congress, through the Oversight Committee, and Mr. Daugherty's efforts to motivate public opinion. These statements are clearly protected by the Doctrine and claims based on these statements should be dismissed.

Complaint); *Gale v. City of Phila.*, 86 A.3d 318, 319 (Pa. Commw. Ct.), *appeal denied*, 99 A.3d 927 (2014) (affirming dismissal based on governmental immunity "where the defense of immunity is clearly applicable on the face of the complaint"); *Firetree Ltd. v. Fairchild*, 920 A.2d 913, 919 (Pa. Commw. Ct. 2007) (affirming dismissal on *Noerr Pennington* and Speech and Debate clause grounds); *see also Trustees of Univ. of Pa. v. St. Jude Children's Research Hosp.*, 940 F. Supp. 2d 233, 242 (E.D. Pa. 2013) (dismissing claims barred by *Noerr-Pennington* Doctrine because, "taking all allegations as true, … the plaintiff is not entitled to relief as a matter of law").

B. Defendants' Statements and Participation in the FTC Action are Protected by Pennsylvania Law.

44. Similarly, Pennsylvania law protects all communications "relevant" or "pertinent" "to any stage of a judicial proceeding," including statements made by witnesses both in trial testimony and in preparation for testimony. *Smith v. Griffiths*, 327 Pa. Super. 418, 423, 476 A.2d 22, 24 (Pa. Super. Ct. 1984); *Triester v. 191 Tenants Ass'n*, 272 Pa. Super. 271, 279, 415 A.2d 698, 702 (1979) (affirming dismissal of defamation of title/commercial disparagement claim where defamatory statements alleged were all in context of judicial proceedings); *Pelagatti v. Cohen,* 370 Pa. Super. 422, 432, 536 A.2d 1337, 1342 (Pa. Super. Ct. 1987).

45. The Complaint alleges Wallace made objectionable statements in April 2014, long after the FTC Action was underway. (Compl. ¶¶ 46, 57, 58.) As also alleged in the Complaint, Mr. Wallace's formal testimony was requested and compelled in the FTC Action. (Compl. ¶¶ 53, 54.) These statements, alleged only to have been made by Wallace to a party involved in ongoing litigation, about facts essential to that litigation, are "relevant and pertinent to" formal judicial proceedings.

46. The only statements allegedly made by Mr. Wallace are therefore protected by judicial privilege, and the two new claims, based on those statements, should be dismissed.

CONCLUSION

47. For the reasons discussed above, Defendant Richard Edward Wallace respectfully requests the Court to sustain his preliminary objections, strike paragraphs 57 and 58, and dismiss Counts VII and VIII in the Complaint, with prejudice.

Dated: October 23, 2015

Respectfully submitted,

/s/ Mary Beth Buchanan

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of October, 2015, a true and correct copy of the foregoing Preliminary Objections, including Exhibit A and Proposed Order, was served on all counsel of record via electronic mail, as follows:

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/s/ Mary Beth Buchanan
Mary Beth Buchanan

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LABMD, INC., Plaintiff, v. TIVERSA HOLDING CORP. f/k/a TIVERSA, INC.; ROBERT J. BOBACK; M. ERIC JOHNSON; and DOES 1-10, Defendants.	)	Civil Action No. 2:15-cv-00092-MRH-MPK Judge Mark R. Hornak

PROTECTIVE ORDER

AND NOW, this 29th day of May, 2015, upon agreement of the parties, upon consideration of the controlling case law and the Joint Motion for a Protective Order, IT IS HEREBY ORDERED the following shall act as a Protective Order for the Parties as follows:

1. Non-Party the Committee On Oversight And Government Reform of the U.S. House Of Representatives ("Committee") has asserted that Exhibit Q to Defendants' originally filed RICO Case Statement [ECF 18-17] ("the Affidavit") is a confidential Committee legislative document that (i) is subject to the protections of the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, and (ii) was not authorized to be publicly disclosed.

2. A Protective Order is appropriate under governing law. See LEAP Sys., Inc. v. Moneylrax, Inc., 638 F.3d 216 (3d Cir. 2010) (finding party's interest in maintaining confidentiality of settlement agreement entered into on basis of court's assurances of confidentiality outweighed presumptive right of public access to court documents); see also Gravel v. United States, 408 U.S. 606 (1972); United States v. Rayburn House Office Building,

497 F.3d 654 (D.C. Cir. 2007) (Speech or Debate Clause privilege protects absolutely against compelled disclosure).

3. This Protective Order only pertains to the Affidavit filed on the docket February 18, 2015 and identified as Docket Entry 18-17, and no other portions of the docket. Accordingly, the remaining portions of the docket will no longer remain sealed. Docket entry 18-17 shall remain sealed unless otherwise ordered by this Court.

4. The Parties may use the Affidavit in the course of this litigation, including in regard to depositions, pleading, confidential, court-supervised mediation, brief, or memoranda to be filed with the Court, in the above-captioned civil matter, subject to the provisions of this Protective Order.

5. If a Party uses the Affidavit in relation to any materials filed with the Court, the Party shall, pursuant to the terms of the Protective Order, seek permission to file the Affidavit under seal.

6. Plaintiff and Defendants may, with advance notice to, and approval by, the Committee, display the Affidavit to third parties in connection with this litigation, including during depositions, or to expert witnesses, only if the non-party acknowledges the terms of this Protective Order and agrees in writing to abide by its terms. Any non-parties to whom a copy of the Affidavit is displayed subject to this Protective Order may not retain a copy of the Affidavit and must return all copies of the Affidavit after the conclusion of the third party's testimony or deposition.

7. The Parties will not publicly disclose or file the Affidavit and if any Party uses the Affidavit it will be clearly marked as Confidential. Should the Affidavit become public, LabMD and Defendants shall immediately notify the Committee. Should the Committee disclose the

Affidavit in any public setting or document, this Protective Order shall be deemed vacated as of the time of such disclosure

8. In the event a challenge is asserted regarding the designation of the Affidavit as confidential pursuant to the terms of this Protective Order, Plaintiff and Defendants shall immediately notify the Committee. The Committee shall have 10 days after receipt of the notification to seek relief from the Court. LabMD and Defendants have agreed that they will not oppose the Committee's efforts to keep the Affidavit confidential pursuant to the terms of this Protective Order.

9. The Parties have notified the Court that there is pending litigation in the Court of Common Pleas, Alleghany County, between, among others, Tiversa and LabMD. The Parties have consented to seeking a similar Protective Order in that case to allow for use of the Affidavit therein.

Mark R. Hornak
United States District Judge

cc: All counsel of record

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 MEMORIALIZING BENCH RULINGS ON PENDING MOTIONS

On April 7, 2015, Federal Trade Commission ("FTC") Complaint Counsel filed a Motion to Compel Production of Daugherty Affidavit ("Motion to Compel"). Respondent opposed the Motion to Compel, asserting, among other grounds, that the Daugherty Affidavit was protected by the work product doctrine. By Order dated April 21, 2015, Complaint Counsel's Motion to Compel was granted in part, to allow Complaint Counsel's alternative request that the Administrative Law Judge undertake an *in camera* review of the Daugherty Affidavit prior to determining the merits of the Motion to Compel ("April 21 Order"). The April 21 Order directed Respondent to produce the Daugherty Affidavit to the Administrative Law Judge only, for examination in connection with determining the merits of the parties' discovery dispute.

Subsequent to the April 21 Order, the House Oversight and Government Reform Committee ("OGR") asserted that it regarded the Daugherty 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 . . . ." ("OGR Letter"). On April 23, 2015, Respondent filed a Motion to Reconsider the April 21 Order on the basis of the OGR Letter.

On April 30, 2015, Complaint Counsel filed an Unopposed Motion for *In Camera* Treatment of the Daugherty Affidavit, stating that OGR had agreed not to assert the privilege in these proceedings, provided that the Daugherty Affidavit was given *in camera* status, and further asserting that, as a result of OGR's position, Respondent's Motion to Reconsider the April 21 Order had been rendered moot.

During trial in this matter, on May 5, 2015, Complaint Counsel's Motion to Compel Production of the Daugherty Affidavit and the Unopposed Motion for *In Camera* Treatment of the Daugherty Affidavit were both GRANTED (*see* Trial transcript, May 5, 2015, pp. 1316-1318, 1396-1397). Further, on May 14, 2015, Respondent filed a Notice of Withdrawal of its Motion to Reconsider.

Indefinite *in camera* treatment is granted in those unusual cases where the sensitivity of the information will not diminish with the passage of time, including information that is privileged. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 157, at *6-7 (Nov. 22, 2000); *In re Textron, Inc.*, 1991 FTC LEXIS 135 (April 26, 1991). It is hereby ORDERED that the Daugherty Affidavit, which has been produced to Complaint Counsel, shall receive indefinite *in camera* treatment, under the conditions explained on the record.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: May 15, 2015

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

TIVERSA HOLDING CORP. and ROBERT J. BOBACK,	)	CIVIL DIVISION
	)	No. GD-14-016497
Plaintiffs,	)	
v.	)	
LABMD, INC.; MICHAEL J. DAUGHERTY; and RICHARD EDWARD WALLACE,	)	
Defendants.	)	

ORDER

AND NOW, this ___ day of _____ 2015, upon consideration of the Preliminary Objections of Defendant Richard Edward Wallace ("Wallace") to the Second Amended Complaint ("Complaint") filed by Plaintiffs and the Response of Plaintiffs thereto, if any, it is hereby:

ORDERED that the Preliminary Objections are **SUSTAINED**; that paragraphs 57 and 58 of the Complaint are stricken; and that Counts VII and VIII against Wallace are **DISMISSED, IN THEIR ENTIRETY, WITH PREJUDICE.**

IT IS SO ORDERED.

BY THE COURT,

_____