

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

In the Matter of	)	
	)	
LabMD, Inc.,	)	DOCKET NO. 9357
a corporation,	)	
Respondent.	)	

ORDER ON RESPONDENT’S MOTIONS TO ADMIT  
PROFFERED EXHIBITS RX 542-RX 548

I.

Currently pending are two motions filed by Respondent LabMD, Inc. (“Respondent” or “LabMD”) to admit certain proffered exhibits into the trial record, identified as RX 542 through RX 548.<sup>1</sup> Federal Trade Commission (“FTC”) Complaint Counsel filed oppositions to the motions. As more fully explained below, RX 542 and RX 543 are admitted only for certain limited purposes. As to RX 544-RX 548, Respondent has failed to provide a proper evidentiary foundation for admission of these documents, including for the limited purpose of impeachment. However, Respondent is not precluded from providing proper evidentiary foundations for admission of RX 544-RX 548 when the trial in this matter reconvenes. Accordingly, Respondent’s motions are GRANTED IN PART AND DENIED IN PART WITHOUT PREJUDICE.<sup>2</sup>

II.

The proffered exhibits are summarized as follows:

<sup>1</sup> The evidentiary hearing in this matter has been in recess to allow completion of immunity proceedings for Respondent’s proffered witness, Mr. Richard Wallace. See Order Requiring Testimony Under Grant of Immunity, October 9, 2014; Order Granting Respondent’s Renewed Motion for Order Requiring Testimony Under Grant of Immunity, December 29, 2014.

<sup>2</sup> The proffered exhibits have been reviewed for potential *in camera* issues. See FTC Rule 3.45. Based on that review, there is no sufficient basis for concluding that public disclosure of the Congressional letters comprising RX 542 and RX 543 (the “OGR letters”), which are admitted into evidence for only limited purposes and only excerpts of which are disclosed herein, “will likely result in a clearly defined, serious injury . . . .” 16 C.F.R. § 3.45(b). Indeed, there is no indication that the OGR letters are anything other than public documents. Furthermore, it is noted that no motions have been filed seeking *in camera* treatment for any of the proffered exhibits. Although this Order makes no finding as to potential *in camera* treatment for RX 544-RX 548, which are not admitted into evidence, to alleviate any concerns in that regard, only brief summaries of these documents are disclosed herein.

1. RX 542

RX 542 is a three-page letter dated June 11, 2014 from Rep. Darrel Issa, the Chairman of the House Oversight and Government Reform Committee (the “OGR” or the “Committee”), to the Chairwoman of the Federal Trade Commission, Edith Ramirez (“RX 542” or the “June 11, 2014 letter”). The House Oversight and Government Reform Committee is a congressional committee charged with Federal Trade Commission oversight. The June 11, 2014 letter notes that the OGR is investigating the activities of Tiversa Holding Company (“Tiversa”), a non-party witness upon which Complaint Counsel relies in this case, and expresses concern that testimony from Tiversa’s chief executive officer, Mr. Robert Boback, in the instant case may not have been truthful. RX 542 also includes excerpted statements reportedly made to the Committee by Mr. Boback.

2. RX 543

RX 543 is an eight-page letter dated December 1, 2014 from Rep. Issa of the OGR to Chairwoman Ramirez of the FTC (“RX 543” or the “December 1, 2014 letter”). The December 1, 2014 letter reiterates that the OGR is investigating Tiversa, attaches internal Tiversa documents reportedly produced by Tiversa to the OGR for its investigation (RX 544-RX 548, addressed below), and, based on those documents, expresses concern that Tiversa withheld or otherwise did not provide full information to the FTC in response to subpoenas in the instant case.

3. RX 544

RX 544 purports to be a “Tiversa Investigation Request Form,” regarding an unidentified incident on April 18, 2008, identified as CIG00081.

4. RX 545

RX 545 is a two-page document titled “Tiversa Incident Record Form” for incident number CIG00081, referring to a file disclosure incident and referencing LabMD.

5. RX 546

RX 546 purports to be a “Tiversa Forensic Investigation Report,” dated August 12, 2008, for incident number CIG00081, comprising 4 pages, which references LabMD and the file disclosure incident referred to in RX 544 and RX 545.

6. RX 547

RX 547 appears to be a two-page email from Robert Boback to others at Tiversa, dated September 5, 2013, providing an update on litigation involving Tiversa and LabMD, and describing events concerning the discovery and/or disclosure of a 1718-page PDF file referencing LabMD (the “1718 file”).

7. RX 548

RX 548 is identified as a “Tiversa Forensic Investigation Report – LABMD0001.” The sixteen-page report notes that it was prepared for LabMD. The report, which is not dated, refers to various investigative findings regarding the disclosure and dissemination of the 1718 file.

**III.**

**A. RX 542 and RX 543 (the “OGR letters”)**

Respondent argues that the statements of Robert Boback, excerpted in the OGR letters of June 11 and December 1, 2014 (collectively, the “OGR letters”) are admissible to show that Mr. Boback’s deposition testimony regarding the origin and dissemination of the 1718 file, which is at the center of this case, has been inconsistent, and that Mr. Boback is therefore not credible. Respondent further argues that the OGR letters tend to support Respondent’s theory that the 1718 file was taken directly from a LabMD workstation, and not found on any P2P network, as alleged in this case. While not denying that the statements in the OGR letters are hearsay, Respondent argues that hearsay is not a sufficient basis for excluding the OGR letters.

Complaint Counsel responds that the OGR letters contain hearsay statements of the Chairman of the Committee, and that the statements attributed to Mr. Boback in the letters are “hearsay within hearsay,” were not sworn, and represent mere excerpts. Accordingly, Complaint Counsel argues, the statements are insufficiently reliable to overcome the hearsay objection. Moreover, Complaint Counsel contends, the statements in the letters attributed to Mr. Boback are not inconsistent with Mr. Boback’s deposition testimony, and should therefore not be received to impugn Mr. Boback’s credibility. Complaint Counsel further notes that the OGR letters do not constitute the findings or conclusions of a Congressional investigation, for purposes of an exception to the hearsay rule, but are only the opinions and conclusions of the Committee’s Chairman.

It should be noted that there is no dispute as to the authenticity of the OGR letters and the receipt of the letters by the FTC. Nor is there any valid dispute that the Committee “is investigating the activities of Tiversa, Inc., a company upon which the Federal Trade Commission [is] rel[ying] as a source of information in its enforcement action against LabMD, Inc.” (June 11, 2014 letter at 1); that the Committee is concerned about the truthfulness of the information provided to the FTC; or that Tiversa apparently did not fully provide requested documents subpoenaed in this matter, demonstrated by certain Tiversa documents produced by Tiversa to the OGR and attached to the December 1, 2014 letter (RX 544-RX 548). There is no reason to question the veracity of the OGR letters’ statements in this regard. Accordingly, official notice or judicial notice will be taken of these facts, and only these facts, pursuant to FTC Rule 3.43(f).

In addition, the statements purportedly made by Mr. Boback to the Committee, as excerpted in the OGR letters, will not be considered for the truth of the matters asserted therein,

and therefore are not, by definition, hearsay. Accordingly, the OGR letters are not excluded on hearsay grounds. Further, to be clear, any preliminary conclusions of the OGR stated in the letters, based on statements by Mr. Boback to the Committee, will not be considered for the truth of the matters asserted, and therefore are not, by definition, hearsay. Finally, Respondent has failed to provide a proper evidentiary foundation for admitting Mr. Boback's statements to the Committee, as reported in the OGR letters, as inconsistent statements of Mr. Boback bearing on his credibility.

Accordingly, with the limitations and conditions described above, RX 542 and 543 are ADMITTED.

**B. RX 544-RX 548 (Tiversa documents produced to the OGR)**

Respondent states that RX 544-RX 548 were within the scope of prior discovery requests to Tiversa in this case, but that Tiversa did not produce the documents. Respondent argues that RX 544-RX 548 are relevant and probative of issues related to LabMD and the 1718 file and are not duplicative of prior testimony or evidence already admitted. Respondent further argues that admission of these unproduced documents would not cause hardship to Complaint Counsel or delay the proceedings because the trial in this matter is ongoing and the record remains open. Moreover, Respondent asserts, LabMD would be significantly prejudiced were the proffered exhibits to be excluded. Respondent urges that RX 544-RX 546 be admitted for all purposes, but that RX 547 and RX 548 be admitted only as inconsistent statements of Mr. Boback, for the purpose of impeachment and for no other purpose.

Complaint Counsel responds that the documents are being offered for the truth of the matters asserted therein, and therefore RX 544-RX 546 constitute inadmissible hearsay, with no applicable hearsay exception and insufficient indicia of reliability. Complaint Counsel notes that the documents are not sworn and that Respondent has not laid any foundation for their admission, such as a records certification or witness testimony from Tiversa. Additionally, Complaint Counsel argues, there is no legal basis for limiting the purposes for which RX 547 and RX 548 may be used to impeachment only. Furthermore, according to Complaint Counsel, there is no foundation for admitting the documents as containing inconsistent statements of Mr. Boback because Mr. Boback has not been given an opportunity to explain, and/or deny the statements.

It cannot be determined on the present record whether or not RX 544-RX 548 should be admitted and, if so, for what purposes, because Respondent has failed to provide proper evidentiary foundations for the admission of these exhibits. Authenticity, reliability, and/or proper use for impeachment have not been demonstrated. Unless and until a proper evidentiary foundation is provided, the proffered exhibits will not be admitted. Accordingly, Respondent's Motion to admit RX 544-RX 548 as evidence in this matter is DENIED WITHOUT PREJUDICE.

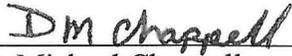
**IV.**

For all the foregoing reasons, and as set forth above:

Respondent's Motion to Admit RX 542 is GRANTED IN PART and is otherwise DENIED.

Respondent's Motion to Admit RX 543-RX 548 is GRANTED IN PART AND DENIED IN PART. As to RX 543, Respondent's Motion is GRANTED IN PART and is otherwise DENIED. As to RX 544-RX 548, Respondent's Motion is DENIED WITHOUT PREJUDICE.

ORDERED:

  
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D. Michael Chappell  
Chief Administrative Law Judge

Date: February 12, 2015