

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



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

RESPONDENT LABMD, INC.’S MOTION TO ADMIT RX 645 IN CAMERA

Pursuant to Additional Provision 16 to this Court’s Scheduling Order, and Commission Rule 3.43 (16 C.F.R. § 3.43), and with the consent of Complaint Counsel, Respondent LabMD, Inc. (“LabMD”) hereby moves to admit RX 645 with permanent *in camera* treatment. Proffered exhibit RX 645 consists of documents first provided to LabMD on or about May 4, 2015 in a supplemental production from Richard Wallace and is attached hereto as Exhibit A.

The proffered evidence is probative of and relevant to the testimony provided by Mr. Wallace on May 5, 2015, pertaining to the additional eighteen files he downloaded from a LabMD workstation at or about the same time he downloaded the 1718 File. Mr. Wallace has properly laid the foundation for these documents during his live testimony and they should be admitted into evidence in this proceeding. In accordance with this Court’s Revised Scheduling Order and due to the sensitive nature of some of the documents, Respondent seeks permanent *in camera* treatment for the exhibit. Complaint Counsel consented to this Motion to Admit RX 645 and consented to its permanent *in camera* treatment.

I. EVIDENCE FOR ADMISSION.

LabMD moves for admission of RX 645, which consists of eighteen files produced to Complaint Counsel and Respondent on May 4, 2015, by Richard Wallace, about which Mr. Wallace testified during his live testimony before the Court on May 5, 2015. The file includes

probative evidence, including [REDACTED]

[REDACTED] In all, RX

645 includes the following eighteen documents:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

II. STANDARD OF REVIEW.

Relevant, material, and reliable evidence shall be admitted. Commission Rule 3.43. Hearsay that is “relevant, material, and bears satisfactory indicia of reliability so that its use is fair” also should be admitted. Commission Rule 3.43(b); *see also In re Polyvore Int’l, Inc.*, No. 9327, 2010 FTC LEXIS 62, at *6-7 (July 10, 2010) (noting that hearsay evidence may be received in FTC proceedings). However, a document that is not admitted for the truth of the matter asserted, by definition, is not hearsay. Fed. R. Evid. 801.

Here, Mr. Wallace testified extensively regarding the existence of eighteen files that he downloaded from a LabMD workstation located in Atlanta, Georgia, at or around the same time

he downloaded the 1718 File. These documents are relevant to this case, probative to the issue of how Tiversa confirmed the owner of the 1718 File, and Respondent has laid the foundation for their admission. Additionally, Complaint Counsel consented to the admission of RX 645 in the instant proceedings and does not oppose the instant Motion to Admit RX 645 with *in camera* treatment.

III. THE PROFFERED EVIDENCE SHOULD BE ADMITTED UNDER RULE 3.43.

This Court should admit RX 645 into evidence in accordance with Commission Rule 3.43. During his testimony, Richard Wallace, a former Forensic Analyst at Tiversa, testified extensively to the fact that he downloaded a total of nineteen files from a LabMD workstation in Atlanta, Georgia. Specifically, he testified that he downloaded the 1718 File and then “browsed the host” to ascertain LabMD’s identity as the owner of that file. *See* Trial Tr., vol. 9, at 1404:16-1405:10 (Testimony of Richard Wallace). At that time, Mr. Wallace downloaded eighteen additional documents. *See id.* at 1406:24-25 (“[t]he insurance aging file would be in the 19-file total, 18 additional”); 1406:2-5 (testifying that nineteen total LabMD files are in the Tiversa data store and that one related to CIGNA).

Mr. Wallace described the documents, stating that several of them “had the red and white LabMD logo on the top of them.” *See id.* at 1457:1-4. He also stated that “there was a Word document that had what an employee for LabMD would use to log in to different Web portals for insurance carriers to I believe submit information for payment.” *See id.* at 1457:5-8.

Thus, Respondent has laid a proper foundation for the admission of RX 645, which includes the eighteen additional files downloaded by Tiversa at or around the time Tiversa downloaded the 1718 File.

Additionally, the documents that comprise RX 645 are reliable. RX 645 is composed of documents produced to both Complaint Counsel and Respondent on May 4, 2015 from counsel for Richard Wallace. There is no reason to doubt their authenticity as copies of records obtained by Richard Wallace (and, in fact, Complaint Counsel has raised no such issue).

There is little doubt that the documents are relevant to this case. Specifically, the proffered exhibit is probative to the issue of Tiversa's downloading the 1718 File, which is at the heart of this case.

Finally, the admission of RX 645 will not delay or hinder the instant proceeding, but serves only to establish a clear administrative record.

IV. RX 645 SHOULD BE PROVIDED *IN CAMERA* PROTECTION.

Many of the documents contained in the forty-seven page exhibit proffered as RX 645 contain confidential sensitive personal information under Commission Rule 3.45, 16 C.F.R. §3.45. *See* Ex. A. Thus, and pursuant to this Court's Revised Scheduling Order, LabMD moves that RX 645 be granted permanent *in camera* status. Complaint Counsel consented to the motion to provide RX 645 permanent *in camera* treatment.

Under Rule 3.45(b), the Administrative Law Judge may order that material be placed *in camera* if the material constitutes sensitive personal information. Commission Rule 3.45(b).

Sensitive personal information shall include, but shall not be limited to:

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. Additionally, this Court must order that material be placed *in camera* upon any finding that “its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment.” *Id.*

Here, the documents contain sensitive personal information (“SPI”) about former LabMD employees, former patients utilizing LabMD’s services, and former LabMD clients that could harm a member of the public should they to be admitted publicly. Specifically, some of the pages constitute [REDACTED]

[REDACTED]

[REDACTED] Additional detail is provided below:

[REDACTED]

The above-described pages with RX 645 contain SPI under Commission Rule 3.45 and this Court should, therefore, provide permanent *in camera* treatment of RX 645.

V. CONCLUSION.

For the reasons set forth above, LabMD's Motion to Admit RX 645 *in Camera* should be granted.

Dated: June 8, 2015.

Respectfully submitted,

/s/ Prashant K. Khetan

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Counsel for Respondent, LabMD, Inc.

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

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

DOCKET NO. 9357

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.’S
MOTION TO ADMIT RX-645 IN CAMERA**

Upon consideration of Respondent’s Motion to Admit RX-645 *in Camera*, and in consideration of the entire Record in this case,

IT IS HEREBY ORDERED that Respondent’s Motion to Admit RX-645 *in Camera* be and is hereby GRANTED; and

Exhibit RX-645 shall be admitted into evidence as a confidential document provided permanent *in camera* treatment.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

EXHIBIT A

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

In the Matter of)

DOCKET NO. 9357

LabMD, Inc.,)
a corporation.)
_____)

STATEMENT REGARDING MEET AND CONFER

LabMD, Inc. respectfully submits this Statement, pursuant to Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Admit RX 645 *in Camera*, counsel for LabMD conferred with Complaint Counsel regarding the subject of these motions.

Complaint Counsel advised that it did not oppose the instant Motions and that it would consent to the admission of RX-645 as a confidential document subject to *in camera* treatment.

Dated: June 8, 2015.

Respectfully submitted,

/s/ Prashant K. Khetan

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Counsel for Respondent, LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2015, I caused to be filed the foregoing document and an electronic copy with the Office of the Secretary:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and caused to be hand-delivered a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
Jarad Brown, Esq.
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Room CC-8232
Washington, D.C. 20580

Dated: June 8, 2015.

By: /s/ Erica L. Marshall

CERTIFICATE OF 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.

Dated: June 8, 2015.

By: /s/ Erica L. Marshall

Notice of Electronic Service

I hereby certify that on June 08, 2015, I filed an electronic copy of the foregoing (PUBLIC) Motion to Admit RX 645 In Camera , with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
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Washington, DC, 20580

I hereby certify that on June 08, 2015, I served via E-Service an electronic copy of the foregoing (PUBLIC) Motion to Admit RX 645 In Camera , upon:

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