

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 OPPOSITION TO
RESPONDENT’S MOTION TO ADMIT RX646, RX650, RX652, AND RX657**

The Court should deny admission to RX646 and RX657 because LabMD, Inc. (“LabMD”) does not have good cause to offer exhibits not identified on its pre-hearing exhibit list, especially after it has rested its case. As described below, Complaint Counsel does not object to the admission of RX650 and RX652, or *in camera* treatment of any of the exhibits that are the subject of LabMD’s motion.

BACKGROUND

On May 5, 2015, the evidentiary hearing resumed with the testimony of Richard Wallace. At the conclusion of Mr. Wallace’s testimony, counsel for LabMD indicated that it would seek admission of eighteen documents produced by Mr. Wallace, Tr. 1460-62, which Mr. Wallace testified that Tiversa had downloaded from a LabMD computer. Tr. 1406-07. In order to evaluate whether it might seek leave to offer rebuttal evidence, Complaint Counsel clarified:

MS. VANDRUFF: And Your Honor, it would be easier for at least complaint counsel to assess the rebuttal to know that respondent has closed its evidence. I think the only outstanding issue are these 18 documents that Mr. Sherman has described.

JUDGE CHAPPELL: Well, I think you raise a good point. Does respondent rest? Other than these documents we’re talking about.

MR. SHERMAN: Yes, Your Honor.

JUDGE CHAPPELL: Okay.
MR. SHERMAN: Respondent rests.

Tr. 1462. The Court provided Complaint Counsel until May 12, 2015 to seek leave to offer rebuttal evidence. Tr. 1460-61, 1463. On May 12, 2015, Complaint Counsel filed a Notice Regarding Rebuttal, informing the Court that it would not seek leave to offer additional rebuttal evidence.¹

On June 1, 2015, the Court ordered that the evidentiary hearing reconvene on June 15, 2015. Order Reconvening Evidentiary Hearing (June 1, 2015). The Court also required that motions for *in camera* treatment of any exhibits that a party would seek to offer into evidence be filed by June 8, 2015. *Id.*

On June 5, 2015, counsel for LabMD met and conferred with Complaint Counsel regarding, *inter alia*, LabMD's anticipated motion to admit RX646, RX650, RX652, and RX657. LabMD provided neither copies of its proposed exhibits bearing RX numbers or, for RX646, RX650, and RX652, the Bates ranges appearing on the proposed exhibits. *Cf.* Scheduling Order, Additional Provisions ¶ 23 (Sept. 25, 2013) (requiring exhibits to bear the designation RX or CX and include page numbering). Instead, LabMD identified RX646, RX650, and RX652 only by the exhibit numbers assigned to the documents at various depositions. As a result, Complaint Counsel incorrectly identified certain documents discussed during the meet-and-confer.

On June 8, 2015, LabMD filed a motion to admit RX645 *in camera*, to which Complaint Counsel consented. Resp't. LabMD, Inc.'s Motion to Admit RX645 *In Camera* (June 8, 2015). RX645 is a composite exhibit, consisting of eighteen documents produced by Mr. Wallace, which LabMD indicated it would seek to admit before resting its case. *See id.*; Tr. 1460-62.

¹ Complaint Counsel offered the testimony of its rebuttal expert, Clay Shields, on May 23, 2014.

Also on June 8, 2015, LabMD filed the instant motion to admit RX646, RX650, RX652, and RX657 *in camera* (“Motion”).

ARGUMENT

I. COMPLAINT COUNSEL DOES NOT OPPOSE ADMISSION OF LABMD’S PROPOSED EXHIBITS ALREADY IN EVIDENCE

Complaint Counsel does not oppose the admission of RX650 and RX652 because these exhibits have already been admitted into evidence as part of the larger document previously admitted by the parties’ consent as RX403.² Although their admission would be duplicative,³ Complaint Counsel does not object on that ground.

II. LABMD SHOULD BE FORECLOSED FROM OFFERING ADDITIONAL EVIDENCE BECAUSE IT RESTED ITS CASE AND DOES NOT HAVE GOOD CAUSE

The Court should deny the admission of LabMD’s proposed exhibits RX646 and RX657 because LabMD failed to present the documents before it rested its case, and because LabMD does not have good cause for the admission of additional exhibits that do not appear on LabMD’s pre-hearing exhibit list.

On May 5, 2015, LabMD represented to the Court that it rested its case with the exception of seeking the admission of eighteen documents produced by Mr. Wallace. Tr. 1462.

² RX403 was admitted by stipulation as part of JX0002. At the time of the June 5, 2015 meet-and-confer, Complaint Counsel was unable to determine that RX650 and RX652 were already in evidence, which contributed to Complaint Counsel being unable to consent to Respondent’s Motion to Admit.

³ In addition, and contrary to LabMD’s assertion, RX650 and RX652 are not materially different. They are the same document, except that RX652 includes an additional page—the last page of an email Bates numbered Eric Johnson - 23—that counsel for LabMD mistakenly attached to the document when using it at Mr. Johnson’s deposition. The entire document as produced by Mr. Johnson during discovery, including the pages covered by RX650 and RX652, has been admitted as RX403, Bates numbered Eric Johnson - 1 through Eric Johnson - 34.

Complaint Counsel relied upon LabMD's representation in this regard in assessing whether to seek leave to offer further rebuttal. Tr. 1462. LabMD moved to admit the eighteen documents that it represented constituted the remainder of its case, and Complaint Counsel did not oppose. Resp't. LabMD, Inc.'s Motion to Admit RX645 *In Camera* (June 8, 2015). LabMD now seeks to reopen its proofs by offering RX646 and RX657, denying Complaint Counsel the opportunity to seek leave to rebut the additional exhibits. Since Complaint Counsel did not offer additional rebuttal, LabMD may not offer RX646 and RX657 as surrebuttal, nor has it sought leave to do so. The Court should deny LabMD's attempt to circumvent the rules of the proceeding.

In addition to the improper procedural posture, LabMD has not presented, and does not have, good cause to offer documents it did not include on its exhibit list prior to the evidentiary hearing. The Scheduling Order provides that exhibits not identified by a party's final exhibit list may only be added "by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause." Scheduling Order, Additional Provisions ¶ 16 (Sept. 25, 2013). LabMD has made no effort to demonstrate good cause why RX646 and RX657 were not included on its final exhibit list, which was due on April 9, 2014. Nor can it. LabMD cannot have good cause for failing to include two documents that it has possessed since 2004 (RX657) and January 2013 (RX646). Moreover, RX646, an email relating to LabMD documents recovered by the Sacramento Police, and RX657, a LabMD sales representative agreement, have not become any more relevant to LabMD's defenses in the past fourteen months than they were before.

The Court should therefore deny admission of RX646 and RX657 because LabMD rested its case, and has not presented and does not have good cause to offer exhibits it failed to include on its exhibit list prior to the evidentiary hearing.

III. COMPLAINT COUNSEL DOES NOT OPPOSE *IN CAMERA* TREATMENT FOR THE PROFFERED EXHIBITS

Complaint Counsel does not oppose *in camera* treatment for the exhibits that are the subject of the Motion, if the Court admits them into evidence. However, LabMD makes a number of incorrect statements in describing the exhibits:

- First, regarding RX646, no portion of the deposition of Ruth Yodaiken was taken *in camera*; rather, Complaint Counsel invoked the protective order at the deposition. *See* Motion at 1; RX516 at 14. But Complaint Counsel did not seek *in camera* protection for any part of the transcript of Ms. Yodaiken's deposition, and the transcript was admitted into evidence by JX0002 without *in camera* treatment.
- Likewise, regarding RX657, the deposition of Lawrence Hudson was not taken *in camera* but under LabMD's invocation of the protective order. *See id.*; CX0718/RX500 at 7. But LabMD chose not to seek *in camera* protection for Ms. Hudson's deposition transcript, which was also admitted into evidence by JX0002 without *in camera* treatment. *See id.*
- Mr. Johnson designated as confidential, not *in camera*, documents he produced to LabMD, including the document offered as RX650 and RX652. *See id.* at 1, Exs. A, B. On April 11, 2014, in accordance with the revised scheduling order, LabMD notified counsel for Mr. Johnson by letter of its intention to offer into evidence documents produced by Mr. Johnson, to give Mr. Johnson an opportunity to seek *in camera* protection. Mr. Johnson did not do so, and the document was admitted as part of RX403 by JX0002 without *in camera* treatment.
- The exhibits do not appear to contain any Sensitive Personal Information listed in Rule 3.45(b). *See id.* at 3-4, Exs. A-D. And RX652 includes the public email address of a

Federal Trade Commission employee, not a private email address. *See id.* at 4, Ex. C at 1.

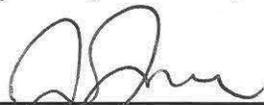
- RX646 does not contain details of the insurance aging file. *See id.* at 4. It describes the information contained in the LabMD documents recovered by the Sacramento, California Police Department, but does not disclose any personal information.

CONCLUSION

The Court should deny admission to RX646 and RX657 because LabMD does not have good cause to offer them after it rested its case.

Dated: June 11, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 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
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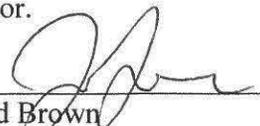
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CERTIFICATE FOR ELECTRONIC FILING

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.

June 11, 2015

By: _____



Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection