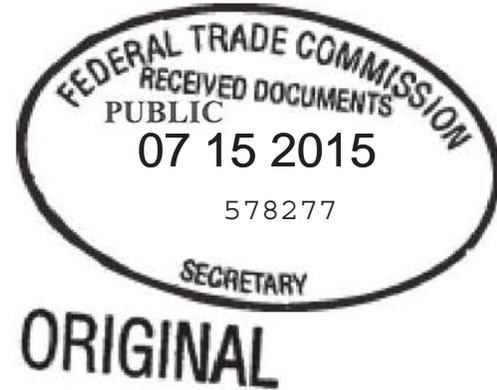


UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

DOCKET NO. 9357

ORDER ON RESPONDENT'S MOTION TO ADMIT EXHIBITS

I.

On June 12, 2015, Respondent LabMD, Inc. ("Respondent" or "LabMD") filed a Motion to Admit Select Exhibits ("Motion"). Federal Trade Commission ("FTC") Complaint Counsel filed an opposition on June 24, 2015 ("Opposition"). For the reasons that follow, Respondent's Motion is GRANTED as to proposed RX 644, subject to certain qualifications and limitations described herein, and the Motion is otherwise DENIED.

II.

Respondent presented its final witness, Mr. Richard Wallace, on May 5, 2015. At the conclusion of that testimony, Respondent rested its case, subject only to anticipated introduction of certain documents that had been produced by Mr. Wallace pursuant to a subpoena *duces tecum* (the "Wallace documents"). (Tr. 1460-1462). Thereafter, Complaint Counsel advised that it would not be seeking to introduce any rebuttal evidence. *See* Complaint Counsel's Notice Regarding Rebuttal, filed May 12, 2015.

On June 8, 2015, in accordance with the deadline set by the Order of June 1, 2015, Respondent filed a motion to admit RX 645, consisting of the Wallace documents, to which Complaint Counsel consented. Respondent also filed a motion to admit four additional proposed exhibits, designated as RXs 646, 650, 652, and 657. Complaint Counsel responded that it did not object to RX 650 and RX 652 because they were already in evidence under a separate exhibit number. Complaint Counsel objected to admission of RX 646 and RX 657 because Respondent had rested its case, subject only to the admission of the Wallace documents, and that Complaint Counsel relied on this fact in declining to request rebuttal. Complaint Counsel also argued that Respondent had possession of these additional exhibits well before resting its case and therefore failed to demonstrate good cause for their late admission. Based on the foregoing, RX 646 and

RX 657 were not admitted, but RX 650 and RX 652 were allowed. (Tr. 1475-1476; *see also* Order Memorializing Bench Rulings, June 22, 2015).

On June 12, 2015, after the deadline set by Order issued on June 1, 2015 and just prior to the date set for completion of the evidentiary hearing, *see* Order Reconvening Hearing, June 1, 2015, Respondent filed the instant Motion. The Motion requests admission of 59 separate exhibits, consisting of several hundred pages of documents (“Proposed Exhibits”).

III.

Forty-nine of the 59 Proposed Exhibits consist of documents that Respondent obtained from the FTC under the Freedom of Information Act, 5 U.S.C. § 552 (the “FOIA documents”). The remaining Proposed Exhibits consist of deposition exhibits from the instant case; documents generated in federal court litigation brought by LabMD against the FTC; and letters and a staff report issued by the House Oversight and Governmental Affairs Committee (“OGR”).¹

The arguments of the parties with respect to each Proposed Exhibit are addressed in detail in the parties’ briefs on the Motion. In summary, Respondent argues that the Proposed Exhibits are each relevant, material, and reliable. Further, Respondent argues that “some” of the FOIA documents were not received until “May” and that the Proposed Exhibits should be admitted, notwithstanding the lateness of the proffer, as necessary to “properly effectuat[e] the ‘ascertainment of the truth.’” Motion at 3 (citation omitted). Complaint Counsel argues that there is no valid excuse for Respondent’s failure to seek admission of the Proposed Exhibits prior to resting its case. Among other things, Complaint Counsel states that the FOIA documents were provided to Respondent, on a rolling basis, on September 11, 2014, February 19, 2015, and April 28, 2015; and that of the remaining Proposed Exhibits, only RX 644, a staff report issued by OGR (“OGR staff report”), was transmitted to Respondent after Respondent rested its case.

IV.

Except for the OGR staff report designated as RX 644, Respondent has not provided any valid reason, much less good cause, for failing to offer the Proposed Exhibits prior to resting its case. Moreover, Respondent has not demonstrated that these Proposed Exhibits are so relevant, material, and reliable, that Respondent’s delay should be excused in the interest of ascertaining the truth in this case, as argued by Respondent.

Indeed, other than RX 644, the record demonstrates that Respondent had possession of each Proposed Exhibit prior to resting its case, including some documents apparently obtained as far back as 2013 and/or 2014. Moreover, Respondent relied on many of the FOIA documents to support other motions filed by Respondent in April 2015.² Accordingly, Respondent’s Motion to Admit is DENIED as to all Proposed Exhibits except RX 644.

¹ The specific Proposed Exhibits are attached to Respondent’s Motion and are summarized herein.

² *See* exhibits attached to Respondent’s Motion to Dismiss, filed April 24, 2015, and Respondent’s Motion to Disqualify Commissioner Edith Ramirez, filed April 27, 2015.

The record shows that RX 644, the OGR staff report, was provided to Respondent on or about May 18, 2015, after Respondent rested its case. Respondent does not seek admission of RX 644 for the truth of the matters asserted therein, and for this reason, the document does not constitute hearsay. In addition, similar communications issued by OGR have previously been admitted into evidence in this proceeding, subject to certain limitations and qualifications. *See* Order issued February 12, 2015, admitting RX 542 and RX 543. For these reasons, RX 644 will be admitted, subject to the limitations and qualifications set forth below.

V.

Having fully reviewed and considered Respondent's Motion, Complaint Counsel's Opposition, and the relevant record in this case, Respondent's Motion to Admit RX 644 is GRANTED, and RX 644 is hereby admitted subject to the following limitations and qualifications as to its evidentiary use: (1) official notice is taken of the fact that the OGR investigated the activities of non-party witness Tiversa, Inc. ("Tiversa") and of the conclusions of the OGR staff as to the truthfulness and completeness of the information provided to the FTC by Tiversa and its president, Robert Boback; (2) statements purportedly made by Mr. Boback to the OGR, to the extent referred to in RX 644, will not be considered for the truth of the matters asserted therein; and (3) documents provided to OGR, to the extent referred to in RX 644 and not previously admitted into evidence in this case, will not be considered for the truth of the matters asserted therein.

Except for the limited admission of RX 644, described above, Respondent's Motion to Admit Select Exhibits is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 15, 2015

Notice of Electronic Service

I hereby certify that on July 15, 2015, I filed an electronic copy of the foregoing Order on Respondent's Motion to Admit Exhibits, with:

D. Michael Chappell
Chief Administrative Law Judge
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Washington, DC, 20580

Donald Clark
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I hereby certify that on July 15, 2015, I served via E-Service an electronic copy of the foregoing Order on Respondent's Motion to Admit Exhibits, upon:

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