

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 REQUESTING OFFICIAL NOTICE OF PROFFERED EXHIBIT 660**

Ignoring this Court’s orders, Respondent again seeks the untimely introduction of additional evidence, now under the guise of official notice. But like its other recent attempts to admit evidence, Respondent, LabMD, Inc. (“LabMD”), has failed to provide any justification for not offering its proposed exhibit before resting its case, and has failed to demonstrate the relevance of the proposed exhibit to any claim or defense in this proceeding. In addition, LabMD has failed to articulate any fact that RX660 establishes of which the Court should take official notice. For these reasons, LabMD’s Motion Requesting Official Notice of Proffered Exhibit 660 (“Motion”) should be denied.

BACKGROUND

On June 15, 2015, the Court denied LabMD’s motion to admit RX646 and RX657—two exhibits that it possessed before the evidentiary hearing began. The Court found Complaint Counsel’s arguments to be “persuasive” that LabMD had not, and could not, demonstrate good cause to admit exhibits it possessed before resting its case. Tr. 1475-76.

By order of July 15, 2015, the Court denied admission to fifty-eight of fifty-nine additional proposed exhibits LabMD sought to admit by motion of June 12, 2015,¹ on the basis that LabMD possessed the exhibits prior to resting its case and had “not provided any valid reason, much less good cause, for failing to offer the Proposed Exhibits prior to resting its case.” Order on Resp’t’s Mot. to Admit Exs. at 2 (July 15, 2015) (“July 15 Order”). The Court admitted the remaining exhibit, RX644, for limited purposes because the exhibit was not provided to LabMD until after it rested its case. *Id.* at 3.

During the evidentiary hearing on July 15, 2015, the Court stated that “[a]s of today, the evidentiary hearing is complete, allowing for the supplementation of the record with the redacted exhibits allowed by July 17.” Tr. 1493. The Court addressed all outstanding motions before it, and at the conclusion of the hearing, counsel for LabMD stated that it had “[n]othing further” to present to the Court. Tr. 1503. LabMD did not inform the Court that it would seek official notice of an additional document. *See* Tr. 1490-1503.

ARGUMENT

I. LABMD SHOULD BE FORECLOSED FROM OFFERING PROPOSED RX660 BECAUSE IT RESTED ITS CASE AND DOES NOT HAVE GOOD CAUSE

The Court should not take official notice of LabMD’s proposed exhibit RX660 because LabMD failed to offer it before it rested its case, and has provided no reason for failing to seek official notice earlier. 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 not argued that its request for official

¹ LabMD’s proposed exhibit RX660, the subject of the instant motion, was not part of the fifty-nine exhibits that LabMD sought to admit in its June 12, 2015 motion.

notice falls outside the good cause requirement. And LabMD has made no effort to demonstrate good cause why RX660 was not included on its final exhibit list before the commencement of the evidentiary hearing. Nor can it. The version of the Commission's Operating Manual LabMD has offered has been available on the FTC's "FOIA Reading Rooms" page since September 2013.² Indeed, LabMD has stated no reason for not introducing proposed RX660 prior to resting its case. The Court should therefore not take official notice of RX660. *See* July 15 Order at 2; *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996) (Court should consider, among other factors, "the reason for the moving party's failure to introduce the evidence earlier" when evaluating whether to admit evidence after a party has rested).

II. LABMD FAILS TO ARTICULATE RELEVANCE OF RX660

In addition, LabMD has failed to articulate the relevance of proposed RX660 to any claim, defense, or material fact in this proceeding.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401.³ The proponent of the evidence bears the burden of showing its relevance. *Dowling v. United States*, 493 U.S. 342, 351 n.3 (1990); 22 Fed. Prac. & Proc. Evid. § 5166 (2d ed.); *United States v. Kelly*, 556 F.2d 257, 265 (5th Cir. 1977).

Besides conclusory assertions that proposed RX660 is "material to LabMD's defense in this matter" and "relevant and material," the only offer of relevance or materiality LabMD makes

² FTC's FOIA Reading Rooms are available at <https://www.ftc.gov/about-ftc/foia/foia-reading-rooms>. The Operating Manual is available under the link on that page entitled "FTC Administrative Staff Manuals."

³ *In re Herbert R. Gibson, Sr.*, 1978 FTC LEXIS 375, at *2 n.1 (May 3, 1978) ("The Federal Rules of Evidence while not controlling in FTC proceedings frequently provide a useful guide . . .").

is as follows: “Relevance: FTC’s internal guidelines regarding confidentiality and access of documents.” Motion at 1-2. It strains the imagination what “fact [] of consequence in determining the action” this could make “more or less probable.” Fed. R. Evid. 401. The burden was LabMD’s to show relevance and materiality, and LabMD has failed. For this reason also, the Court should not take official notice of proposed RX660.

III. LABMD FAILS TO STATE ANY FACT OF WHICH THE COURT SHOULD TAKE OFFICIAL NOTICE

Finally, LabMD has failed to specify a fact that proposed RX660 establishes of which the Court should take official notice. “‘Official notice’ may be taken of any *material fact* that is not subject to reasonable dispute” Rule 3.43(f), 16 C.F.R. § 3.43(f) (emphasis added). LabMD has not specified any such fact, offering instead a sixty-six-page document—one chapter of the Commission’s Operating Manual. The Court and Complaint Counsel are therefore left to guess what fact LabMD regards to be material, and of what the Court would be taking official notice. Because LabMD has failed to specify a material fact, the Court should deny LabMD’s request for official notice of proposed RX660.

CONCLUSION

As discussed above, the Court should not take official notice of proposed RX660 because LabMD does not have good cause to offer it after it rested its case, LabMD has failed to articulate the relevance of proposed RX660, and LabMD has failed to state any fact that proposed RX660 establishes of which the Court should take official notice.

Dated: July 29, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 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
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:

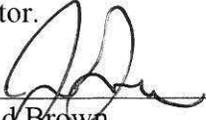
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CERTIFICATE FOR ELECTRONIC FILING

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.

July 29, 2015

By: 
Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection