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

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

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION TO ADMIT RX-543 – RX-548

Respondent's Motion represents yet another attempt to impugn Complaint Counsel's motives[1] and divert the Court's attention from the main issue in this case: the overwhelming evidence that Respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to consumers' sensitive personal information. Ultimately, Respondent fails to justify the admission of the documents it seeks to admit. RX-543 – RX-546 are inadmissible hearsay, failing to satisfy any exception to the rule against hearsay, and bearing no other satisfactory indicia of reliability to support admission under the Commission's Rules. Additionally, there is no basis for the relief that Respondent seeks for RX-547 and RX-548: admission of the documents solely for impeachment. Further, Complaint Counsel has not sought permanent *in camera* treatment for RX-543 – RX-548 as Respondent's Motion inexplicably

[1] Respondent's Motion includes a number of unsupported and inflammatory assertions regarding Complaint Counsel's conduct and motives. *See, e.g.*, Resp't Motion at 5 (misrepresenting that the Commission encouraged Tiversa to create the Privacy Institute). This Opposition addresses only those allegations that are germane to the relief Respondent seeks. However, Complaint Counsel disputes the veracity of the remaining assertions.

represents. The documents regarding which Respondent seeks relief do nothing to mitigate the overwhelming evidence that Respondent violated Section 5.

BACKGROUND

On December 1, 2014, Complaint Counsel received a copy of a letter with 26 pages of exhibits from Representative Darrell Issa, outgoing Chairman of the U.S. House of Representatives Committee on Oversight and Government Reform ("Oversight Committee"), to Federal Trade Commission Chairwoman Edith Ramirez ("December 1st Letter"). The December 1st Letter relates to Tiversa, Inc. ("Tiversa"), and includes a number of exhibits that were ostensibly produced to the Oversight Committee by Tiversa. *See* Respondent LabMD, Inc.'s Motion to Admit RX-543 – RX-548 ("Resp't Motion"), Exs. 1-6. The exhibits bear the designation "Confidential – For Committee and Staff Use Only." *Id.*, Exs. 2-6. Through the Commission's Office of Congressional Affairs, Complaint Counsel requested, and received on December 2, 2014, permission to share the letter with the Court and counsel for Tiversa. *See id.*, Ex. 7. On December 2, 2014, Complaint Counsel emailed the letter to the Court, copying counsel for LabMD and Tiversa. *Id.* Complaint Counsel requested provisional *in camera* treatment for the letter and its exhibits to allow Tiversa an opportunity to evaluate whether to seek protection under Rule 3.45. *See id.*

On December 4, 2014, counsel for Respondent initiated a meet-and-confer by teleconference with Complaint Counsel regarding the admission of the December 1st Letter. Complaint Counsel informed counsel for Respondent on December 5, 2014 by email that it would not consent to admission of the December 1st Letter.

ARGUMENT

I. RX-543 – RX-546 ARE INADMISSIBLE HEARSAY

RX-543 – RX-546 constitute inadmissible hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered into evidence to prove the truth of the matter asserted." Rule 3.43(b); *see also* Fed. R. Evid. ("FRE") 801(c). Hearsay may only be admitted "if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." Rule 3.43(b).

Respondent fails to justify the admissibility of RX-543 – RX-546, all of which constitute out-of-court statements. Respondent offers RX-543 through RX-546 for the truth of the matter asserted, *see* Resp't Motion at 5-6, and as such the rule against hearsay applies. Respondent's proposed exhibits do not fall under the "Public Records" or any other exception to the rule against hearsay, and they do not bear satisfactory indicia of reliability to warrant admission under the Commission's Rules of Practice.

A. RX-543 Is Inadmissible Hearsay

1. RX-543 Does Not Fall Within a Hearsay Exception

Respondent seeks admission of the letter portion of the December 1st Letter as RX-543. Respondent asserts that RX-543 is admissible under multiple prongs of the hearsay exception for public records. RX-543, however, is not a public record to which FRE 803(8) applies, and no other hearsay exception applies to it. A Public Record is:

> A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

FRE 803(8).

None of the three prongs of FRE 803(8)(A) apply to RX-543. First, FRE 803(8)(A)(i) does not apply to RX-543 because it does not "set out" the Oversight Committee's activities. Even under a strained reading of the Rule as covering the Committee's "activities" investigating Tiversa, RX-543 does not set out such information; rather, the letter states the opinions of the Committee's outgoing Chairman. In addition, the letter was not issued by the Committee, by vote or otherwise.

Second, there is no indication in RX-543, and Respondent provides no authority for the proposition, that the Oversight Committee is "under a legal duty to report" the information contained in RX-543. *See* FRE 803(8)(A)(ii). On the contrary, RX-543 itself states that the Committee "'may' . . . investigate 'any matter.'" Resp't Motion, Ex. 1 at 8. Furthermore, outgoing Chairman Issa's opinions do not constitute "a matter observed" by the Oversight Committee.

Third, although the Oversight Committee is "legally authorized" to investigate, *see* FRE 803(A)(iii); Resp't Motion, Ex. 1 at 8, RX-543 is not a report of the Oversight Committee. *See* http://oversight.house.gov/report/. RX-543 does not contain Congress's or even the Committee's "factual findings." RX-543 was authored by the Chairman, and its opinions were not adopted by the Committee.

Most importantly, FRE 803(8) does not apply because RX-543 reflects opinions resulting from an out-of-court investigative process, the probity of which the Court cannot evaluate. *See* FRE 803(8)(B); *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1307 (5th Cir. 1991) (stating focus of trustworthiness inquiry is "whether report was compiled or prepared in a way that indicates that its conclusions can be relied upon"). The conclusions of RX-543 are based on an unknown body of documentary and testimonial evidence, not all of which is before the Court or

even known to the parties. In addition, Courts routinely decline to admit "official reports" of Congress—which RX-543 is not—under Rule 803(8) out of concern that "the possibility that partisan political considerations" may influence the "factual findings, conclusions, or opinions included in Congressional reports." *Barry v. Iron Workers Pension Plan*, 467 F. Supp. 2d 91, 98 (D.D.C. 2006) (listing cases).

2. RX-543 Is Not Admissible Under Commission Rules

RX-543 should not be admitted because it does not satisfy the Commission's standards for indicia of reliability. *See* Rule 3.43(b). The admissibility and probative value to be given to hearsay evidence should be determined by analyzing "the possible bias of an out-of-court declarant, the context in which the hearsay material was created, whether the statement was sworn to, and whether it is corroborated or contradicted by other forms of direct evidence." FTC Rules of Practice, 74 Fed. Reg. 1804-01, 1816 (Jan. 13, 2009).

First, RX-543 is not under oath. *See* 74 Fed. Reg. 1804-1, 1816 (whether statement "sworn to" relevant to hearsay admissibility). Second, RX-543's conclusions are opinions, not based on personal knowledge of the facts, but based on an assessment of documents and testimony, of which presumably only an incomplete subet is before the Court for evaluation of its conclusions. *See id.* ("context in which the hearsay material was created" relevant to hearsay admissibility); Scheduling Order (Sept. 25, 2013) at 7, Add'l Provs. 17 (personal knowledge required for witness testimony), 18 (non-expert witness shall not provide opinions beyond FRE 701). Finally, courts are wary of admitting of Congressional reports—and RX-543 is decidedly less formal—because of the possible partisan bias. *See Barry*, 467 F. Supp. 2d at 98; 74 Fed. Reg. 1804-1, 1816 (possible bias relevant to hearsay admissibility).

Finally, even were the statements of RX-543's author admissible—which they are not—RX-543 is replete with hearsay within hearsay, not falling within any hearsay exception and not

bearing indicia of reliability. *See United Tech. Corp. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009) ("[P]lacing otherwise inadmissible hearsay statement by third-parties into a government report does not make the statements admissible.") (quotation omitted). RX-543 quotes or paraphrases from the contents of several purported Tiversa documents that are exhibits to the December 1st Letter, *e.g.*, *id.*, Ex. 1 at 4, and uses the contents of those documents to support its conclusions. As discussed below, those documents are not subject to any exception to the rule against hearsay and do not bear indicia of reliability.

For these reasons, RX-543 lacks satisfactory indicia of reliability and should therefore not be admitted into evidence.

B. RX-544 – RX-546 Do Not Bear Satisfactory Indicia of Reliability

Respondent also seeks the admission of RX-544 – RX-546, documents ostensibly produced to the Oversight Committee by Tiversa and attached to RX-543. Respondent fails to provide satisfactory indicia of reliability for these documents. They are not public records, as Respondent suggests, having been created by Tiversa. *See* FRE 803(8). They do not fall under any other exception to the rule against hearsay. And the exhibits cannot piggy-back on the admissibility of RX-543, with which they were produced, because RX-543 does not itself satisfy any hearsay exception. RX-544 – RX-546 therefore do not bear satisfactory indicia of reliability: they do not satisfy a hearsay exception; they are not under oath; and no information is provided about the context of their creation. *See* 74 Fed. Reg. 1804-1, 1816.

It is possible, however, for Respondent to establish a proper foundation for RX-544 – RX-546, including by presenting the Court and Complaint Counsel with a certification of records

satisfying Rule 3.43(c).[2] Alternatively, Respondent may establish an evidentiary foundation for RX-544 – RX-546 with testimony from a competent Tiversa witness. However, without a proper foundation, RX-544 – RX-546 are unreliable hearsay and should not be admitted.

II. NO BASIS FOR RELIEF SOUGHT FOR RX-547 AND RX-548

Respondent seeks the unusual relief that RX-547 and RX-548 be "deemed inadmissible for anything other than impeachment." Resp't Motion at 2-3. Respondent provides no basis for this extraordinary relief: Respondent's styled its request as a Motion to Admit. Even if it were styled differently, Respondent has not met its heavy burden to prevail on a motion *in limine* or a motion for sanctions. *See* Scheduling Order (Sept. 25, 2013) at 5-6, Add'l Prov. 9 (motions *in limine* discouraged; evidence should only be excluded by motion *in limine* when "clearly inadmissible on all potential grounds"); Rule 3.38(b). Furthermore, Respondent's proposed use of RX-547 and RX-548 as impeachment is impermissible unless Mr. Boback is given an opportunity to explain or deny the statements and Complaint Counsel has an opportunity to examine him regarding the statements. *See* FRE 613(b). Finally, Respondent provides no justification for why the Court should treat RX-547 and RX-548 differently from RX-544 – RX-546, besides that the latter support its theory of the case and the former do not. The Court should therefore not admit RX-547 and RX-548 as impeachment, and deny Respondent's baseless request to deem RX-547 and RX-548 inadmissible for any purpose other than impeachment.

[2] Counsel for Respondent did not raise the possibility of seeking admission of the exhibits to the December 1st Letter separately during the Meet and Confer. Had it done so, the parties could have conferred on possible foundation(s) that would support the documents' admission.

III. COMPLAINT COUNSEL HAS NOT SOUGHT PERMANENT *IN CAMERA* TREATMENT FOR THE DECEMBER 1ST LETTER OR EXHIBITS

Complaint Counsel never sought permanent *in camera* treatment for the December 1st Letter, including its exhibits, as Respondent misrepresents. *See* Resp't Motion at 8.[3] Rather, Complaint Counsel observed that the attachments to the December 1st Letter included indicia of confidentiality. Specifically, the bates-stamp on the documents indicated "Confidential – For Committee and Staff Use Only." In order to provide Tiversa with notice as contemplated under the Commission's Rules, *see* Rule 3.45(b), without delaying its submission to the Court, Complaint Counsel requested provisional *in camera* treatment and simultaneously informed Tiversa to provide it an opportunity to evaluate whether to seek further protection.

IV. NOTHING IN LABMD'S PROPOSED EXHIBITS CONTRADICTS OVERWHELMING EVIDNCE THAT LABMD'S FAILURES VIOLATE SECTION 5

Respondent's rehashed claims that Tiversa violated Georgia law by downloading the 1718 File "from LabMD in early 2008, and never thereafter," and that the "FTC would have discovered that Tiversa, not LabMD, was the proper target of enforcement authorities" are unfounded and contrary to both the law of this case and the documents Respondent seeks to admit. Resp't Motion at 6.

The Complaint alleges that Respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to personal information, which caused or is likely to cause substantial injury to consumers. Respondent stipulated that the 1718 File, containing sensitive personal information on thousands of consumers, was available for sharing on a P2P

[3] Respondent did not inquire whether Complaint Counsel intended to seek permanent *in camera* treatment for the December 1st Letter during the Meet and Confer.

network. JX0001, Facts 10-11. As Complaint Counsel previously explained, even if found only at LabMD, the "1718 File's presence on a P2P network would remain a cognizable injury, if for no other reason than that others had access to it." Opp. to Mot. for Sanctions (Aug. 25, 2014) at 7. The Commission reached the same conclusion:

> [E]ven if we accepted as true the claim[] that Tiversa retrieved the Insurance Aging File without LabMD's knowledge or consent . . . , [it] would not compel us, as a matter of law, to dismiss the allegations in the Complaint that LabMD failed to implement reasonable and appropriate data security . . . . To the contrary, LabMD's factual contentions concerning Tiversa . . . are fully consistent with the Complaint's allegations that LabMD failed to implement reasonable and appropriate data security procedures.

Order Den. Mot. for Summ. Decision (May 19, 2014) at 6-7. Moreover, Georgia statutory law, which no court has applied to P2P, does not change this analysis. *See* Opp. to Motion for Sanctions at 7 (authorities cited within).

However, the record does not support that the 1718 File was found only at LabMD. In fact, the documents that are the subject of Respondent's motion reinforce that, contrary to Respondent's claim, the 1718 File was found at multiple times and locations on a P2P network. *See* Resp't Motion, Ex. 1, at 4-6, Ex. 4 at 2, Ex. 6 at 14.

CONCLUSION

RX-543 – RX-548 are hearsay, not within any hearsay exception, and without satisfactory indicia of reliability. Their use in this proceeding without first establishing a proper evidentiary foundation would be contrary to the Commission's Rules. *See* Rule 3.43(b). In addition, RX-547 and RX-548 are not admissible as impeachment at this time, *see* FRE 613(B), and there is no basis to declare them inadmissible except for purposes of impeachment. Accordingly, the Court should deny Respondent's Motion to Admit RX-543 – RX-548.

Dated: January 2, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 2, 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:

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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
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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.

January 2, 2015 By: _____

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