

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 SELECT EXHIBITS**

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INTRODUCTION

Respondent's eleventh-hour motion to admit fifty-nine proposed exhibits utterly fails to articulate bases for the proposed exhibits' admissibility. LabMD Inc.'s ("LabMD") June 12, 2015 Motion to Admit Select Exhibits ("Motion") is but the latest in a series of attempts to divert the Court's attention from what is relevant in this case: whether LabMD failed to implement and maintain reasonable data security measures to protect the sensitive consumer data it maintained, unfairly causing or likely causing harm to consumers that they could not reasonably avoid and that provided no countervailing benefits to consumers or competition. LabMD possessed the vast majority of these documents before it rested its case, and it has not shown good cause for admitting the documents at this stage of the proceedings. Further, LabMD has failed to articulate the relevance of the proposed exhibits to any claim, defense, or material fact and has grossly misrepresented the contents of several proposed exhibits to the Court. The proposed exhibits also suffer from numerous other deficiencies precluding their admission, including that for some documents, the Court has previously ruled on their admissibility and that others constitute unreliable hearsay. For these reasons, the Court should deny admission to all of the proposed exhibits.

Section I of Complaint Counsel's Opposition addresses LabMD's failure to provide a justification for the late admission of the forty-nine exhibits (out of the fifty-nine it seeks to admit by its Motion) it has possessed since before it rested its case, eight of which it possessed before the evidentiary hearing began in May 2014. Section II addresses nine of the remaining ten exhibits, for which LabMD has failed to provide a valid argument of relevance. Section III explains that as to the remaining exhibit, RX644, a Congressional staff report regarding Tiversa

Holding Corp. (“Tiversa”), the Court has already taken official notice of the only facts for which it could be admissible.

In short, the first three sections of the brief alone provide ample basis to bar admission of all of the proposed exhibits. Section IV provides additional arguments as to why the Court should not admit selected exhibits. Section IV.A addresses the proposed exhibits that LabMD has previously offered into evidence, ignoring the Court’s previous rulings without any explanation. Section IV.B addresses documents LabMD offers for the irrelevant purpose of HIPAA security standards. Section IV.C addresses LabMD’s failure to address RX655 in its Motion, thereby waiving its admission.

Finally, Section V identifies Complaint Counsel’s objections to LabMD’s proposed exhibits organized by the categories and groups in which LabMD has offered them.

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, relying on LabMD's representation, Complaint Counsel filed a Notice Regarding Rebuttal, informing the Court that it would not seek leave to offer additional¹ rebuttal evidence.

On May 18, 2015, at the request of the Court, the parties provided a joint report on the status of exhibits in evidence. LabMD did not raise the issue of additional exhibits at that time.

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 3, 2015, counsel for LabMD notified Complaint Counsel that it would be sending Complaint Counsel a list of exhibits for which it intended to seek admission. On June 4, 2015 at 6:00 PM, counsel for LabMD provided a list of exhibits for which counsel represented LabMD would seek admission. The list included RX645, which is comprised of the eighteen documents produced by Mr. Wallace, and for which Complaint Counsel consented to admission. In addition, the list included approximately eighty other proposed exhibits. On June 5, 2015, counsel for LabMD met and conferred with Complaint Counsel regarding LabMD's anticipated motion to admit the proposed exhibits.

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). Also on June 8, 2015, LabMD filed a motion to admit RX646, RX650, RX652, and RX657 *in*

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

camera. While Complaint Counsel consented to the admission of RX650 and RX652, it opposed the admission of RX646 and RX657, documents LabMD possessed before the evidentiary hearing began in May 2014. Complaint Counsel argued that LabMD had failed to demonstrate good cause to offer the exhibits late and after resting its case. On June 15, 2015, the Court denied LabMD's motion in part, holding Complaint Counsel's arguments in this regard to be "persuasive." Tr. 1475-76.

LabMD served the instant Motion on Complaint Counsel at 4:11 PM on June 12, 2015, less than one business day before the hearing was set to resume at 1:00 PM on June 15, 2015. The Motion seeks admission of fifty-nine proposed exhibits.²

On June 15, 2015, the Court addressed LabMD's Motion during the hearing. Tr. 1477-78. The Court provided Complaint Counsel the opportunity to respond in writing. Tr. 1478. The Court also granted Complaint Counsel's oral motion to file an over-length brief to oppose the admission of the fifty-nine exhibits, which LabMD did not oppose. Tr. 1478. LabMD requested leave to reply to Complaint Counsel's opposition, which the Court denied. Tr. 1480-82. The Court stated that any reply LabMD filed would need to be accompanied by a motion for leave to file a reply and would be granted or denied based on the standards articulated in the Commission's Rules. Tr. 1481-82; *see* Rule 3.22(d).

² The proposed exhibits include 49 that are comprised of documents that Complaint Counsel understands were transmitted to LabMD's counsel, Cause of Action, by the Commission's Freedom of Information Act ("FOIA") office on September 11, 2014, February 19, 2015, and April 28, 2015, and ten documents received from other sources. Of these materials, only the Staff Report prepared for Representative Issa (proposed RX644) was transmitted to LabMD's counsel after counsel represented that LabMD had rested its proofs.

For the Court's convenience, an index of the proposed exhibits, which identifies Complaint Counsel's arguments herein opposing each exhibit's admission, is attached as **Appendix A**.

ARGUMENT

LabMD's proposed exhibits are inadmissible because LabMD has failed to meet its heavy burden of justifying its out-of-time attempt to admit dozens of documents and because LabMD has failed to make the requisite showing of relevancy.

I. NO COLORABLE ARGUMENT JUSTIFIES THE LATE-ADMISSION OF THE MAJORITY OF LABMD'S PROPOSED EXHIBITS

By the end of February 2015, LabMD possessed forty-nine of the fifty-nine proposed exhibits it seeks to admit through its Motion,³ many of them for months to years before. Nonetheless, on May 5, 2015, over two months later, LabMD represented to the Court that it rested its proofs. Tr. 1462. The Court should deny admission of these forty-nine proposed exhibits, because LabMD has failed to establish good cause for not moving the admission of the proposed exhibits before it rested its case.

A. LabMD Cannot Provide Good Cause for Exhibits It Possessed Before the Hearing Began

The Scheduling Order provides that exhibits not identified on 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

³ LabMD possessed the following proposed exhibits by the end of February 2015, well before LabMD rested its case on May 5, 2015:

- (1) Before the hearing commenced: RX552, RX553, RX649, RX653, RX654-56, RX659;
- (2) September 2014: RX554, RX611-28;
- (3) December 2, 2014: RX630; and
- (4) February 2015: RX583, RX584, RX586-88, RX590-RX600; RX602-04, RX606, RX610.

The balance of the proposed exhibits are comprised of documents mailed to LabMD by the Commission's FOIA Office on April 28, 2015 (RX631-32, RX634-35, RX637-40, RX643) and one exhibit, RX644, served on LabMD on May 18, 2015. These proposed exhibits are also inadmissible. *See* Sections II and III, *infra*.

Administrative Law Judge upon a showing of good cause.” Scheduling Order, Additional Provisions ¶ 16 (Sept. 25, 2013).

LabMD has not and cannot establish good cause for the late-admission of eight of its proposed exhibits that it possessed before the evidentiary hearing began in May 2014.⁴ The Court’s reasoning with respect to RX646 and RX657 is equally applicable here. Tr. 1475-76 (denying admission to RX646 and RX657 on basis that LabMD rested its case and did not establish good cause for failing to include them on its exhibit list before the hearing). These eight proposed exhibits should be denied admission for the same reasons. *See* Tr. 1475-76; Compl. Counsel’s Opp’n to Resp’t’s Motion to Admit RX646, RX650, RX652, and RX657 (June 11, 2015).

B. LabMD Has Failed to Justify Introducing New Evidence After Resting

In addition, LabMD has failed to establish good cause for reopening its case to introduce the forty-one exhibits it obtained since the evidentiary hearing began in May 2014, but well before resting its case. *See* Scheduling Order, Additional Provisions ¶ 16 (Sept. 25, 2013).⁵ It is

⁴ LabMD possessed RX552, RX553, RX649, RX653-56, and RX659 before the commencement of the evidentiary hearing in May 2014, and in many cases used them in this or a parallel proceeding. The date from which LabMD clearly possessed each of these exhibits is provided in **Appendix A**.

Complaint Counsel is not aware of LabMD’s use of RX656 prior to the deposition of Robert Boback on June 7, 2014. RX656 was published in February 2010 and relates to LabMD and Tiversa. Mr. Boback was subpoenaed to testify at the hearing by LabMD, and his deposition was in lieu of hearing testimony. To the extent LabMD could try to make the implausible argument that it did not identify RX656 before the hearing began, LabMD’s failure to prepare its case in accordance with the Scheduling Order—by identifying exhibits it intended to use, with its own witnesses—cannot generate good cause.

⁵ LabMD obtained the following forty-one exhibits, from FOIA productions or other sources, since the hearing began in May 2014, but still well before resting its case on May 5, 2015:

- (1) September 2014: RX554, RX611-28;
- (2) December 2, 2014: RX630; and

within the discretion of the trial court to grant or refuse the introduction of additional evidence by a party who has rested its case. *Gulf Refining Co. of La. v. Phillips*, 11 F.2d 967, 969 (5th Cir. 1926). In exercising its discretion, the Court should consider “the importance and probative value of the evidence, the reason for the moving party’s failure to introduce the evidence earlier, and the possibility of prejudice to the non-moving party.” *Garcia v. Woman’s Hosp. of Tex.*, 97 F.3d 810, 814 (5th Cir. 1996); *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 674, 679 (2d Cir. 1998).

First, LabMD has failed to provide good cause for not introducing these forty-one proposed exhibits earlier. *See Garcia*, 97 F.3d at 814 (stating courts should consider “reason for the moving party’s failure to introduce the evidence earlier”); Scheduling Order, Additional Provisions ¶ 16 (Sept. 25, 2013). LabMD’s provides two excuses, but both are invalid. LabMD first argues that its proposed exhibits are responsive to discovery served on Complaint Counsel, but were not produced. *See Motion* at 3. Contrary to LabMD’s unsupported claim, Complaint Counsel has fully complied with LabMD’s discovery requests under the Commission’s Rules of Practice.⁶ LabMD next argues that it received some of the proposed exhibits in May 2015 from the Commission’s FOIA Office. *See Motion* at 3. But this only applies to nine of LabMD’s

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- (3) February 2015: RX583, RX584, RX586-88, RX590-RX600; RX602-04, RX606, RX610.

⁶ *See* Rule 3.31(c)(2) (Scope of Discovery); Letter from Brown to Khetan (Jan. 16, 2015) and Letter from VanDruff to Sherman (Mar. 19, 2015) (both attached as **Exhibit 1**). This is not the first time LabMD has asserted that Complaint Counsel should have produced additional documents in discovery, despite the clear limitations on the scope of discovery of the Commission under the Rules of Practice and the scope of LabMD’s requests. *See Resp’t’s Opp’n to Compl. Counsel’s Mot. to Compel Produc. of Daugherty Aff.* (Apr. 14, 2015) at 1. If LabMD’s claim had any basis in fact, it has had every opportunity to seek appropriate relief.

fifty-nine proposed exhibits, which are addressed in Section II.⁷ LabMD sat on the forty-one proposed exhibits discussed in this Section for at least two months, and has not argued any good cause for failing to offer them prior to resting its case.⁸

Second, Complaint Counsel is prejudiced by LabMD's eleventh-hour offer of new proposed evidence. *See Garcia*, 97 F.3d at 814 (stating courts should consider the "possibility of prejudice to the non-moving party"). Complaint Counsel relied upon LabMD's representation that it had rested its case in assessing whether to seek leave to offer further rebuttal. Tr. 1462. LabMD now seeks to reopen its proofs by offering new proposed exhibits in an attempt to raise additional issues without an opportunity for Complaint Counsel to respond. Since Complaint Counsel did not offer additional rebuttal, LabMD may not offer the exhibits as surrebuttal, nor has it sought leave to do so. The Court should deny LabMD's attempt to circumvent the rules of the proceeding.

Third, LabMD has failed to meet its burden to establish the relevance of its proposed exhibits to any claim, defense, or material fact. *See Garcia*, 97 F.3d at 814 (stating courts should consider the "importance and probative value of the evidence"). As discussed in detail in Sections IV and V below, for many of the forty-one exhibits, LabMD fails to make any relevance argument. Instead, LabMD relies on conclusory assertions of relevance, and vague statements such as that "these exhibits are admissions of FTC regarding material facts," without identifying any such purported facts. *See, e.g.*, Motion at 8. In the rare instances where LabMD has articulated a relevance argument for a particular exhibit or group of exhibits, it has done so by

⁷ Those nine exhibits are not admissible for other reasons, as described in Section II below.

⁸ *See* Note 5, *supra* (list of the forty-one proposed exhibits).

misrepresenting the contents of the documents to the Court, as described below. *See* Section V, *infra*.

For these reasons, the Court should deny admission to the forty-nine proposed exhibits LabMD possessed by February 2015, which are identified in Note 3, *supra*.

II. THE CATEGORY 4 EXHIBITS SHOULD NOT BE ADMITTED BECAUSE THEY ARE NOT RELEVANT

Nine of the ten exhibits LabMD identifies as “Category 4” were transmitted to LabMD’s counsel by the Commission’s FOIA office on April 28, 2015: RX631, RX632, RX634, RX635, RX637-RX640, and RX643 (collectively “Category 4”).⁹ Assuming, *arguendo*, that LabMD has good cause for the admission of these nine proposed exhibits out-of-time because LabMD’s counsel did not receive them sufficiently in advance of the May 5, 2015 hearing to notify the Court that it required additional time before resting its case, LabMD has failed to justify the admissibility of these exhibits because it has not, and cannot, establish their relevance.

“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. 401.¹⁰ 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). “‘Relevance’ does not exist in

⁹ The tenth document in Category 4, RX630, was the subject of Respondent’s December 23, 2014 Motion to Admit, which this Court resolved by Order of February 12, 2015. But for the attachments to the December 1, 2014 letter, which Respondent elected to include with RX630 only, RX543 and proposed RX630 are identical documents. As described in Section IV.A, *infra*, the Court should not permit Respondent to relitigate its December 23, 2014 motion.

¹⁰ *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 . . .”).

isolation; it consists of a relationship between the proffered evidence and some proposition of fact.” 22 Fed. Prac. & Proc. Evid. § 5162.2 (2d ed.).

Instead of setting forth the relevance of the proposed Category 4 exhibits in its Motion, LabMD makes factual assertions regarding the proposed exhibits that are not relevant to any claim or defense, or that misrepresent the content of the proposed exhibits. LabMD expressly asserts that the proposed Category 4 exhibits are relevant because they are “communications regarding FTC’s response to [the Committee on Oversight and Government Reform of the United States House of Representatives’ (“OGR”)] December 1, 2014 letter to Commissioner [sic] Ramirez.” Motion at 7. There is no relationship between that assertion and a “fact of consequence in determining the action.” Fed. R. Evid. 401. LabMD has not made any effort to explain how communications regarding the Commission’s response to Representative Issa’s letter are in any way relevant to claims or defenses in this proceeding.

In addition to insufficiently articulating the relevance of the proposed Category 4 exhibits, LabMD categorically mischaracterizes the proposed exhibits in its Motion to the Court. Specifically, the documents are in every case either non-substantive or almost completely redacted. Not a single Category 4 exhibit concerns, or is evidence of, “the lack of FTC standards regarding data practices and ‘unfairness’ under Section 5.” *See* Motion at 7. Likewise, no Category 4 exhibit includes “evidence of FTC’s public positions, and contrary internal actions and discussions, regarding the viability of Tiversa’s evidence in the LabMD matter, as well as FTC’s view of Tiversa’s credibility as the sole source of evidence regarding a ‘likely’ cause of substantial injury under Section 5 of the FTC Act” Motion at 6 n.5, 7 n.7.¹¹ Even

¹¹ Notwithstanding these deficiencies in LabMD’s Motion, Complaint Counsel does not intend to cite to Robert Boback’s testimony or CX0019 in its proposed findings of fact. Nor

considered as a group, the Category 4 exhibits do not make any fact related to these assertions more or less probable. Accordingly, the Court should deny admission to the Category 4 proposed exhibits.

III. RX644 – STAFF REPORT ON TIVERSA SHOULD NOT BE ADMITTED BECAUSE COURT TOOK OFFICIAL NOTICE OF ONLY FACTS FOR WHICH IT COULD BE ADMISSIBLE

The only exhibit that LabMD could not have offered before resting its case is proposed RX644, a staff report prepared for then-Chairman of OGR, Representative Darrell Issa (“Staff Report”). LabMD asserts that it is not offering RX644 for the truth of the matter asserted. Motion at 4-5. Regardless, RX644 should not be admitted because LabMD has failed to set forth a non-hearsay purpose for its admission, and the Court has already taken official notice of the only potentially admissible facts that the proposed exhibit could establish if admitted for a non-hearsay purpose.¹²

To the extent RX644 could be admissible to establish that OGR investigated Tiversa, the Court has already taken official notice of that fact. Order on Resp’t Motions to Admit Proffered Exhibits RX 542-RX 548 at 3 (Feb. 12, 2015) (“Feb. 12 Order”). The Court’s February 12th Order admitted RX542 and RX543 for the limited purpose of taking official notice under Rule

does Complaint Counsel intend to cite to expert conclusions predicated on Mr. Boback’s testimony or CX0019.

¹² LabMD states that “[t]his exhibit is not offered for the truth of the matters set forth therein.” Motion at 4-5. Indeed, the staff report could not be admitted for the truth of the matters asserted therein because it constitutes an out-of-court statement relying upon multiple levels of out-of-court statements for the factual propositions and conclusions it sets forth. Proposed RX644 is not a public record for which FRE 803(8)’s hearsay exception applies, and it does not fall under any other exception to the rule against hearsay. *See* Fed. R. Evid. 803. Nor does it bear satisfactory indicia of reliability to warrant admission under the Commission’s Rules of Practice. *See* Rule 3.43(b); Complaint Counsel’s Opp. to Resp’t’s Mot. to Admit RX-543-RX-548 at 3-6 (Jan. 2, 2015). The fact that proposed RX644 is styled as a “Staff Report” and contains the conclusions of OGR staff does not change this analysis. The report was prepared for the then-Chairman of OGR, and was not issued by the Committee, by vote or otherwise.

3.43(f) that: (1) letters from Representative Issa are authentic and were received by the FTC; (2) OGR was investigating the activities of Tiversa, which is “a source of information” for the FTC; (3) “[t]he Committee is concerned about the truthfulness of the information provided to the FTC”; and (4) that “Tiversa apparently did not fully provide requested documents subpoenaed in this matter” *Id.* at 3-4. Because the Court has already taken official notice of the only potentially admissible facts which RX644 could establish if admitted for a non-hearsay purpose, admission of RX644 would be needlessly duplicative. *See* Rule 3.43(b) (“Evidence, even if relevant, may be excluded . . . based on consideration of undue delay, waste of time, or needless presentation of cumulative evidence.”).

IV. LABMD’S PROPOSED EXHIBITS SUFFER MULTIPLE OTHER BARS TO ADMISSION

All of LabMD’s proposed exhibits should be denied admission based on the arguments above alone. In addition, many of the proposed exhibits suffer from multiple other bars to admission. The Court has already ruled on the admissibility of several of the proposed exhibits and LabMD has not acknowledged those rulings or provided cause for their reconsideration. Other documents relate to HIPAA, which is irrelevant to this case. Additional documents, which are not offered for a non-hearsay purpose, constitute unreliable hearsay. And LabMD has failed to mention or address the admissibility of one exhibit, identified only in its Appendix, anywhere in its Motion.

A. LabMD’s Motion Attempts to Relitigate Court’s Prior Rulings

Proposed exhibits RX630, RX587, RX593, and RX596 should not be admitted, because the Court has previously ruled on the admissibility of the documents, and LabMD has provided no basis for reconsidering those rulings.

Proposed RX630 consists of the December 1, 2014 Letter from Representative Darrell Issa to Chairwoman Ramirez and documents that were attached as exhibits to the letter: a Tiversa Investigation Request Form, a Tiversa Incident Record Form, a Tiversa Forensic Investigation Report, and a September 5, 2013 email from Robert Boback to Dan Kopchak and Molly Trunzo. The Court has ruled on the admissibility of these documents as follows:

- The December 1, 2014 Letter was admitted as RX543 for limited purposes by the Court's February 12, 2015 Order. Feb. 12 Order; *see also* Section III, *supra* (describing limitations set by Feb. 12 Order).
- The Court denied admission of the Tiversa Investigation Request Form (previously labeled RX544) and the email from Robert Boback to Dan Kopchak and Molly Trunzo (previously offered as RX547) "unless and until a proper evidentiary foundation is provided." Feb. 12 Order at 4.
- The Tiversa Incident Record Form was admitted as RX545 at the May 5, 2015 hearing. Tr. at 1419.
- The Tiversa Forensic Investigation Report was admitted, not for the truth of the matter asserted, as RX546 at the May 5, 2015 hearing. Tr. at 1425-26.

LabMD's Motion seeks to admit RX630 for all purposes, but it has failed to provide a foundation for the admission of the December 1, 2014 Letter and the Tiversa Forensic Investigation Report for purposes beyond the limited purposes for which the Court already admitted them. LabMD should be foreclosed from relitigating the Court's prior rulings by resubmitting these documents as a composite proposed exhibit and seeking the proposed exhibit's admission for all purposes. LabMD's Motion also fails, again, to provide a proper evidentiary foundation for the Tiversa Investigation Request Form (previously offered as RX544) and the email from Robert Boback to Dan Kopchak and Molly Trunzo (previously offered as RX547), and thus, there is no reason for the Court to reconsider its February 12 Order. Feb. 12 Order at 4. In addition, because the Tiversa Incident Record Form has already been admitted, there is no need for LabMD to re-submit it into evidence. The Court should therefore not admit proposed RX630.

Similar reasoning dictates that the Court should also deny admission of proposed RX587, RX593, and RX596, all of which include, along with other communications, copies of the June 11, 2014 Letter from Representative Issa to Chairwoman Ramirez. The Court ordered the admission of the June 11, 2014 Letter as RX542 for the same limited purposes as the December 1, 2014 Letter. Feb. 12 Order at 3-4. Because the Court has already taken official notice of the only facts that RX542 could potentially be admissible to establish, there is no need to admit additional exhibits that contain that document in order to take notice of those facts.¹³ Additionally the Court should reject LabMD's improper attempt to relitigate the Court's ruling on RX542 by including the June 11, 2014 Letter in composite exhibits with additional documents and then seeking to admit those proposed exhibits, RX587, RX593, or RX596, for all purposes. Thus, the Court should not admit proposed exhibits RX587, RX593, or RX596.

B. HIPAA Is Not Relevant to this Proceeding

LabMD offers multiple exhibits that it purports relate to its compliance with HIPAA “data security standards”—RX552, RX553, and RX649—ignoring the law of this case and its own verified discovery responses. In denying LabMD's Motion to Dismiss, the Commission rejected LabMD's argument that it was not liable for its data security practices under Section 5 of the FTC Act because LabMD is subject to the requirements of HIPAA. Order Denying Resp't's Motion to Dismiss at 10-14 (Jan. 16, 2014); *see also* Order Denying Resp't's Motion for Summary Decision at 5-6 (May 19, 2014) (stating that factual assertions related to HIPAA “are not material to the violations of law alleged in the complaint”).

¹³ This reasoning is equally applicable to proposed exhibits RX584, RX613, and RX627, which also relate to OGR's investigation of Tiversa's activities, discussed in Sections V.B.2 and V.C, *infra*.

Moreover, LabMD's assertion that it "has contended throughout this case as a material fact that it is a HIPAA-covered entity which did not commit any HIPAA-related data security violations," Motion at 4, is an outrageous mischaracterization of its position during fact discovery. LabMD took the unequivocal position that its compliance with HIPAA's requirements was irrelevant to this proceeding: Complaint Counsel propounded a contention interrogatory to LabMD asking whether it contends that it "has complied with the [HIPAA] Privacy Rule . . . or the Security Rule . . . promulgated by the Department of Health and Human Services." CX0765 (Resp't's Resps. to Compl. Counsel's 2nd Set of Discovery) at 12-13 (attached as **Exhibit 2**). LabMD responded that this interrogatory was "neither relevant nor reasonably calculated to lead to the discovery of admissible evidence," and provided no substantive response. *Id.* Having taken the position that its compliance with HIPAA was not relevant to the Commission's claims or LabMD's defenses, LabMD cannot now—more than a year later—assert that HIPAA is relevant. Permitting the late introduction of such evidence would deny Complaint Counsel the opportunity to rebut or put on a case on this issue.

LabMD is thus foreclosed from introducing evidence regarding its purported compliance with HIPAA's requirements. The Court should therefore deny admission to LabMD's HIPAA-related exhibits, RX552, RX553, and RX649. In addition to lacking relevance, LabMD's HIPAA-related exhibits suffer from multiple other bars to admission discussed below.

1. RX552 Is Impermissible Expert Testimony and Inadmissible Hearsay

RX552 is a composite exhibit consisting of an April 11, 2014 declaration written by Cliff Baker, and the entire transcript of a May 7, 2014 hearing in LabMD's lawsuit against the Commission in the District Court for the Northern District of Georgia, on LabMD's Motion for a

Preliminary Injunction. In addition to the reasons discussed above, the documents comprising RX552 suffer from multiple other bars to admission.

a. The Cliff Baker Declaration Is Unreliable Hearsay and Unqualified Expert Testimony

The Cliff Baker Declaration is inadmissible for multiple reasons. First, the Cliff Baker declaration is hearsay, an out-of-court statement offered for the truth of the matter asserted, not falling within any exception to the rule against hearsay. *See* Fed. R. Evid. 801-803. It is analogous to the affidavits of LabMD employees that the Court excluded in the final pre-hearing conference on May 15, 2015. Tr. 14-24. Like those affidavits, the Baker Declaration does not have sufficient indicia of reliability to be admissible hearsay. *See* Rule 3.43(b). On this basis alone, RX552 should not be admitted.

Second, LabMD offers the declaration—which purports to be an “Expert Opinion Declaration”—as an “expert report.” *See* Motion at 4. LabMD has not designated Mr. Baker as a witness, much less an expert witness, in this case. *See* Scheduling Order, Additional Provisions ¶ 18 (Sept. 25, 2013) (“Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.”). Nor did LabMD qualify Mr. Baker as an expert in the proceeding in which LabMD first offered this declaration.¹⁴

Finally, LabMD did not identify Mr. Baker on its witness list. *See id.*, Additional Provisions ¶ 15 (Sept. 25, 2013) (good cause required to add witness not designated on final proposed witness list). LabMD’s failure to have identified Mr. Baker as a witness or expert

¹⁴ Rule 3.43(b) states that, among other things, “expert reports . . . shall be admissible” if otherwise meeting standards of admissibility in 3.43(b). Since Mr. Baker was not qualified as an expert in this or the Preliminary Injunction proceeding, his declaration should not be admitted under this provision.

deprived Complaint Counsel of the opportunity to depose Mr. Baker and subject his opinions to cross-examination.

b. The Preliminary Injunction Hearing Transcript Includes Unreliable Hearsay

The Preliminary Injunction Hearing transcript included as part of RX552 should also not be admitted because LabMD has offered it for the same purposes as the declaration—expert opinion relating to standards under HIPAA. *See* Motion at 4. First, Mr. Baker has not been properly identified as an expert in this proceeding, so his testimony should not be admitted. *See* Scheduling Order, Additional Provisions ¶ 18. Second, the transcript contains far more content than Mr. Baker’s testimony, and LabMD has not provided any argument for the relevance of the additional portions, nor has LabMD sought to limit admission of the transcript to only Mr. Baker’s testimony from the transcript. LabMD cannot justify the relevance of the remainder of the transcript because it includes attorney colloquy that is not admissible under the Commission’s Rules or the Federal Rules of Evidence, and other irrelevant testimony regarding LabMD’s First Amendment claims and the sufficiency of Complaint Counsel’s pre-complaint investigation.¹⁵ Finally, LabMD should not be permitted to use the hearing transcript to bootstrap the Baker Declaration into evidence, to which it is inappropriately attached.

2. RX533 – LabMD’s CLIA Certificate Should Not Be Admitted Because It Is Irrelevant

LabMD offers as proposed exhibit RX533 an “HHS/CMS Certificate of Compliance,” effective date Nov. 13, 2011. In addition to the irrelevance of HIPAA to this matter, RX533

¹⁵ *See* Ans. at 6-7 (no assertion of a First Amendment Retaliation Claim as an affirmative defense); Order on Complaint Counsel’s Motion to Quash Subpoena Served on Complaint Counsel and for Protective Order, at 6 (Jan. 30, 2014) (stating that information concerning the FTC’s pre-complaint investigation is not relevant).

should also not be admitted because there is no evidence or expert testimony tying RX533 to any rule or regulation with which LabMD asserts it was complying. Instead, RX553 relates to laboratory procedures, which are patently not relevant to claims or defenses in this proceeding.

3. RX649 – Article Quoting HHS Spokesperson Should Not Be Admitted Because It Is Irrelevant and Unreliable Hearsay

Proposed exhibit RX649 is an article from PHIprivacy.net relating to Tiversa’s defamation suit against LabMD, purporting to quote an HHS spokesperson regarding “HHS’s decision not to investigate or prosecute LabMD.” RX649 at 1-2. First, LabMD fails to provide a valid basis for the relevance of RX649. In addition, “HHS’s decision not to investigate or prosecute LabMD” is not a “fact [] of consequence in determining the action.” Fed. R. Evid. 401; RX649 at 1. Second, RX649, which LabMD seeks to admit for the truth of the matter asserted, constitutes hearsay and hearsay within hearsay. *See* Motion at 5; Rule 3.43(b). RX649 does not fall within any exception to the rule against hearsay, *see* Fed. R. Evid. 803, and it does not otherwise bear satisfactory indicia of reliability, *see* Rule 3.43(b). In particular, the quotation from an “HHS spokesperson” that LabMD offers for the truth does not bear satisfactory indicia of reliability: it is not under oath, and the identity of the speaker is not provided.

C. LabMD Failed to Justify Admissibility of RX655

LabMD includes proposed exhibit RX655 in its Appendix A. But LabMD failed to mention or address RX655 at any point in its Motion. By doing so, LabMD failed to meet its burden to justify RX655’s admissibility and relevance, and has therefore waived its admission.

V. OBJECTIONS TO EACH OF LABMD’S PROPOSED EXHIBITS

In addition to the arguments above, as described below, LabMD has failed to establish admissibility, including relevance, for its proposed exhibits. This Section addresses LabMD’s

proposed exhibits in the categories and groupings in which LabMD has attempted to support their admissibility, with cross-references to earlier sections addressing certain proposed exhibits, where applicable. This Section does not reiterate the lack of good cause for LabMD's late-introduction of its proposed exhibits, which applies to at least forty-nine of the proposed exhibits and is discussed in Section I above.

As a preliminary matter, LabMD makes a blanket assertion that the proposed exhibits "are offered to show, as a general matter, the state of mind and actions of FTC as an agency responding to a Congressional inquiry involving a material government witness who supplied FTC with evidence and testimony in furtherance of its pending adjudication against LabMD." Motion at 3. Even if all of the proposed exhibits could accurately be characterized as pertaining to that subject, which they cannot, LabMD has failed to articulate the relevance of that subject to any claim or defense in this proceeding. In addition, LabMD inexplicably combines multiple, unrelated documents into composite exhibits without providing bases for its proposed document compilations that would establish the relevance, individually or as a group, of the documents contained within each proposed exhibit. Finally, to the extent LabMD believes that these proposed exhibits relate to its argument that the Commission is somehow tainted by its response to Congressional inquiries, that issue has been settled by the Commission's June 15, 2015 Opinion and Order denying LabMD's Motion to Disqualify Chairwoman Ramirez.

A. Category 1

1. RX552 and RX533

- RX552 and RX533, exhibits LabMD offers as relevant to data security obligations under HIPAA, are addressed in Section IV.B above.

2. RX554

- **LabMD’s assertion:** RX554 is “relevant, and probative FTC CID to the Privacy Institute, which included the insurance aging file at the center of FTC’s case.” Motion at 4.
 - Complaint Counsel’s Response Regarding Relevance:
 - Pre-complaint investigation, which includes the Civil Investigative Demand (“CID”) to the Privacy Institute, is not relevant to any claim or defense. Order on Compl. Counsel’s Motion to Quash Subpoenas at 6 (Jan. 30, 2014);
 - LabMD fails to explain how RX554 has any tendency to make any fact that is of consequence more or less probable. *See* Motion at 4; Fed. R. Evid. 401; and
 - LabMD fails to articulate any fact regarding the 1718 File that the CID makes more or less probable. *See* Motion at 4; Fed. R. Evid. 401.

3. RX615 and RX616

- **LabMD’s assertion:** LabMD argues that RX615 and RX616, two emails each attaching the Commission’s responses to Questions for the Record arising out of a February 4, 2014 hearing before the U.S House of Representatives Subcommittee on Commerce, Manufacturing and Trade, are relevant to the Commission’s lack of standards for data security in the medical industry and regarding P2P networks. *See* Motion at 4.
 - Complaint Counsel’s Response Regarding Relevance:
 - The proposed exhibits do not contain any discussion of Commission “standards for data security in the medical industry,” and thus are not probative of whether the Commission lacks such standards. *See* Motion at 4. In addition, the proposed exhibits do not in any way suggest that the Commission’s authority does not extend to companies that maintain patient information.¹⁶ *Cf.* Order on Mot. to Dismiss at 14; and
 - The security of P2P networks themselves is not a fact of consequence to this matter.

4. RX644

- RX644, the Staff Report regarding Tiversa, is addressed in Section III above.

¹⁶ The one reference to the HI-TECH Act, RX615 at 8 (QFR document at 7), states “The FTC also generally lacks authority to require companies to issue notification to affected consumers to alert them to a breach of their personal information (with the exception of our narrow scope of authority under the HI-TECH Act).” This statement does not relate to limits on the Commission’s authority over HIPAA covered entities. It relates only to limits on the Commission’s authority to enforce provisions requiring certain companies to provide notification to consumers.

5. RX649

- RX649, an article that LabMD offers as relevant to data security obligations under HIPAA, is addressed in Section IV.B and IV.B.3 above.

6. RX653

- **LabMD's assertion:** LabMD states that RX653 consists of "relevant emails between Samuel Hopkins/Tiversa and [Eric] Johnson regarding data for Johnson's study. The foundation for this exhibit is Johnson's deposition testimony." Motion at 5.
 - Hearsay Objection: RX653 is unreliable hearsay, not falling within any exception to the rule against hearsay. No foundation for RX653 was laid at Mr. Johnson's deposition sufficient to overcome a hearsay objection. *See* CX721 at 78-80; and
 - Complaint Counsel's Response Regarding Relevance: LabMD failed to provide any basis for the relevance of RX653, relying only on the conclusory assertion that it is comprised of "relevant emails." *See* Motion at 5.

7. RX654

- **LabMD's assertion:** LabMD states that RX654, the May 4, 2009 testimony of Robert Boback before a House of Representatives Subcommittee, is "relevant" and that its foundation is "the deposition testimony of Boback on November 21, 2013, and Wallace's trial testimony." Motion at 5.
 - Hearsay Objection:
 - RX654 is unreliable hearsay, not falling within any exception to the rule against hearsay: No business record or other foundation sufficient to overcome hearsay was established at Mr. Boback's deposition or during Mr. Wallace's testimony. *See* CX703 at 143-56; Wallace, Tr. 1341-42, 1432-33.
 - RX654 does not bear indicia of reliability because it not under oath, and therefore is not testimony that "shall be admissible" under Rule 3.43(b).¹⁷
 - Complaint Counsel's Response Regarding Relevance: LabMD failed to present any basis for the relevance of RX654, relying only on the conclusory assertion that it is "relevant testimony." *See* Motion at 5.

¹⁷ *See* Full Transcript of Hearing before U.S. House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection on H.R. 2221 at 2-4 (May 5, 2009), available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Final-Transcript-CTCP-HR-2221-Data-Accountability-Protection-HR-1319-Informed-P2P-User-2009-5-5.pdf> (witnesses not placed under oath) (video at <http://democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-hr-2221-the-data-accountability-and-trust-act-and-hr-1319-the-informed-p2p-user-a>).

8. RX656

- **LabMD's assertion:** LabMD asserts that RX656, a February 26, 2010 article published by Computer World, is "relevant to CX0019 and FTC's representations to Congress." Motion at 6. LabMD further states that RX656 is "relevant, reliable, public, and probative evidence of what Boback stated to Computer World on or about February 26, 2010. The article is not offered for the truth of what Boback stated." *Id.*
 - Hearsay Objection:
 - RX656 is unreliable hearsay. LabMD's states that it is not offering RX656 "for the truth of what Boback said," *see* Motion at 6; RX656 at 2, but that non-hearsay purpose only addresses the hearsay within hearsay of Mr. Boback's quote;
 - LabMD is offering RX656 for the truth of what it asserts, which is that Mr. Boback stated the quoted words. *See* Motion at 6; RX656 at 2. That is a hearsay purpose, and RX656 does not fall within any exception to the rule against hearsay. No business record or other foundation sufficient to overcome hearsay was established at Mr. Boback's deposition. *See* RX541 at 49-54; and
 - RX656 does not otherwise have sufficient indicia of reliability.
 - Complaint Counsel's Response Regarding Relevance:
 - Despite LabMD's assertions, the article is not relevant to CX0019, because it does not mention or allude to LabMD or the 1718 File in any way;
 - Nothing in the article bears on the Commission's representations to Congress, which is not a fact of consequence to this matter. *See* Fed. R. Evid. 401 (defining relevance);
 - Mr. Boback's statements to Computer World are not a fact of consequence. *See id.*; and
 - Even if any of these facts tend to make any other fact of consequence more or less probable, LabMD has failed to explain how.

B. Category 2

1. RX587

- **LabMD's assertion:** LabMD describes RX587 as a "[r]elevant public document of FTC's response to OGR's June 11 letter stating that Congress was investigating Tiversa and FTC." Motion at 6. LabMD also asserts that the documents are "admissions of FTC employees regarding material facts at issue in this case." Motion at 6.
 - LabMD's Mischaracterization: LabMD's description mischaracterizes the documents which are included in RX587. LabMD fails to acknowledge that RX587 includes both the June 11, 2014 Letter from Representative Issa to Chairwoman Ramirez (RX542), as well as the June 13, 2014 response letter from Commission Secretary

Donald Clark to Representative Issa. Additionally, the letter from Representative Issa states that OGR was investigating Tiversa, not the FTC, as LabMD claims.

- Complaint Counsel’s Response Regarding Relevance:
 - LabMD fails to set forth any relationship between its assertion and a “fact of consequence in determining the action.” Fed. R. Evid. 401; and
 - LabMD fails to identify any “material facts” of which the document supposedly is an admission, and instead merely cites to Mr. Wallace’s testimony and the OGR staff report on Tiversa (proposed RX644) without explanation. The June 13, 2014 response letter acknowledges receipt of the June 11, 2014 letter and states that the Commission would respond to any Committee requests, thus the letter contains no admissions of material facts by Commission employees.

2. RX592-94; RX596; RX613-14; RX617; RX619; RX621-22, RX625

- **LabMD’s assertion:** LabMD’s states that the proposed exhibits are “communications regarding FTC’s response to OGR’s June 11, 2014 letter to Commissioner [sic] Ramirez, and to OGR’s June 17, 2014 letter to FTC Acting Inspector General Kelly Tshibaka.” Motion at 6.
 - Complaint Counsel’s Response Regarding Relevance.¹⁸
 - LabMD fails to set forth any relationship between its assertions and a “fact of consequence in determining the action.” Motion at 6; Fed. R. Evid. 401.
 - Despite LabMD’s assertions that these proposed exhibits are “admissions of FTC employees regarding material facts at issue in this case,” it fails to identify to which material facts it is referring.
 - RX613 includes, embedded into one of its emails, the full text of the letter from Representative Issa to FTC Acting Inspector General Kelly Tshibaka.
 - The Court should not admit RX613 for the same reasons it should not admit copies of the Staff Report and additional letters from Representative Issa, addressed in Sections III and IV.A, *supra*: the Court has already taken official notice of the only facts for which these documents could be admissible; and
 - LabMD has failed to establish how the letter is relevant in combination with the emails with which it is offered.

¹⁸ As discussed above in Section IV.A, because RX593 and RX596 include RX542, which was admitted only for limited purposes, the Court should reject LabMD’s attempt to relitigate that ruling by including RX542 in composite exhibits with additional documents by denying admission to RX593 and RX596.

- Hearsay Objection:
 - The letter from Representative Issa to FTC Acting Inspector General Kelly Tshibaka constitutes unreliable hearsay, and LabMD has not provided a limited, non-hearsay purpose for the Court to admit the letter as part of RX613.
 - **LabMD's assertions:** LabMD also states that these proposed exhibits individually or as a group, evidence either a lack of FTC "standards regarding data practices and 'unfairness' under Section 5," Motion at 6 and 7, or "evidence of FTC's public positions, and contrary internal actions and discussions, regarding the viability of Tiversa's evidence in the LabMD matter, as well as FTC's view of Tiversa's credibility as the sole source of evidence regarding a 'likely' cause of substantial injury under Section 5 of the FTC Act," *id.* at 6 n.5.
 - LabMD's Mischaracterization: These proposed exhibits do not relate in anyway to either of these points.
 - **RX625 – LabMD's assertion:** LabMD asserts that RX625 is an email exchange "regarding an improper request by [an] FTC employee [to an OGR staff member] for a transcript of Boback's June 5, 2014 testimony before OGR." Motion at 7.
 - LabMD's Mischaracterization: LabMD points to no authority to support its contention that this request was improper, and the proposed exhibit does not itself show that the request was "improper."
- C. **Category 3 – RX584; RX586; RX611-12; RX618; RX620; RX623-24; RX626-28**
- **LabMD's assertion:** LabMD asserts that these proposed exhibits are "communications regarding FTC's response to OGR's July 18, 2014 letter to Commissioner [sic] Ramirez." Motion at 7.
 - Complaint Counsel's Response Regarding Relevance:
 - This assertion does not establish relevance because LabMD has not set forth any relationship between that description and a "fact of consequence in determining the action," or for that matter, any fact that the exhibits "make more or less probable." Fed. R. Evid. 401; and
 - RX584 and RX627 include, along with emails, a copy of a July 18, 2014 Letter from Representative Issa to Chairwoman Ramirez requesting documents from the Commission on behalf of OGR.
 - The Court should not admit RX584 and RX627 for the same reasons it should not admit copies of the Staff Report and additional letters from Representative Issa, addressed in Sections III and IV.A, *supra*: the Court has already taken judicial notice of the only facts for which these documents could be admissible; and
 - LabMD has failed to establish how the letter is relevant in combination with the emails with which it is offered.

- Hearsay Objection:
 - The July 18, 2014 Letter from Representative Issa to Chairwoman Ramirez constitutes unreliable hearsay, and LabMD has not provided a limited, non-hearsay purpose for the Court to admit it as part of RX584 and RX627.
- **LabMD's assertion:** LabMD also states that these proposed exhibits, individually or as a group, evidence either “the lack of FTC standards regarding data practices and ‘unfairness’ under Section 5,” Motion at 7, or “evidence of FTC’s public positions, and contrary internal actions and discussions, regarding the viability of Tiversa’s evidence in the LabMD matter, as well as FTC’s view of Tiversa’s credibility as the sole source of evidence regarding a ‘likely’ cause of substantial injury under Section 5 of the FTC Act,” *id.* at 7 n.6 (citing Note 5).
 - LabMD's Mischaracterization: None of these proposed exhibits, almost entirely non-substantive documents, addresses either of these points.

D. Category 4 – RX630-32, RX634-35, RX637-40, RX643

- LabMD’s exhibits identified as Category 4 are addressed in Sections II (RX631-32, RX634-35, RX637-40, and RX643) and IV.A (RX630) above.

E. Category 5

1. RX583

- **LabMD's assertion:** LabMD describes RX583 as, “October 2014 email communications between DAEO White, Senior FTC Leadership, and LabMD Complaint Counsel, and voicemail verifications from August 2014.” Motion at 8.
 - Complaint Counsel's Response Regarding Relevance: LabMD fails to set forth any relationship between that description and a “fact of consequence in determining the action.” Fed. R. Evid. 401.
- **LabMD's assertion:** LabMD also represents that RX583 is “evidence of FTC’s public positions, and contrary internal actions and discussions, regarding the viability of Tiversa’s evidence in the LabMD matter, as well as FTC’s view of Tiversa’s credibility as the sole source of evidence regarding the insurance aging file.” Motion at 8 n.8 (citing to Note 5).
 - LabMD's Mischaracterization: None of the documents within RX583 touches on this point.

2. RX590-91

- **LabMD's assertion:** LabMD describes RX590 and RX591 as, “communications regarding FTC’s responses to OGR’s June 11 and June 17, 2014 letters to Commissioner [sic] Ramirez and FTC’s IG.” Motion at 8.
 - Complaint Counsel's Response Regarding Relevance: LabMD fails to set forth any relationship between that description and a “fact of consequence in determining the action.” Fed. R. Evid. 401.

- **LabMD’s assertion:** LabMD also states that these proposed exhibits include FTC discussions about “an upcoming meeting on Capitol Hill with Rep. Terry regarding Tiversa.” Motion at 8.
 - LabMD’s Mischaracterization: While RX591 does discuss a scheduled meeting with Representative Terry, nothing in this proposed exhibit speaks to the subject matter or topics to be discussed at that meeting.
 - Complaint Counsel’s Response Regarding Relevance: Even were its characterization accurate, LabMD fails to set forth any relationship between this assertion and a fact of consequence. Fed. R. Evid. 401.
- **LabMD’s assertion:** LabMD also states that RX590 and RX591 are “evidence of FTC’s public positions, and contrary internal actions and discussions, regarding the viability of Tiversa’s evidence in the LabMD matter, as well as FTC’s view of Tiversa’s credibility as the sole source of evidence regarding the insurance aging file.” Motion at 8 n.8 (citing to Note 5).
 - LabMD’s Mischaracterization: None of the communications within RX590 or RX591 touches on these points.

3. RX595; RX597-99; RX600; RX602-04; RX606

- **LabMD’s assertion:** LabMD describes these proposed exhibits as, “email communications showing FTC Complaint Counsel in the LabMD matter, as well as FTC Senior Leadership and officials, contacting DAEO White with regard to the LabMD matter,” and “communications by and between FTC Senior Leadership and FTC employees, including but not limited to Complaint Counsel, regarding the LabMD case.” Motion at 8. LabMD also asserts that the proposed exhibits “are admissions of FTC regarding material facts in this case.” Motion at 8.
 - Complaint Counsel’s Response Regarding Relevance:
 - LabMD fails to set forth any relationship between those descriptions and a “fact of consequence in determining the action.” Fed. R. Evid. 401; and
 - LabMD does not identify any material facts to which it is referring. Furthermore, these proposed exhibits are all almost entirely redacted or non-substantive, and are not admissions of any material facts.

4. RX610

- **LabMD’s assertion:** LabMD describes RX610 as “communications showing FTC Complaint Counsel in the LabMD matter, as well as FTC Senior Leadership and officials, discussing the disqualification of Commissioner Julie Brill on December 24, 2013.” Motion at 8.
 - Complaint Counsel’s Response Regarding Relevance: LabMD fails to set forth any relationship between that description and a “fact of consequence in determining the action.” Fed. R. Evid. 401.

5. RX655

- RX655 is discussed in Section IV.C above.

6. RX659

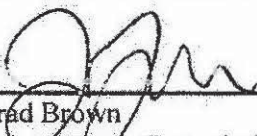
- Complaint Counsel does not have additional objections as to RX659.

CONCLUSION

For the reasons above, the Court should deny LabMD's Motion and deny admission to the proposed exhibits it seeks to offer into evidence.

Dated: June 24, 2015

Respectfully submitted,


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Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 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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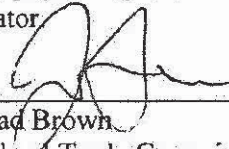
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CERTIFICATE FOR ELECTRONIC FILING

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 24, 2015

By: _____


Jaraq Brown
Federal Trade Commission
Bureau of Consumer Protection

Appendix A

Appendix A
Sections of Opposition that Address Each Proposed Exhibit

Ex. No.	LabMD Description	LabMD has possessed since no later than*	Opposition Section in which Proposed Exhibit is Addressed
Category 1			
RX552	Expert report of Cliff Baker and Preliminary Injunction Hearing Transcript, LabMD, Inc. v. FTC (Case 1:14-cv-00810-WSD)	4/11/2014 & 5/7/2014	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began Section IV.B - HIPAA Is Not Relevant Section IV.B.1 - Inadmissible Expert Testimony and Unreliable Hearsay
RX553	HHS/CMS Certificate of Compliance: LabMD, Inc. 2003-2013 (Ex. 1 to Daugherty Decl.) (Mar. 20, 2014), N.D. Ga. Case	11/13/2011	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began Section IV.B - HIPAA Is Not Relevant Section IV.B.2 - Failed to Establish Relevance
RX554	C.I.D. to Privacy Institute (July 10, 2009-Aug. 13, 2009)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.A.2 - Failed to Establish Relevance
RX615	FTC responses to Questions for the Record to U.S. House Subcomm. on Commerce, Manuf. & Trade on Feb. 4, 2014) (July 11, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.A.3 - Failed to Establish Relevance
RX616	FTC responses to Questions for the Record to U.S. House Subcomm. on Commerce, Manuf. & Trade on Feb. 4, 2014) (July 16-17, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.A.3 - Failed to Establish Relevance
RX644	OGR Staff Report dated January 2, 2015 prepared for OGR Chairman Darrell E. Issa: "Tiversa, Inc.: White Knight or High- Tech Protection Racket?"	5/18/2015	Section III - Staff Report Should Not Be Admitted Because Court Took Judicial Notice of Only Admissible Facts
RX649	News article re HIPAA (Sept. 9, 2013), Exhibit 1 to Pepson Decl. ND Ga. Case	3/20/2014	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began Section IV.B - HIPAA Is Not Relevant Section IV.B.5 - Unreliable Hearsay and Failed to Establish Relevance
RX653	Emails between Hopkins and Johnson (Mar. 2008), Johnson Dep. Ex. RX10 (Feb. 18, 2014)	2/18/2014	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began Section V.A.6 - Unreliable Hearsay and Failed to Establish Relevance
RX654	Boback testimony/House Subcomm. Commerce, Trade, & Consumer Protection (May 4, 2009), Boback Dep. Ex. RX1 (Nov. 21, 2013)	11/21/2013	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began Section V.A.7 - Unreliable Hearsay and Failed to Establish Relevance
RX656	Computer World article, Robert Boback Dep. RX536 (June 7, 2014)	6/7/2014	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began Section V.A.8 - Unreliable Hearsay and Failed to Establish Relevance

* Note: For those proposed exhibits with "(FOIA)" after the date in the column "LabMD has possessed since no later than," the date represents Complaint Counsel's understanding of the date upon which the FOIA Office transmitted the documents to counsel for LabMD.

Appendix A
Sections of Opposition that Address Each Proposed Exhibit

Ex. No.	LabMD Description	LabMD has possessed since no later than*	Opposition Section in which Proposed Exhibit is Addressed
Category 2			
RX587	Letter dated June 13, 2014 from FTC Sec'y Clark to OGR/Issa	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section IV.A - Attempts to Relitigate Court's Prior Ruling Section V.B.1 - Mischaracterized and Failed to Establish Relevance
RX592	FTC email chain between Acting FTC IG Tshibaka to Hippsley, DAEO White, & OCR Dir. Bumpus	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX593	Email chain: Sec'y Clark, DAEO White, COS Hippsley, Atty. Advisor Burstein	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section IV.A - Attempts to Relitigate Court's Prior Ruling Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX594	Email chain reflecting Comm'r Ramirez's edits/input into June 13, 2014 response letter	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX596	Email chain by: Comm'r Ramirez, DAEO White, Sec'y Clark, OCR Staff	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section IV.A - Attempts to Relitigate Court's Prior Ruling Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX613	Email chain: Shannon Taylor (U.S. House) & OCR staffer Kim Vandecar	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX614	Email chain: Taylor & Vandecar (June 18, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX617	Email: Taylor to Vandecar (June 18, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX619	Email from Vandecar to OGR staff (June 13, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX621	Email chain: FTC Staff and OGR Staff (June 11-13, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX622	Emails: Joseph Wender (Sen. Markey staffer) and Vandecar re FTC data security standard (June 13, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance
RX625	Email from Vandecar to Mark Marin (OGR Deputy Staff Dir.) (June 16-17, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.B.2 - Mischaracterized and Failed to Establish Relevance

Appendix A
Sections of Opposition that Address Each Proposed Exhibit

Ex. No.	LabMD Description	LabMD has possessed since no later than*	Opposition Section in which Proposed Exhibit is Addressed
Category 3			
RX584	Emails regarding OGR's July 18, 2014 letter to Comm'r Ramirez	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX586	Emails regarding OGR's June 11 & July 18, 2014 letters to Comm'r Ramirez	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX588	Emails regarding OGR's July 18, 2014 letter to Comm'r Ramirez (July 18-20, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX611	Emails: Ellen Doneski (Sen. Jay Rockefeller/Senior Staff) to Comm'r Ramirez regarding Sen. Rockefeller's July 23, 2014 letter	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX612	Email chain: Hill staffers and OCR Dir. Bumpus/OCR Staff	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX618	FTC response letter by Sec'y Clark to OGR's July 18, 2014 letter	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX620	Email: OCR Staff, Daniel Kaufman, and OGR Staff	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX623	Emails: FTC Staff and OGR Staff re FTC's response to OGR's July 18, 2014 letter (July 21, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX624	Emails: OCR Staff and OGR Staff (July 23, 2014)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX626	Email: OGR staffer Patrick Satalin (Rep. Peter Welch) to Aaron Burstein (Atty. Advisor to Comm'r Brill) regarding July 24, 2014 OGR hearing	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX627	Email: Jennifer Barblan (OGR Senior Counsel) to OCR staffer Claudia Simons transmitting OGR's July 18, 2014 letter (July 18, 2014 12:28 PM)	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance
RX628	Email: Matthew Smith (FTC DPIP) to OGR transmitting file 2014072.zip/708,171.51 KB of FTC data/records	9/11/2014 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.C - Mischaracterized and Failed to Establish Relevance

Appendix A
Sections of Opposition that Address Each Proposed Exhibit

Ex. No.	LabMD Description	LabMD has possessed since no later than*	Opposition Section in which Proposed Exhibit is Addressed
Category 4			
RX630	Dec. 1, 2014 letter from OGR to Comm'r Ramirez with select attachments	12/3/2014	Section IV.A - Attempts to Relitigate Court's Prior Ruling
RX631	Email: Laura Riposo Van Druff to Chief ALJ D. Michael Chappell transmitting the FTC's December 16, 2014 response letter (Dec. 18, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX632	Email: Van Druff to David C. Shonka re LabMD matter (Dec. 2, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX634	Emails: Bumpus and Van Druff regarding FTC's December 16, 2014 response letter (Dec. 16, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX635	Email: OGR to FTC/OCR transmitting OGR's December 1, 2014 letter (Dec. 1, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX637	Email: Bumpus to Shonka & Vandecar (Dec. 3, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX638	Emails: FTC officials regarding OGR's December 1, 2014 letter (Dec. 1-2, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX639	Email: Sec'y Clark to Staff regarding OGR's December 1, 2014 letter (Dec. 19, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX640	Emails: Comm'r Ramirez and COS Heather Hipsley (Dec. 10, 2014; Dec. 15, 2014)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance
RX643	Emails: Sec'y Clark and Bumpus (Dec. 15, 2015)	4/28/2015 (FOIA)	Section II - Mischaracterized and Failed to Establish Relevance

Appendix A
Sections of Opposition that Address Each Proposed Exhibit

Ex. No.	LabMD Description	LabMD has possessed since no later than*	Opposition Section in which Proposed Exhibit is Addressed
Category 5			
RX583	Emails: DAEO White from Complaint Counsel, FTC leadership (Oct. 2014); voicemail verifications (Aug. 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.1 - Mischaracterized and Failed to Establish Relevance
RX590	Emails: Mithal/DAEO White/Staff Atty. Blodgett (June 23-27, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.2 - Mischaracterized and Failed to Establish Relevance
RX591	Emails: Comm'r Ramirez, DAEO White, Gen. Counsel Jon Nuchterlein (June 20, 2014); internal FTC email from Mithal to DAEO White re June 19, 2014 internal meeting	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.2 - Mischaracterized and Failed to Establish Relevance
RX595	Email: Alain Sheer and DAEO White (Nov. 5, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX597	Emails: Van Druff, Sheer and DAEO White (June 19, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX598	Email: Van Druff to DAEO White (Nov. 5, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX599	Notice of voicemail: DPIP Ass't Dir. Schoshinski to DAEO White (June 9, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX600	Emails: Comm'r Ramirez/COS Hipsley to DAEO White, OCR Dir. Bumpus, Dir. Pub. Affairs & Comms. Justin Cole (May 30, 2014); Sheer and DAEO White (May 31 & June 2, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX602	Email: Van Druff to DAEO White (Mar. 25, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX603	Email: FTC witness Ruth Yodaiken and DAEO White (Mar. 14, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX604	Email: Van Druff to DAEO White (Nov. 4, 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX606	Emails: FTC Senior Leadership, DAEO White, and LabMD Complaint Counsel (Feb.-Mar. 2014)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.3 - Failed to Establish Relevance
RX610	Emails: FTC Senior Leadership regarding Comm'r Brill's disqualification (Dec. 17-18 & 26, 2013)	2/19/2015 (FOIA)	Section I.B - No Good Cause, LabMD Possessed Before Resting Case Section V.E.4 - Failed to Establish Relevance
RX655	Letter from Settlemeyer to Boback (June 25, 2008), Boback Dep. Ex. RX2 (Nov. 21, 2013)	11/21/2013	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began Section IV.C - LabMD Did Not Address Proposed Exhibit in Motion
RX659	Letter from Mary K. Engle to George Searle, CEO LimeWire (Aug. 19, 2010)	3/3/2014	Section I.A - No Good Cause, LabMD Possessed Before Hearing Began

Exhibit 1



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

January 16, 2015

VIA EMAIL

Prashant K. Khetan
Cause of Action
1919 Pennsylvania Avenue, NW
Suite 650
Washington, DC 20006

Re: In the Matter of LabMD, Inc., FTC Docket No. 9357

Dear Mr. Khetan:

Thank you for your letter of January 7, 2015. Through our supplemental responses and productions on July 28, 2014, April 22, 2014, March 3, 2014, and February 19, 2014, Complaint Counsel has regularly discharged our obligation to supplement disclosures and responses to discovery. Consistent with our obligations pursuant to Rule 3.31 and other applicable rules, we will continue to do so through the close of the evidentiary record. We will also continue to comply with the Additional Provisions of the Court's Pretrial Scheduling Order, including Paragraph 14, which governs the production of third-party documents.

Sincerely,

A handwritten signature in black ink, appearing to read "Jarad Brown".

Jarad Brown

cc: William A. Sherman, II (*via email*)
Reed D. Rubinstein (*via email*)
Hallee K. Morgan (*via email*)
Kent Huntington (*via email*)
Sunni Harris (*via email*)
Robyn Burrows (*via email*)
Daniel Epstein (*via email*)
Patrick Massari (*via email*)



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

March 19, 2015

VIA EMAIL

William A. Sherman, II
Dinsmore & Shohl LLP
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004

Re: In the Matter of LabMD, Inc., FTC Docket No. 9357

Dear Mr. Sherman:

This letter responds to your letter of March 12, 2015, in which you ask, among other things, whether Complaint Counsel has provided Respondent with copies of all documents relevant to this litigation that the Federal Trade Commission provided to the United States House of Representatives' Committee on Oversight and Government Reform ("Oversight Committee").

To begin with, your letter mischaracterizes our March 11, 2015 phone conversation. In your letter you state that I "indicated that [I] would investigate [whether Complaint Counsel had provided all such documents to Respondent] and get back to [you]." In fact, in response to your question, I asked whether there were particular discovery requests to which your inquiry related. You responded that you would send a letter specifying the requests to which your inquiry pertained. Although your letter does not identify specific discovery requests, for the purposes of this letter, Complaint Counsel assumes that your inquiry relates to the parties' ongoing obligation to supplement and amend discovery responses pursuant to FTC Rule of Practice 3.31(e).

The Oversight Committee's requests to the Federal Trade Commission included requests for documents that are not responsive to Respondent's discovery requests and that are outside the scope of discovery in this matter. *See* FTC Rule of Practice 3.31(c)(2).

Through our supplemental responses and productions on February 19, 2014, March 3, 2014, April 22, 2014, July 28, 2014, January 21, 2015, February 5, 2015, and March 12, 2015, Complaint Counsel has timely and fully complied with our obligation to supplement disclosures and responses to discovery. At present, we believe we have fully complied with our discovery

William Sherman
March 19, 2015
Page 2

obligations under the Rules of Practice. Of course, the obligation of Rule 3.31(e) applies equally to both parties. To date, Respondent has not supplemented its disclosures or responses to discovery.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura Riposo VanDruff', with a long horizontal flourish extending to the right.

Laura Riposo VanDruff

cc: Reed D. Rubinstein (*via email*)
Prashant K. Khetan (*via email*)
Sunni Harris (*via email*)
Hallee K. Morgan (*via email*)
Daniel Epstein (*via email*)
Patrick Massari (*via email*)

Exhibit 2

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

In the Matter of)	DOCKET NO. 9357
)	
LabMD, Inc.,)	
a corporation.)	
)	

RESPONDENT'S RESPONSES

Respondent, LabMD, Inc. ("LabMD"), for its response to Complaint Counsel's Interrogatories and Requests ("Discovery Requests") states as follows:

GENERAL OBJECTIONS

1. Respondent objects to the Discovery Requests to the extent that they seek information which is neither relevant to, nor reasonably likely to lead to the discovery of admissible evidence.
2. Respondent objects to the Discovery Requests to the extent that they are overly broad, unduly burdensome, vague, ambiguous, and/or unrestricted by any relevant date parameters.
3. Respondent objects to the Discovery Requests to the extent that they seek information which is protected from discovery by the attorney-client privilege or work product doctrine.
4. Respondent objects to the Discovery Requests to the extent they seek a legal conclusion.

5. Respondent objects to the Discovery Requests to the extent they seek information and/or documents that are contained in or are part of the public record and readily obtainable by Complaint Counsel.

6. Respondent reserves all rights to object to the competency, relevancy, materiality and/or admissibility of the information and/or documents disclosed in response to the Discovery Requests.

7. Respondent objects to the Discovery Requests to the extent they seek information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information.

8. Respondent hereby incorporates these General Objections into each of the Responses herein, and failure to include each such General Objection in response to each Discovery Requests shall not waive LabMD's objections in this regard.

REQUESTS

29. Documents Sufficient to Show the last known address of all Consumers whose Personal Information is included in the 1,718 File or the Sacramento Documents.

RESPONSE: Respondent objects to this request as irrelevant and unduly burdensome. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that the FTC, has already been provided the name, social security number, and/or prior address of any of the Consumers identified in the 1,718 File or the Sacramento Documents, and thus FTC

is able to find the most recent address based upon its access to federal records such as tax returns. Therefore, the information sought is just as available, if not more so, to the FTC than to LabMD.

30. All documents listed in the document labeled FTC-LABMD-003755.

RESPONSE: Respondent objects to this request as unduly burdensome. Without waiving these objections and/or the foregoing General Objections, Respondent will produce the documents, to the extent they exist, listed in FTC-LABMD-003755, but makes no representation that these documents contain the same information as the documents listed in FTC-LABMD-03755 on the date the screenshot was taken.

31. All documents relating to any steps taken or investigation conducted by or on behalf of LabMD in connection with the Security Incident described in Paragraphs 17-19 of the Complaint, including any risk assessments conducted by or on behalf of the company pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH).

RESPONSE: Respondent objects to this request as irrelevant. Without waiving these objections and/or the foregoing General Objections, responsive documentation was provided to Complaint Counsel on February 24, 2010 by letter from Phillipa Ellis in responses to requests numbered 13, 14, 15, 16, and 17.

32. All documents relating to any steps taken or investigation conducted by or on behalf of LabMD in connection with the Security Incident described in Paragraph 21 of the Complaint, including any risk assessments conducted by or on behalf of the company pursuant to the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act (HITECH).

RESPONSE: Respondent objects to this request as irrelevant. Without waiving these objections and/or the foregoing General Objections, responsive documents were provided pursuant to Requests No. 16 and 17 of Complaint Counsel's First Set of Requests for Production of Documents.

33. Documents Sufficient to Show the dates during which LabMD employed Karalyn Garrett.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent will produce responsive documents.

34. Documents Sufficient to Show the dates during which LabMD employed Rosalind Woodson.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent will produce responsive documents.

35. Documents Sufficient to Show each substantially different Communication from LabMD to referring physicians, employees, contractors, or referring physicians' patients related to LabMD's decision to stop accepting new specimens.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent will produce responsive documents.

36. For each substantially different Communication from LabMD to referring physicians, employees, contractors, or referring physicians' patients related to LabMD's decision to stop accepting new specimens, Documents Sufficient to Show the full name and address of every Person to whom or to which Lab MD directed the Communication.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states no such document exist.

37. All Documents relating to LabMD's intent to dissolve as a Georgia corporation.

RESPONSE: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states no such document exist.

38. Documents Sufficient to Show the means by which LabMD protects or will protect Personal Information in its possession, custody, or control from unauthorized disclosure or access during the time period subsequent to LabMD's decision to stop accepting new specimens.

RESPONSE: Respondent objects this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, overly broad, and unduly burdensome. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing

General Objections, Respondent further states that LabMD will employ the same policies and procedures to protect Protected Health Information as it did prior to its decision to stop accepting new specimens, and that this information has already been provided. LabMD states that the laboratory information system, medical software is no longer connected to the internet.

39. All Documents LabMD intends to use to refute the allegations of the Complaint.

RESPONSE: Respondent will comply with its discovery obligations as stated in the ALJ's Revised Scheduling Order, and will produce proposed exhibits on April 9, 2014.

40. All Documents LabMD intends to use to support any affirmative defenses in its Answer.

RESPONSE: Respondent will comply with its discovery obligations as stated in the ALJ's Revised Scheduling Order, and will produce proposed exhibits on April 9, 2014.

INTERROGATORIES

10. Describe LabMD's current operations, including LabMD's status as a Georgia corporation with its principal office or place of business at 2030 Powers Ferry Road, Building 500, Suite 520, Atlanta, Georgia 30339, and state the date on which LabMD decided to stop accepting new specimens.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, vague, ambiguous, and overly broad. Specifically, Complaint Counsel's use of the phrase "LabMD's current operations" is ambiguous. Without waiving these objections and/or the foregoing General Objections, Respondent states that LabMD is a Georgia corporation with its principal office at 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339, and that it began winding down its operations and stopped accepting new specimens on December 20, 2013.

11. State whether LabMD intends to dissolve as a Georgia corporation, setting forth specifically the time period in which it intends to file a Notice of Intent to Dissolve, wind-up its assets and obligations, or file Articles of Dissolution.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states that LabMD does not intend to dissolve as a Georgia corporation.

12. For the period from August 1, 2013 through January 1, 2015, state whether and how LabMD intends to preserve the Personal Information currently in its possession, custody, or control. If LabMD intends to preserve the Personal Information currently in its possession, custody, or control, describe how LabMD intends to protect the Personal Information from unauthorized access or disclosure.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that it will employ the same policies, procedures, hardware, and software utilized to protect Protected Health Information post August 2013 as it used prior to August 2013. This information has already been provided. Further the information is now kept in an unmarked location not readily recognizable as a business.

13. State the types of Personal Information that LabMD has collected or maintained. For each type of Personal Information, identify the number of Consumers whose Personal Information LabMD has collected or maintained, and state whether the information is stored or maintained electronically or in hard copy.

ANSWER: Respondent objects to this request as overly broad, burdensome, and vague. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Furthermore, Respondent states that this interrogatory is impossible to answer as worded, as LabMD did not keep track of the number of Consumers by the classifications of Personal Information which Complaint Counsel designates in its definition section. Without waiving these objections and/or the foregoing General Objections, Respondent states that LabMD has received the categories of Protected Health Information as described in Complaint Counsel's definition section, and that this information is kept electronically. Only inbound requests for lab tests, checks and transaction records are kept in hard copy.

14. For Personal Information that LabMD stores or maintains electronically, identify the location(s) on LabMD's networks (e.g., servers, applications, databases, or personal computers) where each type of Personal Information is stored or maintained. If the location(s) have changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents

relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that Protected Health Information is stored only on the Lytec and LabNet servers, and is not stored on personal computers, databases, or applications.

15. For each location on LabMD's networks identified in response to Interrogatory 14, identify the format (e.g., encrypted or clear readable text) in which the Personal Information is stored or maintained. If the format has changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only collected Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that all Protected Health Information is stored in an encrypted form.

16. For each location on LabMD's networks identified in response to Interrogatory 14, identify the means by which LabMD protects the Personal Information contained therein from unauthorized access or disclosure. If the means by which Lab MD protects Personal Information has changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that regardless of location, Protected Health Information is protected by passwords, security cameras, locks, and encryption software. In addition, Respondent further states that the Lytec server is the only server currently connected to the internet.

17. For Personal Information LabMD stores or maintains in hard copy, identify the location(s) of the hard copy information, and describe the means by which LabMD protects the Personal Information contained therein from unauthorized access or disclosure. If the means by which Lab MD protects Personal Information has changed during the Applicable Time Period, describe the change(s) and state the date(s) on which the change(s) occurred.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving these objections and/or the foregoing General Objections, Respondent states that Protected Health Information previously stored at 2030 Powers Ferry Road, Building 500, Suite 520, Atlanta, Georgia 30339 was stored in locked file cabinets. Protected Health

Information currently located at 1250 Parkwood Circle, Unit 2201, Atlanta, GA 30339 is stored in a locked condominium in a locked room, in a gated community only accessible by code.

18. State whether LabMD has used any of the following IP addresses for a business purpose:
173.16.83.112; 68.107.85.250; 201.194.118.82; 90.215.200.56.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, Respondent states that none of the above mentioned IP addresses have been used by LabMD, Inc. for a business purpose, to the best of its knowledge.

19. State the dates on which LabMD's employment relationship with each of the following individuals ended, describing for each the reasons that his or her employment ended:
Lawrence Hudson; Rosalind Woodson; Curt Kaloustian; Alison Simmons; Karalyn Garrett; and Kim Gardner.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections and/or the foregoing General Objections, states that Lawrence Hudson was terminated for his sales performance; Rosalind Woodson was terminated for poor job performance and for breaking company policy; Curt Kaloustian was terminated for job abandonment; Allison Simmons was terminated for poor job performance; and Karalyn Garrett was terminated for poor job performance and sleeping on the job. Respondent will produce additional documentation.

20. For each job title responsible for tasks related to LabMD's billing- including Billing Representative, Billing Specialist, Accounts Receivable Specialist, Payment Posting

Specialist, Billing Manager, Client Services Manager, or Finance Manager- identify and describe each technical measure used to limit access to Personal Information maintained by LabMD.

ANSWER: Respondent objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only collected Protected Health Information. Without waiving these objections or the foregoing General Objections, see Respondent response to Complaint Counsel's Interrogatory 1 and 2.

21. For each .pdf file listed in the document labeled FTC-LABMD-003755, identify the types of Personal Information contained therein, and identify the number of Consumers whose Personal Information is contained therein.

ANSWER: Respondent objects to this requests to the extent its seeks information and/or documents relating to Personal Information as defined by Complaint Counsel stating that LabMD, Inc. has never collected Personal Information; rather, it has only received Protected Health Information. Without waiving the these objections or the foregoing General Objections, Respondent states that no documents, except the 1718 File, contained Protected Health Information.

22. State whether you contend that LabMD has complied with the Privacy Rule, 45 C.F.R. Part 160 and Subparts A and E of Part 164, or the Security Rule, 45 C.F.R. Part 160 and Subparts A and C of Part 164, promulgated by the Department of Health and Human Services. If you contend that LabMD has complied with the Privacy Rule or the Security Rule promulgated by the Department of Health and Human Services, identify all facts that support that contention.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

23. State whether you contend that peer-to-peer file sharing applications do not present a risk that users will inadvertently share files on peer-to-peer networks. If you contend that that peer-to-peer file sharing applications do not present a risk that users will inadvertently share files on peer-to-peer networks, identify all facts that support that contention.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects as it is premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Respondent will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

24. State whether you contend that Lime Wire was used to conduct an intrusion of LabMD's computer networks. If you contend that Lime Wire was used to conduct an intrusion of LabMD's computer networks, identify all facts that support that contention.

ANSWER: Respondent objects to this Request to the extent that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Respondent further objects as it is premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Respondent will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

25. Identify each denial of a material allegation and each affirmative defense in your Answer, and for each state all facts upon which you base the denial or affirmative defense.

ANSWER: Respondent objects to this Request as the Answer speaks for itself. Respondent further objects to this request to the extent it seeks attorney work-product. Moreover Respondent objects as it is premature and unduly burdensome because it is a contention interrogatory and no response is required prior to the close of discovery pursuant to Rule 3.35(b)(2). Respondent will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

/s/ William A. Sherman, II
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CERTIFICATE OF SERVICE

This is to certify that on March 3, 2014, I served via electronic mail delivery a copy of the foregoing document to:

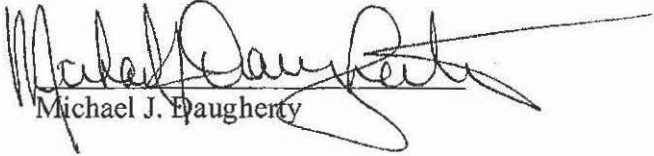
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VERIFICATION

I, Michael J. Daugherty, hereby verify that the foregoing answers to the above interrogatories are true and accurate to the best of my knowledge and information.


Michael J. Daugherty