

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



ORIGINAL

In the Matter of)
)
)

LabMD, Inc.,)
a corporation,)
Respondent.)
_____)

DOCKET NO. 9357

**ORDER DENYING RESPONDENT'S MOTION FOR OFFICIAL
NOTICE AND ADMISSION OF PROFFERED EXHIBIT RX 660**

I.

On July 17, 2015, Respondent LabMD, Inc. ("Respondent" or "LabMD") filed a Motion Requesting Official Notice of Proffered Exhibit RX 660 ("Motion"). Federal Trade Commission ("FTC") Complaint Counsel filed an opposition to the Motion on July 29, 2015 ("Opposition"). As set forth below, Respondent's Motion is DENIED.

II.

Respondent requests that official notice be taken of Chapter 15 of the Federal Trade Commission's Operating Manual, titled "Confidentiality and Access" ("Chapter 15 of the Operating Manual"), which Respondent identifies as proffered exhibit RX 660, and asks that this document be admitted into the trial record. Respondent argues that Chapter 15 of the Operating Manual constitutes a public statement and policy, which is readily available on the FTC's website (*see* https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch15confidentialityandaccess_0.pdf); that the existence and contents of Chapter 15 of the Operating Manual cannot be subject to credible dispute; and the source of the document cannot reasonably be questioned. Respondent further asserts that Chapter 15 of the Operating Manual is relevant and material.

Complaint Counsel argues that Respondent has failed to provide any justification for not offering its proposed exhibit or seeking official notice prior to resting its case on May 5, 2015. Complaint Counsel further asserts that Respondent has not articulated any fact as to which it seeks official notice, as required by FTC rules, or demonstrated that anything in Chapter 15 of the Operating Manual is relevant to any claim or defense in this proceeding.

III.

Although Respondent titled its motion as one for official notice, in its request for relief, Respondent seeks admission of proffered exhibit RX 660 into evidence. Respondent rested its

case on May 5, 2015. The evidentiary hearing was completed on July 15, 2015, and pursuant to FTC Rule 3.44(c), which requires the record to be closed three business days after the completion of the evidentiary hearing, the record was closed on July 20, 2015. Respondent has provided no reason for failing to seek admission or official notice of proffered RX 660 earlier. Thus, Respondent has failed to demonstrate good cause to admit proffered RX 660 into evidence at this late stage of the proceedings.

In addition, Respondent has not met the standards for obtaining official notice. Pursuant to Rule 3.43(f) of the Commission's Rules of Practice:

“Official notice” may be taken of any *material fact* that is not subject to reasonable dispute in that it is either generally known within the Commission's expertise or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.

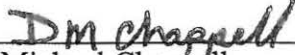
16 C.F.R. § 3.43(f) (emphasis added).

Respondent has not pointed to any “fact” for which it seeks official notice, much less any material fact. Rather, Respondent seeks official notice of the entirety of Chapter 15 of the Operating Manual. Moreover, Respondent has not demonstrated that the proffered exhibit, or any fact therein, is “material”; instead, Respondent provides only the conclusory phrase: “Relevance: FTC's internal guidelines regarding confidentiality and access of documents.” Motion at 1. Respondent, as the moving party, has failed to meet its burden of showing any material fact established by RX 660 for which official notice could be taken.

IV.

For the foregoing reasons, Respondent's Motion is DENIED. However, the document for which Respondent seeks admission is a statement of the FTC publicly available on the FTC's website. Accordingly, similar to consent decrees, public speeches made by Commissioners, press releases, and other publicly available statements of the FTC, Respondent may cite to Chapter 15 of the Operating Manual in its Post-Trial Briefs.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 30, 2015

Notice of Electronic Service

I hereby certify that on July 30, 2015, I filed an electronic copy of the foregoing Order Denying Respondent's Motion for Official Notice and Admission of Proffered Exhibit RX 660, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
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Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
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I hereby certify that on July 30, 2015, I served via E-Service an electronic copy of the foregoing Order Denying Respondent's Motion for Official Notice and Admission of Proffered Exhibit RX 660, upon:

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