

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 RX542**

RX542 is not admissible for any purpose because it is hearsay not subject to any exception to the rule against hearsay. Moreover, the letter does not bear satisfactory indicia of reliability. Finally, the quoted excerpts within the letter constitute hearsay within hearsay, do not appear to have been provided under oath, and are incomplete and partially redacted.

BACKGROUND

At approximately 5:30PM on June 11, 2014—the evening prior to the resumption of the evidentiary hearing in this matter—the Commission’s Office of Congressional Relations received a copy of the document subsequently marked by Respondent’s counsel as RX542, a letter from Representative Darrell Issa, Chairman of the U.S. House of Representatives Committee on Oversight and Government Reform (“Oversight Committee”), to Federal Trade Commission Chairwoman Edith Ramirez (“RX542”).¹ RX542 addresses the Oversight

¹ In addition to the Ranking Minority Member, Respondent’s counsel, counsel for Mr. Wallace, and Complaint Counsel were copied on the letter. Complaint Counsel received its copy of the letter from Chairman Issa by U.S. Mail on June 16, 2014.

Committee's investigation into Tiversa, Inc. ("Tiversa"), and it asserts that information Tiversa "provided to the FTC" may have been "incomplete or inaccurate." *See* Exhibit 1 to Respondent's Motion to Admit RX-542 ("Motion") (June 17, 2014), at 1.

The basis for this statement in RX542 is attributed to "a transcribed interview" of Robert Boback, CEO of Tiversa, with "Committee staff." RX542 varyingly states that Mr. Boback "testified" and "stated," but there is no indication that Mr. Boback's interview was under oath, nor is there a statement regarding who was present during the interview. *See id.* at 1. The transcribed interview, which has not been provided to Complaint Counsel or to the Commission, apparently spans more than 100 pages. *See* Motion Ex. 1 at 1 n.2. RX542 quotes 19 lines of Mr. Boback's statement that are excerpted from the transcribed interview. *See id.* at 1-2. The quotes substitute "[Tiversa Employee A]" and "[Tiversa Employee B]" for actual names, and contain multiple ellipses, representing several omissions from within the quoted passages. *See id.* RX542 concludes that the information it contains "bears directly on the ongoing proceeding against LabMD, Inc." *See id.* at 2. However, there is no indication in the letter, or otherwise known to Complaint Counsel, of the Chairman's, Committee members', or Committee staff's familiarity with the record evidence received by the Court in this case. RX542 concludes by stating that the Committee is considering next steps in its investigation of Tiversa and may seek information from the Commission. *See id.*

During the evidentiary hearing on June 12, 2014, the Court suggested that RX542 be offered into evidence by the parties as a joint exhibit. Complaint Counsel declined to sponsor the exhibit for the reasons set forth in this memorandum. Respondent moved the admission of RX542, and Complaint Counsel objected to its admission on the basis of hearsay. The Court ordered Respondent to seek its admission by written motion by 5:00PM on June 16, 2014 and to

brief Complaint Counsel's hearsay objection, and for Complaint Counsel to respond by 5:00PM on June 17, 2014.

ARGUMENT

The Court ordered the parties to brief Complaint Counsel's hearsay objection to RX542. Trial Tr. June 12, 2014 at 1283-84. Nonetheless, after pages about the relevance of RX542, Respondent's Motion fails to overcome Complaint Counsel's hearsay objection because—contrary to Respondent's assertions—RX542 is not a "Public Record," *see* Fed. R. Evid. 803(8), and does not bear "satisfactory indicia of reliability," *see* 16 C.F.R. § 3.43(b). Accordingly, RX542 is inadmissible under the Commission's Rules of Practice.

"Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered into evidence to prove the truth of the matter asserted." *Id.*; *see also* Fed. R. Evid. 801(c). Hearsay may only be admitted "if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair." 16 C.F.R. § 3.43(b). The admissibility and probative value to be given to hearsay evidence should be determined by analyzing "the possible bias of an out-of-court declarant, the context in which the hearsay material was created, whether the statement was sworn to, and whether it is corroborated or contradicted by other forms of direct evidence." FTC Rules of Practice, 74 Fed. Reg. 1804-01, 1816 (Jan. 13, 2009).

Respondent offers RX542 for the proposition that Complaint Counsel's evidence regarding the 1718 file, based on Tiversa documents and the testimony of Mr. Boback, is not credible. *See* Motion at 3-4. As such, Respondent offers RX542 for the truth of the matter asserted. This is an inadmissible purpose for which, as discussed below, no hearsay exception applies.

I. RX542 DOES NOT FALL UNDER A HEARSAY EXCEPTION

Respondent asserts that RX542 is admissible under the hearsay exception for Public Records under Fed. R. Evid. 803(8). A Public Record for purposes of hearsay exception is:

A record or statement of a public office if: (A) it sets out: (i) the office's activities; (ii) a matters observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and (B) neither the source of the information nor other circumstances indicate a lack of trustworthiness.

Fed. R. Evid. 803(8). RX542, however, is not a public record to which Rule 803(8) applies.

First, Chairman Issa's letter relates to an "ongoing investigation"; it does not contain the Congress's or even the Committee's "factual findings." Second, even if the letter were an "official report," as contemplated by the Supreme Court in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 166 n.10 (1988), courts routinely decline to admit Congressional reports under Rule 803(8). *See Barry v. Iron Workers Pension Plan*, 467 F. Supp. 2d 91, 98-99 (D.D.C. 2006) (observing that courts have excluded Congressional reports because of "the possibility that partisan political considerations" may influence the "factual findings, conclusions, or opinions included in Congressional reports") (citing *Richmond Med. Ctr. v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004), *rev'd on other grounds*, *Richmond Med. Ctr. v. Herring*, 570 F.3d 165 (4th Cir. 2009); *Anderson v. City of New York*, 657 F. Supp. 1571 (S.D.N.Y. 1987)).

RX542 and the quotes within it do not fall within any other exception to the rule against hearsay. *See* Fed. R. Evid. 801, 803, 804. The selected interview excerpts of Mr. Boback's transcribed interview are analogous to the un-cross-examined affidavits of John Boyle, Allen Truett, and Christopher Maire, RX313–RX315, which the Court excluded at the Final Prehearing Conference. *See* Final Pre-hrg. Conf. Tr. May 15, 2014 at 73 (excluding affidavits without sufficient indicia of reliability). Unlike the excluded affidavits, however, there is no indication,

besides Respondent's assertion, that the interview was given under oath. RX542 is, therefore, akin to a letter quoting inadmissible, unsworn affidavits, and is not admissible.

II. RX542 IS NOT ADMISSIBLE UNDER COMMISSION'S RULES

RX542 is not admissible under the Commission's Rules of Practice because it lacks satisfactory indicia of reliability. *See* 16 C.F.R. § 3.43(b). Respondent fails to show how RX542 "otherwise meet[s] the standards for admissibility" under Rule 3.43(b). *See* Motion at 5. In particular—contrary to Respondent's assertion—the letter and the interview excerpts it contains do not appear to be "sworn testimony." *Compare* Motion at 5, *with* Motion Ex. 1 at 1.

A. The Committee Letter

RX542 should not be admitted because it does not bear satisfactory indicia of reliability. As discussed above, RX542 does not satisfy any exception to the rule against hearsay. *See* Fed. R. Evid. 803, 804. Nor does it bear sufficient indicia of reliability considered under the Commission's rules. First, the letter is not under oath. *See* Motion Ex. 1; 74 Fed. Reg. 1804-1, 1816 (whether statement is under oath is relevant to admissibility of hearsay evidence). Second, there is no indication—and no showing has been made—that the letter's statements are based on the the Chairman's, Committee Members', or Committee Staff's personal knowledge of the record evidence received by the Court in this case, to which the statements relate. *See* Motion Ex. 1; Scheduling Order (Sept. 25, 2013) at 7, Add'l Prov. 17 (citing FRE 602) ("Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Finally, although the declarant characterizes Mr. Boback as having provided "incomplete and inaccurate" information to the Commission, the excerpts included in the letter are not materially inconsistent with Mr. Boback's June 7, 2014

testimony, which has been received by the Court as RX541.² *See* Motion Ex. 1; 74 Fed. Reg. 1804-1, 1816 (whether statement corroborates or contradicts other evidence is relevant to admissibility of hearsay evidence). For these reasons, RX542 lacks satisfactory indicia of reliability, and should not be admitted to the evidentiary record. *See* 16 C.F.R. § 3.43(b).

B. Interview of Robert Boback Excerpts—Hearsay within Hearsay

Furthermore, the excerpts of Mr. Boback’s interview in RX542 should be excluded from evidence because they constitute hearsay within hearsay, without satisfactory indicia of reliability. The excerpts are hearsay within hearsay, not falling within any hearsay exception. *See* Fed. R. Evid. 803-805. Nor do the quoted bear other indicia of reliability: There is no indication that the interview was under oath. *See* Motion Ex. 1; 74 Fed. Reg. 1804-1, 1816. The interview was not subject to cross-examination by Complaint Counsel. And RX542 does not provide any detail about the circumstances of the interview with Committee Staff, *see* Motion Ex. 1, without which the Court cannot evaluate the context of the interview to determine the reliability of the hearsay. 74 Fed. Reg. 1804-1, 1816 (“context in which the hearsay material was created” is relevant to admissibility of hearsay evidence). Furthermore, the interview transcript is incomplete and includes multiple omissions—preventing consideration by the Court of clarifying or contradictory statements made during the interview—and is redacted to remove the names of employees discussed in the excerpt. *See* Motion Ex. 1. The incomplete nature of the excerpts, the redactions, and the lack of information about the circumstances of the interview prevent the Court from assessing the reliability of the interview transcript. Combined with the unsworn nature of the interview, the excerpts thus do not bear satisfactory indicia of reliability. *See* 74 Fed. Reg. 1804-1, 1816. Without satisfactory indicia of reliability, the use of the excerpts

² RX541 has been granted provisional *in camera* status. *See* Trial Tr. June 12, 2014 at 1304-05.

is not fair under the Commission's Rules, and the quoted excerpts, as well as the entire letter, should therefore not be admitted into evidence. *See* 16 C.F.R. § 3.43(b).

CONCLUSION

RX542 constitutes hearsay and hearsay within hearsay, not within any exception to the rule against hearsay, and without satisfactory indicia of reliability. Its use in this proceeding would be contrary to the Commission's Rules. *See* 16 C.F.R. § 3.43(b). Accordingly, the Court should deny Respondent's Motion to Admit RX-542 into Evidence and exclude RX542 from the evidentiary record.

Dated: June 17, 2014

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown

Federal Trade Commission
600 Pennsylvania Ave., NW
Room CC-8232
Washington, DC 20580
Telephone: (202) 326-2927 – Brown
Facsimile: (202) 326-3062
Electronic mail: jbrown4@ftc.gov

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2014, I filed the foregoing document 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 delivered *via* electronic mail and 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:

Michael Pepson
Lorinda Harris
Hallee Morgan
Robyn Burrows
Kent Huntington
Daniel Epstein
Patrick Massari
Cause of Action
1919 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20006
michael.pepson@causeofaction.org
lorinda.harris@causeofaction.org
hallee.morgan@causeofaction.org
robyn.burrows@causeofaction.org
kent.huntington@causeofaction.org
daniel.epstein@causeofaction.org

Reed Rubinstein
William A. Sherman, II
Sunni Harris
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW, Suite 610

Washington, DC 20004
reed.rubinstein@dinsmore.com
william.sherman@dinsmore.com
sunni.harris@dinsmore.com

Counsel for Respondent LabMD, Inc.

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 17, 2014

By:



Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection