

ORIGINAL

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



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

**RESPONDENT LABMD, INC.'S MOTION TO ADMIT
RX 646, RX 650, RX 652, AND RX 657 *IN CAMERA***

Pursuant to Additional Provision 16 to this Court's Scheduling Order, and Commission Rule 3.43 (16 C.F.R. § 3.43), Respondent LabMD, Inc. ("LabMD") hereby moves to admit RX 646, RX 650, RX 652, and RX 657 (collectively, the "Proffered Exhibits") into evidence with *in camera* treatment. The Proffered Exhibits are attached hereto as Exhibits A-D, respectively.

I. EVIDENCE FOR ADMISSION.

Under Commission Rule 3.43, LabMD moves for admission of the documents described below:

- RX 646: [REDACTED]
- RX 650: [REDACTED]
- RX 652: [REDACTED]

- [REDACTED]
- RX 657: [REDACTED]

II. THE PROFFERED EXHIBITS SHOULD BE ADMITTED UNDER RULE 3.43.

Relevant, material, and reliable evidence shall be admitted. Commission Rule 3.43. Hearsay that is “relevant, material, and bears satisfactory indicia of reliability so that its use is fair” also should be admitted. Commission Rule 3.43(b); *see also In re Polyvore Int’l, Inc.*, No. 9327, 2010 FTC LEXIS 62, at *6-7 (July 10, 2010) (noting that hearsay evidence may be received in FTC proceedings). However, a document that is not admitted for the truth of the matter asserted, by definition, is not hearsay. Fed. R. Evid. 801. The Proffered Exhibits clearly meet the standard for admissibility in the instant proceeding and should be received into evidence.

Each of the Proffered Exhibits are relevant, material, and reliable. First, as noted above, each of the exhibits was utilized and offered as exhibits to depositions already admitted into evidence. *See* RX 500 (Dep. Tr. Lawrence Hudson); RX 503 (Dep. Tr. Eric Johnson); RX 516 (Dep. Tr. Ruth Yodaiken); RX 517 (Dep. Tr. Chris Gormley). Each of the deponents authenticated the documents and testified at length about these exhibits during the depositions. *See* Hudson Dep., at 8-11 (Jan. 13, 2014); Johnson Dep., at 74-78 (Feb. 18, 2014); Yodaiken Dep., at 231-234 (Mar. 5, 2014); Gormley Dep., at 50-53 (Mar. 31, 2014). Thus, both foundation and authentications have been established for each document.

Moreover, these documents are clearly relevant to LabMD’s defense in the instant proceeding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See CX0001, at 1-23; CX0005, LabMD Compliance Program, at 1–10 (Jan. 2003); CX0006, LabMD Policy Manual, at 1-19; CX0444, Ltr. from Ellis to Sheer, at 1-2 (June 4, 2010).

Finally, there is no concern with the reliability of these exhibits. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

For these reasons, this Court should admit RX 646, RX 650, RX 652, and RX 657 into evidence in accordance with Commission Rule 3.43, 16 C.F.R. § 3.43.

III. THE PROFFERED EXHIBITS SHOULD BE PROVIDED *IN CAMERA* PROTECTION.

The Proffered Exhibits each contain confidential sensitive personal information under Commission Rule 3.45, 16 C.F.R. §3.45. Specifically, these documents contain sensitive information that likely could result in injury to the person, partnership, or corporation that requested *in camera* treatment. Pursuant to this Court’s Revised Scheduling Order, LabMD requests that these exhibits be granted permanent *in camera* status.

Under Rule 3.45(b), the Administrative Law Judge may order that material be placed *in camera* if the material constitutes sensitive personal information. Commission Rule 3.45(b).

Sensitive personal information shall include, but shall not be limited to:

an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records.

Commission Rule 3.45(b). Additionally, this Court must order that material be placed *in camera* upon any finding that "its public disclosure will likely result in a clearly defined, serious injury to the person, partnership, or corporation requesting *in camera* treatment." *Id.*

Public disclosure of the proposed exhibits would result in clearly defined injury to the persons and businesses referenced in the proposed exhibits if admitted without *in camera* protection. *See* Commission Rule 3.45(b), 16 C.F.R. §3.45(b). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This Court should, therefore provide *in camera* treatment of the Proffered Exhibits.

CONCLUSION

For the reasons set forth above, LabMD's Motion should be granted.

Dated: June 8, 2015.

Respectfully submitted,

/s/ Prashant K. Khetan
Daniel Z. Epstein, Esq.
Prashant K. Khetan, Esq.
Patrick J. Massari, Esq.
Erica L. Marshall, Esq.
Cause of Action
1919 Pennsylvania Ave., NW Suite 650

Washington, DC 20006
Phone: (202) 499-4232
Facsimile: (202) 330-5842
Email: prashant.khetan@causeofaction.org

/s/ Reed D. Rubinstein

Reed D. Rubinstein, Esq.
William A. Sherman, II, Esq.
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW Suite 610
Washington, DC 20004
Phone: (202) 372-9100
Facsimile: (202) 372-9141
Email: reed.rubinstein@dinsmore.com

Counsel for Respondent, LabMD, Inc.

EXHIBIT A





EXHIBIT B

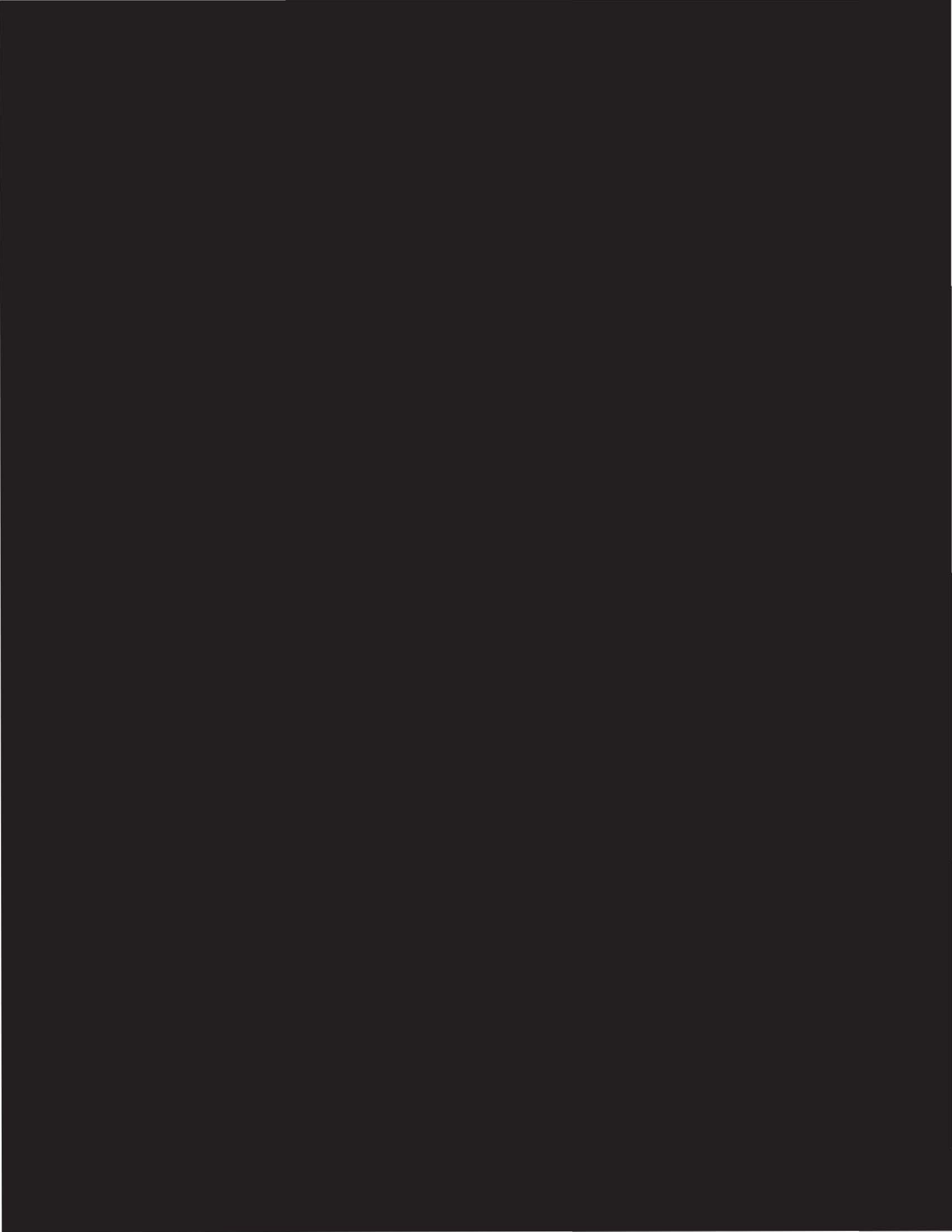






EXHIBIT C

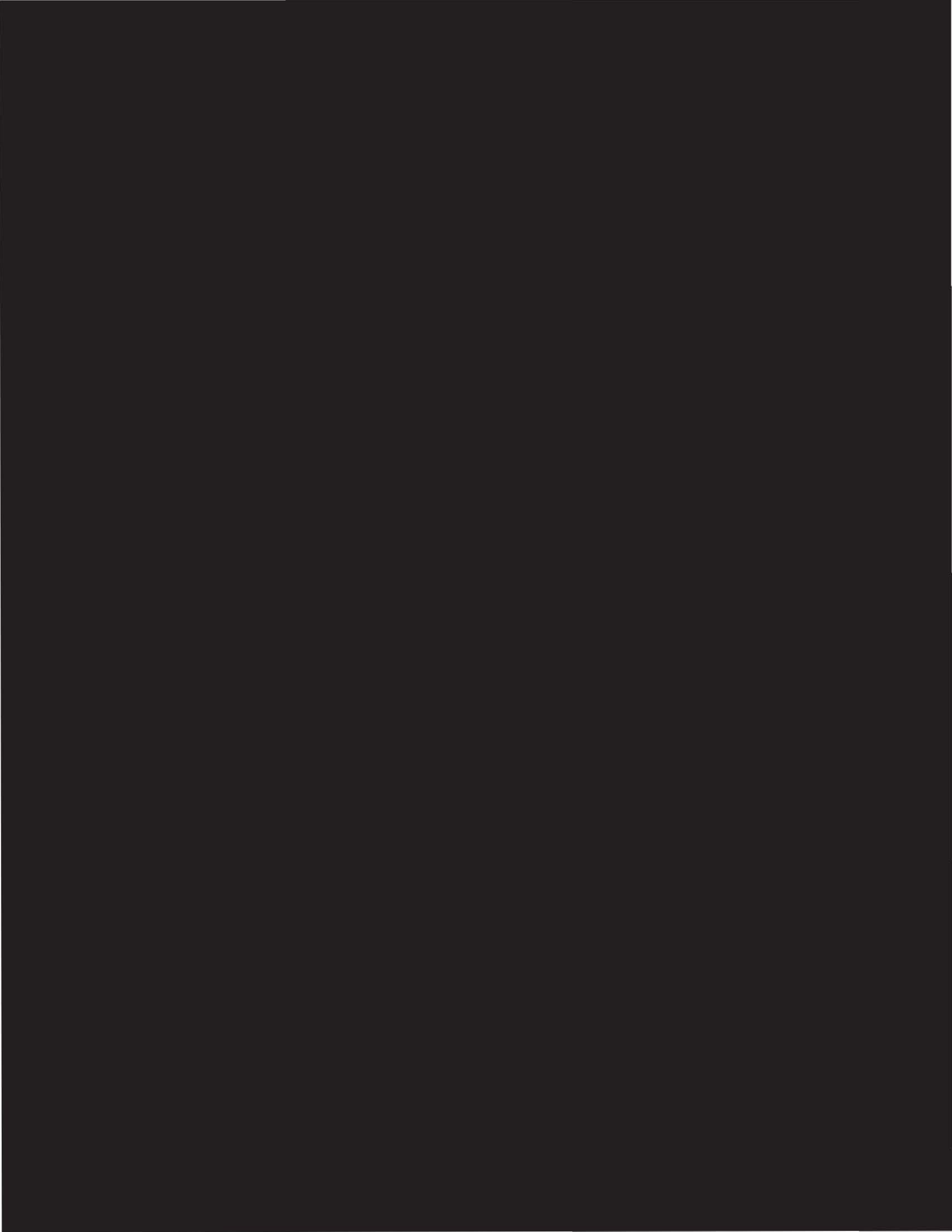






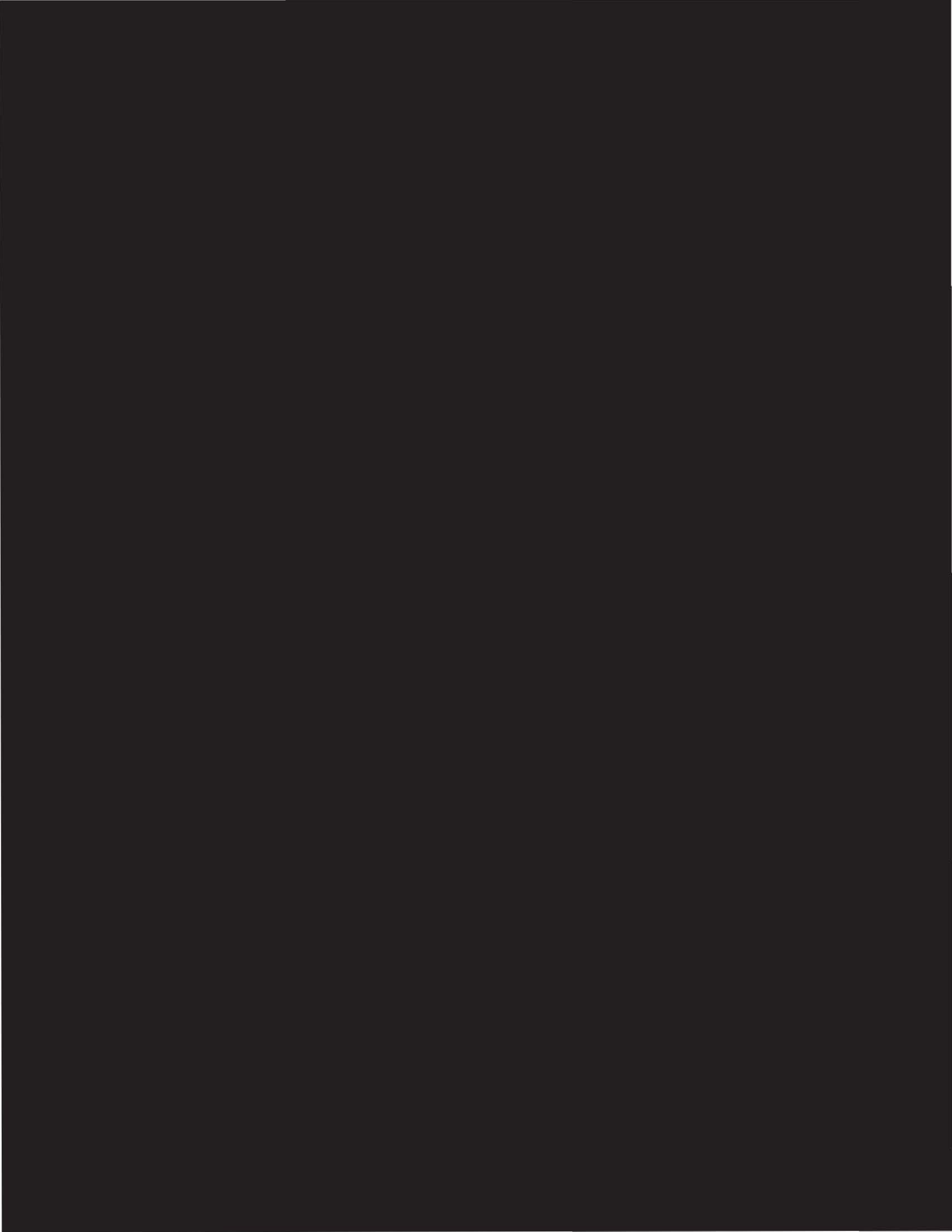


EXHIBIT D





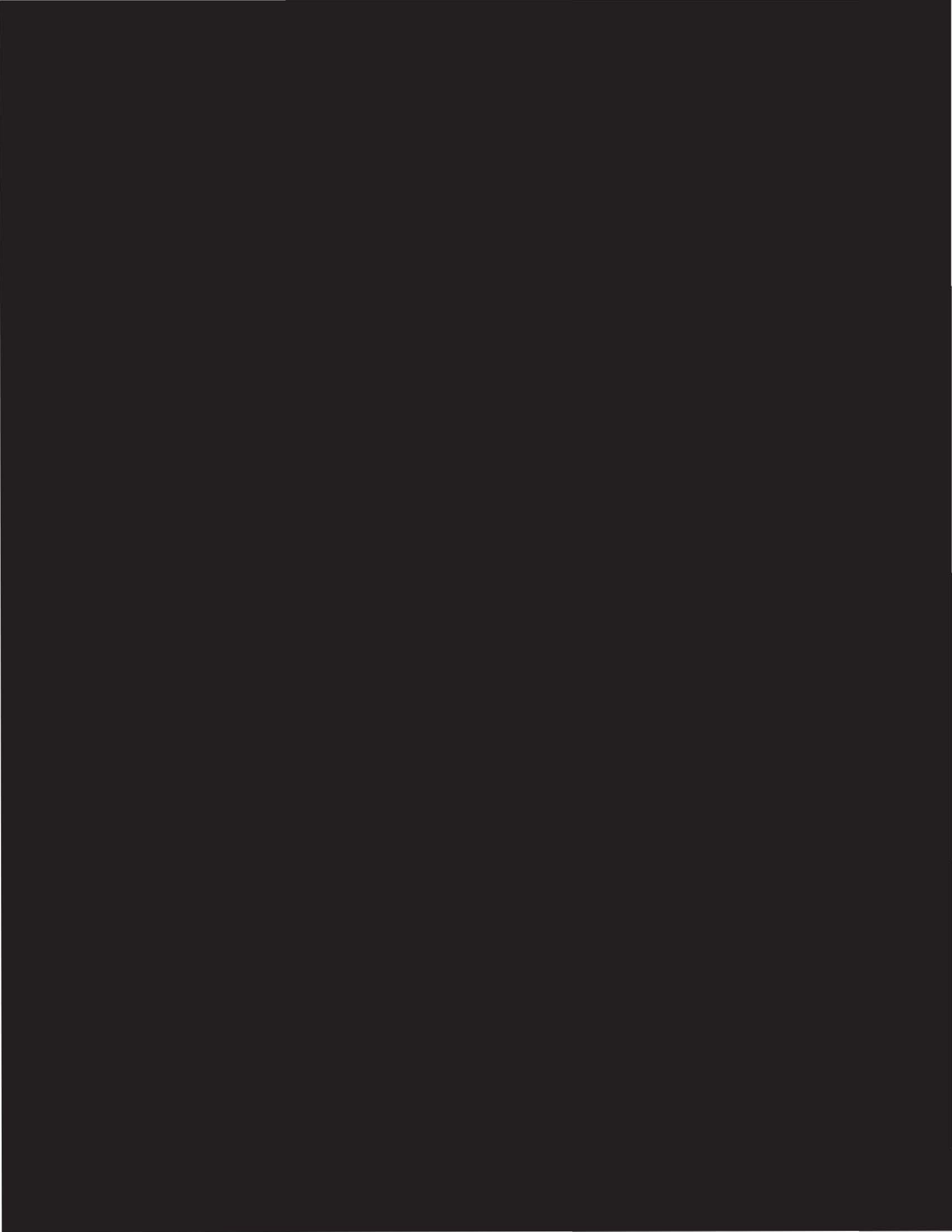


















**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

In the Matter of)
)
LabMD, Inc.,)
a corporation.)
)
_____)

DOCKET NO. 9357

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.’S
MOTION TO ADMIT RX 646, RX 650, RX 652, AND RX 657 IN CAMERA**

Upon consideration of Respondent’s Motion to Admit RX 646, RX 650, RX 652, and RX 657 *in Camera*, and in consideration of the entire Record in this case,

IT IS HEREBY ORDERED that Respondent’s Motion to Admit RX 646, RX 650, RX 652, and RX 657 *in Camera* be and is hereby GRANTED; and

Exhibits RX 646, RX 650, RX 652, and RX 657 shall be admitted as confidential documents provided permanent *in camera* treatment.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

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

In the Matter of)
)
LabMD, Inc.,)
a corporation.)
)
_____)

DOCKET NO. 9357

STATEMENT REGARDING MEET AND CONFER

LabMD, Inc. (“LabMD”) respectfully submits this Statement, pursuant to Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Admit RX 646, RX 650, RX 652, and RX 657 *in Camera*, on June 5, 2015, counsel for LabMD (Patrick Massari and Erica Marshall) conferred with Complaint Counsel (Laura Riposo VanDruff and Jarad Brown) regarding the subject of this motion. Complaint Counsel advised that it did not consent to the instant Motion.

Dated: June 8, 2015.

Respectfully submitted,

/s/ Prashant K. Khetan

Daniel Z. Epstein, Esq.

Prashant K. Khetan, Esq.

Patrick J. Massari, Esq.

Erica L. Marshall, Esq.

Cause of Action

1919 Pennsylvania Ave., NW Suite 650

Washington, DC 20006

Phone: (202) 499-4232

Facsimile: (202) 330-5842

Email: prashant.khetan@causeofaction.org

/s/ Reed D. Rubinstein

Reed D. Rubinstein, Esq.

William A. Sherman, II, Esq.

Dinsmore & Shohl, LLP

801 Pennsylvania Ave., NW Suite 610

Washington, DC 20004

Phone: (202) 372-9100

Facsimile: (202) 372-9141

Email: reed.rubinstein@dinsmore.com

Counsel for Respondent, LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2014, I caused to be filed the foregoing document and an electronic copy with the Office of the Secretary:

Donald S. Clark, Esq.
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail and caused to be hand-delivered a copy of the foregoing document to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
Jarad Brown, Esq.
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Room CC-8232
Washington, D.C. 20580

Dated: June 8, 2015.

By: /s/ Erica L. Marshall

CERTIFICATE OF 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.

Dated: June 8, 2015.

By: /s/ Erica L. Marshall

Notice of Electronic Service

I hereby certify that on June 08, 2015, I filed an electronic copy of the foregoing (PUBLIC) Respondent's Motion to Admit RX 546, RX 650, RX 652, RX 657, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on June 08, 2015, I served via E-Service an electronic copy of the foregoing (PUBLIC) Respondent's Motion to Admit RX 546, RX 650, RX 652, RX 657, upon:

John Krebs
Attorney
Federal Trade Commission
jkrebs@ftc.gov
Complaint

Hallee Morgan
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Jarad Brown
Attorney
Federal Trade Commission
jbrown4@ftc.gov
Complaint

Kent Huntington
Counsel
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Sunni Harris
Esq.
Dinsmore & Shohl LLP
sunni.harris@dinsmore.com
Respondent

Daniel Epstein
Cause of Action
daniel.epstein@causeofaction.org
Respondent

Patrick Massari
Counsel
Cause of Action
patrick.massari@causeofaction.org
Respondent

Prashant Khetan
Senior Counsel
Cause of Action
prashant.khetan@causeofaction.org
Respondent

Alain Sheer
Federal Trade Commission
asheer@ftc.gov
Complaint

Laura Riposo VanDruff
Federal Trade Commission
lvandruff@ftc.gov
Complaint

Megan Cox
Federal Trade Commission
mcox1@ftc.gov
Complaint

Ryan Mehm
Federal Trade Commission
rmehm@ftc.gov
Complaint

Erica Marshall
Counsel
Cause of Action
erica.marshall@causeofaction.org
Respondent

I hereby certify that on June 08, 2015, I served via other means, as provided in 4.4(b) of the foregoing (PUBLIC) Respondent's Motion to Admit RX 546, RX 650, RX 652, RX 657, upon:

Melinda Claybaugh
Attorney
Federal Trade Commission
mclaybaugh@ftc.gov
Complaint

Laura Berger
Attorney
Federal Trade Commission
lberger@ftc.gov
Complaint

Reed Rubinstein
Dinsmore & Shohl LLP
Respondent

Erica Marshall
Attorney