

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

**COMPLAINT COUNSEL’S MOTION FOR PROTECTIVE ORDER
REGARDING RULE 3.33 NOTICE OF DEPOSITION**

Pursuant to Rules 3.22, 3.31(d), and 3.33(b), 16 C.F.R. §§ 3.22, 3.31(d) & 3.33(b), Complaint Counsel respectfully moves for a Protective Order to prevent Respondent from proceeding with the deposition of designee(s) of the Commission’s Bureau of Consumer Protection, as noticed in Respondent’s January 30, 2014 Notice of Deposition of the Bureau of Consumer Protection. Respondent’s Notice is overbroad in seeking testimony regarding matters outside the scope of fact discovery, failing to describe the matters on which it requests examination with “reasonable particularity,” and attempting to reach members of the Commission. Complaint Counsel conferred in good faith with Respondent in an effort to resolve the dispute but was not able to reach an agreement. *See* Meet and Confer Statement, attached as **Exhibit A**).

BACKGROUND

Commission staff opened a Part II investigation into the adequacy of LabMD, Inc.’s (“LabMD”) information security practices in January 2010. Prior to initiating the investigation,

Commission staff met with representatives of Tiversa Holding Corporation (“Tiversa”).¹ During the investigation, the Sacramento Police Department contacted staff after finding LabMD documents, which contained personal information of hundreds of consumers, in the possession of identity thieves.

On August 28, 2013, the Commission voted to approve an Administrative Complaint alleging that LabMD engaged in unfair practices in violation of Section 5 of the FTC Act by failing to take reasonable and appropriate measures to prevent unauthorized access to consumers’ personal information. Compl. ¶¶ 6-11, 17-21. The Complaint alleges that one result of LabMD’s failures is that a LabMD file containing the sensitive personal information of approximately 9,300 consumers was shared to a public peer-to-peer file sharing network without detection by LabMD. Compl. ¶¶ 10(g), 17-20.

On January 30, 2014, the last date on which this Court’s Revised Scheduling Order (Oct. 22, 2013) permitted the parties to serve certain routine discovery requests, Respondent served a “Notice of Deposition of the Bureau of Consumer Protection” (“Notice”).² *See* Ex. B. The Notice was served pursuant to Rule 3.33(c)(1), the analogue to Rule 30(b)(6) of the Federal

¹ Tiversa is referenced in Topic 1 of Respondent’s “Notice of Deposition of the Bureau of Consumer Protection,” attached as **Exhibit B**, at 4. Also included with Tiversa in Topic 1 are Eric Johnson and Dartmouth College. *Id.* Professor Eric Johnson, a former Professor at Dartmouth College, published a scholarly article in February 2009 that relates to unintentional disclosures of personal information in the health care industry. Professor Johnson’s research used data supplied by Tiversa. Complaint Counsel has not identified Professor Johnson or Dartmouth College on its Preliminary Witness List, which is attached as **Exhibit C**.

² Although Respondent’s Notice is directed to “the Bureau of Consumer Protection . . . or its designee(s),” the cover letter accompanying the Notice characterizes it as a “Notice of Deposition of the Federal Trade Commission.” (Ex. B at 1.) The Rules of Practice preclude deposition discovery of the Commission. *See* Rule 3.33(c)(1), 16 C.F.R. § 3.33(c)(1) (excluding the Federal Trade Commission from the scope of the Rule); *see also* Section V, *infra*.

Rules of Civil Procedure, which allows a party to name a Bureau of the Commission. Respondent's Notice defines the "1,718 File" as "the 1,718 page file the Tiversa Holding Corporation ('Tiversa') found on a peer-to-peer network and identified as having been created and stored on a LabMD computer." *Id.* at 4. The Notice defines the Bureau of Consumer Protection ("Bureau") as "[t]he Federal Trade Commission's Bureau of Consumer Protection, and its directors, officers, and employees." *Id.* at 3. Respondent's Notice seeks Bureau designee(s) to testify regarding "matters known or reasonably available to the [Bureau] concerning the following Topics:

- (1) The 1[,]718 file, including the [Bureau's] relationship with Tiversa, Dartmouth College, and Eric Johnson.
- (2) All data-security standards that have been used by the [Bureau] to enforce the law under Section 5 of the Federal Trade Commission Act since 2005.
- (3) Consumers that have been harmed by LabMD's allegedly inadequate security practices. [and]
- (4) Relationship with the Sacramento Police Department relating to documents it found at a Sacramento 'flop house' belonging to LabMD.

Id. at 4 ("Topics").

Complaint Counsel met and conferred with counsel for Respondent, and the parties were not able to reach an agreement to withdraw or narrow the Notice. *See* Ex. A.

ARGUMENT

The Court should enter a Protective Order preventing Respondent from deposing designee(s) of the Bureau, as requested in its expansive Notice, because Respondent's Notice seeks testimony regarding subjects that are outside of the scope of fact discovery, fails to

describe the matters on which it requests examination with “reasonable particularity,” and attempts to impermissibly expand the reach of Rule 3.33(c)(1). *See* Rule 3.33(b) (providing that the Court may rule on a “motion by a party that a deposition shall not be taken upon a determination that such deposition would not be reasonably expected to meet the scope of discovery set forth under § 3.31(c) . . .”).

I. TOPICS 1 AND 4 FALL OUTSIDE OF RULE 3.31(C) AND ARE NOT DESCRIBED WITH “REASONABLE PARTICULARITY”

Without defining the term “relationship” in its Notice, Respondent’s Notice identifies as Topics for the deposition the “[t]he 1[,]718 File, including the [Bureau’s] relationship with Tiversa, Dartmouth College, and Eric Johnson” and the Bureau’s “[r]elationship with the Sacramento Police Department relating to documents it found at a Sacramento ‘flop house’ belonging to LabMD.” Ex. B at 4 (Topics 1 and 4). None of these “relationships” is a proper subject of deposition discovery pursuant to Rule 3.33(c)(1), and the subjects on which Respondent seeks testimony regarding the 1,718 File are not stated with “reasonable particularity.”

Respondent’s deposition of the Bureau regarding its “relationship” with Tiversa is outside the scope of discovery. *See* Rule 3.31(c). Respondent has propounded written discovery regarding Commission staff’s communications with Tiversa, Eric Johnson, and Dartmouth, which largely pre-date the investigation of LabMD, to Complaint Counsel (Resp’t. LabMD, Inc.’s First Set of Reqs. for Produc. of Docs., attached as **Exhibit D**, at 11 (Req. 4) (requesting “[a]ll communications between Tiversa and FTC”) and to Tiversa (Subpoena *Duces Tecum* to Tiversa (Nov. 13, 2013), attached as **Exhibit E**, at 24 (requesting, generally, all documents and

communications with the Commission, and with Dartmouth College and Eric Johnson, and all documents referring or relating to LabMD or the 1,718 file)). During the November 25, 2013 deposition of Tiversa's Rule 3.33 designee, Robert Boback, Respondent took deposition discovery regarding these communications. In addition, Respondent will have the opportunity to take additional deposition discovery regarding these communications at the tentatively scheduled deposition of Tiversa employee Rick Wallace. *See Subpoena Ad Testificandum* of Rick Wallace, attached as **Exhibit F**. The meetings that predate the initiation of the investigation are outside the scope of discovery, as those communications were not collected or reviewed in the course of the investigation of the matter or prosecution of this case. *See* Rule 3.31(c)(2). Notwithstanding the considerable discovery that Respondent has taken regarding communications with Tiversa, Respondent has made no showing of good cause to overcome the default rule of Rule 3.31(c)(2) that only communications collected or reviewed in connection with the investigation or prosecution of the case are discoverable.

To the extent that these Topics relate to "relationships" with the enumerated third parties, the Notice fails because Topics 1 and 4 are overbroad and not stated with "reasonable particularity," as required by Rule 3.33(c)(1). The purpose of the "reasonable particularity" requirement is to allow an entity to efficiently prepare a designated witness on the specified topics. *Cf.* Charles A. Wright, et al., 8A Fed. Prac. & Proc. Civ. § 2103 (3d Ed. 2013) (addressing Fed. R. Civ. P. 30(b)(6), which similarly requires "reasonable particularity"). *See also McBride v. Medicalodges, Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008) ("the requesting party must take care to designate, with *painstaking specificity*, the particular subject areas that are intended to be questioned") (emphasis added). Respondent's vague "relationships" Topics make

such preparation impossible. For example, Respondent's Notice Topic 1 requires the absurd result that the Bureau's designee(s) be prepared to respond to questions as far afield from the issues in this adjudicative proceeding as personal friendships between Bureau employees who never participated in the investigation or prosecution of this matter and Dartmouth employees who were similarly uninvolved in any area relating to the subject of this Administrative Proceeding. Likewise, there is no limiting principle to the "relationship" described in Topic 4. It would be impossible to educate a designated Bureau witness about every conceivable association between the Bureau and four separate entities.³ Accordingly, Respondent's Notice fails as to Topics 1 and 4 because they are not stated with "reasonable particularity."

Finally, Respondent's Notice Topic 1 relates, *inter alia*, to "the 1[,]718 File." In this regard, it, too, is overbroad and not stated with "reasonable particularity," as required by Rule 3.33(c)(1). No single witness has personal knowledge of the Bureau "and its directors, officers, and employees" as it relates to the 1,718 File. It would be impossible to educate a Bureau designee about every conceivable subject of examination regarding the 1,718 File. That Respondent could have specified more narrow topics regarding the 1,718 File is evidenced by its Requests for Production to Complaint Counsel, which include more precise requests relating to the 1,718 File. *See, e.g.*, Requests for Production 1, 5, 6, 7 (Ex. D). Given the breadth of Respondent's Notice as it relates to "the 1[,]718 File," the Court should prevent Respondent from deposing a designee of the Bureau regarding this Topic.

³ Complaint Counsel has produced and will produce responsive, discoverable, and non-privileged documents relating to communications with Tiversa and the Sacramento Police Department. *See* Resp. to Reqs. for Prod., attached as **Exhibit G**, at 5-6 (Resp. 4), 14-15 (Resp. 15).

II. STANDARDS USED TO ENFORCE SECTION 5 ARE OUTSIDE THE SCOPE OF DISCOVERY

Respondent's Notice Topic 2 calls for the Bureau's designee(s) to provide testimony regarding "[a]ll data-security standards that have been used by the [Bureau] to enforce the law under Section 5 of the Federal Trade Commission Act since 2005." Ex. B at 4. The orders and opinions of the Commission and of this Court preclude such discovery. The Commission's January 16, 2014 Order Denying Respondent LabMD's Motion to Dismiss ("MtD Order") and this Court's January 30, 2014 Order on Complaint Counsel's Motion to Quash ("Quash Order") rejected Respondent's assertions that: (1) the Commission has failed to give fair notice of "what data-security practices the Commission believes Section 5 of the FTC Act forbids or requires" (Fifth Affirmative Defense); and (2) the Commission's actions have been "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (Third Affirmative Defense). To this end, the Commission held that "the three-part statutory standard governing whether an act or practice is 'unfair,' set forth in Section 5(n)" provides "fair notice of what conduct is prohibited." MtD Order at 16. Likewise, this Court held that evidence challenging the "bases for the Commission's commencement of this action" is "not relevant for purposes of discovery in an administrative adjudication." Quash Order at 6 and cases cited therein. Accordingly, Respondent's Notice Topic 2, which relates to "data-security standards," does not correspond to any permissible affirmative defense and is foreclosed by the MtD Order and the Quash Order.

III. INQUIRY REGARDING CONSUMERS HARMED BY RESPONDENT'S PRACTICES CONSTITUTES PREMATURE EXPERT DISCOVERY

Respondent's Notice Topic 3 fails because it demands testimony that Complaint Counsel will present through expert witnesses. Specifically, Respondent's Notice Topic 3 requires that

the Bureau's designee(s) be prepared to testify regarding "[c]onsumers that have been harmed by LabMD's allegedly inadequate security practices." Ex. B at 4. Respondent propounded written discovery requests relating to consumer harm, and Complaint Counsel has produced and will produce responsive, discoverable, and non-privileged documents. See **Ex. G** at 12-13 (Resp. 13); Resp. to Interrogs., attached as **Exhibit H**, at 7-8 (Resp. 5).⁴ With the exception of the information disclosed in Complaint Counsel's discovery responses, Respondent's Notice Topic 3 calls exclusively for evidence that Complaint Counsel intends to present through expert witnesses. Complaint Counsel's expert witnesses were timely disclosed to Respondent on February 3, 2014. Complaint Counsel's expert reports, however, are not required to be served until March 18, 2014, more than two weeks after the close of fact discovery. Because Respondent's Notice Topic 3 requires the Bureau to prematurely disclose the opinions of Complaint Counsel's expert witnesses, it is not an appropriate subject for discovery pursuant to Rule 3.33(c)(1).

IV. NOTICE'S DEFINITION OF BUREAU IMPERMISSIBLY ATTEMPTS TO REACH MEMBERS OF THE COMMISSION

Respondent's Notice also fails because it impermissibly attempts to reach the members of the Commission. The Notice defines the Bureau to include its "directors, *officers*, and employees." Ex. B at 3 (emphasis added). The Commission Chairwoman has appointed a Director to lead the Bureau. And certain Commission employees report—directly or

⁴ Complaint Counsel is cooperating to present Kevin Wilmer, a witness identified on Complaint Counsel's Preliminary Witness List and in its Response to Interrogatory 5, in response to Respondent's Subpoena *Ad Testificandum* served on Mr. Wilmer. See Ex. C at 13; Ex. H at 7-8 (Resp. 5).

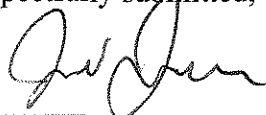
indirectly—to the Bureau Director. However, to the extent that the Bureau has any “officers,” that term can apply only to the Commissioners themselves. Rule 3.33(c)(1) does not permit deposition discovery of Commissioners. Rather, to require the appearance of a Commissioner, the Court must issue a subpoena pursuant to Rule 3.36 (setting forth procedures by which a party may seek a subpoena “requiring the appearance of a Commissioner”). Because Respondent’s definition of “Bureau” impermissibly attempts to reach the members of the Commission, the Court should prevent Respondent from proceeding with its Rule 3.33(c)(1) deposition. Alternatively, the Court should issue an order preventing the deposition from relating to “matters known or reasonably available” to the Commissioners.

CONCLUSION

For the foregoing reasons, the Court should grant Complaint Counsel's Motion for a Protective Order.

Dated: February 14, 2014

Respectfully submitted,



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

Federal Trade Commission
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Electronic mail: jbrown4@ftc.gov

Complaint Counsel

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

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| _____ |) | |
| In the Matter of |) | |
| |) | |
| LabMD, Inc., |) | Docket No. 9357 |
| a corporation, |) | |
| Respondent. |) | |
| |) | |
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[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S MOTION FOR PROTECTIVE ORDER REGARDING RULE 3.33 NOTICE OF DEPOSITION

Upon consideration of Complaint Counsel’s Motion for Protective Order Regarding Rule 3.33 Notice of Deposition:

IT IS HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED.

IT IS FURTHER ORDERED that Respondent LabMD, Inc. shall not proceed with the deposition of designee(s) of the Federal Trade Commission’s Bureau of Consumer Protection.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system.

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:

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Lorinda Harris
Kent Huntington
Hallee Morgan
Robyn Burrows
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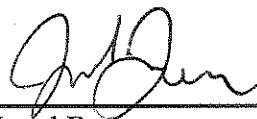
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Counsel for Respondent LabMD, Inc.

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.

February 14, 2014

By:



Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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

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| In the Matter of |) | |
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| LabMD, Inc., |) | Docket No. 9357 |
| a corporation, |) | |
| Respondent. |) | |
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STATEMENT REGARDING MEET AND CONFER PURSUANT TO RULE 3.22(g)

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g). Prior to filing the attached Motion for Protective Order Regarding Rule 3.33 Notice of Deposition, Complaint Counsel met and conferred with counsel for Respondent, LabMD, Inc., (“Respondent” or “LabMD”) in a good faith effort to resolve by agreement the issues raised by the motion, and has been unable to reach an agreement.

Complaint Counsel conferred with counsel for Respondent twice regarding the issues raised in the attached motion. First, on February 5, 2014 at 11:30 AM, Margaret Lassack, Ryan Mehm, Jarad Brown, John Krebs, and Megan Cox for Complaint Counsel, as well as attorney Katrina Blodgett of the Federal Trade Commission, conferred by telephone with William Sherman, II for Respondent. Next, on February 7, 2014 at 3 PM, Laura Riposo VanDruff, Margaret Lassack, Ryan Mehm, Jarad Brown, and Megan Cox for Complaint Counsel conferred by telephone with William Sherman, II, Lorinda Harris, and Sunni Harris for Respondent.

At these teleconferences, Complaint Counsel and counsel for Respondent conferred regarding narrowing the Topics included in Respondent's Notice of Deposition of the Bureau of Consumer Protection, but were unable to reach agreement.

Dated: February 14, 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 NJ-8100
Washington, DC 20580
Telephone: (202) 326-2927 – Brown
Facsimile: (202) 326-3062
Electronic mail: jbrown4@ftc.gov

Complaint Counsel

Exhibit B

DINSMORE & SHOHL LLP
801 Pennsylvania Avenue, N.W. ^ Suite 610
Washington, DC 20004
www.dinsmore.com

William A. Sherman, II
(202) 372-9117 (direct) ^ (202) 372-9141 (fax)
william.sherman@dinsmore.com

January 30, 2014

VIA HAND DELIVERY & E-MAIL

Laura VanDruff
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Avenue, N.W., NJ-8100
Washington, DC 20580

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

Dear Ms. VanDruff:

Enclosed is Respondent's Notice of Deposition of the Federal Trade Commission ("FTC"). Please note that the date set forth for the time of your client's deposition is simply a placeholder; however, we look forward to finding a mutually convenient date for the deposition of the FTC. Please contact us when you have identified the deponent and determined the dates which you and your client are available for the FTC's deposition.

Sincerely,



William A. Sherman, II
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Phone: 202.372.9100
Fax: 202.372.9141
william.sherman@dinsmore.com

cc (via email):

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

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

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

DOCKET NO. 9357

**RESPONDENT'S NOTICE OF DEPOSITION OF THE BUREAU OF CONSUMER
PROTECTION**

PLEASE TAKE NOTICE that, pursuant to Rules 3.33(a) and (c)(1) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.33(a) and (c)(1), Respondent will take the deposition of the Bureau of Consumer Protection ("BOCP") or its designee(s), who shall testify on the BOCP's behalf about matters known or reasonably available to the BOCP. The testimony will be taken at Dinsmore & Shohl, 801 Pennsylvania Ave, Suite 610, Washington, DC 20004 beginning at 9:00 A.M on February 17, 2014, or the alternate agreed up on by Respondent and Complaint Counsel

DEFINITIONS

1. The term "**communication**" includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
2. "**Complaint**" means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.
3. "**Dartmouth College**" means Dartmouth College, its divisions, programs, projects, affiliates, contractors, and its directors, officers, and employees.
4. "**Document**" means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical,

contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book or label. **“Document”** shall also include electronically stored information (“ESI”). **ESI** means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

5. **“Bureau of Consumer Protection”** or **“BOCP”** means the Federal Trade Commission’s Bureau of Consumer Protection, and its directors, officers, and employees.
6. **“Includes”** or **“including”** means “including, but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
7. **“LabMD”** means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
8. **“Or”** as well as **“and”** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
9. **“Personal information”** means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
10. The terms **“relate”** or **“relating to”** or **“referring or relating to”** mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting,

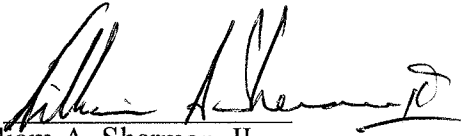
explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.

11. **“Sacramento Police Department”** means the Sacramento Police Department and its officials, employees, and agents.
12. **“Tiversa”** means Tiversa Holding Corporation, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, Board members, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
13. **“1,718 File”** means the 1,718 page file Tiversa Holding Corporation (“Tiversa”) found on a peer-to-peer network and identified as having been created and stored on a LabMD computer

DEPOSITION TOPICS

1. The 1718 file, including the BOCP’s relationship with Tiversa, Dartmouth College, and Eric Johnson.
2. All data-security standards that have been used by the BOCP to enforce the law under Section 5 of the Federal Trade Commission Act since 2005.
3. Consumers that have been harmed by LabMD’s allegedly inadequate security practices.
4. Relationship with the Sacramento Police Department relating to documents it found at a Sacramento “flop house” belonging to LabMD.

January 30, 2014

By: 
William A. Sherman, II

CERTIFICATE OF SERVICE

This is to certify that on January 30, 2014, I served via electronic delivery a copy of the foregoing document to:

Alain Sheer
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Fax Number: 202-326-3062

January 30 2014


By: 
William A. Sherman, II

Exhibit C

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

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

COMPLAINT COUNSEL’S PRELIMINARY WITNESS LIST

Pursuant to the Court’s Revised Scheduling Order, dated October 22, 2013, Complaint Counsel hereby provides its Preliminary Witness List to Respondent LabMD, Inc. (“LabMD” or “Respondent”). This list identifies the fact witnesses who may testify for Complaint Counsel at the hearing in this action by deposition and/or investigational hearing transcript, declaration, or orally by live witness. It does not identify expert or rebuttal expert witnesses, whom Complaint Counsel will identify at a later date in compliance with the Scheduling Order and Revised Scheduling Order entered in this action.

The information disclosed herein is based upon information reasonably available to Complaint Counsel at present. Discovery is ongoing and likely will have an impact on Complaint Counsel’s final proposed witness list. Subject to the limitations in the Scheduling Order and Revised Scheduling Order entered in this action, Complaint Counsel reserves the right:

- A. To present testimony by deposition and/or investigational hearing transcript, declaration, or orally by live witness, from any other person that Respondent identifies as a potential witness in this action;

- B. For any individual listed below as being associated with a corporation, government agency, or other non-party entity, to substitute a witness designated by the associated non-party entity in response to any subpoena that has been or may be issued by Complaint Counsel or Respondent to that non-party entity in this action;
- C. To present testimony by deposition and/or investigational hearing transcript, declaration, or orally by live witness, from the custodian of records of any non-party from which documents or records have been or will be obtained in this action, including, but not limited to, the non-parties listed below, to the extent necessary for the admission of documents or deposition or investigational hearing testimony into evidence in the event that a stipulation cannot be reached concerning the admissibility of such documents or testimony;
- D. To present testimony by deposition and/or investigational hearing transcript, declaration, or orally by live witness, from any witnesses to rebut the testimony of witnesses proffered by Respondent;
- E. Not to present testimony by deposition and/or investigational hearing transcript, declaration, or orally by live witness, from any of the witnesses listed below; and
- F. To supplement this Preliminary Witness List if additional information becomes available through discovery or otherwise.

Subject to these reservations of rights, Complaint Counsel's preliminary list of witnesses is as follows:

Current and Former LabMD Employees

1. John Boyle, former LabMD Vice President of Operations

We expect that Mr. Boyle will testify both in his individual capacity and as LabMD's corporate designee during the Part II investigation. We expect that he will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's

security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's expenditures related to information technology ("IT"); management of LabMD's compliance program; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

2. Brandon Bradley, former LabMD IT employee

We expect that Mr. Bradley will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

3. Sandra Brown, former LabMD finance or billing employee

We expect that Ms. Brown will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

4. Matt Bureau, former LabMD IT employee

We expect that Mr. Bureau will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

5. Michael Daugherty, LabMD President and Chief Executive Officer

We expect that Mr. Daugherty will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

6. Jeremy Dooley, former LabMD Communications Coordinator and IT employee

We expect that Mr. Dooley will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

7. Liz Fair, former LabMD finance or billing employee

We expect that Ms. Fair will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

8. Karalyn Garrett, former LabMD finance or billing employee

We expect that Ms. Garrett will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

9. Patricia Gilbreth, LabMD finance or billing employee

We expect that Ms. Gilbreth will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

10. Patrick Howard, former LabMD IT employee

We expect that Mr. Howard will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

11. Lawrence Hudson, former LabMD sales employee

We expect that Ms. Hudson will testify about LabMD's computer networks, including, but not limited to remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

12. Robert Hyer, former LabMD IT Manager and former LabMD contractor

We expect that Mr. Hyer will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

13. Curt Kaloustian, former LabMD IT employee

We expect that Mr. Kaloustian will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

14. Eric Knox, former LabMD sales employee

We expect that Mr. Knox will testify about LabMD's computer networks, including, but not limited to remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

15. Chris Maire, former LabMD IT employee

We expect that Mr. Maire will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

16. Jeff Martin, LabMD IT employee and former LabMD contractor

We expect that Mr. Martin will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

17. Jennifer Parr, LabMD IT employee

We expect that Ms. Parr will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; LabMD's IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

18. Alison Simmons, former LabMD IT employee

We expect that Ms. Simmons will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

19. Connie Wavrin, former LabMD Lab Manager and Safety Coordinator

We expect that Ms. Wavrin will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; management of LabMD's compliance program; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

20. Rosalind Woodson, former LabMD finance or billing employee

We expect that Ms. Woodson will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which she and other LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

21. LabMD – designated witness(es) to be determined

We expect that one or more witnesses designated by LabMD will testify about LabMD’s computer networks, including, but not limited to, remote access thereto; LabMD’s security policies and practices, and employee training; the personal information to which LabMD employees had access; LabMD’s IT-related expenditures; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents. We also expect that LabMD will testify about any other topics listed in any deposition notice that may be issued by Complaint Counsel to LabMD in his action.

Current and Former Clients of LabMD

22. Midtown Urology, PC (“Midtown Urology”) – designated witness(es) to be determined

We expect that one or more witnesses designated by Midtown Urology will testify about Midtown Urology’s relationship and communications with LabMD; computer hardware and software provided to Midtown Urology by LabMD, and the maintenance thereof; and the transmission of personal information between Midtown Urology and LabMD. We also expect that the witness(es) designated by Midtown Urology will testify about facts relating to the documents produced in response to Complaint Counsel’s subpoena *duces tecum* to Midtown Urology in this action, and the admissibility of those documents into evidence in the hearing in this action.

23. Southeast Urology Network (“S.U.N.”) – designated witness(es) to be determined

We expect that one or more witnesses designated by S.U.N. will testify about S.U.N.’s relationship and communications with LabMD; computer hardware and software provided to S.U.N. by LabMD, and the maintenance thereof; and the transmission of personal information between S.U.N. and LabMD. We also expect that the witness(es)

designated by S.U.N. will testify about facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to S.U.N. in this action, and the admissibility of those documents into evidence in the hearing in this action.

24. 21st Century Oncology, LLC d/b/a UroSurg Associates ("UroSurg") – designated witness(es) to be determined

We expect that one or more witnesses designated by UroSurg will testify about UroSurg's relationship and communications with LabMD; computer hardware and software provided to UroSurg by LabMD, and the maintenance thereof; and the transmission of personal information between UroSurg and LabMD. We also expect that the witness(es) designated by UroSurg will testify about facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to UroSurg in this action, and the admissibility of those documents into evidence in the hearing in this action.

Contractors and Other Individuals and Entities
Who Have Provided Services or Equipment to LabMD

25. Brian Bissel, former LabMD contractor

We expect that Mr. Bissel will testify about LabMD's computer networks, including, but not limited to, remote access thereto; the products and/or services that he provided to LabMD, including but not limited to the security features of those products and/or services; LabMD's security policies and practices; the personal information to which he and LabMD employees had access; and facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint or any other security incidents.

26. Hamish Davidson, President of ProviDyn, Inc.

We expect that Mr. Davidson will testify about facts related to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to ProviDyn, Inc. in this action and the admissibility of those documents into evidence in the hearing in this action.

27. Allen Truett, former Chief Executive Officer of Automated PC Technologies, Inc.

We expect that Mr. Truett will testify about LabMD's computer networks, including, but not limited to, remote access thereto; the products and/or services that he and his company, Automated PC Technologies, Inc., provided to LabMD, including but not limited to the security features of those products and/or services; the communications between LabMD and Mr. Truett or Automated PC Technologies, Inc.; and the facts underlying and set forth in the affidavit that Mr. Truett executed on May 20, 2011, which LabMD submitted to Commission staff during the Part II investigation.

28. Cypress Communications, LLC ("Cypress") – designated witness(es) to be determined

We expect that one or more witnesses designated by Cypress will testify about LabMD's computer networks, including, but not limited to, remote access thereto; and the products and/or services that Cypress has provided to LabMD, including but not limited to any security features of those products and/or services. We also expect that the witness(es) designated by Cypress will testify about facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to Cypress in this action and the admissibility of those documents into evidence in the hearing in this action.

Other Individuals and Entities

29. Robert Boback, Chief Executive Officer of Tiversa Holding Corporation (“Tiversa”)

We expect that Mr. Boback will testify, as Tiversa’s corporate designee, about Tiversa’s understanding and use of peer-to-peer file sharing applications and networks; Tiversa’s communications with LabMD; facts relating to how Tiversa obtained multiple copies of the “P2P insurance aging file” referenced in Paragraph 17 of the Complaint and the different IP addresses from which Tiversa obtained copies of that file; and other facts relating to the security incident alleged in Paragraphs 17-20 of the Complaint. We also expect that Mr. Boback will testify about facts relating to the documents produced in response to Complaint Counsel’s subpoena *duces tecum* to Tiversa Holding Corporation in this action and the admissibility of those documents into evidence in the hearing in this action.

30. Erick Garcia

We expect that Mr. Garcia will testify about the conduct underlying his plea of no contest to California charges of identity theft entered on March 6, 2013 in the Superior Court of California, County of Sacramento, and other facts relating to the security incident alleged in Paragraph 21 of the Complaint.

31. Karina Jestes, Detective, Sacramento, CA Police Department

We expect that Detective Jestes will testify about facts relating to the security incident alleged in Paragraph 21 of the Complaint, including but not limited to, facts relating to her investigation of the conduct underlying the pleas of no contest to California charges of identity theft entered by Erick Garcia and Josie Martinez Maldonado, and her training and experience as it relates to identity theft. We also expect that Detective Jestes will testify about facts relating to the documents produced in response to Complaint Counsel’s subpoena

duces tecum to the Custodian of Records of the Sacramento, CA Police Department in this action and the admissibility of those documents into evidence in the hearing in this action.

32. Roger Jones, Records Section Supervisor, Sandy Springs, GA Police Department

We expect that Mr. Jones will testify about facts related to the admissibility of documents that may be produced in response to Complaint Counsel's subpoena *duces tecum* to the Sandy Springs, GA Police Department into evidence in the hearing in this action.

33. David Lapidés, Detective, Sandy Springs, GA Police Department

We expect that Detective Lapidés will testify about his communications with LabMD and other facts relating to the security incident alleged in Paragraph 21 of the Complaint. We also expect that Detective Lapidés will testify about facts relating to any documents that may be produced in response to Complaint Counsel's subpoena *duces tecum* to the Sandy Springs, GA Police Department in this action, and the admissibility of those documents into evidence in the hearing in this action.

34. Josie Martinez Maldonado

We expect that Ms. Maldonado will testify about the conduct underlying her plea of no contest to California charges of identity theft entered on March 27, 2013 in the Superior Court of California, County of Sacramento, and other facts relating to the security incident alleged in Paragraph 21 of the Complaint.

35. Susan McAndrew, Deputy Director for Health Information Privacy, Office for Civil Rights, U.S. Department of Health and Human Services ("HHS")

We expect that Ms. McAndrew will testify about the existence or non-existence of any evaluations by HHS of LabMD's compliance with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Health Information Technology for Economic

and Clinical Health Act (“HITECH”), and the regulations promulgated under HIPAA and HITECH.

36. Scott Moulton, President of and Lead Certified Computer Forensic Specialist for Forensic Strategy Services, LLC

We expect that Mr. Moulton will testify about the facts underlying and set forth in the affidavit that he executed on January 12, 2012, which LabMD filed in support of its response to the motion to dismiss filed by Tiversa in *LabMD, Inc. v. Tiversa, Inc.*, No. 11-cv-04044 (N.D. Ga. Jan. 13, 2012).

37. Euly Ramirez, Supervisor, Sacramento, CA Police Department

We expect that Ms. Ramirez will testify about facts related to the admissibility of documents produced in response to Complaint Counsel’s subpoena *duces tecum* to the Custodian of Records of the Sacramento, CA Police Department into evidence in the hearing in this action.

38. Andrew Craig Troutman, Associate General Counsel of Elavon, Inc., a wholly owned subsidiary of U.S. Bank National Association

We expect that Mr. Troutman will testify about facts related to the admissibility of documents produced by Elavon, Inc. in response to Complaint Counsel’s subpoena *duces tecum* to U.S. Bank National Association, ND into evidence in the hearing in this action.

39. Kevin Wilmer, Investigator, Federal Trade Commission, Bureau of Consumer Protection, Division of Privacy and Identity Protection

We expect that Mr. Wilmer will testify about the process used to identify the individuals listed in Appendix A (designated as “CONFIDENTIAL”) to Complaint Counsel’s Initial Disclosures as “Individuals Associated with 9-Digit Numbers Listed in the Day Sheets Referenced in Paragraph 21 of the Complaint Whose Names Are Not Listed in Those Day Sheets.”

40. Nathaniel Wood, Assistant Director, Federal Trade Commission, Bureau of Consumer Protection, Division of Consumer and Business Education

We expect that Mr. Wood will testify about facts related to the admissibility of certain documents produced as part of Complaint Counsel's Initial Disclosures into evidence in the hearing in this action.

Dated: December 19, 2013

Respectfully submitted,

/s/ Margaret L. Lassack

Alain Sheer

Laura Riposo VanDruff

Megan Cox

Margaret Lassack

Ryan Mehm

John Krebs

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Federal Trade Commission

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CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing Complaint Counsel's Preliminary Witness List to be served *via* electronic mail on:

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Counsel for Respondent LabMD, Inc.

December 19, 2013

By: /s/ Margaret L. Lassack
Margaret Lassack
Federal Trade Commission
Bureau of Consumer Protection

Exhibit D

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**RESPONDENT LABMD, INC.'S FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS
COMPLAINT COUNSEL
(NUMBERS 1-17)**

Pursuant to the Federal Trade Commission’s Rules of Practice, 3.37, 16 C.F.R. § 3.37, and the Court’s Scheduling Order dated October 22, 2013, LabMD requests that Complaint Counsel produce the documents and material identified below for inspection and copying within thirty (30) days at the offices of Dinsmore & Shohl, LLP 801 Pennsylvania Avenue, N.W., Suite 610, Washington, D.C. 20004.

DEFINITIONS

1. **“All documents”** means each document within your possession, custody, or control, as defined below, that can be located, discovered or obtained by reasonable, diligent efforts, including without limitation all documents possessed by: (a) you, including documents stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or which you have a legal right to bring within your possession by demand.

2. **“All communications”** means each communication, as defined below, that is a document that can be located, discovered, or obtained by reasonable, diligent efforts, including without limitation all communications possessed by: (a) you, including communications stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such

documents by request or that you have a legal right to bring within your possession by demand.

3. The term “**communication**” includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
4. “**Complaint**” means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.
5. The term “**containing**” means containing, describing, or interpreting in whole or in part.
6. “**Dartmouth College**” means Dartmouth College, its divisions, programs, projects, affiliates, contractors, and its directors, officers, and employees.
7. “**Document**” means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book or label. “**Document**” shall also include electronically stored information (“ESI”). **ESI** means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.
8. The term “**documents sufficient to show**” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.

9. The terms “**each**,” “**any**,” and “**all**” shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope
10. “**Federal Trade Commission**” or “**FTC**” means the Federal Trade Commission, and its directors, officers, and employees.
11. “**Includes**” or “**including**” means “including, but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
12. “**LabMD**” means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
13. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
14. The term “**person**” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.
15. “**Personal information**” means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
16. Documents that are in your “**possession, custody, or control**” include, but are not limited to, documents that are in your constructive possession, custody, or control, as well as documents that are in the possession, custody, or control of your attorney (if not privileged or work product). This means that the documents do not need to be owned, written, or recorded by you to fall within this definition, which should be construed liberally.
17. The terms “**relate**” or “**relating to**” or “**referring or relating to**” mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.

18. **“Sacramento Police Department”** means the Sacramento Police Department and its officials, employees, and agents.
19. **“Tiversa”** means Tiversa Holding Corporation, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, Board members, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
20. **“You” or “your”** means Federal Trade Commission.
21. **“1,718 File”** means the 1,718 page file Tiversa Holding Corporation (“Tiversa”) found on a peer-to-peer network and identified as having been created and stored on a LabMD computer
22. The use of the singular includes the plural, and the plural includes the singular.
23. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
24. Words in the masculine, feminine, or neuter form shall include each of the other genders.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by a document request shall be limited to the period from January 1, 2005 to present.
2. **Objections:** Pursuant to Commission Rule of Practice § 3.37(b), any objection and reason therefore must be filed within thirty (30) days of service thereof.
3. **Protective Order:** On August 29, 2013, the Court entered a Protective Order governing discovery material in this matter. A copy of the protective order is enclosed as Exhibit A, with instructions on the handling of confidential information.
4. **Document Identification:** Documents that may be responsive to more than one specification of this Request for Production of Documents need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In

addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

5. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this Request for Production of Documents. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to LabMD or its counsel upon request. Copies of materials shall be produced in color if necessary to interpret them or render them intelligible.
6. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact LabMD's counsel named above before sending those materials to discuss ways to protect such information during production. For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number *in combination with* one or more of the following: date of birth, Social Security number, driver's license number or other state identification number, or a foreign country equivalent, passport number, financial account number, credit card number, or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. **Scope of Search:** These requests relate to documents that are in your possession or under your actual or constructive custody or control, including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, or other agents or consultants, whether or not such documents were received from or disseminated to any other person or entity.
8. **Claims of Privilege:** Pursuant to the Federal Trade Commission's Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a), if any documents are withheld from production based on a claim of privilege or any similar claim, you shall provide, not later than the date set for production of materials, a schedule that describes the nature of the documents,

communications, or tangible things not produced or disclosed in a manner that will enable LabMD's counsel to assess the claim of privilege. The schedule shall state individually for each item withheld: (a) the document control number(s); (b) the full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form); (c) a description of the material withheld (for example, a letter, memorandum, or email), including any attachments; (d) the date the material was created; (e) the date the material was sent to each recipient (if different from the date the material was created); (f) the email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent; (g) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors; (h) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material; (i) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material; (j) the factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and (k) any other pertinent information necessary to support the assertion of protected status by operation of law. If only part of a responsive document is privileged, all non-privileged portions of the document must be produced.

9. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish the admissibility of documents produced in response to this Request for Production of Documents. You are asked to execute this Certification and provide it with your response.
10. **Continuing Nature of Requests:** This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by you prior to the close of discovery, which is currently scheduled for March 5, 2014.
11. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this Request for Production of Documents. We may require the submission of additional documents at a later time. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this litigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise.

Electronic Submission of Documents: The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, you must confirm with LabMD counsel named above that the proposed formats and media types will be acceptable to LabMD. LabMD requests Concordance load-ready electronic productions, including DAT and OPT load files.

12. **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to LabMD as follows:

- (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;

All ESI other than those documents described in (l)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (“OCR”) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (“TIFF”) or as color JPEG images (where color is necessary to interpret the contents); and

- (b) Each electronic file should be assigned a unique document identifier (“DocID”) or Bates reference.

(1) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:

- (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (2) For each document electronically submitted to LabMD, you should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) For electronic mail: begin Bates or unique document identification number (“DocID”), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (“AttachIDs”) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) For email attachments: begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.): begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file; and
 - (d) For imaged hard-copy documents: begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.

(3) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact LabMD's counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to this Request for Production of Documents.

(4) Submit electronic productions as follows:

- (a) With passwords or other document-level encryption removed or otherwise provided to LabMD;
- (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible media;
- (c) All electronic media shall be scanned for and free of viruses;
- (d) Data encryption tools may be employed to protect privileged or other personal or private information. LabMD accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by LabMD; and
- (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA- DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

(5) All electronic files and images shall be accompanied by a production transmittal letter, which includes:

- (a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and
- (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that LabMD's counsel

named above determines prior to submission that the machine-readable form would be in a format that allows LabMD to use the computer files). We have included a Bureau of Consumer Protection Production Guide as Exhibit C. This guide provides detailed directions on how to fully comply with this instruction.

13. **Documents No Longer In Existence:** If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of your document retention policy but you have reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
14. **Incomplete Records:** If you are unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by you to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for you to make an estimate, provide an explanation.
15. **Questions:** Any questions you have relating to the scope or meaning of anything in this request or suggestions for possible modifications thereto should be directed to William A. Sherman, II at 202.372.9100.
16. Documents responsive to the request shall be addressed to the attention of William A. Sherman, II, Dinsmore & Shohl LLP, 801 Pennsylvania Ave., NW, Suite 610, Washington, DC 20004, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

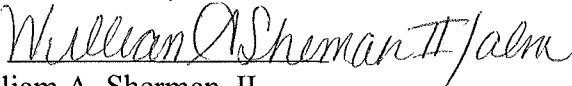
REQUESTS

Please produce the following:

1. All documents referring or relating to the 1,718 File.
2. All communications between Dartmouth College and FTC.
3. All communications between M. Eric Johnson and FTC.
4. All communications between Tiversa and FTC.
5. All communications between FTC and any third person not employed by FTC referring or relating to LabMD or the 1,718 File.
6. All communications between FTC and any federal Government agency, including the U.S. Department of Homeland Security, concerning LabMD generally and/or the 1,718 File specifically.
7. All communications between FTC employees referring or relating to LabMD or the 1,718 File that is not protected as attorney work product, including communications between the FTC and the FTC's Office of Public Affairs (including communications between the FTC and the Office of Public Affairs's current and former employees).
8. All documents sufficient to show what data-security standards are currently used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act.
9. All documents sufficient to show what changes occurred in the data-security standards used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act from 2005 to the present and the dates on which these standards changed.
10. All documents sufficient to show the standards or criteria the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act from 2005 to the present.
11. All documents provided to the FTC pursuant to any Civil Investigation Demand regarding its investigation of LabMD.
12. All documents identifying LabMD and other companies whose documents or files Tiversa downloaded from Peer to Peer Networks which contained Personal Identifying Information and or Protected Health Information that were provided to FTC.
13. All documents identifying consumers that were harmed, or that are substantially likely to be harmed, as result of the claims alleged against LabMD in the Complaint.

14. All documents that are utilized by FTC to determine whether to pursue an investigation or complaint against an entity or individual, including but not limited to evaluation standards and scoring systems.
15. All communications and all documents relating to communications between FTC and the Sacramento Police Department from October 5, 2012 to the present.
16. All communications—including letters—between FTC and the Persons identified in the documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.
17. All documents relating to communications between the Bureau of Competition and the Persons identified in documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.

December 24, 2013

By: 
William A. Sherman, II
Dinsmore & Shohl
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Phone: 202.372.9100
Fax: 202.372.9141
william.sherman@dinsmore.com
Counsel for Respondent LabMD

CERTIFICATE OF SERVICE

This is to certify that on December 24 2013, I served via email a copy of the foregoing document to:

Alain Sheer
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3321
Fax Number: 202-326-3062
Email: asheer@ftc.gov

Laura Riposo VanDruff
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2999
Fax Number: 202-326-3062

Megan Cox
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2282
Fax Number: 202-326-3062

Margaret Lassack
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

Ryan Mehm
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

December 24, 2013

By: 
William A. Sherman, II

Exhibit E



November 13, 2012

VIA FEDERAL EXPRESS

Tiversa Holding Corporation
606 Liberty Avenue
Pittsburgh, PA 15222

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

Dear Sir or Madam:

This letter is to notify you that counsel for LabMD, Inc. (“LabMD”), has issued a subpoena to Tiversa Holding Company, which is enclosed. The Federal Trade Commission’s Rules of Practice state that “[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary [of the Federal Trade Commission], requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena...” 16 C.F.R. § 3.34(a). Please note that the date set forth in the enclosed documents for the time of your deposition is simply a placeholder. We look forward to working with you and Complaint Counsel to find a mutually convenient time for your deposition.

The Commission’s Rules of Practice also provide that “[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary [of the Federal Trade Commission], commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things...” 16 C.F.R § 3.34(b). Accordingly, LabMD’s counsel has also issued a subpoena *duces tecum* for certain of Tiversa’s documents. The subpoena schedule and exhibits are enclosed.

On August 29, 2013, the Federal Trade Commission, Office of Administrative Law Judges issued a Protective Order Governing Discovery Material (the “Protective Order”) in the above-referenced action. The Protective Order protects confidential information produced in discovery in the case. A copy of the Protective Order signed by Chief Administrative Law Judge D. Michael Chappell is enclosed as an exhibit to the subpoena’s schedule.

Any documents you produce to the Commission that are confidential must include the notice “CONFIDENTIAL – FTC Docket No. 9357,” in accordance with paragraph 6 of the

Protective Order. If you produce confidential documents in electronic format, such as on a CD, thumb drive, or other media, you may place the "CONFIDENTIAL – FTC Docket No. 9357 designation on the CD, thumb drive, or other media.

I would be pleased to discuss the scheduling of your deposition and any issues regarding production of documents at your earliest convenience. You may reach me at (202) 449-2024.

Sincerely,



Michael Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.2024
Fax: 202.330.5842
michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and
administrative proceedings before federal agencies.

Enclosures:

- (1) Subpoena *Ad Testificandum* Deposition
- (2) LabMD's Counsel's Notice of Deposition Pursuant to Subpoena
- (3) Subpoena *Duces Tecum*
- (4) LabMD's Counsel's Schedule For Production of Documents Pursuant to Subpoena
- (5) Exhibit A: Protective Order Governing Discovery Material
- (6) Exhibit B: Certification of Records of Regularly-Conducted Activity
- (7) Exhibit C: BCP Production Guide

cc (via email):

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm



SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

| | |
|---|---|
| <p>1. TO</p> <p>Tiversa Holding Corp. 606 Liberty Avenue Pittsburgh, PA 15222</p> | <p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p> |
|---|---|

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

| | |
|---|---|
| <p>3. PLACE OF DEPOSITION</p> <p>Reed Smith Center 225 Fifth Avenue Pittsburgh Pennsylvania 15222</p> | <p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Michael D. Pepson and/or designated Counsel</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION</p> <p>November 21, 2013, 9:00 a.m.</p> |
|---|---|

| |
|---|
| <p>6. SUBJECT OF PROCEEDING</p> <p>In the Matter of LabMD, Inc. Docket No. 9357 (Subpoena pursuant to 3.33(c)(1), requiring the deponent to designate a witness to testify on behalf of the organization)</p> |
|---|

| | |
|--|--|
| <p>7. ADMINISTRATIVE LAW JUDGE</p> <p>Chief ALJ, D. Michael Chappell Federal Trade Commission Washington, D.C. 20580</p> | <p>8. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Michael D. Pepson, Counsel for Respondent LabMD Cause of Action 1919 Pennsylvania Ave, NW Suite 650 Washington, DC 20006</p> |
|--|--|

| | |
|--------------------------------------|---|
| <p>DATE SIGNED</p> <p>11/13/2013</p> | <p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p>  |
|--------------------------------------|---|

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

Return of Service

I hereby certify that a duplicate original of the within subpoena was duly served next day overnight with delivery confirmation on the person named herein on: November 13, 2013.

A handwritten signature in blue ink, consisting of a stylized, cursive 'M' followed by a horizontal line extending to the right.

Michael D. Pepson
Counsel

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**RESPONDENT LABMD, INC.'S NOTICE OF DEPOSITION
PURSUANT TO SUBPOENA TO TIVERSA HOLDING COMPANY**

PLEASE TAKE NOTICE, pursuant to Rules 3.33(a) and (c)(1) of the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.33(a), (c)(1), that LabMD's counsel will take the deposition of Tiversa Holding Corporation ("Tiversa") or its designee(s), who shall testify on Tiversa's behalf about matters known or reasonably available to Tiversa.

DEFINITIONS

1. The term "**communication**" includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
2. "**Company**" means Tiversa Holding Corporation ("Tiversa"), its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
3. The term "**containing**" means containing, describing, or interpreting in whole or in part.
4. "**Document**" means any written, recorded, graphic, electronic, or other material, however produced or reproduced, irrespective of whether it is in the possession, custody, or control of the Company, and irrespective of whether it is claimed to be privileged against discovery on any grounds, including, but not limited to, material in the form of books, reports, witness statements, studies, records, agreements, lists, memoranda, diagrams, checks, sketches, charts, diaries, correspondence, notebooks, facsimiles, telegrams, schedules, bills, invoices, notes, photographs, videotapes, sound recordings, appointment

calendars, films, worksheets, computer printouts, computer discs, information stored in computer memory drives of any kind, bookkeeping entries, or any other documents of any kind whatsoever, irrespective of the form, including any draft or working copy.

5. The terms “**each**,” “**any**,” and “**all**” shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope.
6. “**Includes**” or “**including**” means “including, but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
7. “**LabMD**” means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
8. “**Federal Trade Commission**” means the Federal Trade Commission, and its current and former officers, contractors, affiliates, and employees.
9. “**Dartmouth College**” means Dartmouth College, its divisions, programs, projects, affiliates, contractors, and its directors, officers, and employees.
10. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
11. The term “**person**” means any natural person or any entity other than a natural person, including, but not limited to, includes an individual, general or limited partnership, joint stock company, unincorporated association or society, municipal or other corporation, incorporated association, limited liability partnership, limited liability company, the State, an agency or political subdivision of the State, a court, and any other governmental entity.
12. “**Personal information**” means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.

13. The terms “**relate**” or “**relating to**” or “**referring or relating to**” mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
14. “**Subpoena**” means the Subpoena to Tiversa Holding Corporation, including this Notice, and including the Definitions, Instructions, and Specifications.
15. “**You**” or “**your**” means Tiversa Holding Corporation, or the “Company.”
16. “**1,718 File**” means the 1,718 page file owned by LabMD that the Company claimed in 2008 to have obtained from LabMD via Limewire.
17. The use of the singular includes the plural, and the plural includes the singular.
18. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
19. Words in the masculine, feminine, or neuter form shall include each of the other genders.

DEPOSITION TOPICS

Tiversa is advised that it must designate one or more officer(s), director(s), managing agent(s), or other person(s) who consents to testify on its behalf, and may set forth, for each person designated, the matters on which he or she will testify. The persons so designated shall testify as to matters known or reasonably available to Tiversa relating to the following topics:

1. The systems and other means by which the Company searches or monitors peer-to-peer networks, including Limewire.
2. Information on which the following statement, made by Tiversa’s CEO, Robert Boback, before the House Committee on Oversight and Government Reform on July 29, 2009, was based: “Beginning in 2003, Tiversa developed systems that monitor and interact with and within P2P [peer-to-peer] networks to search for sensitive information in an effort to protect the confidential information of our clients.... Tiversa can see and detect all the previously untraceable activity on the P2P network in one place to analyze searches and requests. While an individual user can only see a very small portion of a P2P file sharing network, Tiversa can see the P2P network in its entirety in real time. With this platform, Tiversa has processed as many as 1.6 billion P2P searches every day, more than the number of web searches entered into Google per day. This unique technology has led some industry experts (Information Week) to refer to Tiversa as the ‘Google of P2P.’”

3. Information on which the following statement, made by Rick Wallace, Forensic Engineer, Global Incident Response Operations Center (GIROC), in an email to Robert Boback on Tuesday May 13, 2008, Subject: LabMD, was based: "I checked back against the timeline to see the date that we originally acquired the file pertaining to LabMD. It appears that we first downloaded the file on 02/05/08 at 3:49PM. Our system shows a record of continued availability for sporadic periods over the past several months but we did not attempt to download it again. The system did not auto-record the IP, unfortunately, most likely due to the little amount of criteria indexed against the DSP."
4. Information on which statements made in a May 28, 2009, press release, entitled "Tiversa Identifies Over 13 Million Breached Internet Files in the Past Twelve Months," are based.
5. Information on which the following statement, in the Dissenting Statement of Commissioner J. Thomas Rosch, Petitions of LabMD, Inc. and Michael J. Daugherty to Limit or Quash the Civil Investigative Demands, FTC File No. 1023099 (June 21, 2012), is based: "I am concerned that Tiversa is more than an ordinary witness, informant, or 'whistle-blower.' It is a commercial entity that has a financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its services to help organizations protect against similar infiltrations. Indeed, in the instant matter, an argument has been raised that Tiversa used its robust, patented peer-to-peer monitoring technology to retrieve the 1,718 File, and then repeatedly solicited LabMD, offering investigative and remediation services regarding the breach, long before Commission staff contacted LabMD."
6. The frequency, duration, means, method, purpose, and objectives with which the Company has searched and currently searches for, accesses, identifies, or obtains documents, files, or copies of files containing personal information from third persons, including LabMD, without their knowledge or permission.
7. Information on which the following statement, in a June 25, 2008, letter from Carl H. Settlemyer III, Bureau of Consumer Protection, Division of Advertising Practices, Federal Trade Commission, to Robert Boback, CEO, Tiversa, Inc., is based: "The Committee [on Oversight and Government Reform of the House of Representatives] has requested information concerning inadvertent file sharing over peer-to-peer ("P2P") networks. Certain information and materials that Tiversa submitted may be responsive to this request."
8. The Company's communications with the Federal Trade Commission referring or relating to the 1,718 File and LabMD.
9. The Company's communications with the Federal Trade Commission referring or relating to any other files, documents, or communications that it may have obtained containing sensitive or personal information, including communications referring or relating to a January 26, 2009 – March 4, 2009, email exchange between Carl H.

Settlemyer III, Bureau of Consumer Protection, Division of Advertising Practices, Federal Trade Commission, to Robert Boback, CEO, Tiversa, Inc., and others, Subject: "P2P ID Theft Research – Conference Call?"

10. On information and belief, a March 5, 2009, conference call between Robert Boback and Carl Settlemyer, Alain Sheer, Stacey Ferguson, and Richard A. Quaresima.
11. The Company's communications with Dartmouth College referring or relating to the 1,718 File.
12. The means by which the Company identified, accessed, and obtained a copy of the 1,718 File without LabMD's actual or constructive knowledge or permission.
13. The time, date, Internet Protocol address, and network from which the Company obtained the 1,718 File, including the Company's bases for this knowledge.
14. The Company's communications with Dartmouth College referring or relating to documents, including files and copies of files, that it has obtained containing sensitive or personal information from third persons without their actual or constructive knowledge or permission.
15. The Company's business model.
16. The Company's communications with LabMD.
17. The operation of peer-to-peer file sharing applications, including Limewire.
18. Contracts, grants, and formal or informal agreements between the Company and any federal Government agency, including the U.S. Department of Homeland Security, under which funding was used to obtain personal information from LabMD or other persons without their actual or constructive knowledge or permission.
19. The risk of inadvertent file sharing using peer-to-peer applications, including Limewire.

November 13, 2013

By: 

Michael Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.2024
Fax: 202.330.5842
michael.pepson@causeofaction.org
Admitted only in Maryland.

Practice limited to cases in federal court and
administrative proceedings before federal agencies.

CERTIFICATE OF SERVICE

This is to certify that on November 13, 2013, I served via email a copy of the foregoing document to:

Alain Sheer
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3321
Fax Number: 202-326-3062
Email: asheer@ftc.gov

Laura Riposo VanDruff
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Federal Trade Commission
600 Pennsylvania Ave, NW
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Megan Cox
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Margaret Lassack
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Phone: 202-326-3713
Fax Number: 202-326-3062

Ryan Mehm
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

November 13, 2013

By: 
Michael D. Pepson



SUBPOENA DUCES TECUM

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Commission Rule 3.34(b), 16 C.F.R. § 3.34(b)(2010)

1. TO

Tiversa Holding Corp.
606 Liberty Avenue
Pittsburgh, PA 15222

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION

Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave, NW, Suite 650
Washington, DC 20006

4. MATERIAL WILL BE PRODUCED TO

Michael D. Pepson

5. DATE AND TIME OF PRODUCTION

November 19, 2013

6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc., Docket 9357

7. MATERIAL TO BE PRODUCED

See attached Schedule and Exhibits, Including Protective Order Governing Discovery Material

8. ADMINISTRATIVE LAW JUDGE

Chief Judge D. Michael Chappell
Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave, NW, Suite 650
Washington, DC 20006
(202) 499-2024
Counsel for Respondent LabMD, Inc.

DATE SIGNED

November 13, 2013

SIGNATURE OF COUNSEL ISSUING SUBPOENA

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to counsel listed in Item 9 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from counsel listed in Item 9.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

Return of Service

I hereby certify that a duplicate original of the within subpoena was duly served next day overnight with delivery confirmation on the person named herein on: November 13, 2013.



Michael D. Pepson
Counsel

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

**RESPONDENT LABMD, INC.'S SCHEDULE FOR
PRODUCTION OF DOCUMENTS PURSUANT TO SUBPOENA TO
TIVERSA HOLDING CORPORATION**

PLEASE TAKE NOTICE, pursuant to LabMD's counsel's attached Subpoena Duces Tecum issued November 13, 2013, under Rules 3.34 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.34, that LabMD's counsel requests that the following material be produced to Cause of Action, 1919 Pennsylvania Ave, NW, Suite 650, Washington, DC 20006.

DEFINITIONS

1. **"All documents"** means each document within your possession, custody, or control, as defined below, that can be located, discovered or obtained by reasonable, diligent efforts, including without limitation all documents possessed by: (a) you, including documents stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or which you have a legal right to bring within your possession by demand.

2. **"All communications"** means each communication, as defined below, that is a document that can be located, discovered, or obtained by reasonable, diligent efforts, including without limitation all communications possessed by: (a) you, including communications stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or that you have a legal right to bring within your possession by demand.

3. The term “**communication**” includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
4. “**Company**” means Tiversa Holding Corporation (“Tiversa”), its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
5. “**Complaint**” means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.
6. The term “**containing**” means containing, describing, or interpreting in whole or in part.
7. “**Document**” means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book or label. “**Document**” shall also include electronically stored information (“**ESI**”). **ESI** means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.
8. The term “**documents sufficient to show**” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.

9. The terms “**each**,” “**any**,” and “**all**” shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope
10. “**Includes**” or “**including**” means “including, but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
11. “**LabMD**” means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
12. “**Federal Trade Commission**” means the Federal Trade Commission, and its directors, officers, and employees.
13. “**Dartmouth College**” means Dartmouth College, its divisions, programs, projects, affiliates, contractors, and its directors, officers, and employees.
14. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
15. The term “**person**” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.
16. “**Personal information**” means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
17. Documents that are in the Company’s “**possession, custody, or control**” include, but are not limited to, documents that are in the Commission’s constructive possession, custody, or control, as well as documents that are in the possession, custody, or control of Commission’s attorney (if not privileged or work product). This means that the documents do not need to be owned, written, or recorded by the Company to fall within this definition, which should be construed liberally.

18. The terms “relate” or “relating to” or “referring or relating to” mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
19. “**Subpoena**” means the Subpoena to Tiversa Holding Corporation, including this Schedule and Exhibits, and including the Definitions, Instructions, and Specifications.
20. “**You**” or “**your**” means Tiversa Holding Corporation, or the “Company.”
21. “**1,718 File**” means the 1,718 page file the Company found on a peer-to-peer network in 2008 and identified as having been created and stored on a LabMD computer
22. The use of the singular includes the plural, and the plural includes the singular.
23. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
20. Words in the masculine, feminine, or neuter form shall include each of the other genders.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by a document request shall be limited to the period from January 1, 2008 to present.
2. **Petitions to Limit or Quash:** Pursuant to Commission Rule of Practice § 3.34(c), any motion to limit or quash this subpoena must be filed within ten (10) days of service thereof.
3. **Protective Order:** On August 29, 2013, the Court entered a Protective Order governing discovery material in this matter. A copy of the protective order is enclosed as Exhibit A, with instructions on the handling of confidential information.
4. **Document Identification:** Documents that may be responsive to more than one specification of this Subpoena need not be submitted more than once; however, the Company’s response should indicate, for each document submitted, each specification to which the document is responsive. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or

electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.

5. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this Subpoena. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to LabMD or its counsel upon request. Copies of materials shall be produced in color if necessary to interpret them or render them intelligible.
6. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact LabMD's counsel named above before sending those materials to discuss ways to protect such information during production. For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number *in combination with* one or more of the following: date of birth, Social Security number, driver's license number or other state identification number, or a foreign country equivalent, passport number, financial account number, credit card number, or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. **Scope of Search:** These requests relate to documents that are in your possession or under your actual or constructive custody or control, including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, or other agents or consultants, whether or not such documents were received from or disseminated to any other person or entity.
8. **Claims of Privilege:** Pursuant to the Federal Trade Commission's Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a), if any documents are withheld from production based on a claim of privilege or any similar claim, you shall provide, not later than the date set for

production of materials, a schedule that describes the nature of the documents, communications, or tangible things not produced or disclosed in a manner that will enable LabMD's counsel to assess the claim of privilege. The schedule shall state individually for each item withheld: (a) the document control number(s); (b) the full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form); (c) a description of the material withheld (for example, a letter, memorandum, or email), including any attachments; (d) the date the material was created; (e) the date the material was sent to each recipient (if different from the date the material was created); (f) the email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent; (g) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors; (h) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material; (i) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material; (j) the factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and (k) any other pertinent information necessary to support the assertion of protected status by operation of law. If only part of a responsive document is privileged, all non-privileged portions of the document must be produced.

9. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish the admissibility of documents produced in response to this subpoena. You are asked to execute this Certification and provide it with your response.
10. **Continuing Nature of Requests:** This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by you prior to the close of discovery, which is currently scheduled for February 12, 2014.
11. **Document Retention:** The Company shall retain all documentary materials used in the preparation of responses to the specifications of this Subpoena. We may require the submission of additional documents at a later time. Accordingly, the Company should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this litigation during

its pendency, irrespective of whether the Company believes such documents are protected from discovery by privilege or otherwise.

Electronic Submission of Documents: The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, you must confirm with LabMD counsel named above that the proposed formats and media types will be acceptable to LabMD. LabMD requests Concordance load-ready electronic productions, including DAT and OPT load files.

12. **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to LabMD as follows:

- (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;

All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (“OCR”) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (“TIFF”) or as color JPEG images (where color is necessary to interpret the contents); and

- (b) Each electronic file should be assigned a unique document identifier (“DocID”) or Bates reference.

(1) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents

as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:

- (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (2) For each document electronically submitted to LabMD, you should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) For electronic mail: begin Bates or unique document identification number (“DocID”), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (“AttachIDs”) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) For email attachments: begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.): begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file; and
 - (d) For imaged hard-copy documents: begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as

necessary to understand the context of the document as maintained in the ordinary course of business.

- (3) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact LabMD's counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to this Subpoena.
- (4) Submit electronic productions as follows:
 - (a) With passwords or other document-level encryption removed or otherwise provided to LabMD;
 - (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible media;
 - (c) All electronic media shall be scanned for and free of viruses;
 - (d) Data encryption tools may be employed to protect privileged or other personal or private information. LabMD accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by LabMD; and
 - (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

**MAGNETIC MEDIA- DO NOT X-RAY
MAY BE OPENED FOR POSTAL INSPECTION.**

- (5) All electronic files and images shall be accompanied by a production transmittal letter, which includes:
 - (a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and
 - (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if

submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that LabMD's counsel named above determines prior to submission that the machine-readable form would be in a format that allows LabMD to use the computer files). We have included a Bureau of Consumer Protection Production Guide as Exhibit C. This guide provides detailed directions on how to fully comply with this instruction.

13. **Documents No Longer In Existence:** If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy but you have reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
14. **Incomplete Records:** If the Company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.
15. **Questions:** Any questions you have relating to the scope or meaning of anything in this request or suggestions for possible modifications thereto should be directed to Michael Pepson, at 202.499.2024, or Reed Rubenstein, at 202.372.9120.
16. Documents responsive to the request shall be addressed to the attention of Michael Pepson, Cause of Action, 1919 Pennsylvania Ave., NW, Suite 650, Washington, DC 20006, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

SPECIFICATIONS

Demand is hereby made for the following documents:

1. All communications between the Company and the Federal Trade Commission.
2. All documents relating to the Company's communications with the Federal Trade Commission referring or relating to LabMD or the 1,718 File.
3. All documents relating to the Company's communications with the Federal Trade Commission referring or relating to personal information the Company has obtained from other persons without their actual or constructive knowledge or permission.
4. All communications between the Company and Dartmouth College, including Professor Eric M. Johnson.
5. All documents relating to the Company's communications with Dartmouth College referring or relating to LabMD or the 1,718 File.
6. All documents referring or relating to any contracts, grants, and formal or informal agreements between the Company and any federal Government agency, including the U.S. Department of Homeland Security, under which funding was used to obtain personal information from LabMD or other persons without their actual knowledge or permission.
7. All documents referring or relating to the Company's communications with Dartmouth College relating to personal information it has obtained from other persons without their actual or constructive knowledge or permission.
8. All documents referring or relating to LabMD.
9. The 1,718 File.
10. All documents sufficient to show the systems and other means by which the Company searches or monitors peer-to-peer networks.
11. All communications between the Company and persons from whom the Company has obtained personal information without their actual or constructive knowledge or permission referring or relating to the Company's investigative and remediation services, including the terms of its service contracts and nondisclosure agreements.
12. All documents referring or relating to the frequency, duration, means, method, purpose, and objectives with which the Company has searched and currently searches for, accesses, identifies, or obtains files or copies of files containing personal information from other persons without their actual or constructive knowledge or permission.

November 13, 2013

By: _____



Michael Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.2024
Fax: 202.330.5842
michael.pepson@causeofaction.org
Admitted only in Maryland.
Practice limited to cases in federal court and
administrative proceedings before federal agencies.

CERTIFICATE OF SERVICE

This is to certify that on November 13, 2013, I served via email a copy of the foregoing document to:

Alain Sheer
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3321
Fax Number: 202-326-3062
Email: asheer@ftc.gov

Laura Riposo VanDruff
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2999
Fax Number: 202-326-3062

Megan Cox
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Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2282
Fax Number: 202-326-3062

Margaret Lassack
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

Ryan Mehm
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

November 13, 2013

By: 
Michael D. Pepson

Exhibit A

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

In the Matter of

LabMD, Inc.,
a corporation,
Respondent.

DOCKET NO. 9357

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:

D. Michael Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: August 29, 2013

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, 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. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9357" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9357" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Exhibit B

CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY

Pursuant to 28 U.S.C. § 1746

1. I, _____, have personal knowledge of the facts set forth below and am competent to testify as follows:
2. I have authority to certify the authenticity of the records produced by Tiversa Holding Corporation and attached hereto.
3. The documents produced and attached hereto by Tiversa Holding Corporation are originals or true copies of records of regularly conducted activity that:
 - a. were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
 - b. were kept in the course of the regularly conducted activity of Tiversa Holding Corp; and
 - c. were made by the regularly conducted activity as a regular practice of Tiversa Holding Corporation.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2013.

Signature

Exhibit C

BCP PRODUCTION GUIDE

Bureau of Consumer Protection Production Guide

An eDiscovery Resource

This guide explains what the Bureau of Consumer Protection (BCP) at the Federal Trade Commission (Commission) generally requires in response to a Civil Investigative Demand (CID) or a subpoena. The suggested formats are based on BCP's experience with many different submissions; follow them to organize your submission and minimize the chance of incompatibility with BCP's processes and systems.

This resource is intended as guidance and does not supersede instructions in any CID or subpoena. Please contact the Commission counsel identified in CID or subpoena to discuss any specific issues you may have with collecting, formatting, or submitting documents.

1. Getting Started: Protocols for All Submissions

Before processing documents in response to a formal request, please note: The following protocols apply to ALL formats submitted to BCP. BCP has additional requirements pertaining to metadata, format, etc., for certain types of documents. See section 2 of these instructions (entitled "Preparing Collections") for details.

a. Concordance Version and Load Files

BCP uses LexisNexis® Concordance® 2008 v 10.05. With the production, you must submit:

- an Opticon image load file (OPT) containing a line for every image file in the production, and
- a Concordance delimited data load file (DAT) containing a line for every document in the production, with Bates references, metadata fields, and native file links where applicable.

b. Virus Scanning

All electronic documents and production media shall be scanned and free of viruses prior to shipping to BCP. BCP will request replacement for any infected media, **which may affect the timing of your compliance with BCP's request.**

c. Extracted Text / OCR

Submit text:

- as document-level text files,
- named for the beginning Bates number, and
- organized into a folder separate from images.

BCP cannot accept Unicode text files and will request replacement files if received.

d. Deduplication

You must have the approval of Commission counsel to globally de-dupe or to apply email threading. You do not need prior approval of Commission counsel to deduplicate within a custodian's document set.

e. Labeling & Numbering Files

For image file names, bates numbers and document identification numbers (Doc IDs), use a consistent number of numerals to prevent issues with image display, using leading zeros where necessary. Do not use a space to separate the prefix from numbers.

Acceptable formats (as long as you are consistent)

- ABC-FTC0000001
- ABCFTC0000001

Unacceptable format

- ABC 0000001

f. Recommended Delimiters

BCP strongly recommends using these delimiters in delimited data load files:

| Description | Symbol | ASCII Character |
|------------------------|--------|-----------------|
| Field Separator | □ | 20 |
| Quote Character | ␣ | 254 |
| Multi Entry delimiter | Ⓜ | 174 |
| <Return> Value in data | ~ | 126 |

g. Image Files

BCP only accepts image files that are:

- 300 DPI
- single-page Group IV TIFF files
- or color JPEG image files where color is necessary to interpret content

h. Date & Time Format

Submit date and time data in separate fields so Concordance can load it.

2. Preparing Collections

a. Preparing Scanned Documents

Submit TIFF (or color JPEG) images with OCR text

Metadata & Other Information Requirements

Include the following metadata fields and information in the delimited data load file. Alongside each piece of information, BCP recommends a corresponding field name for the delimited data load file.

| <u>Document Info / Metadata</u> | <u>Description</u> | <u>Concordance Field Name</u> |
|---------------------------------|---|-------------------------------|
| Beginning Bates number | The beginning bates number for the document | BEGBATES |
| Ending Bates number | The ending bates number for the document | ENDBATES |
| Page Count | The total number of pages in the document | PGCOUNT |
| Custodian | Mailbox where the email resided | CUSTODIAN |

b. Preparing Email & Attachments

Email: Submit TIFF images with extracted text of email

Attachments:

- Submit Microsoft **Excel** and **PowerPoint** files in native format with extracted text and metadata.
- Submit Microsoft **Access** files and other **multimedia files** in native format with *metadata only*.
- Submit other files and attachments as images with extracted text and metadata.

Metadata & Other Information Requirements

- Preserve the parent/child relationship in email by including a reference to all attachments.
- Produce attachments as separate documents and number them consecutively to the parent email.
- Include the following metadata fields and information in the delimited data load file. Alongside each piece of information, BCP recommends a corresponding field name for the delimited data load file.

Metadata for Emails

| <u>Document Info / Metadata</u> | <u>Description</u> | <u>Concordance Field Name</u> |
|---------------------------------|---|-------------------------------|
| Beginning Bates number | The beginning bates number for the document | BEGBATES |
| Ending Bates number | The ending bates number for the document | ENDBATES |
| Page Count | The total number of pages in the document | PGCOUNT |

| | | |
|-----------------------------|--|--------------|
| Custodian | Mailbox where the email resided | CUSTODIAN |
| To | Recipient(s) of the email | RECIPIENT |
| From | The person who authored the email | FROM |
| CC | Person(s) copied on the email | CC |
| BCC | Person(s) blind copied on the email | BCC |
| Date Sent | Date the email was sent | DATESENT |
| Time Sent | Time the email was sent | TIMESENT |
| Subject | Subject line of email | SUBJECT |
| Date Received | Date the email was received | DATERCVD |
| Time Received | Time the email was received | TIMERCVD |
| Child records (attachments) | The beginning bates number(s) of attachments delimited by comma | ATTACHMENTID |
| Location or "Path" | Location of email in personal folders/Deleted Items/Sent Items | FILEPATH |
| Message ID | MS Outlook Message ID or similar number in other message systems | MESSAGEID |

Metadata for Attachments

| <u>Document Info / Metadata</u> | <u>Description</u> | <u>Concordance Field Name</u> |
|---------------------------------|--|-------------------------------|
| Beginning Bates number | The beginning bates number for the document | BEGBATES |
| Ending Bates number | The ending bates number for the document | ENDBATES |
| Page Count | The total number of pages in the document | PGCOUNT |
| Custodian | The name of the original custodian of the file | CUSTODIAN |
| Parent Record | Beginning bates number of parent email | PARENTID |
| Creation Date | The date attachment was saved at the location on the electronic media for the first time | CREATEDATE |
| Creation Time | The time the attachment was saved at the location on the electronic media for the first time | CREATETIME |
| Modified Date | The date/time the attachment was last changed, and then saved | MODDATE |
| Modified Time | The time the attachment was last changed, and then saved | MODTIME |
| Last Accessed Date | The time the attachment was last opened, scanned, or even "touched" by a user or software activity | LASTACCDATE |
| Last Accessed Time | The time the attachment was last opened, scanned, or even "touched" by a user or software activity | LASTACCTIME |

| | | |
|-------------|---|------------|
| Size | The amount of space the file takes up on the electronic media. Usually recorded in kilobytes, however may be reported in single bytes | FILESIZE |
| File Name | The name of the attachment including the extension denoting the application in which the file was created | FILENAME |
| Native link | Relative path of submitted native files such as Excel spreadsheets | NATIVELINK |
| Hash | The SHA (Secure Hash Algorithm) or MD5 (Message Digest) hash for the original native file if available | HASH |

c. Preparing Native Files

- a. Submit Microsoft Access, Excel, and PowerPoint files in native format with extracted text and metadata.
- b. Submit other files and attachments as images with extracted text and metadata.

Metadata & Other Information Requirements

Include the following metadata fields and information in the delimited data load file. Alongside each piece of information, BCP recommends a corresponding field name for the delimited data load file.

Metadata and other information requirements for native files

| Document Info / Metadata | Description | Concordance Field Name |
|--------------------------|--|------------------------|
| Beginning Bates number | The beginning bates number for the document | BEGBATES |
| Ending Bates number | The ending bates number for the document | ENDBATES |
| Page Count | The total number of pages in the document | PGCOUNT |
| Custodian | The name of the original custodian of the file | CUSTODIAN |
| Creation Date | The date attachment was saved at the location on the electronic media for the first time | CREATEDATE |
| Creation Time | The time the attachment was saved at the location on the electronic media for the first time | CREATETIME |
| Modified Date | The date/time the attachment was last changed, and then saved | MODDATE |
| Modified Time | The time the attachment was last changed, and then saved | MODTIME |
| Last Accessed Date | The time the attachment was last opened, scanned, or even "touched" by a user or software activity | LASTACCDATE |
| Last Accessed Time | The time the attachment was last opened, scanned, or even "touched" by a user or software activity | LASTACCTIME |
| Size | The amount of space the file takes up on the electronic media. Usually recorded in kilobytes | FILESIZE |

| | | |
|-------------|---|------------|
| File Name | The name of the file including the extension denoting the application in which the file was created | FILENAME |
| Native link | Relative path of submitted native files | NATIVELINK |
| Hash | The SHA (Secure Hash Algorithm) or MD5 Hash for the original native file if available | HASH |

3. Submitting Your Production

Once you've prepared documents according to this guide, follow these instructions to submit them to BCP.

a. Media BCP Accepts

Submit any of the following:

- For Productions *under* 10 gigabytes:
 - CD-R CD-ROM optical disks formatted to ISO 9660 specifications
 - DVD-ROM optical disks for Windows-compatible personal computers
 - USB 2.0 flash drives
- For Productions *over* 10 gigabytes
 - IDE, EIDE and SATA hard disk drives, formatted in Windows-compatible, uncompressed data in a USB 2.0 external enclosure
 - USB 2.0 flash drives

b. Submit a Production Transmittal Letter

For any format, accompany the submission with a letter that includes all of the following:

- volume name,
- Bates ranges and custodians,
- total number of records,
- total number of images or files,
- list of fields in the order in which they are listed in the data files,
- date and time format, and
- confirmation that the number of files on the volume match the load files.

Exhibit F

January 30, 2014

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Rick Wallace
Tiversa Holding Corporation
606 Liberty Ave.
Pittsburgh, PA 15222

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

Dear Mr. Wallace:

This letter is to notify you that counsel for LabMD, Inc. (“LabMD”), has issued a subpoena to you, which is enclosed. The Federal Trade Commission’s Rules of Practice state that “[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary [of the Federal Trade Commission], requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena....” 16 C.F.R. § 3.34(a). Please note that the date set forth in the enclosed documents for the time of your deposition is simply a placeholder. We look forward to working with you to find a mutually convenient time for your deposition.

On August 29, 2013, the Federal Trade Commission, Office of Administrative Law Judges issued a Protective Order Governing Discovery Material (the “Protective Order”) in the above-referenced action. The Protective Order protects confidential information produced in discovery in the case. A copy of the Protective Order signed by Chief Administrative Law Judge D. Michael Chappell is enclosed as an exhibit to the subpoena’s schedule.

I would be pleased to discuss the scheduling of your deposition at your earliest convenience. You may reach me at (202) 372-9100.

Sincerely,



William A. Sherman, II
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Phone: 202.372.9100
Fax: 202.372.9141
william.sherman@dinsmore.com

Enclosures:

- (1) Subpoena *Ad Testificandum*
- (2) Exhibit A: Protective Order Governing Discovery Material

cc (via email):

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm



SUBPOENA AD TESTIFICANDUM DEPOSITION

Provided by the Secretary of the Federal Trade Commission, and
Issued Pursuant to Rule 3.34(a), 16 C.F.R. § 3.34(a) (2010)

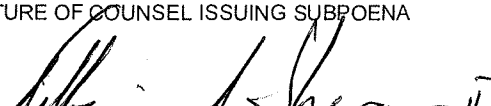
| | |
|--|---|
| 1. TO <i>Rick Wallace Tiversa Holding Corporation 606 Liberty Ave. Pittsburgh, PA 15222</i> | 2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION |
|--|---|

This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

| | |
|---|---|
| 3. PLACE OF DEPOSITION <i>Dinsmore & Shohl LLP 301 Grant St. #2800 Pittsburgh, PA 15219 (412) 281-5000</i> | 4. YOUR APPEARANCE WILL BE BEFORE <i>William A. Sherman II or other designated counsel</i> 5. DATE AND TIME OF DEPOSITION <i>February 18, 2014, at 9:00 a.m.</i> |
|---|---|

| |
|--|
| 6. SUBJECT OF PROCEEDING <i>In the Matter of LabMD, Inc., Docket 9357</i> |
|--|

| | |
|---|--|
| 7. ADMINISTRATIVE LAW JUDGE <i>Chief Judge D. Michael Chappell</i> Federal Trade Commission Washington, D.C. 20580 | 8. COUNSEL AND PARTY ISSUING SUBPOENA <i>William A. Sherman II, Respondent Counsel Dinsmore & Shohl LLP 801 Pennsylvania Avenue, N.W. Suite 610 Washington, DC 20004 (202) 372-9100</i> |
|---|--|

| | |
|-----------------------------------|---|
| DATE SIGNED <i>1-30-14</i> | SIGNATURE OF COUNSEL ISSUING SUBPOENA  |
|-----------------------------------|---|

GENERAL INSTRUCTIONS

APPEARANCE

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply.

MOTION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any motion to limit or quash this subpoena must comply with Commission Rule 3.34(c), 16 C.F.R. § 3.34(c), and in particular must be filed within the earlier of 10 days after service or the time for compliance. The original and ten copies of the petition must be filed before the Administrative Law Judge and with the Secretary of the Commission, accompanied by an affidavit of service of the document upon counsel listed in Item 8, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

The Commission's Rules of Practice require that fees and mileage be paid by the party that requested your appearance. You should present your claim to Counsel listed in Item 8 for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Counsel listed in Item 8.

A copy of the Commission's Rules of Practice is available online at <http://bit.ly/FTCRulesofPractice>. Paper copies are available upon request.

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: (check the method used)

in person.

certified
by registered mail.

by leaving copy at principal office or place of business, to wit:

on the person named herein on:

1-30-14

(Month, day, and year)

William J. Stewart

(Name of person making service)

Respondent Counsel

(Official title)

CERTIFICATE OF SERVICE

This is to certify that on January 30th, 2014, I served via electronic delivery a copy of the foregoing document to:

Alain Sheer
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3321
Fax Number: 202-326-3062
Email: asheer@ftc.gov

Megan Cox
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2282
Fax Number: 202-326-3062

Laura Riposo VanDruff
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-2999
Fax Number: 202-326-3062

Margaret Lassack
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

Ryan Mehm
Attorney
Federal Trade Commission
600 Pennsylvania Ave, NW
Room NJ-8100
Washington, DC 20580
Phone: 202-326-3713
Fax Number: 202-326-3062

January 30, 2014

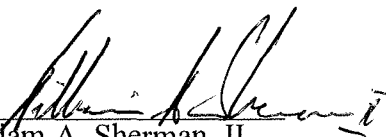
By: 
William A. Sherman, II

Exhibit A

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

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

DOCKET NO. 9357

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:

D. Michael Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: August 29, 2013

ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, 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. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation "CONFIDENTIAL – FTC Docket No. 9357" or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation "CONFIDENTIAL – FTC Docket No. 9357" or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Exhibit G

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

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

COMPLAINT COUNSEL’S ANSWER AND OBJECTIONS TO RESPONDENT’S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS (NUMBERS 1-17)

Pursuant to Sections 3.31 and 3.37 of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent LabMD, Inc.’s First Set of Requests for the Production of Documents (“Respondent’s Requests”). Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

General Objections

The following General Objections apply to each request for documents in Respondent’s Requests and are hereby incorporated by reference into each response. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual request does not waive any of Complaint Counsel’s General Objections as to the other requests.

1. Complaint Counsel objects to Respondent’s Requests to the extent they seek to impose duties and obligations upon Complaint Counsel beyond those imposed by the Commission’s Rules of Practice for Adjudicative Proceedings, including seeking documents that are beyond the scope of permissible discovery under Rule 3.31(c)(2).

Complaint Counsel is limiting its responses to the scope of discovery set forth in Rule 3.31(c)(2) of the Commission's Rules of Practice for Adjudicative Proceedings.

2. Complaint Counsel objects to Respondent's Requests to the extent the requests seek documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the government informer privilege, the law enforcement evidentiary or investigatory privilege, common interest privilege, or any other applicable privilege or immunity. Complaint Counsel does not, by any response to any request, waive or partially waive any applicable privilege or immunity.
3. Complaint Counsel objects to Respondent's Requests to the extent they seek information that relates to expert testimony prior to the dates prescribed by the October 22, 2013 Scheduling Order.
4. Complaint Counsel objects to Respondent's Requests to the extent they are overly broad, vague, ambiguous, unduly burdensome, and oppressive.
5. Complaint Counsel objects to Respondent's Requests as unduly burdensome and oppressive to the extent they ask Complaint Counsel to produce documents that are already in Respondent's possession or control, are in the public record, or can be obtained from some other source that is more convenient to Respondent, less burdensome to Complaint Counsel, and less expensive for both parties. Complaint Counsel will not undertake to catalogue and organize these materials for Respondent.
6. Complaint Counsel objects to Respondent's Requests to the extent that they seek information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

7. Complaint Counsel objects to Respondent's Requests to the extent that they are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the affirmative defenses of the Respondent.
8. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to undertake legal research for Respondent.
9. Complaint Counsel objects to Respondent's Requests to the extent that they require Complaint Counsel to analyze or organize information for Respondent.
10. Complaint Counsel objects to Respondent's Requests to the extent that they seek information or documents Complaint Counsel has already provided to Respondent.
11. Complaint Counsel has not completed its discovery or its preparation for trial. Complaint Counsel's answers to Respondent's Requests are given without prejudice to Complaint Counsel's right to produce information relating to any subsequently discovered facts. Complaint Counsel reserves the right to assert additional objections to Respondent's Requests, and to amend or supplement these objections and responses as necessary after the close of discovery.
12. The failure of Complaint Counsel to object to any document request on a particular ground may not be construed as a waiver of its right to object on any additional ground(s).
13. Complaint Counsel reserves all of its evidentiary or other objections to the introduction, admissibility, or use of any document produced or response herein at the hearing in this action, and does not, by any response to any request, waive any objection, stated or unstated.

14. Pursuant to Rule 3.31(g), the inadvertent production of any privileged document or information shall not constitute a waiver of the applicable privilege.

Responses

1. All documents referring or relating to the 1,718 File.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks information relating to non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents pursuant to Paragraph 14 of the Scheduling Order and at FTC-PRI-000001 to FTC-PRI-001724.

2. All communications between Dartmouth College and FTC.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Subject to its General and Specific objections, Complaint Counsel has no responsive, discoverable, non-privileged documents.

3. All communications between M. Eric Johnson and FTC.

Complaint Counsel refers Respondent to its response to Document Request 2.

4. All communications between Tiversa and FTC.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-PRI-000001 to FTC-PRI-001724, and will produce additional responsive, discoverable, and non-privileged documents.

5. All communications between FTC and any third person not employed by FTC referring or relating to LabMD or the 1,718 File.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint

Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks information relating to non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents pursuant to Paragraph 14 of the Scheduling Order and at FTC-PRI-000001 to FTC-PRI-001724, and will produce additional responsive, discoverable, and non-privileged documents.

6. All communications between FTC and any federal Government agency, including the U.S. Department of Homeland Security, concerning LabMD generally and/or the 1,718 File specifically.

Complaint Counsel refers Respondent to its response to Document Request 5.

7. All communications between FTC employees referring or relating to LabMD or the 1,718 File that is not protected as attorney work product, including

communications between the FTC and the FTC's Office of Public Affairs (including communications between the FTC and the Office of Public Affairs's current and former employees).

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel further objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Subject to and without waiving any General or Specific objections, Complaint Counsel will produce responsive, discoverable, and non-privileged documents.

8. All documents sufficient to show what data-security standards are currently used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act.

Complaint Counsel refers Respondent to its response to Document Request 10.

9. All documents sufficient to show what changes occurred in the data-security standards used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act from 2005 to the present and the dates on which these standards changed.

Complaint Counsel objects to this Document Request as vague and ambiguous.

Complaint Counsel refers Respondent to its response to Document Request 10.

10. All documents sufficient to show the standards or criteria the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act from 2005 to the present.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel further objects to this Document Request. Documents in the

possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request as vague and ambiguous.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-000685 to FTC-000893 and will produce responsive, discoverable, and non-privileged documents.

11. All documents provided to the FTC pursuant to any Civil Investigation Demand regarding its investigation of LabMD.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process

privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent the requested documents that were provided by Respondent can be obtained directly by Respondent through less burdensome means.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-PRI-000001 to FTC-PRI-001724 and refers Respondent to the documents Respondent produced, which have been Bates labeled FTC-LABMD-000001 to FTC-LABMD-003851.

12. All documents identifying LabMD and other companies whose documents or files Tiversa downloaded from Peer to Peer Networks which contained Personal Identifying Information and or Protected Health Information that were provided to FTC.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents pursuant to Paragraph 14 of the Scheduling Order and at FTC-PRI-000001 to FTC-PRI-001724.

13. All documents identifying consumers that were harmed, or that are substantially likely to be harmed, as result of the claims alleged against LabMD in the Complaint.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Document Request to the extent it seeks information relating to non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request as overly broad and unduly burdensome because any underlying relevant information contained in the requested documents can be obtained directly by Respondent through less burdensome means.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents, at FTC-SAC-000001 to FTC-SAC-000044, FTC-000661 to FTC-000684, and FTC-PRI-000001 to FTC-PRI-001724, and will produce responsive, discoverable, and non-privileged documents.

14. All documents that are utilized by FTC to determine whether to pursue an investigation or complaint against an entity or individual, including but not limited to evaluation standards and scoring systems.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as vague and ambiguous. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the

discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel further objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

15. All communications and all documents relating to communications between FTC and the Sacramento Police Department from October 5, 2012 to the present.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications or documents unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this

matter, Complaint Counsel objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel will produce responsive, discoverable, and non-privileged documents.

16. All communications—including letters—between FTC and the Persons identified in the documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.

In addition to the General Objections, Complaint Counsel specifically objects to this Document Request to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such communications unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Document Request as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

To the extent this Document Request seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel objects to this Document Request. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Document Request to the extent it seeks documents that are protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Complaint Counsel further objects to this Document Request to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged documents at FTC-000661 to FTC-000684.

17. All documents relating to communications between the Bureau of Competition and the Persons identified in documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.

Complaint Counsel objects to this Document Request, which seeks information in the possession, custody, or control of a Bureau not involved in this matter. Documents in the possession, custody, or control of that Bureau must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Dated: January 24, 2014

Respectfully submitted,



Laura Riposo VanDruff
Complaint Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2014 I caused a copy of the foregoing document to be served *via* electronic mail to:

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Counsel for Respondent LabMD, Inc.

January 24, 2014


By: 
Laura Riposo VanDruff
Attorney

Exhibit H

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

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

**COMPLAINT COUNSEL’S RESPONSE TO LABMD, INC.’S FIRST SET OF
INTERROGATORIES (NUMBERS 1-22)**

Pursuant to Sections 3.31 and 3.35 of the Federal Trade Commission’s Rules of Practice, Complaint Counsel hereby responds to Respondent LabMD, Inc.’s First Set of Interrogatories (“Respondent’s Interrogatories”). Subject to the General and Specific Objections below, and without waiving these objections, Complaint Counsel answers as follows:

General Objections

The following General Objections apply to each of Respondent’s Interrogatories and are hereby incorporated by reference into each response. The assertion of the same, similar, or additional objections or the provision of partial answers in response to an individual interrogatory does not waive any of Complaint Counsel’s General Objections as to the other interrogatories.

1. Complaint Counsel objects to Respondent’s Interrogatories to the extent they seek to impose duties and obligations upon Complaint Counsel beyond those imposed by the Commission’s Rules of Practice for Adjudicative Proceedings, including seeking documents that are beyond the scope of permissible discovery under Rule 3.31(c)(2), and/or are expressly excluded from interrogatory responses by Rule 3.35(a)(1).

Complaint Counsel is limiting its responses to the scope of discovery set forth in Rule 3.31(c)(2) of the Commission's Rules of Practice for Adjudicative Proceedings.

2. Complaint Counsel objects to Respondent's Interrogatories to the extent the interrogatories seek documents or information protected from disclosure by the attorney-client privilege, the work product doctrine, the government deliberative process privilege, the government informer privilege, the law enforcement evidentiary or investigatory privilege, common interest privilege, or any other applicable privilege or immunity. Complaint Counsel does not, by any response to any interrogatory, waive or partially waive any applicable privilege or immunity.
3. Complaint Counsel objects to Respondent's Interrogatories to the extent they seek information that relates to expert testimony prior to the dates prescribed by the October 22, 2013 Scheduling Order.
4. Complaint Counsel objects to Respondent's Interrogatories to the extent they are overly broad, vague, ambiguous, unduly burdensome, and oppressive.
5. Complaint Counsel objects to Respondent's Interrogatories as unduly burdensome and oppressive to the extent they call for information previously provided to Respondent, already in Respondent's possession or control, are in the public record, or can be obtained from some other source that is more convenient to Respondent, less burdensome to Complaint Counsel, and less expensive for both parties. Complaint Counsel will not undertake to catalogue and organize these materials for Respondent.
6. Complaint Counsel objects to each interrogatory to the extent that it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.

7. Complaint Counsel objects to Respondent's definition of the term "identify." The burden of deriving or ascertaining the information requested is substantially the same for Respondent and Complaint Counsel. Complaint Counsel will include sufficient detail to permit the Respondent to identify readily individual documents, written or oral communication, and publications; and sufficient contact information to permit Respondent to locate natural persons.
8. Complaint Counsel objects to Respondent's Interrogatories to the extent that, as framed, they purport to obligate Complaint Counsel to conduct an extensive and complete investigation of detailed facts within the thirty (30) days allotted for its responses and objections when such facts are known to Respondent and/or contained in the several thousand pages of documents already produced by Respondent.
9. Complaint Counsel reserves all of its evidentiary objections or other objections to the introduction or use of any response herein at the hearing in this action, and does not, by any response to any interrogatory, waive any objection to that interrogatory, stated or unstated.
10. Complaint Counsel has not completed its discovery or its preparation for trial. Complaint Counsel's answers to Respondent's Interrogatories are given without prejudice to Complaint Counsel's right to produce information relating to any subsequently discovered facts. Complaint Counsel reserves the right to assert additional objections to Respondent's Interrogatories, and to amend or supplement these objections and responses as necessary after the close of discovery.

11. Complaint Counsel objects to Respondent's Interrogatories to the extent that they are not reasonably calculated to yield information relevant to the allegations of the Complaint, to the proposed relief, or to the affirmative defenses of the Respondent.
12. Complaint Counsel objects to Respondent's Interrogatories to the extent that they require Complaint Counsel to undertake legal research for Respondent.
13. Complaint Counsel objects to Respondent's Interrogatories to the extent that they require Complaint Counsel to analyze or organize information for Respondent.
14. The failure of Complaint Counsel to object to any interrogatory on a particular ground may not be construed as a waiver of its right to object on any additional ground(s).
15. Complaint Counsel reserves all of its evidentiary or other objections to the introduction, admissibility, or use of any response herein at the hearing in this action, and does not, by any response to any interrogatory, waive any objection, stated or unstated.
16. Pursuant to Rule 3.31(g), the inadvertent production of any privileged document or information shall not constitute a waiver of the applicable privilege.

Responses

1. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 10 of the Complaint that Respondent "failed to provide reasonable and appropriate security for personal information and its computer networks."

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory as 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). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged information at FTC-000001 to FTC-000376 and FTC-000424 to FTC-000656.

2. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 11 of the Complaint that "Respondent could have corrected its security failures at relatively low cost using readily available security measures."

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory as 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). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

3. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 12 of the Complaint that “[c]onsumers have no way of independently knowing about respondent’s security failures and could not reasonably avoid possible harms of such failures.”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy.

Complaint Counsel further objects to this Interrogatory as 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). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

4. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 16 of the Complaint that “since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks.”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es).

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

To the extent this Interrogatory seeks information in the possession, custody, or control of the Commissioners, the General Counsel, or any Bureau or Office not involved in this matter, Complaint Counsel objects to this Interrogatory. Documents in the possession, custody, or control of the aforementioned entities must be sought through written motion under the procedure laid out in Rule 3.36, 16 C.F.R. § 3.36.

Complaint Counsel further objects to this Interrogatory as 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). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Complaint Counsel further objects to this Interrogatory to the extent it seeks production of materials previously produced to Respondent.

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it has previously produced responsive, discoverable, and non-privileged information, at FTC-000685 to FTC-000893.

5. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegations in

Paragraph 21 of the Complaint that “[a] number of the SSNs in the Day Sheets are being, or have been, used by people with different names, which may indicate that the SSNs have been used by identity thieves”;

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy.

Complaint Counsel further objects to this Interrogatory as 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). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Subject to and without waiving any General or Specific objections, Complaint Counsel states that it identified relevant witness(es) in its initial disclosures:

Kevin Wilmer
Federal Trade Commission
Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

6. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegations in Paragraph 22 of the Complaint that “respondent’s failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information”: (1) “caused, or is likely to cause, substantial injury to consumers. . .”, and (2) “was, and is, an unfair act or practice.”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel objects to this Interrogatory to the extent it seeks a legal conclusion.

To the extent this contention Interrogatory addresses “unfair act or practice” and seeks all fact supporting Complaint Counsel’s entire claim, Complaint Counsel objects to this Interrogatory as overbroad, burdensome, and oppressive.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel’s trial strategy.

Complaint Counsel further objects to this Interrogatory as 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). Complaint Counsel will supplement its answer, as appropriate, as set forth in Rule 3.35(b)(2).

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 13.

7. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 23 of the Complaint that “the acts and practices of respondent as alleged in this Complaint constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 16 U.S.C. § 45(a).”

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent it seeks a legal conclusion.

To the extent this contention interrogatory seeks all fact supporting Complaint Counsel's entire claim, Complaint Counsel objects to this Interrogatory as overbroad, burdensome, and oppressive.

Complaint Counsel further objects to this Interrogatory as unduly burdensome to the extent it seeks to compel Complaint Counsel to undertake investigation, discovery, and analysis on behalf of Respondent. Complaint Counsel also objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

8. Identify all communications between the FTC and the Sacramento Police Department regarding the LabMD documents found at 5661 Wilkinson Street, Sacramento, California on October 5, 2012.

RESPONSE:

Complaint Counsel refers Respondent to its responses to Document Requests 5 and 15.

9. Identify all individuals at the FTC who communicated with the Sacramento Police Department regarding the LabMD documents found at 5661 Wilkinson Street, Sacramento, California on October 5, 2012.

RESPONSE:

Megan Cox
Federal Trade Commission
Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

Leslie Melman
Federal Trade Commission
Office of General Counsel
600 Pennsylvania Avenue NW
Washington, DC 20580

Alain Sheer
Federal Trade Commission
Division of Privacy and Identity Protection

601 New Jersey Avenue NW
Washington, DC 20001

Laura Riposo VanDruff
Federal Trade Commission
Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

Ruth Yodaiken
Federal Trade Commission
Division of Privacy and Identity Protection
601 New Jersey Avenue NW
Washington, DC 20001

10. Identify all communications between the FTC and Dartmouth College.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 2.

11. Identify all communications between the FTC and Tiversa.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Requests 1, 4, 11, and 12.

12. Identify all communications between the FTC and M. Eric Johnson.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 2.

13. Identify all individuals who participated in and, or worked with M. Eric Johnson and Tiversa gathering, compiling, analyzing and writing the article/study known as “Data Hemorrhages In The Health Care Sector.”

RESPONSE:

Complaint Counsel has no knowledge of information responsive to Interrogatory 13.

14. Identify companies (other than LabMD) whose documents or files Tiversa downloaded from Peer to Peer Networks which contained Personal Identifying Information (“PIP”) and/or Protected Health Information (“PHI”) that was provided to FTC.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission’s Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC’s investigation of LabMD and preparations for this hearing is not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 12.

15. If any company listed in your response to Interrogatory 14 was not investigated by the FTC, or a complaint has not been filed against them, please explain why the FTC has not done so.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC's investigation of LabMD and preparations for this hearing is not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory as overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

16. Identify the number of consumers harmed as a result of the PII and PHI identified in your response to interrogatory 14, and state the nature of the harm.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory as overly broad, unduly burdensome, not reasonably calculated to lead to the

discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

17. Identify the consumers harmed as a result of respondent's alleged failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information, and state the nature of the harm.

RESPONSE:

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 13.

18. Identify all companies you have investigated and/or filed complaints against since 2005 for alleged data security failures.

RESPONSE:

In addition to the General Objections, Complaint Counsel specifically objects to this Interrogatory to the extent it seeks to impose duties and obligations upon Complaint Counsel beyond the Commission's Rules of Practice for Adjudicative Proceedings. Complaint Counsel further objects that any such information unrelated to the FTC's investigation of LabMD and preparations for this hearing are not relevant to the allegations of the Complaint, to the proposed relief, or to the defenses asserted by Respondent. Complaint Counsel further objects to this Interrogatory to the extent that it seeks information for which the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. Complaint Counsel further objects to this Interrogatory as overly broad, unduly

burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and an improper inquiry into the mental processes of the Commissioners and FTC attorneys.

Complaint Counsel further objects to this Interrogatory to the extent it seeks information that is protected by the work product doctrine, government deliberative process privilege, government informer privilege, law enforcement investigatory privilege, or common interest privilege.

Subject to and without waiving any General or Specific objections, Complaint Counsel will produce responsive, discoverable, and non-privileged information pursuant to Rule 3.35(c).

19. Identify all publications and documents relating to the data security standards, regulations and guidelines the FTC seeks to enforce against LabMD.

RESPONSE:

Subject to and without waiving any objections, Complaint Counsel refers Respondent to its response to Document Request 10.

20. Identify any and all changes in the data security standards, regulations and guidelines the FTC uses to enforce section 5 of the FTC Act.

RESPONSE:

Complaint Counsel objects to this Interrogatory as vague and ambiguous. Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 10.

21. Identify all data security standards, regulations and guidelines the FTC will use to determine whether LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of

expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Subject to and without waiving any General or Specific objections, Complaint Counsel refers Respondent to its response to Document Request 10.

22. Identify the time frame in which the FTC claims that LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

Complaint Counsel objects to this Interrogatory to the extent that it seeks the identity and opinions rendered by non-testifying experts and seeks prematurely the identity and opinions of expert witness(es). Complaint Counsel also objects that this Interrogatory calls for expert opinions and is not an appropriate subject for this manner of discovery.

Complaint Counsel further objects to this Interrogatory to the extent it impermissibly seeks attorney work product and Complaint Counsel's trial strategy.

Complaint Counsel further objects to this Interrogatory to the extent it seeks a legal conclusion.

Complaint Counsel further objects to this Interrogatory as premature and unduly burdensome, as discovery relating to LabMD's security practices is ongoing.

Subject to and without waiving any General or Specific objections, Complaint Counsel identifies the time period of January 1, 2005 through the close of evidence at the Hearing in the above-captioned matter.

VERIFICATION OF LAURA RIPOSO VANDRUFF

I am an attorney of record in this matter and am authorized to make this verification for and on behalf of Complaint Counsel. I have read the foregoing Complaint Counsel's Response to Respondent's First Set of Interrogatories, and am familiar with the contents thereof. The answers to the interrogatories are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the statements made in this Verification are true and correct.

Executed on January 24, 2014

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

Laura Riposo VanDruff

CERTIFICATE OF SERVICE

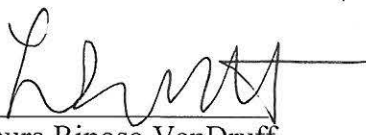
I hereby certify that on January 24, 2014 I caused a copy of the foregoing document to be served *via* electronic mail to:

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Counsel for Respondent LabMD, Inc.

January 24, 2014

By: 
Laura Riposo VanDruff
Attorney