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

ORIGINAL

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

COMPLAINT COUNSEL'S MOTION TO COMPEL PRODUCTION OF DAUGHERTY AFFIDAVIT

More than a month before the hearing in May 2014, LabMD CEO and President Michael Daugherty prepared and executed a factual affidavit for a congressional committee describing information provided by a former employee of Tiversa Holding Corporation ("Tiversa") about the source of the 1,718 File. LabMD ignored its obligation to produce or identify it to Complaint Counsel even though it is clearly relevant to this matter. Instead, Complaint Counsel learned of its existence from filings in litigation between LabMD and Tiversa. Now that Mr. Daugherty's affidavit has come to light, LabMD seeks to hide it behind baseless privilege and responsiveness claims. The affidavit is not work product, as LabMD claims, and it should have been produced to Complaint Counsel in response to requests for production or identified as a supplemental initial disclosure. Complaint Counsel has met and conferred with counsel for LabMD on the subject of this motion, but was unable to reach agreement. Meet and Confer Statement (attached as Exhibit A). Pursuant to Rule 3.38(a)–(b), Complaint Counsel moves the Court to order LabMD to produce the affidavit executed by Mr. Daugherty to Complaint Counsel, or to order LabMD to produce it to the Court for *in camera* consideration of LabMD's privilege and responsiveness claims.

BACKGROUND

On February 18, 2015, counsel for LabMD filed a RICO Case Statement ("Statement") in litigation against Tiversa, Robert Boback, and Eric Johnson. As Exhibit Q to the Statement, LabMD attached an affidavit relating to the 1718 File executed by Mr. Daugherty on April 17, 2014 ("Affidavit"). *See* Op. and Order, *LabMD v. Tiversa et al.*, No. 2:15-cv-00092-MRH-MPK (W.D. Pa. Mar. 17, 2015) at 3, 8 n.3 (attached as Exhibit B).

Hours after filing the Affidavit, LabMD requested that the clerk remove its original Statement from the public docket and replace it with an errata that, among other things, omitted the Affidavit. *Id.* at 3; Pl.'s Errata to RICO Case Stmt., *LabMD v. Tiversa et al.*, No. 2:15-cv-00092-MRH-MPK (W.D. Pa. Feb. 18, 2015) (attached as Exhibit C). LabMD asserted that the original Statement was an inadvertently-filed draft and thus work product, and that the Affidavit was work product and contained "information that was provided in confidence by Plaintiff to its counsel for purposes of . . . representation." Ex. B at 7.

On February 27, 2015, Tiversa moved the district court to unseal and reinstate the original Statement. *Id.* at 5. On March 17, 2015, Chief Magistrate Judge Kelly granted Tiversa's motion, finding that LabMD had waived the asserted work product protection by filing the Statement. *Id.* at 14-15. Judge Kelly did not decide whether the Affidavit would have otherwise been protected from disclosure absent the waiver. *Id.* at 8 n.2. Judge Kelly ordered that the original Statement and two exhibits remain under seal until the time for any appeal had expired. *Id.* at 14-15.

On March 31, 2015, LabMD appealed Judge Kelly's decision to the district judge. Pl.'s Objections to Op. and Order, No. 2:15-cv-00092-MRH-MPK (W.D. Pa. Mar. 31, 2014) (attached as Exhibit D). LabMD stated "[a]t this time, LabMD is not asserting that the half sentence removed from the Original RICO Case Statement and Exhibit Q are privileged or protected from

discovery." *Id.* at 8. LabMD further stated that the discoverability of the Affidavit and whether it will assert privilege "is a fight for a later day." *Id.* The Court scheduled a hearing on the issue for April 15, 2015.

After learning of the Affidavit's existence, Complaint Counsel asked counsel for LabMD why it had not produced or identified it to Complaint Counsel. Letter from VanDruff to Sherman (Mar. 19, 2015) (attached as Exhibit E). LabMD replied that the Affidavit was not produced or identified because it is work product; relevant to the U.S. House of Representatives Committee on Oversight and Government Reform's ("Oversight Committee") investigation of Tiversa; and not responsive to Complaint Counsel's discovery requests, including because it was created after the time period covered by Complaint Counsel's requests. Letter from Sherman to VanDruff (Mar. 26, 2015) (attached as Exhibit F). On March 31, 2015, LabMD produced an addendum to its privilege log claiming work product protection for the Affidavit. Addendum to LabMD, Inc.'s Privilege Log (Mar. 31, 2015) (attached as Exhibit G). The log stated that the Affidavit was authored by Mr. Daugherty and was produced to the Oversight Committee and to LabMD's counsel in other litigation. *Id.*

The magistrate judge's opinion in LabMD's Pennsylvania district court litigation makes clear that the Affidavit is "fact-laden" and was executed under penalty of perjury on April 17, 2014. Ex. B at 3, 8 n.2. The opinion and other filings in that litigation further make clear that the Affidavit pertains to allegations "about the source of the 1718 File," which LabMD learned from "a guilt-ridden former Tiversa employee who did not want to be forced to lie under oath" around April 2, 2014. Ex. C at 32.

ARGUMENT

The Affidavit is relevant to this proceeding because it contains information regarding how and where Tiversa obtained the 1718 File. LabMD's claim of work product for the Affidavit is specious because no such protection covers an executed, fact-laden affidavit produced to a third party. Under its obligation to supplement discovery, LabMD should have produced it or identified it as a supplement to its initial disclosures.

I. AFFIDAVIT IS RELEVANT

The Affidavit is relevant to the allegations of the Complaint and to LabMD's defenses, and thus discoverable. *See* 16 C.F.R. § 3.31(c) (scope of discovery). The Affidavit relates to Tiversa's statements "about the source of the 1718 File" as revealed to LabMD by a "guilt-ridden former Tiversa employee." *See* Ex. C at 32. LabMD has claimed that because Tiversa allegedly lied about the source of the file, LabMD's abysmal security practices leading to the disclosure of the 1718 File on a P2P network were not likely to have caused consumer injury. Since LabMD has made the source of the 1718 File a central issue to its defense, the Affidavit is clearly relevant.

II. AFFIDAVIT IS NOT WORK PRODUCT

LabMD's invocation of work product protection for the Affidavit is baseless. The Affidavit is not entitled to such protection because work product does not extend to an executed witness affidavit that was produced to a third party for an unrelated, non-litigation purpose.

Work product protection provides a limited shield from discovery for "documents and tangible things . . . prepared in anticipation of litigation or for the hearing by or for another party or by or for that other party's representative . . . ." 16 C.F.R. § 3.31(c)(5). The purpose is "to promote the operation of the adversary system by ensuring that a party cannot obtain material

that his opponent has prepared in anticipation of litigation." *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997) (discussing work product under Federal Rules).

A. Executed Witness Affidavits Are Not Work Product

The Affidavit is not work product because it is an executed witness affidavit. No court has found work product protection for an executed affidavit once it has been filed for its intended purpose—here, submission to the Oversight Committee.[1] Indeed, the majority of courts have held that executed witness affidavits are not protected work product. *Murphy*, 259 F.R.D. at 430; *see also Schipp v. Gen. Motors Corp.*, 457 F. Supp. 2d 917, 924 (E.D. Ark. 2006). Such affidavits "merely recite relevant facts within the affiant's personal knowledge, rather than revealing an attorney's mental impressions or legal strategy . . . ." *Walker v. George Koch Sons, Inc.*, No. 2:07CV274, 2008 WL 4371372, at *5 (S.D. Miss. Sept. 18, 2008). The Affidavit here is no different: it was written and executed under penalty of perjury by a witness and is "fact-laden." Ex. B at 8 n.2. Once executed, the Affidavit became the testimony of Mr. Daugherty, consisting of factual assertions rather than attorney opinion. *See Walker*, 2008 WL 4371372, at *5. The Affidavit is therefore not entitled to work product protection.

B. Affidavit Not Created in Anticipation of Litigation

In addition, the Affidavit is not work product because it was not "prepared in anticipation of litigation." 16 C.F.R. § 3.31(c)(5). LabMD asserts that the Affidavit is "relevant to [the Oversight Committee's] unrelated investigation of Tiversa" and was produced to the Committee

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[1] *See, e.g.*, *Murphy v. Kmart Corp.*, 259 F.R.D. 421, 428-31 (D.S.D. 2009) (discussing cases); *Intel Corp. v. VIA Techs., Inc.*, 204 F.R.D. 450, 452 (N.D. Cal. 2001) (summary judgment affidavits had protection prior to filing); *Bell v. Lackawanna Cnty.*, 892 F. Supp. 2d 647, 661 (M.D. Pa. 2012) (same); *Lamer v. Williams Commc'ns, LLC*, No. 04-CV-847, 2007 WL 445511, at *2 (N.D. Okla. Feb. 6, 2007) (declarations taken by investigator for attorney's trial preparation).

for that purpose. Ex. G. Thus, Mr. Daugherty prepared the Affidavit not in anticipation of litigation, but for an "unrelated" congressional investigation. *See id.*

III. AFFIDAVIT IS RESPONSIVE AND SHOULD HAVE BEEN PRODUCED IN APRIL 2014

The parties are under a continuing obligation to supplement all responses to discovery, including requests for production. 16 C.F.R. § 3.31(e). The Affidavit is responsive to Complaint Counsel's requests for production and should have been produced. Although Complaint Counsel does not know the exact content of the Affidavit, it clearly relates to LabMD's understanding regarding Tiversa's acquisition of the 1718 File. *See* Ex. C at 32; Ex. B at 3, 7; Ex. D at 9. That information is responsive to Complaint Counsel's Request for Production 31: "[a]ll documents relating to any steps taken or investigation conducted by or on behalf of LabMD in connection with the Security Incident described in Paragraphs 17-19 of the Complaint." Compl. Counsel's Second Reqs. for Produc. to Resp't at 9 (attached as Exhibit H). Mr. Daugherty's receipt and memorialization of new information about how Tiversa acquired the 1718 File in an Affidavit for the Oversight Committee are plainly "steps taken or investigation conducted by or on behalf of LabMD in connection with" the disclosure of the 1718 File on a P2P network. In addition, this request covers the time-period January 1, 2005 to the present, which encompasses the date of the Affidavit. *See id.* at 3.

LabMD should have produced the Affidavit prior to the evidentiary hearing,[2] and its failure to do so has prejudiced Complaint Counsel, as discussed below. The Court should order LabMD to produce the Affidavit immediately because it is responsive to Complaint Counsel's

[2] As discussed above, LabMD's work product claim is specious. Nonetheless, if LabMD believed the Affidavit was work product, it should have produced a privilege log in April 2014, not March 2015, providing Complaint Counsel the opportunity to seek appropriate relief.

discovery and not privileged. *See* 16 C.F.R. § 3.38(a) (production required if objections to discovery not justified).

If the Court cannot assess LabMD's work product or responsiveness claims based exclusively on the briefing, Complaint Counsel requests that the Court order LabMD to provide the Affidavit to the Court for *in camera* determination of LabMD's privilege claim and the Affidavit's responsiveness. *Cf. Hendershott v. Skipper*, 160 F.R.D. 129, 130 (D. Or. 1995) (*in camera* review for discoverability); *Hintz. v. Goen Techs. Corp.*, No. 3:04-CV-228 RM, 2005 WL 6567754, at *3 (N.D. Ind. Aug. 11, 2005) (*in camera* review of redactions for responsiveness). If the Court finds the Affidavit responsive and non-privileged, the Court should order LabMD to produce it to Complaint Counsel.

IV. AFFIDAVIT SHOULD HAVE BEEN SUPPLEMENT TO INITIAL DISCLOSURES

In addition to being responsive to Complaint Counsel's discovery requests, LabMD should have identified the Affidavit as a supplement to its mandatory initial disclosures because it is relevant and not work product. *See* 16 C.F.R. § 3.31(e).

The Commission's Rules require broader initial disclosures of documents than the analogous Federal Rule of Civil Procedure. The parties must disclose to each other all documents and tangible things in their possession, custody, or control that "are relevant to the allegations of the Complaint, to the proposed relief, or to the defenses of the respondent . . . ." 16 C.F.R. § 3.31(b)(2); *see* Fed. R. Civ. P. 26(a)(1)(A).

As discussed above, the Affidavit is relevant to the allegations of the Complaint and LabMD's defenses. Although work product is excluded from mandatory initial disclosures, 16 C.F.R. § 3.31(b)(5), LabMD's work product claim is specious, as discussed above. The Commission's Rules require regular supplementation of initial disclosures as well as discovery

requests. 16 C.F.R. § 3.31(e). Because the Affidavit is relevant and LabMD has no legitimate claim of privilege, LabMD should have identified the Affidavit as a supplement to its initial disclosures prior to the evidentiary hearing's commencement to provide Complaint Counsel with an opportunity to compel production or seek leave to issue a request for its production.

In light of LabMD's failure to identify the Affidavit as a supplemental initial disclosure before the hearing commenced, or any time since, Complaint Counsel requests that the Court order LabMD to produce the Affidavit to Complaint Counsel. *See* 16 C.F.R. § 3.38(b) (permitting relief for discovery failures "as is just," including but not limited to remedies provided).[3] By hiding the Affidavit behind meritless claims, LabMD prejudiced Complaint Counsel's ability to present its case-in-chief and respond to LabMD's defenses, including addressing unanticipated allegations about the source of the 1718 File, to which the Affidavit clearly pertains. Complaint Counsel could have also used the Affidavit in preparation to cross-examine Mr. Daugherty; sought leave to issue a request for production of the Affidavit; or sought leave to depose witnesses revealed in the Affidavit.

Alternatively, the Court should grant Complaint Counsel leave to immediately issue a request for the Affidavit's production under Rule 3.37, rather than requiring Complaint Counsel to wait for LabMD to identify the Affidavit as a supplement to its initial disclosures before seeking additional relief. This relief will prevent any unnecessary delay in the proceeding or

[3] The Commission's initial disclosure requirement gives parties the choice of providing either "a copy of, or a description by category and location of" relevant documents. 16 C.F.R. § 3.31(b)(2). Because LabMD's delay has prejudiced Complaint Counsel, as described herein, LabMD should be compelled to provide a copy of the Affidavit rather than a description. The latter could further delay the proceeding and prolong the prejudice to Complaint Counsel by requiring Complaint Counsel to seek further relief.

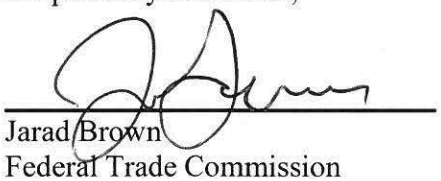
further prejudice to Complaint Counsel, which would occur if the hearing were to resume without Complaint Counsel having had an opportunity to review the Affidavit.

CONCLUSION

For the reasons above, the Court should grant Complaint Counsel's Motion to Compel Production of Daugherty Affidavit, and order LabMD to produce the Affidavit to Complaint Counsel or provide it to the Court for *in camera* consideration. The Court should further order LabMD to produce the Affidavit to Complaint Counsel as relief for the prejudice LabMD caused by failing to identify it, or in the alternative grant Complaint Counsel leave to immediately issue a request for its production.[4]

Dated: April 7, 2015

Respectfully submitted,



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Complaint Counsel

[4] Based on the content of the Affidavit, Complaint Counsel may seek additional relief as appropriate.

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

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

[PROPOSED] ORDER GRANTING MOTION TO COMPEL PRODUCTION OF DAUGHERTY AFFIDAVIT

Upon consideration of Complaint Counsel's Motion to Compel Production of Daugherty Affidavit,

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

IT IS FURTHER ORDERED that Respondent LabMD, Inc. will produce to Complaint Counsel the Affidavit executed by Michael Daugherty on April 17, 2014, and described in Complaint Counsel's Motion, no later than 24 hours after issuance of this Order.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2015, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-113
Washington, DC 20580

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

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

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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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.

April 7, 2015

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

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

STATEMENT REGARDING MEET AND CONFER PURSUANT TO RULE 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Compel Production of Daugherty Affidavit, Complaint Counsel Jarad Brown reached out to counsel for Respondent William Sherman and Prashant Khetan on Friday, April 3, 2015 at 1:17 PM to request a time to meet and confer on Monday, April 6, 2015.

Laura Riposo VanDruff and Jarad Brown met and conferred with counsel for Respondent William Sherman by teleconference on April 7, 2015 at 9:30 AM in a good faith effort to resolve by agreement the issues raised by the Motion. Despite good faith efforts, Complaint Counsel has been unable to reach agreement with counsel for Respondent on the subject of this Motion.

Dated: April 7, 2015

Respectfully submitted,

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Exhibit A

Exhibit B

2IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LABMD, INC., Plaintiff,	)	
vs.	)	Civil Action No. 15-92
	)	Judge Mark R. Hornak/
TIVERSA HOLDING CORP. *formerly known as* TIVERSA, INC.; ROBERT J. BOBACK; M. ERIC JOHNSON; DOES 1-10, Defendants.	)	Chief Magistrate Judge Maureen P. Kelly Re: ECF Nos. 21, 23 and 26

OPINION AND ORDER

KELLY, Chief Magistrate Judge

I. FACTUAL AND PROCEDURAL BACKGROUND

In a new chapter of the ongoing litigation between the parties,[1] Plaintiff LabMD, Inc., a Georgia corporation ("LabMD") has filed this civil action stating claims for conversion, defamation, interference with business relations, fraud, negligent misrepresentation, conspiracy

[1] Litigation between the parties previously commenced in Georgia state court, was removed to the United States District Court for the Northern District of Georgia, and was subsequently dismissed for lack of personal jurisdiction. LabMd v. Tiversa, Inc., No. 11-4044 (N.D. Ga. Aug. 15, 2012), *aff'd*, 509 F. App'x 842 (11th Cir. Feb. 5, 2013). Thereafter, Tiversa filed an action in this Court against LabMd pleading state law claims for defamation, slander *per se*, commercial disparagement and trade libel. Tiversa Holding Corp. v. LabMD, Inc., No. 13-1296 (W.D. Pa. Sept. 5, 2012). On November 4, 2014, Judge Nora Barry Fischer dismissed Tiversa's action for lack of diversity jurisdiction, upon the addition of Richard Edward Wallace, a Pennsylvania resident, as a named defendant. (ECF No. 84). Tiversa is now pursuing its claims in a separate consolidated action in the Pennsylvania Court of Common Pleas of Allegheny County, at GD-14-16497, before Judge Christine Ward. Also pending and arising out of the subject matter of this action is an administrative action commenced by the Federal Trade Commission, In the Matter of LabMD, Inc., No. 9357 (F.T.C.).

Exhibit B

and a claim for the violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c).

Plaintiff's claims arise out of an alleged shakedown scheme, whereby Defendant Tiversa, Inc., a Pennsylvania corporation, ("Tiversa"), Defendant Robert J. Boback, a Pennsylvania resident ("Boback"), and Defendant M. Eric Johnson, a New Hampshire resident ("Johnson") conspired to infiltrate LabMD's computer systems and, upon gaining access, created a data security breach in LabMD's confidential patient health-related computer files. Tiversa then offered to sell LabMD services to remedy the security breach that Tiversa created. When LabMD refused to purchase Defendant Tiversa's services, Defendants turned to the Federal Trade Commission and reported that due to LabMD's failed data security protocols, confidential patient health and personal information was disseminated on peer to peer networks, for unbridled use by identity thieves. Tiversa informed the FTC that its analysis of LabMD's data security led it to conclude that LabMD was in violation of federal privacy rules and regulations.

LabMD alleges that as a result of Defendants' conduct, the Federal Trade Commission initiated a public and wide-ranging investigation, leaving LabMD "an insolvent shell of a company." LabMD further alleges that an ongoing investigation by the United States House of Representatives Committee on Oversight and Governmental Reform revealed that Tiversa inaccurately provided information to the Federal Trade Commission, and that Tiversa benefitted commercially from federal investigations of several companies that were initiated upon Tiversa's reports of security data breaches. This revelation appears predicated upon statements allegedly made a former Tiversa employee. (ECF No. 1, ¶ 31). It would further appear that at least one former Tiversa employee has been provided a grant of immunity by the United States Attorney General, and is expected to testify in the coming weeks before the Federal Trade Commission, in

its pending action against LabMD. In the Matter of LabMD, Inc., No. 9357, 2014 WL 7495797 (F.T.C.) (Dec. 29, 2014).

Having recognized the history between LabMD and Tiversa, the Court now addresses two pending motions. The first is a Motion to Modify Docketing of Errata at ECF 18 and 19 filed by Tiversa (ECF Nos. 21, 23), and the second is a Motion for Disclosure of Plaintiff's Original RICO statement and co-Defendant's Unredacted Motion to Modify by M. Eric Johnson (ECF No. 26).

On February 18, 2015, pursuant to Local Rule 7.1B, LabMD filed its "RICO Case Statement," setting forth with specificity the facts underlying its RICO related claims against each of the Defendants. ECF No. 18. Plaintiff attached Exhibit P to the RICO Case Statement, which is a publicly available Order of Chief Administrative Law Judge D. Michael Chappell. Also attached to the RICO Case Statement, at Exhibit Q, is an executed fact-laden Affidavit, dated April 17, 2014.

Several hours after LabMD filed the RICO Case Statement, an "Errata" containing an amended version of the RICO Case Statement was filed on the docket at ECF No. 19. The amendment removes any reference to the contents of Exhibits P and Q, and indicates that the documents have been "Removed." The docket entry further states: "Reason for Correction: Inadvertent filing of privileged draft." An entry by a Clerk's Office staff member notes that ECF No. 18 has been removed from public view. In pertinent part, the Errata is an amended version of the RICO Case Statement and appears to revise LabMD's allegations as to how and when it learned of Defendants' alleged fraudulent concealment.

Later that day, counsel for LabMD wrote a letter to counsel for Defendants, stating that in accordance with the notification requirements of Rule 26(b)(5)(B) of the Federal Rules of Civil

Exhibit B

Procedure, counsel was reporting an inadvertent disclosure of privileged matter which was filed on the docket at ECF No. 18, and that upon notification to the Court of the inadvertent filing, the privileged draft was removed and "timely replaced with the final filed version." (ECF No. 24-2). Plaintiff's counsel requested that any copies accessed by Defendants be destroyed.

Counsel for Tiversa responded, requesting the legal basis for LabMD's assertion of privilege, and noting that the cited Federal Rule of Civil Procedure pertains to discovery materials, which on its face, would not apply to the retracted documents. (ECF No. 24-3). Counsel for LabMD replied, expressing disappointment in the lack of "professional courtesy," and claiming that the draft RICO Case Statement is not a pleading, but is required by LR 7.1B as "another mandatory Initial Disclosure under Fed. R. Civ. P. 26(a)(1)." Citing Fed. R. Evid. 502(b) and Rule 4.4(b) of the Model Rules of Professional Conduct as adopted in Pennsylvania, counsel claimed the documents are attorney work-product, and also claiming that the documents include "information that was provided in confidence by Plaintiff to its counsel for purposes of this representation." (ECF No. 24-4). The correspondence between counsel reveals the anticipated necessity for resort to this Court to resolve the issue.

Subsequently, a telephone call was received at the Chambers of the undersigned from counsel for Tiversa, requesting a conference addressing the removal of the original RICO Case Statement as well as Exhibits P and Q. Counsel was instructed to file the pending Motion to Modify the Docket, and was provided a briefing schedule, which was also communicated to counsel for LabMD by telephone.

Given the absence of a Motion to Seal pursuant to Standing Order 2:05-mc-45 of the United States District Court for the Western District of Pennsylvania and/or a related Order, Chambers' staff contacted the Clerk's Office to determine how the documents at ECF No. 18

came to be removed from public view. It was reported that a secretary for LabMD's local counsel contacted the Clerk's Office and stated that she had inadvertently filed a draft of the RICO Case Statement. She requested that she be permitted to file the correct version, which omitted Exhibits P and Q, and any references thereto. She also requested that the originally filed version be removed from public view. The Clerk's Office honored the request, and the documents were sealed and removed from public view. The Court notes that LabMD is presumed to have knowledge of the procedures for sealing documents filed of record as implemented through the Local Rules for the United States District Court for the Western District of Pennsylvania, given that LabMD has previously filed appropriate motions. See e.g. No. 13-1296, ECF No. 54.

On February 26, 2015, Tiversa and Boback filed an "Unopposed Motion for Leave to File Under Seal." (ECF No. 20). The Motion explained the procedural irregularity at issue as well as LabMD's position that the originally filed RICO Case Statement and Exhibits P and Q were privileged and/or subject to protection afforded by the attorney work-product doctrine. The Motion explained that Tiversa intended to file a Motion to Modify Docketing of ECF No. 18 and 19 to strike the Errata or, in the alternative, to compel production of the redacted documents.

Upon the granting of Tiversa's Motion for Leave to File Under Seal (Text Order dated February 27, 2015), Tiversa and Boback filed the pending motion (ECF No. 23) and brief in support (ECF No. 24). On March 5, 2015, counsel for M. Eric Johnson entered his appearance and filed a "Motion for Disclosure of Plaintiff's Original RICO Statement and co-Defendant's Unredacted Motion to Modify." (ECF No. 26). LabMD has responded to both pending motions, which are now ripe for review.

Exhibit B

II. STANDARD OF REVIEW

The standard applicable to the inadvertent disclosure of privileged material is set forth at Rule 502 of the Federal Rules of Evidence. Rule 502 provides, in relevant part, that, when an inadvertent disclosure of privileged material is made in a federal proceeding, the disclosure does not operate as a waiver if:

> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable), following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed.R.Evid. 502(b). The analysis involves a two-step process: "'[f]irst, it must be determined whether the documents in question were privileged or otherwise protected and second, if privileged documents are produced then a waiver occurs unless the three elements of FRE 502(b) are met.'" Gilson v. Pennsylvania State Police, No. 12-CV-00002, 2015 WL 403181, at *1-2 (W.D. Pa. Jan. 30, 2015)(quoting Wise v. Washington Cty., Civ. No. 10–1677, 2013 WL 4829227, at *2 (W.D. Pa. Sept.10, 2013) and Rhoades v. Young Women's Christian Ass'n of Greater Pittsburgh, Civ. No. 09–261, 2009 WL 3319820, at *2 (W.D. Pa. 2009) (alteration in the original)). Further, "the disclosing party has the burden of proving that each of Rule 502(b)'s elements has been satisfied." Id. (citing Wise, 2013 WL 4829227, at *2 and Rhoades, 2009 WL 33319820, at *2).

Courts in this Circuit also consider the following factors in determining whether waiver has occurred: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and (5)

whether the overriding interests of justice would or would not be served by relieving the party of its errors. See Gibson, 2015 WL 403181, at *2, (citing Wise, 2013 WL 4829227, at *2 (W.D. Pa. Sept.10, 2013); Rhoades, 2009 WL 3319820, at *2; Smith v. Allstate Ins. Co., 912 F.Supp.2d 242, 247 (W.D. Pa. 2012)); Carlson v. Carmichael, Civ. No. 10–3579, 2013 WL 3778356, at *2 (E.D. Pa. July 19, 2013); Fed. R. Evid. 502 Advisory Committee's Note; Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 254 F.R.D. 216, 219 (E.D. Pa. 2008)).

LabMD also relies upon Rule 26(b)(5)(B), which provides:

> If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

III. DISCUSSION

A. Whether the documents are privileged?

Tiversa seeks to strike the Errata filing and reinstate the original RICO Case Statement, contending that the Exhibit Q Affidavit "undermines Plaintiff's allegations and exposes the factual predicate of how Plaintiff learned of the purported fraud alleged in this case." ECF No. 24, p. 1. LabMD, as the party with the burden of proof under F.R.E. 502(b), claims that the original RICO Case Statement, including the exhibits thereto, constitute an inadvertently filed "draft" and are privileged attorney work-product. LabMD further argues that the executed Affidavit and publically available FTC hearing Order are also privileged, because the decision to include these documents is an indication of counsel's thought processes and litigation strategy. (ECF No. 27, p. 4).

The doctrine of work-product immunity "'shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.'" In re Grand Jury (Impounded), 138 F.3d 978, 981 (3d Cir. 1998) (quoting United States v. Nobles, 422 U.S. 225, 238 (1975)). The work-product doctrine "promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients." In re Chevron Corp., 633 F.3d 153, 164 (3d Cir. 2011), Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1428 (3d Cir. 1991) (citations omitted).

Taking at face value LabMD's claim that the originally filed RICO Case Statement is a "draft" pleading, clearly prepared in the course of litigation, it would appear that the work-product doctrine protects against disclosure. However, given the circumstances in which the document was made public, the Court finds the protection afforded under the work-product doctrine has been waived.[2]

B. Whether privilege was waived?

1. Inadvertance

Applying the criteria set forth in Rule 502(b), as well as the related factors employed in this Circuit, LabMD has not met its burden of proving that it is entitled to the protection afforded by the attorney work-product doctrine. LabMD presents no evidence to support its claim that filing the documents with the Court was inadvertent and not the result of a post-filing change in

[2] Given this disposition, the Court will save for another day whether a publicly available Order filed on the FTC docket is privileged, as well as whether any privilege attaches to a fact-laden fully executed party Affidavit signed "under penalty of perjury." See e.g. Bell v. Lackawanna County, 892 F. Supp.2d 647, 661-62 (M.D. Pa. 2012), and cases cited therein.

strategy. The documents do not bear a "DRAFT" stamp or notation, and the originally filed RICO Case Statement is a fully executed complete document, accompanied by an appropriate Certificate of Service, bearing an electronic signature. Thus, there is no basis for the Court to weigh the blanket assertion that the originally filed RICO Case Statement is a draft document not intended to be filed on the public docket.

2. Reasonableness of Precautions

With regard to precautions taken to prevent inadvertent disclosure, LabMD again presents no evidence as to procedures typically employed by counsel to ensure that drafts are segregated and protected, and that documents filed with the Court are reviewed by the responsible attorney prior to submission. Faced with a similar paltry state of evidence as to protective measures employed by counsel, privilege was deemed waived by Judge Fischer in Wise, supra:

> Defendants have presented little evidence about the precautions taken to prevent the inadvertent disclosure. Mr. Joyal explains that it is the practice of his office to scan all documents received in a case in order to easily attach them to e-mails and court filings. (Docket No. 156, at ¶ 7). Because his usual secretary had been on vacation at the time the inadvertent disclosure were made, he believes that all the inadvertently disclosed documents were e-mailed to Plaintiff's counsel by a substitute secretary. (Docket No. 156, at ¶ 15). Nothing in his affidavit indicates how he supervises his subordinates or whether he performs a final review prior to transmission in order to guard against inadvertent disclosures. During oral argument, Mr. Joyal was unable to speak to the general practice of other attorneys in his law firm or at Travelers Insurance with respect to preventing inadvertent disclosures. (Docket No. 162, at 16). While he represented that in the normal course of events there would be an attorney who would review documents before they were sent to opposing counsel, there was no attorney with knowledge of the case who reviewed the documents in this instance because the disclosure took place during the holidays, when a number of attorneys and staff were out of the office. Id. at 16–17.
>
> An attorney's responsibilities, however, do not take a holiday. Nothing prevented Mr. Joyal from asking another attorney in the office to review what the substitute secretary planned to forward to Plaintiff's counsel and to call him (even on his holiday vacation) in order to properly vet the disclosure before submission to his

> opponent. Alternatively, nothing prevented him from seeking an extension until after his holiday vacation at which time he could have personally reviewed the challenged documents.

Wise, 2013 WL 4829227, at *2-3. Here, LabMD presents no evidence to weigh precautionary measures taken, or to determine whether the filing occurred due to an inappropriate delegation to administrative staff or some mishap otherwise within the control of counsel. Therefore, consideration of this factor weighs in favor of finding waiver.

Along with the reasonableness of precautions taken to prevent inadvertent disclosure, the Court also considers the number of documents disclosed. In this case, LabMD filed *one* document with *two* exhibits, a number readily within the ability of counsel to review prior to filing. This is not a situation where a small number of documents are overlooked in the course of a mass document production, entitling counsel to more deference. In Smith v. Allstate Ins. Co., 912 F. Supp. 2d 242, 248 (W.D. Pa. 2012), the Court found an insurer "narrowly satisfied its burden" under Rule 502(b) and did not waive privilege where seven documents containing privileged information were served with more than 1,200 pages of documents in response to Plaintiff's Request for Production of Documents. In such an instance, inadvertence may be understandable given the number of documents to be examined before production. See, e.g., McGreevy v. CSS Industries, Inc., No. 95-CV-8063, 1996 WL 412813 at *2 (E.D. Pa. July 17, 1996)(small number of documents produced weighs in favor of a finding of waiver when assessing care exercised to protect privilege); Advanced Med., Inc. v. Arden Med. Sys., Inc., No. 87-CV-3059, 1988 WL 76128, at *2 (E.D. Pa. July 18, 1988)(in extraordinary situations such as expedited discovery or massive document exchanges, a limited inadvertent disclosure will not necessarily result in a waiver). Accordingly, this factor too weighs in favor of finding waiver.

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The Court also considers dispositive the extent of the disclosure, which in this case involved the publication of the document on the docket of this action. In McGreevy, supra, the Court found that the inclusion of a privileged document in a court filing "gives rise to a presumptive right of public access. Thus, regardless of counsel's intent, the filing of the [document] as a judicial document places it in the public domain and is inconsistent with a claim of privilege." McGreevy, 1996 WL 412813, at *3; see also, J.N. v. S. W. Sch. Dist., 14-CV-0974, 2014 WL 4792260, at *11 n.14 (M.D. Pa. Sept. 24, 2014)(filing a document with the court "is inconsistent with a claim of privilege" and generally results in waiver).

The Court in J.N. v. S. W. Sch. Dist., cited with approval United States v. Gangi, 1 F. Supp. 2d 256, (S.D.N.Y. 1998), where the Court found waiver of attorney work product privilege with regard to the unintentional filing of an internal Prosecution Memorandum with the Court in conjunction with an indictment. The Prosecution Memorandum set forth the Government's legal theories, anticipated witness list, alleged victims and cooperating witnesses, and summarized anticipated testimony. Unfortunately, through a series of preventable errors, the Prosecution Memorandum was attached to the Indictment and turned over to the Court for distribution, where it was copied and provided to counsel for two defendants. The Court considered several factors including the failure of counsel to act with due care by labeling the document "confidential," the failure to provide instructions to agents with regard to the sensitive nature of the document and, most damning, the public filing of the document. The Court determined that there had been a waiver of attorney work product protection. Id. at 267. In reaching its decision, the Court found persuasive other instances where the public filing of attorney work product was deemed to waive any protection afforded.

> The case most analogous to this case is Carter v. Gibbs, 909 F.2d 1450 (Fed. Cir. 1990). There, the Government inadvertently appended an internal DOJ

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> memorandum, containing attorney work product, to the copy of a Government brief that was served on the opposing party in a civil case. The court held that the Government had waived the work product privilege. Adopting a strict approach, the court ruled that it was "irrelevant" that the disclosure was inadvertent, observing that:
>
> > [The] purpose [of the work product privilege] is to prevent the disclosure of an attorney's mental impressions and thought processes either to an opponent in the litigation for which the attorney generated and recorded those impressions, or to a third party with interests not 'common' to those of the party asserting the privilege....
> >
> > ... Voluntary disclosure of attorney work product to an adversary in the litigation for which the attorney produced that information defeats the policy underlying the privilege.... Granting the motion would do no more than seal the bag from which the cat has already escaped.
>
> Id. at 1451 (emphasis added) (citations omitted); accord In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) ("[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels. Short of court-compelled disclosure, or other equally extraordinary circumstances, we will not distinguish between various degrees of 'voluntariness' in waivers of ... privilege.") (citation and footnote omitted); FDIC v. Singh, 140 F.R.D. 252, 253 (D.Me.1992) (applying strict accountability rule because "[o]ne cannot 'unring' a bell").

U.S. v. Gangi, at 263-64. See also Vardon Golf Co. v. Karsten Mfg. Corp., 213 F.R.D. 528, 533-34 (N.D. Ill. 2003)(finding waiver where otherwise protected material was disclosed to a party in a public document). Here, the voluntary and complete disclosure of the original RICO statement on the public docket and to at least two Defendants weighs most heavily in favor of finding waiver.

3. Delay and measures taken to rectify disclosure

The sole Rule 502(b) factor weighing against a finding of waiver is the absence of substantial delay in attempting to "claw back" the originally filed RICO Case Statement. The

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docket reflects that the revised version of the RICO Case Statement was filed on the same day as the original. However, the manner chosen by counsel to rectify the situation cannot be countenanced. It is apparent that an end-run around the Court and opposing counsel was attempted through an *ex parte* call to the Clerk of Court's docketing office by the secretary of LabMD's counsel.[3] The appropriate procedure to seal the originally filed RICO Case Statement would have entailed the filing of a Motion to Withdraw and a Motion to Seal, pursuant to Standing Order 2:05-mc-45 of the United States District Court for the Western District of Pennsylvania, seeking expedited review, so that any claimed privilege could have been addressed in due course with appropriate notice to the Court and to all parties.[4]

---

[3] The local rules require leave of court to seal a publicly filed document and thereby take into consideration that there is a presumption of access to judicial records. See In re Cendant Corp., 260 F.3d 183, 194 (3d Cir. 2001). A party seeking to seal a portion of the judicial record bears the burden of demonstrating that "disclosure will work a clearly defined and serious injury to the party seeking disclosure." Hart v. Tannery, 461 F. App'x 79, 81 (3d Cir. 2012), quoting Miller v. Ind. Hosp., 16 F.3d 549, 551 (3d Cir.1994).

[4] See, e.g., In re Sleepmaster Fin. Corp., 284 B.R. 411, 414 (Bankr. D. Del. 2002), where counsel attempted to correct a filing belatedly discovered to contain incorrect information:

> Counsel contacted the Clerk's Office to try and remedy the Debtors' error. This was inappropriate. The Clerk's Office is not to take directions from counsel.
>
> Further the directions given by counsel in this case were wrong. The Clerk's Office should not have marked the docket entry for that pleading as "Entered in Error." The pleading was not entered on the docket in error; it was properly docketed in this case because it was a pleading filed in this case. A designation of "Entered in Error" is proper only where the pleading was erroneously entered on the docket in the wrong case (because, for example, the case number was erroneous or it was docketed in the main case when it should have been docketed in the adversary) or where the document actually filed is not what the docket reflects, in which case a corrective entry should be noted on the docket.
>
> In this case, however, once the Certificate of No Objection was filed of record by counsel, it could not properly be removed from the file or the docket. The only proper procedure to avoid the effect of that filing was for counsel for the Debtors to file a Motion or Notice withdrawing that pleading.

Under the circumstances presented, it is evident that LabMD has not met its burden under Rule 502(b) to show reasonable precautions, if any, to prevent inadvertent disclosure, or to establish that the filing in fact was inadvertent and not reflective of a late in the day change of strategy. Based on the foregoing, the Court grants the Motion to Modify Docketing of Errata at ECF No. 18 and 19 (ECF No. 23). However, the Court will require that the documents at issue remain sealed from public view until the expiration of the appropriate time for an appeal from this Order to a District Judge. If no appeal of this Order is filed by April 1, 2015, the Clerk will be directed to unseal ECF No. 18 and all exhibits thereto, docket ECF No. 19 as Plaintiff's Amended RICO Case Statement, and unseal ECF Nos. 23 and 24, Defendants Motion and Brief in Support. An appropriate Order follows.

ORDER

AND NOW, this 17th day of March 2015, upon consideration of the Motion to Modify Docketing of Errata at ECF 18 and 19 (ECF No. 23), and the briefs filed in support and in opposition thereto, and upon consideration of the Motion for Disclosure of Plaintiff's Original RICO Statement and co-Defendants' Unredacted Motion to Modify" (ECF No. 26) and Plaintiff's response in opposition thereto, IT IS HEREBY ORDERED as follows:

1. Defendants' Motion to Modify Docketing of Errata at ECF 18 and 19 (ECF No. 23) is GRANTED;
2. IT IS FURTHER ORDERED that execution of this Order modifying the docket as set forth below shall be stayed until the expiration of the fourteen-day (14) period permitted under the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rule 72.C.2 of the Local Rules of Court to file an appeal from this Order to the District Judge, and, in the event an

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appeal is filed from this Order, this Order shall be stayed until the resolution of such an appeal;

3. IT IS FURTHER ORDERED that in the absence of an appeal filed on or before April 1, 2015, the Clerk shall unseal ECF No. 18 and all exhibits thereto, docket ECF No. 19 as Plaintiff's Amended RICO Case Statement, and unseal ECF Nos. 23 and 24, Defendants Motion and Brief in Support; and
4. IT IS FURTHER ORDERED that the Motion for Disclosure of Plaintiff's Original RICO Statement and co-Defendants' Unredacted Motion to Modify" (ECF No. 26) filed on behalf of Defendant M. Eric Johnson is denied without prejudice subject to the resolution of an appeal of this Order, if any.

BY THE COURT:

/s/ Maureen P. Kelly
MAUREEN P. KELLY
CHIEF UNITED STATES MAGISTRATE JUDGE

cc: All counsel of record by Notice of Electronic Filing

Exhibit B

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LABMD, INC., Plaintiff, v. TIVERSA HOLDING CORP. f/k/a TIVERSA, INC.; ROBERT J. BOBACK; M. ERIC JOHNSON; and DOES 1-10, Defendants.	**No. 2:15-cv-00092-MRH-MPK** **The Honorable Mark R. Hornak** **ELECTRONICALLY FILED** **JURY TRIAL DEMANDED**

RICO CASE STATEMENT

Pursuant to Local Rule 7.1B, Plaintiff LabMD, Inc. ("Plaintiff" or "LabMD"), by its attorneys at Fox Rothschild LLP and Taylor English Duma LLP, hereby sets forth the following responses to the issues raised in the Court's RICO case form:[1]

[1] Plaintiff respectfully submits that the information called for by Local Rule 7.1B goes beyond the pleading requirements of Rules 8 and 9 of the Federal Rules of Civil Procedure, and does not appear to be authorized by Federal Rule of Civil Procedure 83. Accordingly, although Plaintiff hereby complies with Local Rule 7.1B, it does so subject to, and without waiver of, Plaintiff's right to object to any attempt to test the sufficiency of Plaintiff's pleadings without treating this Statement as an amendment of Plaintiff's Complaint. *See*, *e.g.*, *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993); *Aluminum Bahr. B.S.C. v. Dahdaleh*, 17 F. Supp. 3d 461, 467 (W.D. Pa. 2014) (Ambrose, J.) ("In a civil RICO case, the RICO case statement is part of the pleadings."); *see also Tal v. Hogan*, 453 F.3d 1244, 1262 n.18 (10th Cir. 2006); *Commercial Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374, 378 (2d Cir. 2001); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 n.3 (1st Cir. 1991).

Exhibit C

1. State whether the alleged unlawful conduct is in violation of any or all of the provisions of 18 U.S.C. §§ 1962(a), (b), (c) or (d).

RESPONSE:

It is alleged that the conduct of Defendants Tiversa Holding Corp. f/k/a Tiversa, Inc. ("Tiversa"), Robert J. Boback ("Boback"), and M. Eric Johnson ("Johnson") (collectively, "Defendants") violated 18 U.S.C. §§ 1962(c) & (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

RESPONSE:

Defendant Tiversa

As set forth more fully in Paragraphs 14-36 of the Complaint (Dkt. 1), Tiversa: (i) made misrepresentations to LabMD for the purpose of soliciting its business, specifically to try to persuade LabMD to use Tiversa's "Incidence Response Services" (collectively, the "Solicitations") (*see* Complaint, ¶ 20); (ii) in retaliation for LabMD's refusal to give in to the Solicitations, turned LabMD's file containing sensitive and confidential patient data (the "1718 File") over to Johnson to use in research reports, articles, and presentations (*see id.*, ¶¶ 21, 28-29); (iii) in further retaliation for LabMD's refusal to give in to the Solicitations, provided the 1718 File to the Federal Trade Commission (the "FTC"), and falsely told the FTC that Defendants had obtained the 1718 File from a peer-to-peer network where non-parties were downloading the 1718 File (*see id.*, ¶¶ 22-27); (iv) misled LabMD, the FTC, the United States House Committee on Oversight and Government Reform (the "Oversight Committee"), the media, and the public with respect to whether the 1718 File had been downloaded from a peer-to-peer

network or by anyone other than Defendants, who, upon information and belief, illicitly obtained the 1718 File through computer hacking (*see id.*, ¶¶ 30-33); (v) refuses to return the 1718 File to LabMD (*see id.*, ¶ 35), and; (vi) published false and fraudulent statements about LabMD to third parties, including statements that refer to LabMD's trade and profession that were calculated to injure it therein and were disparaging words productive of special damage which flows naturally therefrom (*see id.*, ¶¶ 36-37).

Defendant Boback

Boback is, and has been at all times relevant to this action, Tiversa's Chief Executive Officer who oversees all of its operations. (*Id.*, ¶ 15). As set forth more fully in Paragraphs 14-36 of the Complaint, Boback: (i) made misrepresentations, and directed that misrepresentations be made by Tiversa, to LabMD for the purpose of the Solicitations (*see id.*, ¶ 20); (ii) in retaliation for LabMD's refusal to give in to the Solicitations, directed Tiversa to turn the 1718 File over to Johnson to use in research reports, articles, and presentations (*see id.*, ¶¶ 21, 28-29); (iii) in further retaliation for LabMD's refusal to give in to the Solicitations, directed the 1718 File to be turned over to the FTC, and falsely told, and/or directed that Tiversa tell, the FTC that Defendants had obtained the 1718 File from a peer-to-peer network where third party individuals were downloading the 1718 File (*see id.*, ¶¶ 22-27); (iv) misled, and directed Tiversa to mislead, LabMD, the FTC, the Oversight Committee, the media, and the public with respect to whether the 1718 File had been downloaded from a peer-to-peer network or by anyone other than Defendants, who, upon information and belief, actually illicitly obtained the 1718 File through computer hacking (*see id.*, ¶¶ 30-33); (v) refuses to return, or to have Tiversa return, the 1718 File to LabMD (*see id.*, ¶ 35), and; (vi) published, and directed Tiversa to publish, false and fraudulent statements about LabMD to third parties, including statements that refer to LabMD's

trade and profession that were calculated to injure it therein and were disparaging words productive of special damage which flows naturally therefrom (*see id.*, ¶¶ 36-37).

Defendant Johnson

Johnson was employed by Dartmouth College as the Director of the Tuck School of Business's Glassmeyer/McNamee Center for Digital Strategies. (*Id.*, ¶ 16). Johnson was performing research with Tiversa on cyber security issues. His research had "turned up some interesting stuff," but it was "not as rich" as he had hoped, so he asked Tiversa to "share a couple other of [its] recent medical finds … to spice up the report [and] … really boost the impact of the report." (*Id.*, ¶ 21). Tiversa provided Johnson with the 1718 File to "spice up" Johnson's report. (*Id*.). Johnson received funding from the U.S. Department of Homeland Security, among other federal agencies, for his work with Tiversa in investigating data breaches on peer-to-peer networks. (*Id.*, ¶ 27). As set forth more fully in Paragraphs 16-36 of the Complaint, Johnson: (i) misled LabMD, the FTC, the Oversight Committee, the media, and the public with respect to whether the 1718 File had been downloaded from a peer-to-peer network by anyone other than Defendants (*see id.*, ¶¶ 30-33); (ii) refuses to return the 1718 File to LabMD (*see id.*, ¶ 35), and; (iii) published false and fraudulent statements about LabMD to third parties, including statements that refer to LabMD's trade and profession that were calculated to injure it therein and were disparaging words productive of special damage which flows naturally therefrom (*see id.*, ¶¶ 36-37).

Exhibit C

3. List alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each.

RESPONSE:

The Privacy Institute

To facilitate Defendants' ability to turn over select businesses (those that rejected Tiversa's solicitations) to the FTC, and to try to shield themselves from investigation or liability, Defendants created The Privacy Institute. (*Id.*, ¶ 19). The Privacy Institute was a Delaware non-profit organization that was dissolved in 2013. (*Id.*). As Boback recently admitted, The Privacy Institute was set up "to provide some separation from Tiversa from getting a civil investigative demand at Tiversa, primarily." (*Id.*). The Privacy Institute was a participant in Defendants' scheme, but is not listed as a Defendant because, upon information and belief, it is judgment proof.

Tiversa Employees

LabMD suspects that one or more Tiversa employees knowingly participated in Defendants' scheme, including by helping Defendants mislead LabMD, the FTC, the Oversight Committee, the media, and the public with respect to whether the 1718 File had been downloaded by anyone other than Defendants.

Johnson's Associates

LabMD suspects that one or more of Johnson's associates knowingly participated in Defendants' scheme, including by helping Defendants mislead LabMD, the FTC, the Oversight Committee, the media, and the public with respect to whether the 1718 File had been downloaded by anyone other than Defendants.

4. List the alleged victims and state how each victim has been allegedly injured.

RESPONSE:

LabMD

As set forth more fully in the Complaint, Defendants' scheme has been financially devastating to LabMD, including by causing the FTC's investigation and enforcement action against it. As a direct consequence of the FTC's proceedings, including the attendant adverse publicity and the administrative burdens that were imposed on LabMD to comply with the FTC's demands for access to current and former employees and the production of thousands of documents, LabMD's insurers cancelled all of the insurance coverage for LabMD and its directors and officers, and LabMD lost virtually all of its patients, referral sources, and workforce, which had included around 40 full-time employees. Consequently, LabMD was effectively forced out of business by January 2014, and it now operates as an insolvent entity that simply provides records to former patients. In addition, Defendants have published false and fraudulent statements about LabMD to third parties, including statements that refer to LabMD's trade and profession that were calculated to injure it therein and were disparaging words productive of special damage which flows naturally therefrom.

Open Door Clinic

Defendants' scheme has been used in Tiversa's attempt to get business from numerous other entities. If the entity gives in to Tiversa's solicitations, the entity is harmed by having to pay thousands of dollars to Tiversa. If the entity does not give in to Tiversa's solicitations, the entity may be the injured by Defendants in a manner similar to the way LabMD was injured.

The Open Door Clinic ("Open Door") was one such other victim of Defendants' scheme. On July 24, 2014, David Roesler, the Executive Director of Open Door, testified before the

Oversight Committee about Tiversa's actions. (A true and correct copy of Mr. Roesler's prepared statement is attached hereto as Exhibit "A"). Open Door is a small not-for-profit AIDS Service Organization in suburban Chicago providing medical and support care for people living with AIDS/HIV. In his prepared statement, Mr. Roesler explained, in pertinent part:

> In July 2008 a company called Tiversa contacted Open Door and said that they had access to a confidential document obtained from a P2P network on the Internet. [¶] Communications with Tiversa included a contract for services. The suggested fees for the contract were for $475/hr. [¶] We contacted our IT Service Provider who researched our network and found no evidence of any P2P networks at that time. [¶] In September 2009, Tiversa contacted Open Door again to report that documents were still available on P2P software. [¶] Open Door's IT Service Provider, once again, reviewed its network to confirm that there was no evidence of P2P software.
>
> Nov 2009 clients began calling their case workers reporting that they were receiving phone calls from lawyers asking them to join a class action lawsuit due to their information released by Open Door.[2] At Open Door's November Board Meeting, one board member, also a client, brought in a letter from an out of state law firm asking them to join a class action lawsuit.
>
> January 2010, we received a letter from the FTC. The letter indicated that they had found a file on a P2P Network with a different title than that revealed by Tiversa. … [¶] Open Door and its IT provider once again reviewed our network and each workstation to confirm that there was no P2P software at that time.
>
> February 2010, a class action lawsuit was filed in Kane County Illinois against Open Door. [¶] Sensational newspaper headlines and numerous media outlets began calling and showing up at the clinic.
>
> March 7, 2013 Open Door's Settlement agreement was approved by court order, dismissing the class action. [¶] Open Door and its insurers agreed to these motions. Open Door denied and continues to deny any legal responsibility for the disclosure, had the case been tried we would've expected to prevail but because of the uncertainties and expense of litigation Open Door and its insurers agreed to terminate this litigation under these terms.

[2] Apparently, Boback believes that, as an additional "punishment" for a business' rejection of Tiversa's solicitations, Defendants' publication of the purported security breach will lead to a class action lawsuit being filed against the uncooperative business. In fact, Boback bragged in an internal Tiversa email dated September 5, 2013 (only recently uncovered by the Oversight Committee) that he "only suppose[s] that it is [a] matter of time before there will be a class action suit file[d] against LabMD… ." (A true and correct copy of this email is attached hereto as Exhibit "B").

Exhibit C

Mr. Roesler, when questioned under oath during the July 24, 2014 Oversight Committee hearing, went on to explain the following:

> MR. ISSA: Mr. Roesler, same thing. From your testimony, you engaged professional outside people to give you security.
>
> MR. ROESLER: That's correct.
>
> MR. ISSA: So you used what you would consider and still consider to be maybe not best practices, but the best practices you knew of and could afford; right?
>
> MR. ROESLER: Yes.
>
> MR. ISSA: We were told under oath by Mr. Boback twice that in fact deceptive software was what they went out looking for and found these breaches. And I just want to close by asking just one question. … Mr. Roesler, in your case, you had a kind of a unique thing that I want to make sure you get a chance to explain to us. A company Tiversa in Pittsburg (sic), more or less, contacts you. Coincidentally, a plaintiff's law firm in Pittsburgh, Pennsylvania, as I understand it, forms a class action lawsuit and goes after you and has the information to contact those very people who they told you you had this breach. So the law firm has the name of all your clients; is that right?
>
> MR. ROESLER: That's exactly right.
>
> MR. ISSA: And they didn't get it from you. So in your case, you do have a breach. You know that somebody clandestinely got your clients, your AIDS patients' information, gave it to a law firm who then used it -- and I ask unanimous consent that the sample – and we'll get it here in a second – letter that that law firm sent out to every one of your patients, this is called Serrano & Associates, and it says right on the bottom, "This is a solicitation to provide legal services." And is this a copy for the ranking member? I'll give a copy to the ranking member. You've seen that solicitation?
>
> MR. ROESLER: Indeed.
>
> MR. ISSA: So I just want to make sure for the record that both sides understand. Tiversa contacts you and says there's been a vulnerability, offers you to sell you the services for nearly $500 an hour. You turn them down after talking to your professionals and find no vulnerability. But then a law firm has the very information they were talking about, which obviously was gleaned somewhere and probably off of your servers or your drives. They then -- it gets somehow to a law firm coincidentally in Pittsburgh who then goes about creating a plaintiff's – a class action suit, contacts your patients who in no other way were contacted except by this law firm, and proceeds to sue you for years.

Exhibit C

MR. ROESLER: That is my perspective.

See Transcription of July 24, 2014 Oversight Committee Hearing, pp. 48-51, a true and correct copy of which is attached hereto as Exhibit "C."

AIDS/HIV Patients of Open Door

The AIDS/HIV patients of Open Door are additional victims of Defendants' scheme. The file containing their sensitive and confidential information was made public only because of Defendants' scheme. Had Defendants not shared this sensitive and confidential information with the FTC, plaintiffs' attorneys, the media, and the public, none of this information would have been exposed.

LabMD Patients

The patients of LabMD, whose samples were sent to LabMD for cancer detection services, are additional victims of Defendants' scheme. The file containing their sensitive and confidential information was made public only because of Defendants' scheme. Had Defendants not shared this sensitive and confidential information with the FTC, the media, and the public, none of this information would have been exposed.

Former Employees of LabMD

LabMD's employees who lost their jobs as a result of Defendants' actions are additional victims of Defendants' scheme. Had Defendants not shared the 1718 File with the FTC, the media, and the public, none of this information would have been exposed.

Additional Companies Turned Over to FTC

Boback admitted to turning over the names of 84-100 companies to the FTC. (*See* December 1, 2014 letter from Oversight Committee at n. 1, a true and correct copy of which is attached hereto as Exhibit "D"; *see also* Boback's February 10, 2015 statement to "The

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Pathology Blawg" at 2, a true and correct copy of which is attached hereto as Exhibit "E"). Two of these companies were previously identified victims LabMD and Open Door. However, upon information and belief, some or all of these additional businesses were harmed by Defendants' scheme. Some of the companies capitulated and hired Tiversa. Upon information and belief, at least one company, Franklin's Budget Car Sales, Inc., also known as Franklin Toyota/Scion, of Statesboro, Georgia, ultimately entered into a consent order with the FTC whereby it was forced to "establish and maintain [a] comprehensive information security program[]." (*See* October 26, 2012 FTC press release, a true and correct copy of which is attached hereto as Exhibit "F").

FTC/Congress/American Taxpayers

The FTC has spent thousands, if not millions, of dollars investigating purported security breaches revealed to it by Defendants. Unless discovery in this matter shows otherwise, the FTC was unaware that Defendants were misleading it about those breaches, including about whether they even existed. Defendants even went so far as to make misrepresentations in the depositions taken as part of the FTC investigation of LabMD. Unless discovery reveals that the FTC was aware of Defendants' racketeering actions, the FTC is another victim of Defendants' scheme. Similarly, the Oversight Committee and Congress have been forced to devote time and resources to investigating issues that stemmed from Defendants' scheme. As Darrell Issa, former Chairman of the Oversight Committee, explained:

> [I]t is our opinion that at a minimum, if the assertions that have been made are true, the FTC has been misled and this Committee has been misled on multiple occasions. The Secret Service, NCIS, the White House, through the assertion made -- and I don't know if the gentleman was here when it was made. But the assertion that Marine One's cockpit upgrade was compromised when it was in Iran may not have been true. All of those things caused this Committee to think that we need to act now and to look into it.

See Exhibit "C" (Transcription of July 24, 2014 Oversight Committee Hearing), pp. 109-10.

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5. Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim. The description of the pattern of racketeering shall include the following information:

a. A list of the alleged predicate acts and the specific statutes which were allegedly violated;

RESPONSE:

The predicate acts included mail fraud and wire fraud, and are described in Paragraphs 14-36 of the Complaint. Those predicate acts constitute violations of one or more of the following statutes: 18 U.S.C. § 1341 (mail fraud), and 18 U.S.C. § 1343 (wire fraud).

b. The date of each predicate act, the participants in each such predicate act and the relevant facts surrounding each such predicate act;

RESPONSE:

As described more fully in the Complaint, including the exhibits thereto, Defendants used the U.S. mail, private postage carrier, e-mail, facsimile, internet, and/or telephonic communication to, among other things: (i) transmit the Solicitations; (ii) make false and fraudulent statements, including through the transmission of interviews, articles, and statements, (iii) convert the 1718 File, and; (iv) make misrepresentations to LabMD, the FTC, the Oversight Committee, the media, and the public. The predicate acts included, but are not limited to the following:

- April 29, 2008: Tiversa employee and Johnson exchange emails (via interstate electronic communication – wire fraud) which provide evidence of their conspiracy. (*See* Exhibit "G" to Complaint).

- May 13, 2008: Tiversa telephoned LabMD (via interstate call – wire fraud) and made misrepresentations about the 1718 File.

- May 13, 2008: Tiversa/Boback sent three separate emails to LabMD (via interstate electronic communication – wire fraud) making misrepresentations about the 1718 File. (*See* Exhibit "F" to Complaint).

- May 15, 2008: Tiversa/Boback sent another email to LabMD (via interstate electronic communication – wire fraud) making misrepresentations about the 1718 File. (*See id*).

- May 22, 2008: Tiversa/Boback sent two additional emails (via interstate electronic communication – wire fraud) to LabMD making misrepresentations about the 1718 File. (*See id*).

- May 23, 2008: Tiversa/Boback sent two additional emails (via interstate electronic communication – wire fraud) to LabMD making misrepresentations about the 1718 File. (*See id*).

- May 30, 2008: Tiversa/Boback sends another email to LabMD (via interstate electronic communication – wire fraud) making misrepresentations about the 1718 File. (*See id*).

- June 6, 2008: Tiversa/Boback sends another email to LabMD (via interstate electronic communication – wire fraud) making misrepresentations about the 1718 File. (*See id*).

- July 15, 2008: Tiversa/Boback sends another email to LabMD (via interstate electronic communication – wire fraud) making misrepresentations about the 1718 File. (*See* Exhibit "B" to Complaint).

- April 2009: Johnson publishes research paper (*Data Hemorrhages in the Health-Care Sector*), which is disseminated through the mail and/or wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud), and

contains misrepresentations and false and fraudulent statements about, among other things, the 1718 File, LabMD, and Open Door. (*See* Exhibit "J" to Complaint).

- May 28, 2009: Defendants, through Tiversa, issued a press release (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) containing misrepresentations and false and fraudulent statements about, among other things, the 1718 File, LabMD, and Open Door. (A true and correct copy of the press release is attached hereto as Exhibit "G").

- Summer 2009: Upon information and belief, Defendants, through the Privacy Institute, used the U.S. mail and/or private postage carrier (mail fraud) to mail converted documents of LabMD, Open Door, and at least 82 other companies to the FTC along with misrepresentations about at least the 1718 File. (*See* Exhibit "E" (Boback's statement to "The Pathology Blawg") at 2). As the Oversight Committee recently reported, Defendants intentionally withheld responsive information from the FTC in their attempt to mislead the FTC's investigations. (*See* Exhibit "D" (December 1, 2014 letter from Oversight Committee).

- February 23, 2010: Defendants participate in interviews with Computerworld in which they disseminate through the mail and/or wire misrepresentations (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) about, among other things, the 1718 File. (*See* Exhibit "H" to Complaint).

- March/April 2011: Johnson publishes article (*Usability Failures and Healthcare Data Hemorrhages*), which is disseminated through the mail and/or wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud), and contains misrepresentations and false and fraudulent statements about, among other

things, the 1718 File, LabMD, and Open Door. (A true and correct copy of this article is attached hereto as Exhibit "H").

- November 8, 2012: Letter from John C. Hansberry of Pepper Hamilton, on behalf of Tiversa, to LabMD's counsel in which the following misrepresentations were made through the mail and/or wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud): "In our conversation, you also described an FTC investigation of LabMD. We were previously unaware of any such investigation. You explained that LabMD believes that Tiversa is somehow complicit in the FTC's investigation because the FTC investigation came after LabMD decided it would not hire Tiversa. LabMD's accusation is patently false and baseless." Boback's recent admissions, as well as other testimony from Tiversa and FTC employees, indicate that Tiversa was directly responsible for the FTC's investigation of LabMD. (A true and correct copy of this letter is attached hereto as Exhibit "I").

- February 10, 2012: Tiversa's Reply to LabMD's Opp. To Tiversa's MTD, pp. 6-7 at fn. 4, N.D. Ga., Case No. 1:11-cv-04044-JOF, Tiversa disseminated through both the mail and wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) misrepresentations about the 1718 File and LabMD. (A true and correct copy of Tiversa's Reply is attached hereto as Exhibit "J").

- November 16, 2012: Brief of Tiversa, Inc., pp. 14-15, 11th Circuit Court of Appeals, Case No. 12-14504, Tiversa disseminated through both the mail and wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) misrepresentations about the 1718 File and LabMD. (A true and correct copy of Tiversa's Brief is attached hereto as Exhibit "K").

- December 24, 2013: First Amended Complaint of Tiversa/Boback, W.D. Pa., Case No. 2:13-cv-01296-NBF, Tiversa disseminated through both the mail and wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) misrepresentations about the 1718 File and LabMD. (A true and correct copy of Tiversa/Boback's First Amended Complaint (without exhibits) is attached hereto as Exhibit "L").

- February 11, 2014: Tiversa/Boback's Resp. in Opposition to Motion to Dismiss First Amended Complaint at p. 2, W.D. Pa., Case No. 2:13-cv-01296-NBF, Tiversa disseminated through both the mail and wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) misrepresentations about the 1718 File and LabMD. (A true and correct copy of Tiversa/Boback's Response is attached hereto as Exhibit "M").

- November 4, 2014: Verified Complaint of Tiversa/Boback, In The Court Of Common Pleas Of Allegheny County, Pennsylvania, Case No. GD-14-016497, Tiversa disseminated through both the mail and wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) misrepresentations about the 1718 File and LabMD. (A true and correct copy of Tiversa/Boback's Complaint (without exhibits) is attached hereto as Exhibit "N").

c. The time, place and contents of each alleged misrepresentation, the identity of persons by whom and to whom such alleged misrepresentation was made and if the predicate act was an offense of wire fraud, mail fraud or fraud in the sale of securities. The "circumstances constituting fraud or mistake" shall be stated with particularity as provided by Fed. R. Civ. P. 9(b);

RESPONSE:

As described more fully in the Complaint, including the exhibits thereto, as well as the Response to Question 5(b), *supra*, Defendants used the U.S. mail, private postage carrier, e-mail, facsimile, internet, and/or telephonic communication to, among other things: (i) transmit the Solicitations; (ii) make false and fraudulent statements, including through the transmission of interviews, articles, and statements, (iii) convert the 1718 File, and; (iv) make misrepresentations to LabMD, the FTC, the Oversight Committee, the media, and the public. The misrepresentations included, but are not limited to the following:

- Through a series of telephone calls and emails from May 13, 2008-July 15, 2008, Boback, Tiversa, and Tiversa's employees make intentional misrepresentations to LabMD (via interstate call and electronic communication – wire fraud) about the 1718 File, including that it had been, and was being, downloaded by third parties throughout the country. These misrepresentations were intentional, and were relied upon by LabMD to its detriment. Copies of the written misrepresentations are described herein and attached as Exhibits "B," "F," and "G" to the Complaint.

- After LabMD refused Tiversa and Boback's Solicitations, Defendants retaliated against LabMD by publishing, or causing to be published (made via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud), misrepresentations and false and fraudulent statements about, among other things, the 1718 File and LabMD, including that third parties had accessed and downloaded this sensitive confidential patient data due to LabMD's purported deficiencies. Examples of these misrepresentations, which occurred beginning in 2009 and continue to date can be found as Exhibits "J" and "H" to the Complaint, as well as Exhibits "E"-"H" and "J"-"N" hereto.

- Defendants, through the Privacy Institute, used, upon information and belief, the U.S. mail and/or private postage carrier (mail fraud) to make misrepresentations about at least the 1718 File to the FTC. These misrepresentations began in 2009 and continue to date. As the Oversight Committee recently reported, Defendants intentionally withheld responsive information from the FTC in their attempt to mislead the FTC's investigations. (*See* Exhibit "D" (December 1, 2014 letter from Oversight Committee)).

- On November 8, 2012, in an apparent attempt to derail LabMD's efforts to clear its name, Tiversa, through its counsel at the time, made misrepresentations through the mail and/or wire (via interstate electronic communication – wire fraud and/or via U.S. Mail or interstate mail carrier – mail fraud) about Defendants' role in the FTC investigation of LabMD. Recent admissions of Boback, as well as other testimony from Tiversa and FTC employees, have revealed the fallacies in this letter. (See Exhibit "I" (letter from John C. Hansberry of Pepper Hamilton)).

d. Whether there has been a criminal conviction for violation of any predicate act and, if so, a description of each such act;

RESPONSE:

As of the date of this filing, there has not yet been a criminal conviction for violation of any predicate act.

e. Whether civil litigation has resulted in a judgment in regard to any predicate act and, if so, a description of each such act;

RESPONSE:

As of the date of this filing, civil litigation has not yet resulted in a judgment in regard to any predicate act.

f. A description of how the predicate acts form a "pattern of racketeering activity."

RESPONSE:

The predicate acts set out in the Complaint, and detailed above, began in 2008, have continued to date, and have the potential to continue into the future. The acts committed by Defendants are not isolated events, but represent a pattern of deceptive, fraudulent, and illegal practices occurring on a regular basis. Defendants are associated in such a manner as to form on ongoing organization, formal or informal, and function as a continuing unit.

Oversight Committee Chairman Issa succinctly explained the business model:

> Earlier this year, this Committee became aware on a bipartisan basis of serious accusations that Tiversa engaged in a business model that was not focused on protecting consumers alone, but obtaining what we would say effectively is a new form of protection payments from businesses. As is often the case with protection payment demands, many businesses that did not pay up faced serious consequences. Here's how it worked. Tiversa would contact a company or organization and tell them that they had engaged in a practice that left customers' data vulnerable. Tiversa would offer to sell the company or organization remediation services. Many companies took their services and paid at least for a while. Others refused and found themselves turned over to the Federal Trade Commission. The costing concerns created by an FTC investigation can be immense particularly to a small business that in many cases were the ones that Tiversa focused on.

See Exhibit "C" (Transcription of July 24, 2014 Oversight Committee Hearing), pp. 14-15. To summarize the business model of the enterprise, Defendants identify victims, solicit them through mail and/or wire, and, if they agree to the solicitations, the victims transfer money directly to Defendant Tiversa. If the victim refuses the solicitations, as did LabMD, Defendants punish the victim through a campaign of racketeering actions, including being the fodder for Defendant Johnson's reports. In addition to LabMD, other businesses were victimized by Defendants, including but not limited to Open Door.

Defendants' pattern is indicative of the prototypical example provided by the United States Supreme Court in *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989):

> Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes. Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."

H.J., Inc., 492 U.S. at 242-243 (citations omitted); *see also United States v. De Peri*, 778 F.2d 963 (3d Cir. 1985) (describing RICO convictions of members of the Philadelphia Police Department dealing with protection scheme).

6. State whether the alleged predicate acts referred to above relate to each other as part of a common plan, and, if so, describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

   a. The names of each individual partnership, corporation, association or other legal entity which allegedly constitute the enterprise;

   b. A description of the structure, purpose, function and course of conduct of the enterprise;

   c. Whether each defendant is an employee, officer or director of the alleged enterprise;

   d. Whether each defendant is associated with the alleged enterprise;

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e. Whether it is alleged that each defendant is an individual or entity separate from the alleged enterprise, or that such defendant is the enterprise itself, or a member of the enterprise; and

f. If any defendant is alleged to be the enterprise itself, or a member of the enterprise, an explanation whether each such defendant is a perpetrator, passive instrument or victim of the alleged racketeering activity**.**

RESPONSE:

The alleged predicate acts described above relate to each other as part of a common plan among the enterprise, which is defined as an association-in-fact consisting of Defendants Tiversa, Boback, and Johnson, as well as The Privacy Institute, certain Tiversa employees, and, potentially, certain associates of Johnson.[3] Each of the Defendants is associated with the enterprise, and each conducts and participates in the enterprise's affairs. Boback manages, operates, and directs the affairs of the enterprise. He identifies potential victims,[4] solicits them, and, if they agree to his solicitations, has them enter agreements with Tiversa that result in them transferring money directly to Tiversa. If the victim refuses Boback's solicitations, as did LabMD, Boback, in part through Johnson, retaliates against the victim for the enterprise, and

[3] Plaintiff respectfully directs this Court to the United States Supreme Court's guidance in *Boyle v. United States*, 556 U.S. 938 (2009), which was decided after the Court's form RICO Case Statement was drafted. In *Boyle*, the Supreme Court clarified that "an association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Boyle*, 556 U.S. at 948. Importantly, the Supreme Court explained certain attributes not required for such enterprises, including that: the enterprise "need not have a hierarchical structure … decisions may be made on an ad hoc basis and by any number of methods … different members may perform different roles at different times ... [the enterprise] need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies … nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence." *Id*.

[4] In Response to Question No. 4, *supra*, LabMD identifies numerous victims of Defendants' scheme, some of which, like LabMD and Open Door, were targeted directly by Boback and Tiversa's solicitations.

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correspondingly engages in a campaign of racketeering activities. Defendants agreed to, and knowingly, intentionally, and willfully participated in the conduct of the enterprise's affairs through a pattern of racketeering activity, and for the unlawful purpose of harming Plaintiff and others.

As described more fully in the Complaint, the common purpose of the enterprise is to commercially benefit by illicitly obtaining sensitive and confidential data, making misrepresentations about data privacy and security breaches to unsuspecting victims, government agencies, the media, and the public, and to otherwise engage in racketeering activities that advance their purpose. As former FTC Commissioner J. Thomas Rosch once explained, they have "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." (*See* Complaint, Exhibit "A"). As the former Chairman of the Oversight Committee explained, "Tiversa was benefiting commercially from the fact that the FTC was investigating the companies that Tiversa itself referred to the FTC" and, upon information and belief, Defendants misled the FTC, including by failing to comply with a civil investigative demand, in order to enrich itself. (*See id.*, Exhibits "C" and "D"; *see also* Exhibit "D" hereto (December 1, 2014 letter from Oversight Committee)). As a recent article summarized:

> Tiversa Inc.'s credibility as a witness in the Federal Trade Commission's data breach row with LabMD Inc. was called into question in an investigation by a congressional committee, which said in a report made public Friday that the data security company failed to provide complete information about work it performed. [¶] The House Committee on Oversight & Government Reform said in its Dec. 1 report that, to all appearances, Tiversa kept back information contradicting what it told the FTC about the source and dissemination of a LabMD file. The FTC in August 2013 claimed LabMD failed to protect patient data, largely based on a file handed over by Tiversa, which the company claimed was outside LabMD's internal network. [¶] Tiversa's failure to produce the requested documents "calls into question Tiversa's credibility as a source of information for the FTC," according to the committee, and the FTC "should no

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> longer consider Tiversa to be a cooperating witness." [¶] The FTC in August 2013 alleged LabMD failed to protect patient data, largely based on a file handed over by Tiversa.

Emily Field, *House Panel Says Tiversa Held Out on FTC in LabMD Fight*, Law 360 (February 13, 2015), http://www.law360.com/privacy/articles/621787/house-panel-says-tiversa-held-out-on-ftc-in-labmd-fight (a true and correct copy of which is attached hereto as Exhibit "O").

Defendants all benefitted from the FTC's investigations that they instigated. Not only did a number of victims of the investigations retain, or at least contact, Tiversa for its putative expertise, but Johnson received funding from the U.S. Department of Homeland Security, among other federal agencies, for his work with Tiversa in investigating data breaches on peer-to-peer networks, and spent several years publishing articles about, and attending lectures on, work generated by the scheme.

Defendant Tiversa, as well as certain individual Tiversa employees, at Defendant Boback's direction, upon information and belief, hacked into LabMD's computer in Georgia, and then attempted to sell LabMD services to remedy the very breach they created. When LabMD refused to purchase Tiversa's purported remediation services, The Privacy Institute, at the direction of Defendants, turned LabMD in to the FTC. Then, Defendant Johnson and his associates, at Johnson's direction, used LabMD's client files as one of the subjects of Defendants' report about data security. Defendants then proceed to make misrepresentations and false and fraudulent statements about LabMD to the government, media, and the public.

LabMD was by no means the only victim of the enterprise's scheme. LabMD is also aware of at least Open Door and its AIDS/HIV patients as additional victims, and believes that discovery in this case will reveal other victims. (*See also*, Response to Question No. 4, *supra*).

7. State and describe in detail whether it is alleged that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

RESPONSE:

The pattern of racketeering activity and the alleged enterprise are separate and distinct. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) ("The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that."); *see also Levine v. First Am. Title Ins. Co.*, 682 F. Supp. 2d 442, 459-60 (E.D. Pa. 2010) (Slomsky, J.) (applying *King*). In addition to its course of conduct, including making misrepresentations and false and fraudulent statements about LabMD to the government, media, and the public, mail fraud, and wire fraud, described in the Complaint as well as in Response to Question Number 5, *supra*, the enterprise was also involved in other activities designed to achieve its overarching objectives, which were to commercially benefit by making misrepresentations about data privacy and security breaches to unsuspecting consumers, government agencies, the media, and the public, and to otherwise engage in racketeering activities that advance their purpose.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

RESPONSE:

In addition to its course of conduct that included making misrepresentations and false and fraudulent statements about LabMD to the government, media, and the public, mail fraud, and wire fraud, described in the Complaint as well as in Response to Question Number 5, *supra*, the

facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activities. *See United States v. Starrett*, 55 F.3d 1525, 1542-43 (11th Cir. 1995); *see also id.* at 1543 n.10 (discussing how other courts have handled this "relationship requirement"). The enterprise was formed for the purpose of carrying out the pattern of racketeering activity described herein. *See Freedom Med., Inc. v. Gillespie*, 634 F. Supp. 2d 490, 509 (E.D. Pa. 2007), quoting *H.J., Inc.*, 492 U.S. at 240 ("Predicate acts are considered related if they have 'the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and not isolated events.'"). All predicate acts in Defendants' pattern of racketeering activities, detailed above, are related to the enterprise, such that a nexus exists between them. *See Banks v. Wolk*, 918 F.2d 418, 424 (3d Cir. 1990). The predicate acts themselves are related to the activities of that enterprise because the enterprise was formed for illicit purposes. *Id.* (citation omitted).

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

RESPONSE:

Defendants identify potential victims, solicit them, and, if they agree to the solicitations, they enter agreements with Tiversa that result in them transferring money directly to Tiversa, which benefits, among others, Tiversa, Boback, and certain Tiversa employees and shareholders. If the victim refuses the solicitations, Boback, through Johnson, retaliates against the victim for the enterprise, and correspondingly engages in a campaign of racketeering activities. Defendants all benefit from such campaigns because a number of victims will then reluctantly retain Tiversa for its putative expertise, and Johnson can receive funding from the U.S. Department of Homeland Security, among other federal agencies, for his work with Tiversa in investigating

data breaches on peer-to-peer networks, and can publish articles about, and attending lectures on, work generated by the racketeering.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce.

RESPONSE:

The activities of the enterprise relate to businesses in numerous states and, likely, countries. LabMD, in particular, performed cancer screening services for individuals nationwide. As a direct and proximate result of Defendants' actions, LabMD is no longer able to provide services to those clients. Moreover, Tiversa boasts about its purported worldwide presence in providing "cyberintelligence" services. *See United States v. Robertson*, 514 U.S. 669, 672 (1995) ("a corporation is generally "engaged 'in commerce when it is itself'" directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce") (citation omitted); *see also United States v. Pohlot*, 827 F.2d 889, 892 (3d Cir. 1987) (telephone is an instrumentality of interstate commerce); *Greenberg v. Tomlin*, Civil Action No. NO. 92-0006, 1992 U.S. Dist. LEXIS 11458, *12-13 (E.D. Pa. July 27, 1992).

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

a. The recipient of the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

b. A description of the use or investment of such income.

Response:

Not applicable.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

Response:

Not applicable.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

a. The identity of each person or entity employed by, or associated with, the enterprise and

b. Whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

Response:

Defendants, Tiversa, Boback, and Johnson, as well as non-party participants The Privacy Institute, certain Tiversa employees, and Johnson's associates were associated with the enterprise. It is not alleged that any single Defendant is the enterprise.

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

Response:

Defendants identified LabMD and solicited it for Tiversa's purported services. When LabMD refused the solicitations, Defendants conspired to engage in a campaign of racketeering activities by, among other things, making false and fraudulent statements about LabMD to the government, media, and the public. Defendants agreed to, and knowingly, intentionally, and willfully participated in, the conspiracy. Each of the conspirators had the intent to defraud LabMD, which intent was common to all, and each understood that the others had that purpose.

See Salinas v. United States, 522 U.S. 52, 63-64 (1997) (citations omitted) ("A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. ... The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. ... If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators."). The conspirators' racketeering activities set forth herein and in the Complaint are evidence of malice, were done without justification, and proximately caused injuries to LabMD. *See Beck v. Prupis*, 529 U.S. 494, 504-05 (2000); *Johnson v. Hoffa*, 196 Fed. Appx. 88, 90 (3d Cir. 2006). The conspirators include, but are not limited to, Defendants. The Complaint specifically lists DOES 1-10 to account for all currently unidentified conspirators.

15. Describe the alleged injury to business or property.

Response:

As more fully described in the Complaint, Defendants' racketeering activities have been financially devastating to LabMD. Specifically, LabMD has been injured through: (i) the reduction in the value of its business, lost revenue, and expenses associated with insolvency; (ii) the costs in attempting to resolve the purported security breach and to comply with the investigations and demands, which LabMD now knows to have been precipitated by Defendants, and; (iii) the substantial and irreparable loss of goodwill and business opportunities as a result of the acts and omissions of Defendants. Consequently, LabMD was effectively forced out of business by January 2014, and it now operates as an insolvent entity that simply provides records to former patients.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

Response:

As detailed above, when Defendants' victims do not give in to Tiversa and Boback's solicitations, Defendants report them to the FTC along with intentional misrepresentations and false and fraudulent statements about the victim's purported inability to keep client data secure and a copy of the converted data. (*See* Response to Question No. 6(f), *supra*). By misleading and defrauding the FTC about LabMD, Defendants proximately caused the FTC to investigate and bring an enforcement action against LabMD. *See Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 653 (2008) ("the common law has long recognized that plaintiffs can recover in a variety of circumstances where, as here, their injuries result directly from the defendant's fraudulent misrepresentations to a third party"); *see also Wallace v. Powell*, Consolidated Civil Action Nos. 3:09-CV-286, 3:09-CV-291, 3:09-CV-357, 3:09-CV-630, 2010 U.S. Dist. LEXIS 87714, *52-54 (M.D. Pa. Aug. 24, 2010) (applying *Bridge*). As a direct consequence, LabMD's insurers cancelled all of the insurance coverage for LabMD and its directors and officers, and LabMD lost virtually all of its patients, referral sources, and workforce, which had included around 40 full-time employees. (*See also* Response to Question No. 20, *infra*).

17. List the damages sustained by each plaintiff for which each defendant is allegedly liable.

Response:

LabMD has been injured through: (i) the reduction in the value of its business, lost revenue, and expenses associated with insolvency; (ii) the costs in attempting to resolve the purported security breach and to comply with the investigations and demands, which LabMD now knows to have been precipitated by Defendants, and; (iii) the substantial and irreparable loss

of goodwill and business opportunities as a result of the acts and omissions of Defendants. Consequently, LabMD was effectively forced out of business by January 2014, and it now operates as an insolvent entity that simply provides records to former patients. Each of Defendants is liable, jointly and severally, for these damages. *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Lincow*, 444 F. App'x 617, 621-22 (3d Cir. 2011) ("the nature of the RICO offense mandates joint and several liability").

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

Response:

LabMD has not asserted any federal causes of action other than violation of 18 U.S.C. §§ 1962(c) and 1962(d).

19. List all pendent state claims, if any.

Response:

LabMD has asserted state law claims for: Conversion; Defamation *Per Se*; Tortious Interference with Business Relations; Fraud; Negligent Misrepresentation; Civil Conspiracy, and; Attorney Fees and Expenses of Litigation under O.C.G.A. § 13-6-11.

20. Provide any additional relevant information that would be helpful to the court in processing the RICO claim.

Response:

While the Complaint sets forth in great detail the basis for the LabMD's allegations, it is anticipated that discovery will enable the LabMD to more fully establish the extent of Defendants' racketeering activities. Prior to filing the Complaint in this action, LabMD vigorously and repeatedly attempted to obtain information about Defendants' racketeering activities, but has been blocked by Defendants at every turn. For example, LabMD pursued

discovery about Defendants in connection with the FTC's enforcement action against it. As has recently been revealed by Congress, however, Boback made misrepresentations during his deposition in that matter, and the documents Defendants provided to the FTC in connection with that matter were incomplete. (*See* Response to Question No. 6(f), *supra*).

LabMD expects to be met in this litigation with similar all out efforts by Defendants to avoid disclosing evidence of their wrongdoing. For example, even before the discovery process begins, LabMD anticipates that Defendants will pursue a dismissal of some or all of LabMD's claims by arguing that the statute of limitations has run. The Complaint explains several of the actions taken by Defendants to prevent LabMD from discovering their racketeering actions, which have just recently come to light as a result of the investigations of the Oversight Committee. In addition to the evidence set forth in the Complaint, however, LabMD provides the Court with the below legal and factual argument as to why the statute of limitations for LabMD's RICO claims has not yet run.

The Supreme Court has held that a four-year statute of limitations applies to all civil actions under the RICO statute. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). A RICO claim accrues, however, not at the time of injury but at the time when the plaintiff "knew or should have known of their injury" as well as the source of their injury. *See Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 359 F.3d 226, 233 (3d Cir. 2004), citing *Forbes v. Eagleson*, 228 F.3d 471, 485 (3d Cir. 2000). The RICO statute of limitations may also be tolled if plaintiff demonstrates fraudulent concealment. *See Forbes*, 228 F.3d at 486-87. In order to demonstrate that the defendant engaged in fraudulent concealment, the plaintiff "must show active misleading by the defendant," and "must further show that he exercised reasonable diligence in attempting to uncover the relevant facts." *Id*. "[D]etermining whether a

plaintiff had sufficient facts to place her on inquiry notice is 'often inappropriate for resolution on a motion to dismiss,' [unless] … 'the facts needed for determination of when a reasonable [plaintiff] of ordinary intelligence would have been aware of the existence of fraud can be gleaned from the complaint and papers . . . integral to the complaint.'" *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 362 (2d Cir. 2013).

In *Cohen*, the Second Circuit Court of Appeals vacated and remanded a trial court's dismissal of the plaintiff's RICO claims. *Id.* at 363-64. The *Cohen* case involved a lawsuit filed by an ex-wife against her ex-husband and some of his businesses and business associates for, in part, fraudulently concealing millions of dollars in assets during the couple's 1991 legal proceedings related to their separation. The ex-wife, Patricia, alleged in her 2009 action that the defendants hid during the discovery in the 1991 action evidence of a settlement agreement that may have added over $5 million to the marital estate. *Id.* at 356-58. Patricia alleged that she coincidentally learned of the settlement in 2008 when she read a lawsuit that referenced the 1987 settlement. *Id.* at 358. The trial court in *Cohen* concluded that Patricia was on inquiry notice in 1991 because she apparently suspected her ex-husband of concealing some payments and falsely understating the value of certain assets. *Id.* at 362. The Second Circuit disagreed, and provided the following explanation, in pertinent part:

> First, the court appears to have assumed that because Patricia had suspicions in 1991 and did not find the [subject] payment, it follows that her investigation at the time was less than reasonable. There is no basis in the record for that conclusion. Inquiry notice imposes an obligation of reasonable diligence. ... The district court had no basis on the record before it to conclude that the investigation that Patricia made in 1991 was not reasonable.
>
> Second, even assuming that the duty to make a reasonable investigation in 1991, given what Patricia knew, required her to do more than she did, there is no adequate reason on this record to conclude that such further reasonable diligence would have revealed the [subject] lawsuit. … While hindsight shows that the fraud could have been discovered, that fact does not support the conclusion that, on reasonable inquiry, the fraud would have been discovered.

Exhibit C

> Nor did the fact that Patricia had and expressed suspicions in 1991 that [her ex-husband] was lying … put her on inquiry notice of the concealed fact …. The fact that she distrusted her former husband and thought he might be lying is not an objective fact that supports a duty to investigate.
>
> We conclude that, at least on the record before the district court, there was no basis to dismiss Patricia's [RICO, Fraud, and Breach of Fiduciary Duty] claims as untimely. We vacate those rulings and reinstate these claims.

Id. at 362-64 (citations omitted).

LabMD's pursuit of claims against Defendants has been impeded by fraudulent concealment even more egregious than *Cohen*. Like Patricia, LabMD suspected from as early as May 2008 that Defendants were lying about the source of the 1718 File. Unlike Patricia, there was no publically available lawsuit to confirm LabMD's suspicions of Defendants' racketeering actions. Instead, LabMD had to rely on the belated admissions of a guilt-ridden former Tiversa employee who did not want to be forced to lie under oath. Thus, it was not until April 2, 2014 that LabMD affirmatively learned of Defendants' fraudulent concealment from the Oversight Committee. Therefore, for statute of limitations purposes, LabMD was not put on inquiry notice until, at the earliest, April 2, 2014.

LabMD also respectfully directs this Court to Judge Fischer's opinion in *Cranberry Promenade, Inc. v. Cranberry Twp.*, Civil Action No. 09-290, 2010 U.S. Dist. LEXIS 15077, at *3 (W.D. Pa. Feb. 22, 2010) (a copy attached hereto as Exhibit "R"), in which RICO claims were not dismissed as time barred in light of plaintiffs' allegations of wrongdoing by defendants over a long period of time. Notably, Defendants Tiversa and Boback are now represented by the same attorneys who successfully argued on behalf of plaintiffs in that case for tolling of the RICO statute of limitations pursuant to the discovery rule.

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Below is a timeline of a sampling of key efforts by Defendants to "active[ly] mislead[]" LabMD, as well as LabMD's "reasonable diligence in attempting to uncover the relevant facts," *see Forbes*, 228 F.3d at 486-87:

- May 13, 2008 Email from Boback/Tiversa to LabMD: In response to LabMD's request for additional information about the purported data security breach, Boback/Tiversa made misrepresentations to LabMD about from where the 1718 File was downloaded as well as Tiversa's records of the internet protocol ("IP") address from which it was downloaded. These initial misrepresentations about the IP address would morph into the misrepresentations that Boback/Tiversa presented to the FTC, and upon which the FTC relied in its investigation of LabMD. (*See* April 14, 2014 Deposition of James E. Van Dyke (expert hired by FTC) (a true and correct copy of which is attached as Exhibit "S"), pp. 35-46, in which Van Dyke explained that he was told to make two core assumptions when investigating LabMD: (1) that the 1718 File was in the four IP addresses that Boback identified, and (2) that LabMD had flawed data security practices).

- July 15, 2008 Email from Boback/Tiversa to LabMD: In an effort to solicit LabMD's business, Boback wrote to LabMD and claimed that Tiversa "continued to see individuals … downloading copies of the [1718 File]." LabMD refused the solicitations, but in good faith reliance on these misrepresentations, it spent thousands of dollars, and devoted hundreds of man hours, to seek to detect and remedy what were, in truth, phantom data breaches, including by conducting searches related to the 1718 File. In retaliation for LabMD's refusal to purchase Tiversa's services, Tiversa and Boback "fed" LabMD to Johnson for an upcoming research report. In further retaliation for LabMD's refusal to purchase Tiversa's services, Defendants falsely told the FTC that they had obtained the 1718 File from a peer-to-peer

network and that third party individuals were downloading the 1718 File from a peer-to-peer network. These misrepresentations caused the FTC to investigate LabMD and to bring an enforcement action against it in 2010.

- October 19, 2011: LabMD filed in Georgia a lawsuit against Defendants Tiversa and Johnson (as well as Johnson's then employer, Dartmouth College) asserting claims for Conversion, Trespass, and several computer-related violations. The defendants in that case were able to get the action dismissed for lack of personal jurisdiction. However, in addition to preventing LabMD from pursuing any discovery to test the validity of the representations Defendants had made to it in the years prior, Tiversa and Johnson made material misrepresentations to the federal district and appellate courts, which served to further their fraudulent concealment. For example, in a filing with the Northern District of Georgia, Tiversa asserted: "it is undisputed that Tiversa did not hack any computers, did not somehow target LabMD or even know where LabMD and its servers were located when it downloaded the 1,718 File." (*See* Exhibit "J" (Tiversa's Reply in Support of Special Appearance and Motion to Dismiss Plaintiff's Complaint), p. 7, n. 4). Recent admissions from Boback have proven some or all of this statement to be false. Similarly, in a filing with the Eleventh Circuit Court of Appeals, Johnson wrote: "LabMD has not – and cannot – allege that any alleged persistent course of conduct towards LabMD by Tiversa was in furtherance of an alleged conspiracy with Johnson and Dartmouth. In its Brief, LabMD focuses on Tiversa's solicitations of LabMD, which are entirely unrelated to Johnson or Dartmouth." (*See* Trustees of Dartmouth College's and M. Eric Johnson's Appellee Brief, pp. 15-16, a true and correct copy of which is attached hereto as Exhibit "T"). Johnson hid from the Court of Appeals the fact that, in April 2008, Johnson asked Tiversa to "share a couple other of [its] recent medical finds … to ***spice up the report*** [and] …

Exhibit C

really ***boost the impact of the report***." (*See* April 29, 2008 email exchange among Tiversa representatives and Johnson, a true and correct copy of which is attached to the Complaint as Exhibit "G" (emphasis added)). This email, LabMD's first evidence of the true relationship among Defendants, was not uncovered by LabMD until it was produced by Johnson in or about January 2014 in connection with his deposition in the FTC litigation.

- *See also* examples listed in Response to Questions 5(b) and 5(c).

Respectfully submitted,

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Dated: February 18, 2015 By: /s/ John R. Gotaskie, Jr.

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Exhibit C

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 5.6 of the United States District Court for the Western District of Pennsylvania, the foregoing RICO Case Statement has been served by electronic means through the Court's transmission facilities on the following counsel of record:

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Exhibit C

EXHIBIT P

REMOVED

Exhibit C

EXHIBIT Q

REMOVED

Exhibit C

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LABMD, INC., Plaintiff, v. TIVERSA HOLDING CORP. f/k/a TIVERSA, INC.; ROBERT J. BOBACK; M. ERIC JOHNSON; and DOES 1-10, Defendants.	**No. 2:15-cv-00092-MRH-MPK**

PLAINTIFF'S OBJECTIONS TO OPINION AND ORDER

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Exhibit D

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COMES NOW Plaintiff LabMD, Inc. ("LabMD" or "Plaintiff"), by and through its undersigned counsel, and, pursuant to Fed. R. Civ. P. 72(a), Local Rule 72.C.2, and 28 U.S.C. § 636(b)(1)(A), respectfully objects to the Opinion and Order (ECF No. 30) (the "Order") granting the Motion to Modify Docketing of Errata at ECF 18 and 19 and Brief in Support (ECF Nos. 21 and 22) (the "Motion to Modify) of Defendants Tiversa Holding Corp. and Robert J. Boback (collectively "Tiversa"), and in support thereof shows as follows:

I. INTRODUCTION

In the Motion to Modify, Tiversa disputed that LabMD was entitled to promptly revise its initial RICO Case Statement (ECF No. 18) (the "Original RICO Case Statement") to remove from the public record privileged matter that was inadvertently disclosed. LabMD opposed the Motion to Modify on the basis that the Original RICO Case Statement, including its exhibits, constituted a draft, and was therefore privileged as attorney work product, that was inadvertently filed. In the Order, Chief Magistrate Judge Maureen P. Kelly granted the Motion to Modify. LabMD timely, and with all due respect, objects to the Order as clearly erroneous and contrary to law.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On February 18, 2015, at 1:05 p.m., LabMD filed its Original RICO Case Statement pursuant to Local Rule 7.1B. Shortly thereafter, LabMD realized that, in seeking to meet this February 18 filing deadline, it had inadvertently filed a draft that included an Affidavit (Exhibit Q), and a reference thereto, which should not have been included in the RICO Case Statement. LabMD's counsel immediately notified the representative assigned to this action in the Clerk of Court's office of this inadvertent disclosure, and, at approximately 5:00 p.m., less than four hours later, LabMD filed an Errata and a revised RICO Case Statement (ECF No. 19) (the "Revised RICO Statement").

Promptly thereafter, that same day, LabMD's counsel emailed a letter to counsel for all of the Defendants informing them of the inadvertent disclosure of privileged matter, and reminding them of their corresponding obligations under Fed. R. Civ. P. 26(b)(5)(B). Counsel for Defendant M. Eric Johnson never saw the Original RICO Case Statement (underscoring the promptness with which LabMD corrected its inadvertent filing). (*See* ECF No. 26). Tiversa's counsel, however, emailed a letter to LabMD's counsel the following morning "tak[ing] issue with [LabMD's] letter and the claim of privilege," and stating that it somehow "raises serious concerns about Plaintiff's filing." LabMD's counsel responded several hours later and provided additional details that it hoped would avoid the need to burden the Court with this matter. Nonetheless, Tiversa and its counsel declined to accept the explanation of LabMD's counsel, and Tiversa filed the Motion to Modify on February 27, 2015. LabMD timely filed its Response in Opposition to the Motion to Modify (ECF No. 27) on March 6, 2015.

On March 17, 2015, the Chief Magistrate Judge issued the Order granting Tiversa's Motion to Modify and denying Defendant M. Eric Johnson's Motion for Disclosure of Plaintiff's Original RICO Statement and co-Defendant's Unredacted Motion to Modify (ECF No. 26) (the "Motion for Disclosure"). In granting the Motion to Modify, Chief Magistrate Judge concluded that LabMD had not met its burden under Federal Rule of Evidence 502(b). However, the Order also "require[d] that the documents at issue remain sealed from public view until the expiration of the appropriate time for an appeal from this Order to a District Judge." (ECF No. 30-14). The Motion for Disclosure was "denied without prejudice subject to the resolution of an appeal of this Order." (*Id.* at 15).

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LabMD respectfully asserts that the Chief Magistrate Judge's holding on the Motion to Modify was clearly erroneous and contrary to law. LabMD does not object to the denial of the Motion for Disclosure.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Legal Standard

A district court judge may set aside or modify a magistrate judge's non-dispositive decision if it is clearly erroneous or contrary to law. *See, e.g., Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 145 n.27 (3d Cir. 2009); *State Farm Fire & Cas. Co. v. Clark*, No. 2:13-cv-00067, 2013 U.S. Dist. LEXIS 84499, at *4-5 (W.D. Pa. June 17, 2013) (Hornak, J.); *see also* 28 U.S.C. § 636(b)(1)(A) (2006); Fed. R. Civ. P. 72(a); LCvR 72.C.2. "'[T]he standard of review is circumscribed: [t]he district court is bound by the clearly erroneous rule in findings of fact; the phrase 'contrary to law' indicates plenary review as to matters of law.'" *State Farm Fire & Cas. Co.*, 2013 U.S. Dist. LEXIS 84499, at *5 (quoting *Haines v. Liggett Group Inc.*, 975 F.2d 81, 91 (3d Cir.1992)). "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on consideration of the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Lo Bosco v. Kure Engineering Ltd.*, 891 F. Supp. 1035, 1037 (D.N.J. 1995) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

B. The Chief Magistrate Judge's Finding of Waiver Was Clearly Erroneous and Contrary to Law

In the Order, the Chief Magistrate Judge accepted LabMD's claim that the Original RICO Case Statement was a draft prepared in the course of litigation, and thus "the work-product doctrine protects [the Original RICO Case Statement] against disclosure." (ECF No. 30-8).

Nonetheless, the Chief Magistrate Judge held that "the protection afforded under the work-product doctrine has been waived." (*Id.*). As summarized in the Order:

> Rule 502 provides, in relevant part, that, when an inadvertent disclosure of privileged material is made in a federal proceeding, the disclosure does not operate as a waiver if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable), following Federal Rule of Civil Procedure 26(b)(5)(B).

(*Id.* at 6 (quoting Fed. R. Evid. 502(b))). The Chief Magistrate Judge misapplied the criteria in Federal Rule of Evidence 502(b) in concluding that LabMD waived its work product privilege as to the Original RICO Case Statement.

1. Inadvertence

The Chief Magistrate Judge faulted LabMD for not presenting any affirmative evidence to support its position that the Original RICO Case Statement was inadvertently filed and found "no basis" on which to "weigh" LabMD's assertion that the filing of this draft was inadvertent. (*See id.* at 8). This conclusion was clearly erroneous because sufficient circumstantial evidence of inadvertence was before the Court.

First, the Chief Magistrate Judge was willing to treat the Original RICO Case Statement as "a 'draft' pleading, clearly prepared in the course of litigation." (*Id.*). It is self-evident that parties do not intentionally file draft pleadings, especially drafts of something as important as the RICO Case Statement required by Local Rule 7.1B.

Also, the Original RICO Case Statement was filed the afternoon of the due date. The timing of this filing likewise tends to show that LabMD was under pressure to meet this deadline, and hence inadvertently filed a draft.

The Chief Magistrate Judge failed to recognize these facts and instead erroneously focused on the absence of a "DRAFT" stamp on the Original RICO Case Statement and that it

was electronically signed. (*Id.* at 9). But whether and how attorneys label or identify their drafts is entirely idiosyncratic. Not marking the Original RICO Case Statement as a "DRAFT" should hardly be fatal to its work product protection, especially when viewed in isolation.[1]

2. Reasonableness of Precautions

As the Chief Magistrate Judge pointed out, there is substantial "ongoing litigation between the parties" in multiple proceedings. (*See* ECF No. 30-1, and n. 1). The Chief Magistrate Judge also recognized that the parties are involved in "an ongoing investigation [of Tiversa] by the United States House of Representatives Committee on Oversight and Governmental Reform." (*Id.* at 2). Coordinating among LabMD's different counsel in each of these pending matters, as well as with the Congressional Representatives leading the Tiversa investigation, is consequently a challenge. Yet the Chief Magistrate Judge ignored this reality in finding that LabMD "again presents no evidence" on this element of Rule 502(b). (*Id.* at 9).

Similarly, while the Original RICO Case Statement may technically be only "*one* document," (*id.* at 10) (emphasis by the Court), the entire Original RICO Case Statement, including Exhibits, totals **582 pages**. Further, this dispute involves just ½ of 1 sentence[2] in a 35-

[1] Had she assessed the context as a whole and still found the record wanting, the Chief Magistrate Judge could have scheduled a hearing. Indeed, as this Court recently noted, "[i]n most of the reported cases addressing claw-back motions under Rule 502(b), the courts have made rulings following oral argument… or after conducting an evidentiary hearing… or with the benefit of an attorney's verified statement." *Gilson v. Pa. State Police*, 2015 U.S. Dist. LEXIS 10922, 7-8 (W.D. Pa. Jan. 30, 2015) (citing *Wise v. Washington County*, 2013 U.S. Dist. LEXIS 128731, 2013 WL 4829227, at *1; *Carlson v. Carmichael*, 2013 U.S. Dist. LEXIS 101088, 2013 WL 3778356, at *2; *United States v. Sensient Colors, Inc.*, Civil No. 07-1275(JHR/JS), 2009 U.S. Dist. LEXIS 81951, 2009 WL 2905474, at *1 (D.N.J. Sept. 9, 2009); *Peterson v. Bernardi*, 262 F.R.D. 424, 426 (D.N.J. 2009); *Stewart Title Guar. Co. v. Owlett & Lewis, P.C.*, 297 F.R.D. 232, 238 (M.D. Pa. July 18, 2013); *Rhoades v. Young Women's Christian Association of Greater Pittsburgh*, Civil Action No. 09-261, 2009 U.S. Dist. LEXIS 95486, 2009 WL 3319820 *2-3 (W.D. Pa. Oct. 14, 2009)).

[2] Exhibit P and the footnote in which it was mentioned are red herrings. They were removed solely for purposes of drafting consistency (they became superfluous); their removal was

page submission, and only a single 4-page exhibit (Exhibit Q) of 20 exhibits totaling 546 pages. This factor therefore does not weigh in favor of waiver, or is at least neutral on the matter, and the Chief Magistrate Judge's ruling to the contrary was clearly erroneous.

Most notably, however, the Chief Magistrate Judge considered "***dispositive*** the extent of the disclosure." (*Id.* at 11) (emphasis added). Specifically, she held that the act of filing the Original RICO Case Statement on the public docket, where it was viewed by the two Tiversa Defendants, was alone enough to tip the scales in favor of waiver. (*Id.* at 12). LabMD respectfully disagrees.

All but one of the cases cited by the Chief Magistrate Judge in this section of the Order (*J.N. v. S.W. Sch. Dist.*, No. 1:14-CV-0974, 2014 U.S. Dist. LEXIS 134346, (M.D. Pa. Sept. 24, 2014)) predate the enactment of Rule 502(b). As explained by the Advisory Committee Notes, Rule 502(b) opts for the "middle ground" taken by "[m]ost courts" on whether inadvertent disclosure constitutes a waiver of privilege, which finds a waiver "only if the disclosing party acted carelessly in disclosing the communication or information and failed to request its return in a timely fashion." Ignoring this paradigm, the Chief Magistrate Judge was not nearly so benign in denying LabMD the protections of Rule 502(b).

Further, in *J.N.*, while the court observed in transparent dicta that "[f]iling a document with the court 'is inconsistent with a claim of privilege' and generally results in waiver," 2014 U.S. Dist. LEXIS, at *24 n.13, Judge Conner did not remotely suggest that this factor ought to be "dispositive."[3] Indeed, the Advisory Committee Notes expressly caution that none of the

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uncontested; and they are consequently irrelevant to the Court's consideration of the issue of waiver. Exhibit P is indisputably a public Order, and LabMD is not trying to protect it *per se*.

[3] Interestingly, the Order points out that the court in *J.N.* "cited with approval *United States v. Gangi*, 1 F. Supp. 2d 256, [sic] (S.D.N.Y. 1998), where the Court found waiver of attorney work product privilege with regard to the unintentional filing of an internal Prosecution Memorandum with the Court in conjunction with an indictment." (ECF No. 30-11). The Order then quotes

ancillary factors that might be considered by a court in evaluating the three elements in Rule 502, and which inform the Order (*see* ECF No. 30-6-7), "is dispositive." On its face, consequently, the Order is contrary to law in according "dispositive" significance to "the extent of the disclosure, which in this case involved publication of the document on the docket of this action." (*Id.* at 11).

3. Delay and Measures Taken to Rectify Disclosure

The Chief Magistrate Judge initially recognized that "the absence of substantial delay [by LabMD] in attempting to 'claw back' the originally filed RICO Case Statement" cuts in favor of LabMD, and against a finding of waiver, under Rule 502(b). (*Id.* at 12). But the Chief Magistrate Judge then deprived LabMD of the benefit of this determination by criticizing "the manner chosen by [its] counsel to rectify the situation," which the Chief Magistrate Judge characterized as "an end-run around the Court and opposing counsel…through an *ex parte* call to the Clerk of the Court's docketing office by the secretary of LabMD's counsel." (*Id.* at 13). The undersigned counsel respectively submit that this highly negative assessment of their conduct is unwarranted, unfair, and clearly erroneous.

When counsel for LabMD realized that the Original RICO Case Statement had been inadvertently filed, their immediate concern was to seek to remove this ECF filing (ECF No. 18) from the public record as quickly as possible. In asking the Clerk to do so, counsel did not believe that they were acting contrary to Standing Order 2:05-mc-45 because they were not requesting that the Original RICO Case Statement be filed under seal, but simply that it be

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Gangi's treatment of *Carter v. Gibbs*, 909 F.2d 1450 (Fed. Cir. 1990), for *Carter*'s "crown jewels" approach to work product. (*Id.*) However, *Gangi* expressly rejected the "crown jewels" approach embraced by *Carter*: "Defendants ask this Court to apply the strict accountability approach applied in *Carter*…. I decline to do so…[T]he prevailing view in this District, as well as in the majority of the Circuits, is that a more flexible, 'middle of the road approach' should be applied." *Gangi*, F. Supp. 2d at 264. It is exactly this flexible approach that the Chief Magistrate Judge failed to employ here.

withdrawn from access on PACER. Moreover, counsel did not anticipate that merely substituting the Revised RICO Case Statement for the Original RICO Case Statement would become an issue that even required the Court's attention. And with this 20/20 hindsight, it is crystal clear that precious time would have elapsed with the Original RICO Case Statement available on PACER if LabMD had first moved to place the Original RICO Case Statement under seal, even on an expedited basis. Nonetheless, if counsel for LabMD failed to comply with Standing Order 2:05-mc-45, they sincerely apologize to the Court, and ask that LabMD not be penalized for this unintentional oversight by its attorneys.

4. The Overriding Interests of Justice

As the Chief Magistrate Judge acknowledges, courts considering whether a waiver of privilege has occurred additionally take into account "whether the overriding interests of justice would or would not be served by relieving the party of its errors." (ECF No. 30-7). Conspicuously missing from the Order, however, is any discussion of this factor.

At this time, LabMD is not asserting that the half sentence removed from the Original RICO Case Statement and Exhibit Q are privileged or protected from discovery. Instead, LabMD contends, and the Chief Magistrate Judge apparently agrees (*see id.* at 8), that the Original RICO Case Statement, including the selection of the Exhibits, was a draft protected as attorney work product. The question of discoverability is a fight for a later day if and when LabMD seeks to withhold Exhibit Q from discovery, which will depend on a variety of factors, including the status of the ongoing Congressional investigation into Tiversa's illicit activities. The only issue currently before the Court is whether it will honor the attorney work-product protection of ECF No. 18, "a 'draft' pleading, clearly prepared in the course of litigation." (*Id.*).

LabMD would be terribly prejudiced if the Court were to hold that LabMD had waived the protection afforded to the Original RICO Case Statement under the attorney work product doctrine. The legal arguments and exhibits that LabMD's counsel considered in ECF No. 18 represent paradigmatic opinion work product. The purpose of the attorney work product protection is to promote the adversary system by sheltering an attorney's mental process so as to provide a safe area to analyze and prepare a case. *See, e.g., In re Cendant Sec. Litig.*, 343 F.3d 658, 661-62 (3d Cir. 2003); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991). This kind of inviolate opinion work product not only "includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he draws from interviews of witnesses," but "the selection and compilation of documents by counsel." *Sporck v. Peil*, 759 F.2d 312, 316-17 (3d Cir. 1985) (noting that "[i]n selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case" (quoting *James Julian, Inc. v. Raytheon, Co.*, 93 F.R.D. 138, 144 (D. Del. 1982)).

By contrast, a denial of the Motion to Modify in no way harms Tiversa or co-Defendant M. Eric Johnson. Defendants can still seek this information in discovery, and it has nothing to do with whether LabMD's RICO claims are time barred, as Tiversa apparently intends to argue in its forthcoming motion to dismiss. The Chief Magistrate Judge relied on this phantom nexus urged by Tiversa, and thereby clearly erred, in finding that the Revised RICO Case Statement "appears to revise LabMD's allegations as to…when it learned of Defendants' alleged fraudulent concealment." (ECF No. 30-3). To the contrary, both the Original RICO Case Statement and the Revised RICO Case Statement are consistent in pegging this date as April 2, 2014. (*See* ECF No. 27-5-6).

Exhibit D

IV. CONCLUSION

As noted by this Court, "[t]he attorney work product doctrine embodies an important principle, namely that the work of lawyers is for the sole benefit of the interests of their client and is not ammunition for an adversary in litigation, absent the most compelling necessity for its production as provided by Fed. R. Civ. P. 26." *Gilson v. Pa. State Police*, 2015 U.S. Dist. LEXIS 10922, at *19-21 (W.D. Pa. Jan. 30, 2015) (Hornak, J.). There is no question but that, at this early stage of this lawsuit, Tiversa is trying to use the inadvertently filed Original RICO Case Statement to prevent LabMD's counsel from protecting the interests of their client. There is simply no necessity, let alone a compelling one, for this draft work product to be stripped of its cloak of privilege at this time. Whether or not ECF 18, including Exhibit Q, should or must be produced by LabMD as discovery goes forward is an entirely different question for another day.

For the foregoing reasons, LabMD respectfully submits that the Order granting the Motion to Modify is contrary to law and clearly erroneous.[4] As such, LabMD requests that the Order be vacated as to its holding on the Motion to Modify, and the Motion to Modify be denied in its entirety. Additionally, LabMD respectfully submits that the Motion for Disclosure should be denied as moot regardless of this Court's decision on the Motion to Modify.

[4] If the Court disagrees, it would still be improper to grant the Motion to Modify and reinstate ECF on the public record. Rather, the Original RICO Case Statement ought to continue to be sequestered as confidential pursuant to the Pennsylvania ethical rules. *See, e.g., United States v. Kubini*, 2015 U.S. Dist. LEXIS 938, at *49 (W.D. Pa. Jan. 5, 2015) (Where an attorney is in receipt of confidential documents, that attorney "has ethical obligations that may surpass the limitations implicated by the [...] privilege and may apply regardless of whether the documents in question retain their privileged status."); *see also* Model Rules of Prof'l Conduct R. 4.4(b), as adopted in Pennsylvania. At a minimum, to the extent that the Original RICO Case Statement identifies potential nonparty witnesses, either in the investigation by the United States House of Representatives Committee on Oversight and Governmental Reform or in any pending case, any reference to such persons should be redacted. *See United States v. Gangi*, 1 F. Supp. 2d at 267-268 (endorsing redaction to avoid any risk of witness tampering).

Plaintiff also respectfully requests oral argument on the Motion to Modify and these Objections to Opinion and Order.

Respectfully submitted,

FOX ROTHSCHILD LLP

Dated: March 31, 2015

By: /s/ John R. Gotaskie, Jr.

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Attorneys for Plaintiff,
LabMD, Inc.

Exhibit D

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 5.6 of the United States District Court for the Western District of Pennsylvania, the foregoing PLAINTIFF'S OBJECTIONS TO OPINION AND ORDER has been served by electronic means through the Court's transmission facilities on the following counsel of record:

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Robert J. Boback

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Counsel for Defendant,
M. Eric Johnson

FOX ROTHSCHILD LLP

/s/ John R. Gotaskie, Jr.

Exhibit D

Exhibit E

United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

March 19, 2015

VIA EMAIL

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

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

Dear Mr. Sherman:

I am writing in regard to the affidavit described in the Opinion and Order entered earlier this week by Chief Magistrate Judge Maureen Kelly in litigation pending in the Western District of Pennsylvania, to which your client is a party.

As I understand from the filings in that case, your client asserts that a "fact-laden Affidavit, dated April 17, 2014" was inadvertently included as part of a February 18, 2015 filing, which LabMD subsequently withdrew. *LabMD, Inc. v. Tiversa Holding Corp.*, No. 2:15-cv-00092, slip op. at 3 (W.D. Pa. Mar, 17, 2015) (attached). Specifically, your client alleges that the initial filing and the affidavit include "'information that was provided in confidence by [LabMD] to its counsel for purposes of . . . representation.'" *Id.* at 4 (quoting letter from E. Fisher to J. Shaw). The Opinion explains that your client's subsequent submission "revise[d] LabMD's allegations as to how and when it learned" of certain conduct by Tiversa, Mr. Boback, and Dean Johnson. *Id.* at 3.

The Court held that any protection provided by the work product doctrine was waived by the circumstances under which LabMD made public its initial filing, and Judge Kelly expressed skepticism that any privilege or immunity could shield a "fact-laden fully executed party Affidavit signed 'under penalty of perjury.'" *Id.* at 8 n.2 (citation omitted).

An affidavit relating to the facts alleged in LabMD's suit against Tiversa, Mr. Boback, and Dean Johnson may be responsive to Complaint Counsel's discovery requests in this matter, including Complaint Counsel's requests for production, interrogatories, and contention interrogatories. *See* Rule 3.31(e)(2). In addition, the existence of the affidavit is a fact that Respondent was required to have disclosed to Complaint Counsel as a supplement to its initial disclosures. *See* Rule 3.31(b) (requiring copies or a description by category and location of "all documents and electronically stored information including declarations . . . in the possession,

custody, or control of . . . respondent[] that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent"); Rule 3.31(e)(1) (requiring a party "to supplement at appropriate intervals its mandatory initial disclosures under § 3.31(b) if the party learns that in some material respect the information disclosed is incomplete . . . ."). Complaint Counsel only learned of the existence of the April 17, 2014 affidavit when it reviewed Judge Kelly's March 17, 2015 Opinion and Order, eleven months after the affidavit was created.

Please explain why Respondent withheld information regarding the existence of this affidavit. Please also advise whether Respondent will produce the affidavit, and if not, whether you are asserting that a privilege or immunity from production shields the affidavit from discovery in this litigation. If you are asserting that the document is protected from production by an applicable privilege or any similar claim, please comply with your obligations under Rule 3.38A and supplement Respondent's March 24, 2014 privilege log.

I look forward to receiving your response by Tuesday, March 24, 2015.

Sincerely,

Laura Riposo VanDruff

Attachment (1)

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

Exhibit E

Exhibit F

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

March 26, 2015

VIA ELECTRONIC MAIL
Laura Riposo VanDruff
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8100
Washington, D.C. 20580
lvandruff@ftc.gov

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

Dear Laura:

Respondent's counsel did not make Complaint Counsel aware of the existence of the affidavit of Michael Daugherty for the following reasons:

- The Affidavit constitutes work product subject to the work product privilege as incorporated into the FTC Rules under 3.31(c)(4) and 3.31(c)(5) and as such Respondent is not required to produce such materials to supplement its initial disclosures;

- Affidavit was executed by Mr. Daugherty relevant to OGR's investigation of Tiversa which is not a party to this litigation despite the FTC's efforts to treat it as such;

- The Affidavit it is not responsive to FTC's discovery requests, and is outside the scope of time in that the requests limit the time frame of documents requested to a period before the affidavit came into existence.

If counsel is requesting that the affidavit be placed on the privilege log we do not object to doing so.

Sincerely,

William A. Sherman, II

WAS/jb
cc: Jarad Brown (**jbrown4@ftc.gov**)

Exhibit G

Addendum to Respondent LabMD, Inc.'s Privilege Log-Redactions Made on the Basis of Privilege

In the Matter of LabMD, Inc.

March 31, 2015

Date	Bates Range FTC-LABMD	Redacted or Withheld?[1]	Author	Recipients	Subject	Privilege[2]
4/17/14	n/a	W	Michael Daugherty	Committee on Oversight and Government Reform, Taylor English Duma LLP (Counsel for LabMD)	Affidavit relevant to OGR's unrelated investigation of Tiversa.	W-P

[1] R = Redacted
W = Withheld

[2] A-C = Attorney-Client Privilege
W-P = Work Product Doctrine

Exhibit G

Exhibit H

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

COMPLAINT COUNSEL'S SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO RESPONDENT (NUMBERS 29-40)

Pursuant to the Federal Trade Commission's Rule of Practice § 3.37, 16 C.F.R. § 3.37, and the Court's Scheduling Orders, dated September 25 , 2013 and October 22, 2013, Complaint Counsel requests that Respondent produce the documentary materials identified below for inspection and copying within thirty (30) days at the Federal Trade Commission, 601 New Jersey Avenue, NW, Washington, DC 20001.

DEFINITIONS

1. "**All Documents**" means each Document, 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 or non-Corporate Respondent 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. "**Communication**" includes any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished. Examples of Communications include all discussions, meetings, telephone conversations, letters, memoranda, and electronic mail.

3. "**Consumer**" means a natural person.

4. "**Containing**" means containing, describing, or interpreting in whole or in part.

5. "**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 any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, screen shot, 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 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, 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.

6. "**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.

7. "**Each**," "**any**," and "**all**" shall be construed to have the broadest meaning whenever necessary to bring within the scope of any request for production all Documents that might otherwise be construed to be outside its scope.

8. "**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 request for production.

9. "**LabMD**," "**Company**," or "**Respondent**" means Respondent LabMD, Inc., its directors, officers, employees, attorneys, accountants, independent contractors, consultants, agents, predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, successors, and assigns.

10. "**Or**" as well as "**and**" shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any request for production all Documents that otherwise might be construed to be outside its scope.

11. "**Person**" means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity, including the Company.

12. "**Personal Information**" means individually identifiable information from or about a Consumer including: (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. "**Relate**" or "**Relating to**" means in whole or in part discussing, implementing, testing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to.

14. "**Sacramento Documents**" means certain documents seized by the Sacramento Police Department, copies of which have been produced at FTC-SAC-000001 to FTC-SAC-000044; FTC-SAC-000233 to FTC-SAC-000272; FTC-SAC-000273 to FTC-SAC-000282.

15. "**Security Incident**" means any instance of attempted or actual unauthorized access to or unauthorized disclosure of Personal Information maintained by or for LabMD.

16. "**You**" or "**your**" means LabMD.

17. "**1,718 File**" means the 1,718 page document, copies of which have been produced at TIVERSA-FTC_RESPONSE-000001 to TIVERSA-FTC_RESPONSE-001719; TIVERSA-FTC_RESPONSE-001720 to TIVERSA-FTC_RESPONSE-003438; TIVERSA-FTC_RESPONSE-003439 to TIVERSA-FTC_RESPONSE-005157; and TIVERSA-FTC_RESPONSE-005158 to TIVERSA-FTC_RESPONSE-006876.

18. The use of the singular includes the plural, and the plural includes the singular.

19. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

INSTRUCTIONS

1. **Applicable Time Period**: Unless otherwise specified, the time period covered by a request for production shall be limited to the period from **January 1, 2005 to the present.**

2. **Prior Productions**: If any Documents responsive to a request previously have been supplied to the Commission, you may comply with the request by identifying the Document(s) previously provided by Bates number and the date(s) of submission.

3. **Document Identification**: Documents that may be responsive to more than one request need not be submitted more than once. 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 folder, 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 submissions with a unique Bates identifier, and indicate the total number of Documents in your submission.

4. **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 First Set of Requests 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 Commission staff upon request. Copies of materials shall be produced in color if necessary to interpret them or render them intelligible.

5. **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 Complaint Counsel 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.

6. **Scope of Search**: These requests relate to Documents that are in your possession or under your actual or constructive custody or control, including Documents and information in the possession, custody, or control of your directors, officers, employees, attorneys, accountants, independent contractors, consultants, agents, predecessors, divisions, subsidiaries, affiliates, partnerships, joint ventures, successors, and assigns, whether or not such Documents were received from or disseminated to any other person or entity.

7. **Claims of Privilege**: Pursuant to the Federal Trade Commission's Rule of Practice 3.38A, 16 C.F.R. § 3.38A, if any Documents are withheld from production based on a claim of privilege or any similar claim, Respondent 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 Complaint 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.

8. **Continuing Nature of Requests**: These requests for production shall be deemed continuing in nature so as to require production of all Documents responsive to any specification included in these requests promptly upon obtaining or discovering different, new, or further information prior to the close of discovery.

9. **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 the Complaint Counsel named above that the proposed formats and media types will be acceptable to the Commission. The FTC requests Concordance load-ready electronic productions, including DAT and OPT load files.

   (1) **Electronically Stored Information**: Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC 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;

(b) 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);

(c) Each electronic file should be assigned a unique document identifier ("DocID") or Bates reference.

(2) **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;

(3) For each Document electronically submitted to the FTC, 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;

(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.

(4) 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 the Complaint Counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to these requests.

(5) Submit electronic productions as follows:

(a) With passwords or other document-level encryption removed or otherwise provided to the FTC;

(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. The FTC 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 the FTC.

(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.

(6) 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 the Complaint Counsel named above determines prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Complaint Counsel named above will provide a sample index upon request.

We have included a Bureau of Consumer Protection Production Guide as Exhibit A. This guide provides detailed directions on how to comply fully with this instruction.

10. **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 the Respondent has 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.

11. **Failure to Respond**: You are hereby advised that Complaint Counsel will move to preclude you from presenting evidence regarding responsive matters you fail to set forth in your answers to these Requests for Production.

12. **Questions**: Any questions you have relating to the scope or meaning of anything in these requests or suggestions for possible modifications thereto should be directed to Laura Riposo VanDruff at (202) 326-2999. Documents responsive to the request shall be addressed to the attention of Matthew Smith, Federal Trade Commission, 601 New Jersey Avenue, NW, Washington, DC 20001, and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission.

REQUESTS

Produce the following:

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

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

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

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

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

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

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

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

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

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

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

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

January 30, 2014

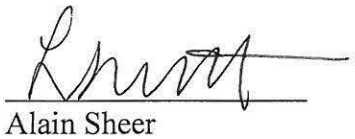
By: 

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Exhibit H

CERTIFICATE OF SERVICE

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

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Counsel for Respondent LabMD, Inc.

January 30, 2014

By: _____
Laura Riposo VanDruff
Federal Trade Commission
Bureau of Consumer Protection

Exhibit H