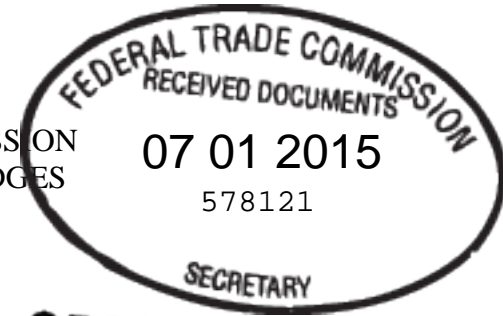


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

**PUBLIC**  
Docket No. 9357

**ORIGINAL**

**COMPLAINT COUNSEL’S RESPONSE TO  
RESPONDENT’S MOTION TO REFER TIVERSA, INC.,  
TIVERSA HOLDING CORP., AND ROBERT BOBACK**

Complaint Counsel does not oppose an investigation of Tiversa, Inc., Tiversa Holding Corporation, or Robert Boback (collectively “Tiversa”) in connection with this proceeding by a law enforcement agency with appropriate investigatory authority. Complaint Counsel submits this Response to correct Respondent’s characterization of Complaint Counsel’s position regarding the Motion’s requested relief and to address statements alleged as facts in the Motion.

**BACKGROUND**

On May 5, 2015, Richard Wallace testified that the 1718 File, which contains 9,300 consumers’ sensitive personal information – including consumers’ names, dates of birth, Social Security numbers, CPT codes for laboratory tests, and health insurance policy numbers – was available on a peer-to-peer (“P2P”) network. Tr. 1371-72. Mr. Wallace testified that he located and downloaded the 1718 File using off-the-shelf P2P software. *Id.* at 1371-73. Mr. Wallace also testified about certain practices by his former employer, Tiversa. Among other subjects, Mr. Wallace’s testimony addressed the creation of CX0019. Tr. 1368-70, 1374-87, 1445-47. Tiversa produced CX0019, which relates to the spread of the 1718 File on the P2P network, in response

to discovery in this litigation.<sup>1</sup> Mr. Wallace testified that CX0019 contained information he fabricated regarding the IP addresses at which Tiversa downloaded the 1718 File from a P2P network. *See, e.g.*, Tr. 1369-70.

At the conclusion of the May 5, 2015 hearing, Respondent's counsel, Reed Rubinstein, advised the Court that Respondent would, "in very short order, [be] asking [the Court] to consider a referral of Tiversa and Mr. Boback, under 18 U.S.C. 1505, for obstruction of this proceeding." Tr. 1464-65. On May 21, 2015, Respondent's counsel, Prashant Khetan, forwarded a draft motion to Complaint Counsel that sought Tiversa's referral to the Department of Justice, requesting that Complaint Counsel consider joining the motion. Complaint Counsel responded that it did not oppose "an investigation of Tiversa and Mr. Boback's conduct in this proceeding by an independent, impartial entity." Email from L. VanDruff to P. Khetan (May 26, 2015) (attached as **Exhibit A**). Complaint Counsel noted, however, that Respondent's draft motion "contain[ed] legal conclusions that [were] irrelevant to the relief requested, dr[ew] factual conclusions that [were] not supported by the record, and reli[ed] upon multiple levels of inadmissible hearsay." *Id.* More than three weeks later, on June 15, 2015, Mr. Khetan forwarded a revised draft motion that sought Tiversa's referral to the Department of Justice and the United States Attorney for the District of Columbia for multiple, potential statutory criminal violations. Complaint Counsel responded, reiterating its position and noting that "we do not accede to the revised proposed order language . . . . [n]or do we assent to the factual recitations or legal arguments set forth in the draft brief." Email from L. VanDruff to P. Khetan (June 16,

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<sup>1</sup> As set forth in Complaint Counsel's Opposition to Respondent's Motion to Admit Select Exhibits, Complaint Counsel does not intend to cite to CX0019 or Mr. Boback's testimony in its proposed findings of fact. Nor does Complaint Counsel intend to cite to expert conclusions predicated on CX0019 or Mr. Boback's testimony. *See* Complaint Counsel's Opp. to Mot. to Admit Select Exhibits at 10-11 n.11 (June 24, 2015).

2015) (attached as **Exhibit B**). Complaint Counsel specifically requested that “any contrary representations regarding Complaint Counsel’s position be corrected.” *Id.*

On June 19, 2015, Respondent’s counsel filed the instant brief, which is substantively identical to the draft brief regarding which Complaint Counsel had requested corrections. That afternoon, Complaint Counsel advised the Court that it anticipated filing a Response.<sup>2</sup>

## ARGUMENT

### I. THE COURT MAY DETERMINE WHETHER A REFERRAL IS APPROPRIATE FROM THE EVIDENTIARY RECORD

Complaint Counsel does not oppose the Court referring Tiversa to a law enforcement agency with appropriate investigatory authority to review Tiversa’s conduct in this proceeding.<sup>3</sup> Mr. Wallace’s allegation that he fabricated evidence that Tiversa submitted in this proceeding raises significant questions. Respondent’s Motion, however, suggests that Complaint Counsel accedes to the proposed order language, which sets forth specific theories of criminal liability. This does not accurately represent Complaint Counsel’s position.

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<sup>2</sup> On June 23, 2015, at the request of Respondent’s counsel, Complaint Counsel, Laura Riposo VanDruff, participated in a teleconference with Respondent’s counsel, Reed Rubinstein, to discuss Complaint Counsel’s anticipated response to Respondent’s Motion. Ms. VanDruff advised Mr. Rubinstein that Complaint Counsel’s anticipated response would state accurately Complaint Counsel’s position on the Motion and address several errors of law and fact. Mr. Rubinstein offered to refile Respondent’s Motion to state more precisely Complaint Counsel’s position. Ms. VanDruff indicated that there would nonetheless remain issues of law and fact that Complaint Counsel would address in its response.

Complaint Counsel did not communicate with counsel for Tiversa before Tiversa filed its June 24, 2015 Response to the instant Motion. After Tiversa’s filing, Complaint Counsel requested that Tiversa resubmit its filing to redact certain information. Email from L. VanDruff to J. Shaw (June 24, 2015) (attached as **Exhibit C**). Complaint Counsel copied Respondent’s counsel on its June 24, 2105 email.

<sup>3</sup> Complaint Counsel does not take a position regarding whether law enforcement should investigate Tiversa’s conduct outside of this proceeding.

Complaint Counsel regards the determination of potential criminal liability to be exclusively within the province of a proper investigative authority, not the parties or the Court. The Court need not reach Respondent's specific theories of criminal liability to determine whether referral is appropriate. For example, the Court does not need to decide whether Tiversa's conduct in this proceeding violated the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C § 1030. Resp't Mot. ¶¶ 17, 22.<sup>4</sup> Such a determination would require weighing the case law applying CFAA to P2P file sharing. Those opinions have held consistently that accessing P2P files designated for sharing does not constitute accessing a computer "without authorization." *See, e.g., Motown Record Co. L.P. v. Kovalcik*, 2009 WL 455137, at \*3 (E.D. Pa. 2009); *Loud Records LLC v. Minervini*, 621 F. Supp. 2d 672, 678 (W.D. Wis. 2009).

The evidentiary record before the Court provides sufficient information from which the Court may decide whether a referral is appropriate. However, determinations regarding criminal liability should be deferred to a law enforcement agency with appropriate investigatory authority.

## II. RESPONDENT MISCHARACTERIZES THE RECORD

Respondent's Motion draws factual conclusions that are not supported by the record.<sup>5</sup> For example, Respondent cites to Mr. Boback's November 21, 2013 and June 7, 2014 depositions (CX0703 and RX541, respectively) for the contention that Mr. Boback "knowingly and willfully testified falsely in this proceeding regarding . . . whether Tiversa spoke with Commission staff specifically about LabMD." Resp't Mot. ¶ 10(e). This assertion is not

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<sup>4</sup> Complaint Counsel does not concede that Respondent's alternative theories of criminal liability are correct as a matter of law or fact.

<sup>5</sup> Complaint Counsel acknowledges that Tiversa did not produce to Complaint Counsel the two 2012 emails it submitted with its October 14, 2014 Notice of Information, which the parties received on October 28, 2014. *See* Resp't Mot. ¶ 14. Complaint Counsel does not otherwise concede that the statements alleged as facts in Respondent's Motion are correct.

supported by the cited record. Instead, the testimony to which Respondent directs the Court’s attention reveals that Mr. Boback testified *consistently* that he did not have a specific recollection of discussing LabMD at a meeting with FTC staff in Washington, DC. *Compare* CX0703 at 141-42 (stating that LabMD “may have been” discussed in a meeting in DC, “but only in the context of multiple organizations”) *with* RX541 at 61-62 (stating that he “d[id] n[o]t believe [LabMD] was” discussed at a meeting with Commission staff in DC but acknowledged that “it may have been” because Tiversa and Commission staff discussed a spreadsheet regarding multiple companies). Respondent’s citations to this evidence, which contradict its assertion that Mr. Boback testified falsely regarding interactions with Commission staff, illustrate Respondent’s mischaracterizations of the record.

### III. RESPONDENT’S ASSERTIONS RELY ON EXTRAJUDICIAL CONCLUSIONS

Respondent’s Motion also relies on conclusions that third parties, unrelated to this proceeding, reached separately from the evidentiary record in this matter. For example, Respondent cites to documents created by or for Representative Darrell Issa for the truth of the matters asserted therein. *See* Resp’t Mot. ¶¶ 1, 6, 8-9, 13 (citing to RX543, Representative Issa’s December 1, 2014 letter to Chairwoman Ramirez, and to proposed RX644, a staff report prepared for Representative Darrell Issa).<sup>6</sup> This Court should not rely on the conclusions

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<sup>6</sup> Respondent’s Motion also apparently seeks to admit Motion Exhibit 6 as part of proposed RX630. Resp’t Mot. ¶ 9 n.1. The Court should deny this out-of-time request. In addition to the arguments set forth in Complaint Counsel’s Opposition to Respondent’s Motion to Admit Select Exhibits at 12-13 (June 24, 2015), Respondent has provided no foundation for its assertion that proposed RX630 is “a business record of Tiversa.” Resp’t Mot. ¶ 9 n.1. In addition, even if part of the proposed exhibit reflects the “present sense impression of Boback” (*id.*)—which it does not—that argument does not support admission of the entire proposed RX630, which is an 18-page document. Proposed RX630 is unreliable hearsay, contains hearsay within hearsay, and does not fall within any exception to the rule against hearsay. *See* Fed. R. Evid. 801-803; 16 C.F.R. § 3.43(b).

reached or information contained within those documents in any referral it may make because the documents contain third parties' subjective conclusions and hearsay statements, not facts developed in this proceeding.

**CONCLUSION**

If the Court determines that it should refer Tiversa to a law enforcement agency with appropriate investigatory authority to investigate Tiversa's conduct in this proceeding, Complaint Counsel respectfully requests that Complaint Counsel's position be reflected in any such referral.

Dated: July 1, 2015

Respectfully submitted,



---

Laura Riposo VanDruff  
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*Complaint Counsel*

## CERTIFICATE OF SERVICE

I hereby certify that on July 1, 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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Prashant K. Khetan  
Erica Marshall  
Cause of Action  
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patrick.massari@causeofaction.org  
prashant.khetan@causeofaction.org  
erica.marshall@causeofaction.org

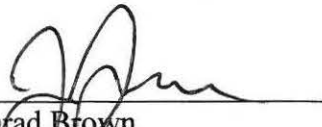
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sunni.harris@dinsmore.com  
*Counsel for Respondent LabMD, Inc.*

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

July 1, 2015

By:

  
Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection



# Exhibit A

## VanDruff, Laura Riposo

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**From:** VanDruff, Laura Riposo  
**Sent:** Tuesday, May 26, 2015 3:29 PM  
**To:** 'Prashant Khetan'; Brown, Jarad  
**Cc:** Reed Rubinstein; Sherman, William  
**Subject:** RE: LabMD - Draft 18 USC 1505 Mtn Referral

Good afternoon, Prashant.

I am writing in response to your email before the Memorial Day weekend regarding Respondent's proposed motion to the Chief Administrative Law Judge Chappell requesting that the Court refer Tiversa and Mr. Boback to the Department of Justice and/or the United States Attorney for the District of Columbia.

As demonstrated by our conduct in this proceeding, Complaint Counsel is committed to preserving and promoting the integrity of the Commission's adjudicative proceedings. To this end, Complaint Counsel does not oppose the principal relief sought in Respondent's proposed motion: an investigation of Tiversa and Mr. Boback's conduct in this proceeding by an independent, impartial entity.

However, Respondent's draft motion contains legal conclusions that are irrelevant to the relief requested, draws factual conclusions that are not supported by the record, and relies upon multiple levels of inadmissible hearsay. Accordingly, Complaint Counsel is not joining Respondent's Motion.

Best regards,

Laura

-----Original Message-----

From: Prashant Khetan [<mailto:prashant.khetan@causeofaction.org>]  
Sent: Thursday, May 21, 2015 9:58 PM  
To: VanDruff, Laura Riposo; Brown, Jarad  
Cc: Reed Rubinstein; Sherman, William  
Subject: LabMD - Draft 18 USC 1505 Mtn Referral

Laura and Jarad,

Per our call earlier today, attached please find a draft Motion to Refer Tiversa and Boback to DOJ for Investigation. As we indicated, we believe that Tiversa's actions in connection with this case present a prime example of obstruction as described in the statute. We know that FTC is interested in protecting the integrity of the process and, therefore, look forward to your response in joining in this motion. Please let us know of your intentions at your earliest convenience, but by midday Tuesday, May 26.

Thanks.

Prashant

Prashant K. Khetan | Chief Counsel | Cause of Action  
1919 Pennsylvania Avenue, NW, Suite 650

Washington, D.C. 20006  
Direct Dial: (202) 350-4944  
Facsimile: (202) 330-5842  
Cell: (301) 325-7639  
Email: [prashant.khetan@causeofaction.org](mailto:prashant.khetan@causeofaction.org)

Confidentiality: The information contained in, and attached to, this communication may be confidential, and is intended only for the use of the recipient named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication, or any of its contents, is strictly prohibited. If you have received this communication in error, please re-send this communication to the sender and delete the original message and any copy of it from your computer system. Thank you.

# Exhibit B

## VanDruff, Laura Riposo

---

**From:** VanDruff, Laura Riposo  
**Sent:** Tuesday, June 16, 2015 10:58 AM  
**To:** 'Prashant Khetan'; Brown, Jarad  
**Cc:** Sherman, William; Reed Rubinstein  
**Subject:** RE: LabMD - Mtn Referral

Good morning, Prashant.

Thank you for sharing your revised draft motion.

As we communicated earlier this month, Complaint Counsel does not oppose the relief sought of an investigation of Tiversa and Mr. Boback's conduct in this proceeding by an independent, impartial entity. However, we do not accede to the revised proposed order language, which specifies potential theories of criminal liability. Nor do we assent to the factual recitations or legal arguments set forth in the draft brief.

We request that any contrary representations regarding Complaint Counsel's position be corrected.

Best regards,

Laura

-----Original Message-----

From: Prashant Khetan [<mailto:prashant.khetan@causeofaction.org>]  
Sent: Monday, June 15, 2015 4:26 PM  
To: VanDruff, Laura Riposo; Brown, Jarad  
Cc: Sherman, William; Reed Rubinstein  
Subject: LabMD - Mtn Referral

Laura and Jarad,

You will recall that you previously refused to join in the motion to refer Tiversa/Boback for investigation, but did not oppose the relief sought. We intend to file the motion this week, but wanted to provide you with a revised motion (which contains much of the same factual history, but includes additional legal provisions) in case Complaint Counsel has reconsidered and would file the motion. Please let us know by tomorrow at 1 p.m.

Thanks.

Prashant

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# Exhibit C

## VanDruff, Laura Riposo

---

**From:** VanDruff, Laura Riposo  
**Sent:** Wednesday, June 24, 2015 12:00 PM  
**To:** Jarrod D. Shaw (jshaw@reedsmith.com)  
**Cc:** William A. Sherman II (william.sherman@dinsmore.com); Reed Rubinstein (reed.rubinstein@causeofaction.org); prashant.khetan@causeofaction.org; patrick.massari@causeofaction.org; erica.marshall@causeofaction.org; Sheer, Alain; Brown, Jarad  
**Subject:** FTC Docket No. 9357 -- redaction of attorney name

Good morning, Mr. Shaw. I am writing in regard to your filing from yesterday afternoon on behalf of Tiversa Holding Corp., Tiversa Inc., and Robert Boback (collectively "Tiversa").

In Tiversa's brief, you refer to purported 2013 conversations between an FTC attorney and Mr. Wallace. When he testified in this proceeding, Mr. Wallace did not testify about any such alleged conversations.

Following the convention of the Court's October 9, 2014 Order, Tiversa's brief does not identify the FTC attorney by name. However, you attach as Exhibit B excerpts from Mr. Boback's June 7, 2014 deposition, in which counsel for Respondent and Mr. Boback identify the FTC attorney.

We respectfully request that you withdraw Tiversa's June 23, 2015 brief and resubmit it, redacting the FTC attorney's name from Exhibit B. It is unnecessary for the FTC attorney to be identified in your filing, particularly because Mr. Wallace provided no testimony regarding any 2013 communications with the FTC attorney.

Best regards,

Laura Riposo VanDruff  
Complaint Counsel

**From:** [jshaw@reedsmith.com](mailto:jshaw@reedsmith.com) [<mailto:jshaw@reedsmith.com>]  
**Sent:** Tuesday, June 23, 2015 5:05 PM  
**To:** Krebs, John; McCoy Hunter, Crystal; Brown, Jarad; [sunni.harris@dinsmore.com](mailto:sunni.harris@dinsmore.com); [daniel.epstein@causeofaction.org](mailto:daniel.epstein@causeofaction.org); [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org); [prashant.khetan@causeofaction.org](mailto:prashant.khetan@causeofaction.org); Sheer, Alain; VanDruff, Laura Riposo; Cox, Megan; Mehm, Ryan; [erica.marshall@causeofaction.org](mailto:erica.marshall@causeofaction.org); [kathleen.campanaro@bryancave.com](mailto:kathleen.campanaro@bryancave.com); [catherine.chae@causeofaction.org](mailto:catherine.chae@causeofaction.org); Tabor, April; Clark, Donald S.; Frankle, Janice Podoll; Mack, Julie; Gross, Dana; Pelzer, Lynnette  
**Subject:** View your Courtesy Copy for the LabMD, Inc. on FTC E-Filing - PRODUCTION

## Notice of Electronic Filing

A filing under Docket Number: D09357 Matter Name: LabMD, Inc. has been made by Jarrod Shaw from Reed Smith on 06/23/2015 at 05:04 PM,

You can access your courtesy copy of the Motions, Briefs, and Proposed Findings [Part 3], Motion of Non-Parties Tiversa Holding Corp., Tiversa, Inc. and Robert J. Boback for Leave to File a Response to LabMD, INC's Motion to Refer Tiversa For Investigation Regarding Potential Criminal Violations, with your E-Filing



credentials here:

<https://ftcefile.gov:443/ShowDoc.aspx?fef='16XtfhupzGE/ZJOXJIXCmCv5N6UXwRLkg5vgLMqUn9o='>

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Federal Trade Commission  
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D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
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**The following people have been sent a courtesy copy by other means, as provided in 4.4(b):**

No attorneys have been served by other means

**Notification of this filing's submission to the E-Filing system has been sent to the following e-mail addresses:**

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