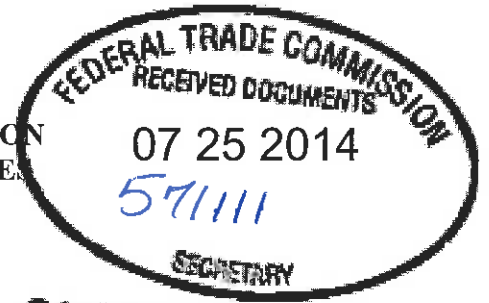


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGE



In the Matter of)

) PUBLIC

) LabMD, Inc.,
) a corporation,
) Respondent.
)
)
)

) Docket No. 9357

ORIGINAL

**RESPONDENT LABMD, INC'S OPPOSITION TO
MOTION FOR LEAVE
TO ISSUE SUBPOENAS FOR REBUTTAL EVIDENCE**

In a last-ditch effort to salvage its case, *and* in the middle of a stay during the trial of this unfounded enforcement action, *and* in the face of a potential FTC Inspector General review, *and* in the midst of an unprecedented Congressional investigation of FTC, Complaint Counsel has filed a motion seeking leave for additional discovery (the "Motion") to gather evidence to rebut the anticipated testimony of Richard Wallace, a former employee of Tiversa Inc. ("Tiversa"). There is no "good cause" for this Motion. To the contrary, Complaint Counsel had years to investigate its claims against LabMD, Inc. ("LabMD") and independently verify the origin of and chain of custody for the 1718 File (the evidence on which FTC based its investigation and prosecution of this case), but failed to do so. The Court previously has ruled on, and denied, Complaint Counsel's demand for additional discovery during trial. Discovery has closed, deadlines have long passed, [REDACTED]

[REDACTED] Not only should the Motion be denied, but this action should be dismissed and LabMD awarded reasonable attorneys' fees and costs.

BACKGROUND

In 2009, Tiversa made a deal with FTC under which Complaint Counsel sent a civil investigative demand to the Privacy Institute, Tiversa's shell corporation, and Tiversa provided FTC with the 1718 File. *See* Boback Dep. (CX0703), at 142-43 (Nov. 21, 2013); Boback Dep. (RX541), at 32:2-37:6 (June 7, 2014). At all times relevant, Complaint Counsel knew or should have known that Tiversa had a direct financial interest in FTC's enforcement actions against LabMD and other similarly situated companies. Complaint Counsel also knew, or should have known, that if Tiversa had taken the 1718 File from a LabMD workstation, then Tiversa had committed a crime. Tiversa, not its victims, ought to have been targeted for enforcement action.

Yet the record proves Complaint Counsel did nothing to corroborate Tiversa's self-interested accusations or to establish a chain of custody for the 1718 File. Instead, Complaint Counsel used the 1718 File to launch a multi-year investigation of LabMD, and then premised its litigation (including all of its expert reports) on Tiversa's unverified claim that it "found" the 1718 File on multiple IP addresses accessible through a P2P network.

LabMD has argued for years that Tiversa stole the 1718 File from its workstation in violation of Georgia law, and that nobody other than Tiversa and Complaint Counsel has ever possessed the stolen file. *See, e.g.*, Initial Pretrial Conference Transcript (the "Pretrial Conference"), at 27-30 (Sept. 25, 2013). The only document "proving" that the 1718 File was found somewhere other than a LabMD workstation is CX0019, a one-page document containing nothing but four typed IP addresses created by Mr. Wallace in or about October 2013, just before Mr. Boback's initial deposition. *See* Boback Dep. (RX541), at 22:10-23:5 (June 7, 2014).¹

¹ Tiversa provided only one copy of the 1718 File to FTC through the Privacy Institute in 2009, yet unveiled three new copies during discovery. *Compare* CX0008, with CX0009, CX0010 and CX0011. *See* Boback Dep. (CX0703), at 50:5-22 (Nov. 21, 2013). In addition, the documents

Moreover, LabMD has argued from the outset that FTC never investigated how Tiversa obtained the file, despite knowing that Tiversa had a commercial incentive to prompt this enforcement action. *See* Rosch Dissent, Petition of LabMD to Quash CIDs, FTC File No. 1023099 (June 21, 2012); *see also* Jaikumar Vijayan, “FTC seeks extensive information from firms being investigated for P2P breaches,” *Computer World* (Feb. 26, 2012). The Motion confirms this to be true – Complaint Counsel filed the Motion to finally gather information regarding “how, when, and where Tiversa found the 1718 File on P2P networks.” *See* Mot. at 4.² Complaint Counsel’s attempt to simply overwrite unfavorable testimony – [REDACTED] – must be denied.

Tiversa provided via the Privacy Institute looked very different than those produced during discovery. *Compare* CX0307 (Privacy Institute spreadsheet), *with* CX0020 (identifying alleged locations for 1718 File). Despite these warning signs, Complaint Counsel never bothered to check or confirm Tiversa’s claims.

² During its case-in-chief, Complaint Counsel used Mr. Boback’s testimony that the 1718 File was “found” at the IP addresses on CX0019 as the lynch-pin of its case and as the basis for its expert reports. *See, e.g.*, Expert Report of Raquel Hill (CX0740), at 1, 15; Expert Report of James Van Dyke (CX0741), at 2, 4, 7, 8; Expert Report of Rick Kam (CX0742), at 6, 9, 18,19; Rebuttal Expert Report of Clay Shields (CX0738), at 3, 25. Mr. Boback’s story, however, fell apart. He contradicted himself and gave testimony that was, according to the House Oversight Committee, false and unreliable. *See* LabMD Motion to Admit RX542, Ex. 1 (Proposed exhibit RX542, Letter from Chairman Issa, House Committee on Oversight and Government Reform, to FTC Chairwoman Edith Ramirez); LabMD Motion to Admit RX542, at 3 n.4 (June 16, 2014) (comparing Mr. Boback’s testimony at his November 2013 deposition with his trial testimony, also via deposition, in June 2014). Boback’s credibility is the lynch-pin of the government’s case and so, perhaps, it is possible to understand the desperation reflected in the Motion. However, given that Complaint Counsel’s strong duty as government attorneys is to seek the truth, *see* 16 CFR § 2635.101(a)(1) (2014), this desperation is misplaced. FTC, by rights, ought to be focused on determining how and why a massive, taxpayer-funded investigation that destroyed an innovative cancer lab was launched without even the most basic of internal controls (*i.e.*, a documented chain of custody for the 1718 File demonstrating that it was not stolen from LabMD), and not on smearing the reputation of Mr. Wallace, a former Tiversa employee who has yet to testify in this case.

Argument

This Court should deny the Motion, which seeks “rebuttal” discovery of a witness that has not testified, during a stay, in the middle of trial, for the following reasons:

First, the time for discovery in this case is over. The time for fact-witness depositions ended more than four months ago, on March 5, 2014. *See* Revised Scheduling Order, at 1 (Oct. 22, 2013). Complaint Counsel rested on May 23, 2014. Trial Tr., at 806:6 (May 23, 2014). Even so, FTC seeks a third round of depositions about the 1718 File, the very foundation of its investigation and case against LabMD. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Complaint Counsel still has no basis to circumvent the Scheduling Order; thus, its latest effort to re-open discovery also must be denied.

Second, nothing in the Scheduling Order (or FTC’s Rules of Practice) authorizes “rebuttal” discovery.³ Rule 3.41(b)(1) would apply only if the Court had “deferred [discovery] during the prehearing procedure,” which it did not. Rule 3.21(c)(2) governs prehearing procedures.⁴ Ignoring this, Complaint Counsel cites the “good cause” requirement in Rule 3.21(c)(2), but fails to address most of the factors. Nor is there any authority for the attempt to

³ Moreover, Complaint Counsel seeks evidence in “rebuttal” of a witness who has not yet testified. Mr. Wallace has taken the stand, but asserted his Fifth Amendment rights in response to any substantive questions. In any event, the Motion fails to show how deposing Mr. Tagliaferi regarding a search Tiversa may have conducted *after* the close of discovery in 2014 could “rebut” any testimony Mr. Wallace *may* give about the search he conducted in 2013.

⁴ Rule 3.21(c), entitled “Prehearing scheduling order[.]” applies to extending deadlines in the prehearing scheduling order, not constructing a new discovery period during the middle of trial.

seek such relief during a stay of the proceedings. In other words, there is no legal basis – even that cited in the Motion – that supports the relief sought here.⁵

Third, Complaint Counsel’s assertion that it was not on notice to seek discovery related to Mr. Wallace’s testimony regarding the 1718 File is belied by the record. *See In re McWane, Inc.*, No. 9351, 2012 FTC LEXIS 151, at *8-12, *14 (F.T.C. Sept. 7, 2012) (denying a motion for further discovery claiming lack of notice, where the supposedly unexpected evidence was encompassed by the claims in the case and, moreover, the parties had taken partial discovery on the issue). In 2013, Mr. Wallace was identified by *FTC* as an individual likely to have discoverable information in this case. *See* Complaint Counsel’s Initial Disclosures, Appendix A, at 5 (Sept. 24, 2013). During the first deposition taken in the case, Mr. Boback testified that while working for Tiversa, Mr. Wallace found the 1718 File outside of LabMD. *See* Boback Dep. (CX0703), at 72-74, 85, 123 (Nov. 21, 2013). On January 30, 2013, LabMD subpoenaed Mr. Wallace, and vigorously pursued the chance to depose him before the close of discovery in March 2014. *See* Mot., Ex. B (emails regarding efforts to take deposition of Mr. Wallace).⁶ Complaint Counsel knew that Mr. Wallace would be an important witness and, moreover, was aware of LabMD’s theory of defense – [REDACTED] [REDACTED] Indeed, LabMD has maintained the same theory for its defense since the inception of this case – [REDACTED]

⁵ By FTC’s theory, LabMD should be entitled to full additional discovery of Tiversa and of the key players within FTC, including Alain Sheer and Ruth Yodaiken, and to explore the full nature and extent of FTC’s relationship with Tiversa, including all communications between them, up to and including any communications concerning the instant Motion and the House Oversight investigation.

⁶ Although after the close of discovery, but months before trial began, LabMD listed Mr. Wallace as a proposed trial witness on the topics of the 1718 File, Tiversa’s operations on P2P networks and Tiversa’s communications with FTC. Respondent’s Supplemental Preliminary Witness List, at 1 (Mar. 5, 2014); Respondent’s Final Proposed Witness List, at 4-5 (Apr. 9, 2014).

[REDACTED]

[REDACTED] Complaint Counsel’s assertion that it recently “learned of this anticipated testimony” is a bald misrepresentation to this Court.

Finally, any such discovery is “unreasonably . . . duplicative” of prior discovery. *See* 16 C.F.R. § 3.31(c)(2). *Compare* FTC Subpoena *Duces Tecum* to Tiversa dated Oct. 30, 2013, Topics 6, 7, and 9 (Exhibit 1) (seeking documents to show “the time, date, Internet Protocol address, and network from which the Company obtained the 1,718 File,” and “how many times the 1,718 File has been shared . . . including the time, date, Internet Protocol address, and networks on which it was shared”), *with* Mot., Ex. E Topics 1 and 2 (proposed subpoenas seeking “documents that relate to the times, dates, Internet Protocol addresses, geographic locations, and networks on or at which [and “on or from which”] the Company located the 1718 File”); *compare* Boback Dep. (CX0703), at 17:2-18:23, 23:16-75:8, 81:7-85:4, 95:10-120:1 134:3-143:23, 164:11-165:17 (Nov. 21, 2013) (questioning regarding Tiversa’s procurement and retention of the 1718 File), *with* Mot., Ex. E (proposed subpoenas seeking “documents that relate to how the Company obtained and maintained the 1718 File”).

The Government is not entitled to re-open discovery during trial for a “do-over” of testimony it does not like. [REDACTED]

[REDACTED]

[REDACTED]



CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Court deny the Motion.

Dated: July 25, 2014

Respectfully submitted,

/s/ Reed D. Rubinstein
Reed D. Rubinstein
William A. Sherman, II
Sunni R. Harris
Dinsmore & Shohl, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20006
Telephone: 202.372.9120
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/s/ Daniel Z. Epstein
Daniel Z. Epstein
Robyn N. Burrows
Kent G. Huntington
Patrick Massari
Hallee K. Morgan
Michael D. Pepson
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.499.4232
Fax: 202.330.5842

Counsel for Respondent, LabMD

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

Alain Sheer, Esq.
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Mail Stop NJ-8122
Washington, D.C. 20580

Dated: July 25, 2014

By: /s/ Hallee K. Morgan

CERTIFICATE OF ELECTRONIC FILING

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

Dated: July 25, 2014

By: /s/ Hallee K. Morgan

EXHIBIT 1



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

PUBLIC

Bureau of Consumer Protection
Division of Privacy and Identity Protection

September 30, 2013

VIA FEDERAL EXPRESS

Tiversa Holding Corporation
606 Liberty Avenue
Pittsburgh, PA 15222

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

To Whom it May Concern:

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

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

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

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

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

I would be pleased to discuss the scheduling of your deposition and any issues regarding production of documents at your earliest convenience. You may reach me at (202) 326-2999.

Sincerely,

A handwritten signature in black ink, appearing to read 'LRV', with a long horizontal stroke extending to the right.

Laura Riposo VanDruff

Enclosures (2)

cc: Michael Pepson (*via email*)
Reed Rubinstein (*via email*)
Eric Kline (*via email*)



SUBPOENA AD TESTIFICANDUM PUBLIC DEPOSITION

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

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

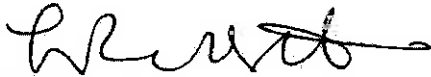
This subpoena requires you to appear and give testimony at the taking of a deposition, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF DEPOSITION</p> <p>Tiversa Holding Corp. 606 Liberty Avenue Pittsburgh, PA 15222</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Laura Riposo VanDruff or other designated counsel</p> <hr/> <p>5. DATE AND TIME OF DEPOSITION</p> <p>November 6, 2013</p>
--	---

6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc., Docket 9357

<p>7. ADMINISTRATIVE LAW JUDGE</p> <p>Chief Judge D. Michael Chappell</p> <p>Federal Trade Commission Washington, D C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Laura Riposo VanDruff, Complaint Counsel Federal Trade Commission 601 New Jersey Ave, NW, Room-8100 Washington, DC 20001 (202) 326-2999</p>
--	---

<p>DATE SIGNED</p> <p>7/30/13</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
-----------------------------------	--

GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

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

RETURN OF SERVICE

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

in person.

by registered mail.

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

Tiversa Holding Corporation
606 Liberty Avenue
Pittsburgh, PA 15222
via FedEx Air delivery on 10/1/13

on the person named herein on:

October 1, 2013

(Month, day, and year)

Laura Riposo VanDuff

(Name of person making service)

General Attorney

(Official title)

7. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
8. The term “**Person**” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.
9. “**Personal Information**” means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
10. The terms “**Relate**” or “**Relating to**” mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
11. “**Subpoena**” means the Subpoena to Tiversa Holding Coporation, including this Notice, and including the Definitions, Instructions, and Specifications.
12. “**You**” or “**Your**” means Tiversa Holding Corporation, or the “Company.”
13. “**1,718 File**” means the 1,718 page file the Company found on a peer-to-peer network in 2008 and identified as having been created and stored on a LabMD computer
14. The use of the singular includes the plural, and the plural includes the singular.
15. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

DEPOSITION TOPICS

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

1. The authenticity and admissibility under the provisions of Rule 3.43 of the Federal Trade Commission’s Rules of Practice, 16 C.F.R. § 3.43, of the 1,718 File.
2. The means by which Tiversa identified, accessed, and obtained a copy of the 1,718 File.

3. The time, date, Internet Protocol address, and network from which Tiversa downloaded the 1,718 File, including Tiversa's bases for this knowledge.
4. Whether the 1,718 File has been shared on peer-to-peer networks between June 2007 and the present, including the time, date, Internet Protocol address, and networks on which it was shared, including Tiversa's bases for this knowledge.
5. Whether LabMD files other than the 1,718 File that were available on peer-to-peer networks since January 2005, including Tiversa's bases for this knowledge.
6. Information on which the following statement, published by Trib Total Media on March 23, 2013 and written by Andrew Conte, was based: "Tiversa's searches of open file-sharing accounts found...[m]edical information on nearly 9,000 patients, including names, Social Security numbers, insurance numbers and home addresses," as written in the article "Unintentional File-sharing a Boon for Hackers."
7. Tiversa's Communications with LabMD, including proposed contracts for services.
8. The operation of peer-to-peer file sharing applications, including Limewire.
9. The risk of inadvertent file sharing using peer-to-peer applications, including Limewire.

September 30, 2013

By:



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

Complaint Counsel
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania, Ave, NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2999 (VanDruff)
Facsimile: (202) 326-3062
Electronic mail: lvandruff@gmail.com

CERTIFICATE OF SERVICE

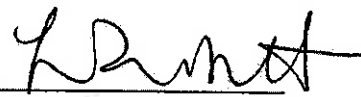
This is to certify that on September 30, 2013, I served *via* electronic mail delivery a copy of the foregoing document to:

Michael D. Pepson
Regulatory Counsel
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
michael.pepson@causeofaction.org

Reed Rubinstein
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW
Suite 610
Washington, D.C. 20004
reed.rubinstein@dinsmore.com

Counsel for Respondent LabMD, Inc.

September 30, 2013

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



SUBPOENA DUCES TECUM

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

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

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

<p>3. PLACE OF PRODUCTION</p> <p>Matthew Smith Federal Trade Commission 601 New Jersey Avenue, N.W. Room NJ-8100 Washington, D.C. 20001</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>Matthew Smith</p> <hr/> <p>5. DATE AND TIME OF PRODUCTION</p> <p>October 30, 2013</p>
---	---

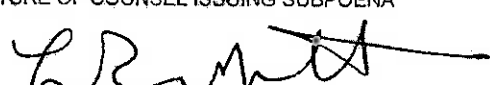
6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc., Docket 9357

7. MATERIAL TO BE PRODUCED

See attached Schedule and Exhibits, including the Protective Order Governing Discovery Material.

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>Chief Judge D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Laura Riposo VanDruff, Complaint Counsel Federal Trade Commission 601 New Jersey Ave, NW, Room-8100 Washington, DC 20001 (202) 326-2999</p>
--	---

<p>DATE SIGNED</p> <p>9/30/13</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
-----------------------------------	---

GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

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

RETURN OF SERVICE

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

- in person.
- by registered mail.
- by leaving copy at principal office or place of business, to wit:

TNessa Holdings Corporation
606 Liberty Avenue
Pittsburgh, PA 15222
via FedEx Air delivery on 10/1/13

on the person named herein on:

October 1, 2013

(Month, day, and year)

Laura Riposo Vanduff

(Name of person making service)

General Attorney

(Official title)

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**COMPLAINT COUNSEL’S SCHEDULE FOR
PRODUCTION OF DOCUMENTS PURSUANT TO SUBPOENA TO
TIVERSA HOLDING CORPORATION**

Pursuant to Complaint Counsel’s attached Subpoena Duces Tecum issued September 30, 2013, under Commission Rule of Practice § 3.34(b), Complaint Counsel requests that the following material be produced to the Federal Trade Commission, 601 New Jersey Avenue, N.W., 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 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. The term **“Communication”** includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
3. **“Company”** shall mean Tiversa Holding Corporation (“Tiversa”), its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.
4. **“Complaint”** means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.

5. The term “**Containing**” means containing, describing, or interpreting in whole or in part.
6. “**Document**” means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book or label. “**Document**” shall also include electronically stored information (“**ESI**”). ESI means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.
7. The term “**Documents Sufficient to Show**” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
8. The terms “**each**,” “**any**,” and “**all**” shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope.
9. “**Includes**” or “**including**” means “including, but not limited to,” so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
10. “**LabMD**” means LabMD, Inc., the named defendant in the above-captioned matter, and its directors, officers, and employees.
11. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
12. The term “**Person**” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.

13. **“Personal Information”** means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
14. The terms **“Relate”** or **“Relating to”** mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
15. **“Subpoena”** means the Subpoena to Tiversa Holding Corporation, including this Schedule and Exhibits, and including the Definitions, Instructions, and Specifications.
16. **“You”** or **“Your”** means Tiversa Holding Corporation, or the “Company.”
17. **“1,718 File”** means the 1,718 page file the Company found on a peer-to-peer network in 2008 and identified as having been created and stored on a LabMD computer
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 document request shall be limited to the period from **January 1, 2008 to present**.
2. **Petitions to Limit or Quash:** Pursuant to Commission Rule of Practice § 3.34(c), any motion to limit or quash this subpoena must be filed within ten days of service thereof.
3. **Protective Order:** On August 29, 2013, the Court entered a Protective Order governing discovery material in this matter. A copy of the protective order is enclosed as Exhibit A, with instructions on the handling of confidential information.
4. **Document Identification:** Documents that may be responsive to more than one specification of this Subpoena need not be submitted more than once; however, the Company’s response should indicate, for each document submitted, each specification to which the document is responsive. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or

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

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

9. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish the admissibility of documents produced in response to this subpoena. You are asked to execute this Certification and provide it with your response.
10. **Continuing Nature of Requests:** This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by you prior to the close of discovery, which is February 12, 2014.
11. **Document Retention:** The Company shall retain all documentary materials used in the preparation of responses to the specifications of this Subpoena. We may require the submission of additional documents at a later time. Accordingly, the Company should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this litigation during its pendency, irrespective of whether the Company believes such documents are protected from discovery by privilege or otherwise.
12. **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 Commission 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); and
 - (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; and
 - (d) **For imaged hard-copy documents:** begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.
- (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 Commission counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to this Subpoena.
- (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; and

- (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

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

- (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 Commission 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 Commission counsel named above will provide a sample index upon request.

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

- 13. **Documents No Longer In Existence:** If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of the Company's document retention policy but you have reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
- 14. **Incomplete Records:** If the Company is unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by the Company to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for the Company to make an estimate, provide an explanation.

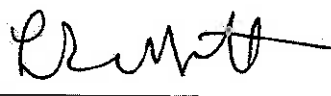
15. **Questions:** Any questions you have relating to the scope or meaning of anything in this request or suggestions for possible modifications thereto should be directed to Laura VanDruff, at (202) 326-2999, or Megan Cox, at (202) 326-2282. Documents responsive to the request shall be addressed to the attention of Matthew Smith, Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, D.C. 20001, and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission.

SPECIFICATIONS

Demand is hereby made for the following documents:

1. All Communications between the Company and LabMD.
2. All proposed contracts for services the Company provided to LabMD.
3. All Communications between the Company and Michael Daugherty or John Boyle.
4. All Documents related to LabMD.
5. The 1,718 File.
6. Documents Sufficient to Show the time, date, Internet Protocol address, and network from which the Company obtained the 1,718 File.
7. Documents Sufficient to Show how many times the 1,718 File has been shared on peer-to-peer networks between June 2007 and the present, including the time, date, Internet Protocol address, and networks on which it was shared.
8. Document Sufficient to show LabMD files other than the 1,718 File that were available on peer-to-peer networks since January 2005.
9. Documents Sufficient to Show the source for the statement: "Tiversa's searches of open file-sharing accounts found...[m]edical information on nearly 9,000 patients, including names, Social Security numbers, insurance numbers and home addresses," as written in the article "Unintentional File-sharing a Boon for Hackers," published by Trib Total Media on March 23, 2013, and written by Andrew Conte.

September 30, 2013

By: 

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

Complaint Counsel
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania, Ave, NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2999 (VanDruff)
Facsimile: (202) 326-3062
Electronic mail: lvandruff@gmail.com

CERTIFICATE OF SERVICE

This is to certify that on September 30, 2013, I served *via* electronic mail delivery a copy of the foregoing document to:

Michael D. Pepson
Regulatory Counsel
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
michael.pepson@causeofaction.org

Reed Rubinstein
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW
Suite 610
Washington, D.C. 20004
reed.rubinstein@dinsmore.com

Counsel for Respondent LabMD, Inc.

September 30, 2013

By:

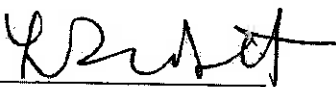

Laura Riposo VanDruff
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

ATTACHMENT A

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

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

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

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

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

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

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

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

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

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

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

Exhibit B

CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY
Pursuant to 28 U.S.C. § 1746

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

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

Executed on _____, 2013.

Signature

Exhibit C

BCP PRODUCTION GUIDE

Bureau of Consumer Protection Production Guide

An eDiscovery Resource

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

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

1. Getting Started: Protocols for All Submissions

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

a. Concordance Version and Load Files

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

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

b. Virus Scanning

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

c. Extracted Text / OCR

Submit text:

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

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

d. Deduplication

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

e. Labeling & Numbering Files

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

Acceptable formats (as long as you are consistent)

- ABC-FTC0000001
- ABCFTC0000001

Unacceptable format

- ABC 0000001

f. Recommended Delimiters

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

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

g. Image Files

BCP only accepts image files that are:

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

h. Date & Time Format

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

2. Preparing Collections**a. Preparing Scanned Documents**

Submit TIFF (or color JPEG) images with OCR text

Metadata & Other Information Requirements

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

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

b. Preparing Email & Attachments

Email: Submit TIFF images with extracted text of email

Attachments:

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

Metadata & Other Information Requirements

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

Metadata for Emails

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

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

Metadata for Attachments

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

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

c. Preparing Native Files

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

Metadata & Other Information Requirements

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

Metadata and other information requirements for native files

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

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

3. Submitting Your Production

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

a. Media BCP Accepts

Submit any of the following:

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

b. Submit a Production Transmittal Letter

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

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