

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



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

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PUBLIC  
Docket No. 9357

**COMPLAINT COUNSEL’S OPPOSITION TO  
RESPONDENT’S RULE 3.43(b) MOTION TO EXCLUDE**

Respondent’s Motion to Exclude, which is actually a motion *in limine*, fails because Respondent has not met its burden of showing that the documents it identifies are clearly inadmissible on all potential grounds.<sup>1</sup> Respondent has failed to demonstrate that the documents’ “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or . . . considerations of undue delay.” Rule 3.43(b). Respondent also fails to explain why three of the documents that are identical to those it previously sought to admit into evidence should now be preemptively excluded. To the extent that Respondent inaccurately suggests Complaint Counsel has not met its discovery obligations, Respondent grossly mischaracterizes the record and ignores its own conduct in this proceeding. Therefore, Respondent’s Motion should be denied.

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<sup>1</sup> See *In re Daniel Chapter One*, 2009 FTC LEXIS 85, at \*18 (Apr. 20, 2009) (“Motion *in limine* refers ‘to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.’”) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Complaint Counsel has not sought to admit any of the documents into evidence, but has taken steps to establish an evidentiary foundation for the documents so as to avoid delay during cross-examination or any permitted rebuttal.

**BACKGROUND**

On September 30, 2013, Complaint Counsel issued subpoenas *ad testificandum* and *duces tecum* to Tiversa Holding Corp. (“Tiversa”). Among other documents, the subpoena *duces tecum* demanded, “[a]ll [d]ocuments related to LabMD.” *See* Subpoenas *Ad Testificandum* and *Duces Tecum* to Tiversa (Sept. 30, 2013) (attached as Ex. A). On November 4, 2013, Tiversa produced documents in response to the subpoena. On November 5, 2013, Complaint Counsel provided Respondent with Tiversa’s production. Nov. 5, 2013 Letter from M. Cox to W. Sherman (attached as Ex. B). On November 13, 2013, Respondent issued subpoenas *ad testificandum* and *duces tecum* to Tiversa. Respondent’s subpoena demanded among other documents, “[a]ll documents referring or relating to LabMD.” *See* Subpoenas *Ad Testificandum* and *Duces Tecum* to Tiversa (Nov. 13, 2013) (attached as Ex. C). On November 21, 2013, the parties deposed Robert Boback, Tiversa’s Chief Executive Officer, as Tiversa’s designee. Upon information and belief, Tiversa never responded to Respondent’s subpoena *duces tecum*. *See* Mar. 12, 2015 Letter from W. Sherman to L. VanDruff (attached as Ex. D).

On June 12, 2014, after Complaint Counsel had rested its case-in-chief, Respondent’s counsel made a proffer of the testimony it anticipated from Richard Wallace regarding the 1718 File if he were to be granted immunity. In light of the allegations in the proffer, on July 8, 2014, Complaint Counsel requested leave of the Court to issue subpoenas *ad testificandum* and *duces tecum* to Tiversa and a subpoena *ad testificandum* to Tiversa employee, Keith Tagliafierri. The requested subpoenas would have required testimony and documents related to, among other things, how, when, and where Tiversa found the 1718 File. *See* Exs. D, E to Complaint Counsel’s Motion for Leave. Respondent opposed the motion stating, “[d]iscovery has closed, deadlines have long passed . . . .” Resp’t Opp. to Motion for Leave at 1. On July 23, 2014, the

Court denied Complaint Counsel's motion, stating in part that, "evidence regarding 'how, when, and where' Tiversa found the 1718 File on P2P networks is part of Complaint Counsel's case-in-chief, which has concluded." Order Denying Motion for Leave at n.1.

On October 28, 2014, Complaint Counsel and Respondent's counsel simultaneously received service copies of Tiversa's "Notice of Information" and its accompanying exhibits, including the documents provisionally marked as CX1007-1009. *See* Oct. 28, 2014 Email from J. Shaw to L. VanDruff and W. Sherman (attached as Ex. E).

On December 1, 2014, Complaint Counsel received a copy of a letter with 26 pages of exhibits, from Representative Darrell Issa, the then-Chairman of the U.S. House of Representatives Committee on Oversight and Government Reform, to FTC Chairwoman Edith Ramirez. The letter relates to Tiversa, and includes a number of exhibits that were ostensibly produced to the Oversight Committee by Tiversa. *See* Resp't LabMD, Inc.'s Motion to Admit RX-543 – RX-548 ("Resp't Motion to Admit"), Exs. 1-6. The exhibits bear the designation "Confidential – For Committee and Staff Use Only." *Id.*, Exs. 2-6. Through the Commission's Office of Congressional Relations, Complaint Counsel requested, and received on December 2, 2014, permission from the Committee to share the letter with the Court and counsel for Tiversa. *See id.*, Ex. 7. On December 2, 2014, Complaint Counsel emailed the letter to the Court, copying counsel for Respondent and Tiversa. *Id.* Complaint Counsel requested provisional *in camera* treatment for the letter and its exhibits to allow Tiversa an opportunity to evaluate whether to seek protection under Rule 3.45 for documents marked confidential. *See id.* Complaint Counsel has never filed and does not intend to file a motion seeking *in camera* treatment for those documents. *See* Feb. 12, 2015 Order on Resp't Motion to Admit at n.2.

On December 23, 2014, Respondent filed a Motion to Admit RX543-RX548. Proposed RX544-546 are *identical* to the documents Complaint Counsel has provisionally marked as CX1015-1017. Respondent sought to admit these documents “for all purposes.” Resp’t Motion to Admit at 2. Complaint Counsel opposed the admission of these three documents because Respondent had not established a proper evidentiary foundation. Complaint Counsel Opp. to Motion to Admit at 6-7. Complaint Counsel stated that it would be possible to establish a proper foundation for RX544-546 with a certification of records satisfying Rule 3.43(c) or testimony from a competent Tiversa witness. *Id.* On February 12, 2015, the Court denied without prejudice Respondent’s motion as it pertained to RX544-546, “unless and until a proper evidentiary foundation is provided.” Order on Resp’t Motion to Admit at 4.

On March 9, 2015, as permitted by the Scheduling Order and in accordance with the Court’s February 12, 2015 Order, Complaint Counsel issued a subpoena *ad testificandum* to Tiversa for a deposition “for purposes of [establishing] authenticity and admissibility” of the six documents provisionally marked as CX1007-1009 and CX1015-1017.<sup>2</sup> Subpoena *Ad Testificandum* to Tiversa (Mar. 9, 2015) (attached as Ex. F); *see* Revised Scheduling Order at 1 (Oct. 22, 2013). Tiversa subsequently agreed to provide a declaration to establish the authenticity and admissibility of the documents, and Complaint Counsel agreed to forgo the deposition and withdrew its subpoena. March 12, 2015 Letter from L. VanDruff to J. Shaw (attached as Ex. G). On March 25, 2015, Respondent filed its Motion preemptively seeking to exclude the documents.

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<sup>2</sup> Complaint Counsel has sought to authenticate only those documents that pre-date the filing of the Complaint in this matter and are most likely to be relevant to Complaint Counsel’s cross-examination of Mr. Wallace or any Court-allowed rebuttal to his testimony.

## ARGUMENT

“Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context.” *In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at \*7-8 (May 6, 2011) (internal citations omitted).

Respondent has not met this high burden. Respondent has failed to show that the documents’ “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or . . . considerations of undue delay.” Rule 3.43(b). Indeed, Respondent recites this standard without any analysis or citations as to how it is met. Instead, Respondent attaches exhibits that do not support the propositions for which they are cited and do nothing to further Respondent’s argument for exclusion. For example, Exhibit 6 to Respondent’s Motion consists of internal Commission emails reciting the logistics of responding to a letter from Representative Issa that, contrary to Respondent’s contention, do not show Commission “bias.”<sup>3</sup> Additionally, given that the documents provisionally marked CX1015-1017 are identical to the documents Respondent sought to admit “for all purposes,” Respondent’s argument that those documents should be preemptively excluded under 3.43(b) strains credulity. Resp’t Motion to Admit at 2.

Therefore, the Court should deny Respondent’s Motion and instead consider admissibility of the documents if Complaint Counsel seeks to admit them into evidence.

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<sup>3</sup> Respondent did not obtain these internal Commission emails through the discovery process in this proceeding. However, since the close of discovery, Cause of Action, which represents Respondent in this matter, has circumvented fact discovery procedures and limits in this proceeding by filing no fewer than ten Freedom of Information Act (FOIA) requests with the Commission. *See* Ex. H. Respondent’s counsel’s FOIA requests seek documents related to this matter that are outside the scope of discovery under the Rules of Practice.

**I. The Documents Are Not Unfairly Prejudicial****A. There is No Credible Risk of the Fact Finder Making a Decision on an Improper Basis**

The potential probative value of the documents Respondent seeks to exclude is not “substantially outweighed by the danger of unfair prejudice.” Rule 3.43(b). The pertinent language of Rule 3.43(b) is virtually identical to Fed. R. Evid. 403. Unfair prejudice under Fed. R. Evid. 403 means “an undue tendency to suggest decision on an improper basis, commonly . . . an emotional one.” *See* Fed. R. Evid. 403 advisory committee’s note; *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (citing to the advisory committee’s definition of unfair prejudice); *see also In re Herbert R. Gibson, Sr.*, 1978 FTC LEXIS 375, at \*2 n.1 (May 3, 1978) (“The Federal Rules of Evidence while not controlling in FTC proceedings frequently provide a useful guide . . .”). As the Court has stated, “the risk of prejudice . . . is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.” Scheduling Order at 6 (Sept. 25, 2013); *see, e.g., United States v. Kienlen*, 349 Fed. Appx. 349, 351 (10th Cir. 2009) (holding that, “excluding evidence in a bench trial under Rule 403’s weighing of probative value against prejudice [is] improper.”) (internal citations omitted) (unpublished opinion). Respondent has offered no evidence that the documents risk causing the fact finder to reach a decision on an improper basis.

**B. Complaint Counsel Has Met Its Discovery Obligations**

To the extent that Respondent is arguing that the parties’ prior lack of knowledge of the existence of the documents creates unfair prejudice, “surprise” is not a ground for exclusion of evidence under the Rule. *See* Fed. R. Evid. 403 advisory committee’s note (stating that, “the granting of a continuance is a more appropriate remedy [for surprise] than exclusion of the evidence.”); *Doe v. Young*, 664 F.3d 727, 735-736 (8th Cir. 2011) (stating that “if any unfair

surprise existed, the proper course . . . was not exclusion but instead something less drastic, such as continuance . . .”).

Further, even if surprise were grounds for finding prejudice, any such prejudice applies equally to both parties. Respondent argues that Complaint Counsel should be barred from potentially using these documents because Complaint Counsel has not filed a motion to compel compliance with its September 2013 subpoena to Tiversa. However, Complaint Counsel and Respondent became aware of the existence of these documents in October 2014 (CX1007-1009) and December 2014 (CX1015-1017). These dates were after the close of discovery, after Complaint Counsel had rested its case-in-chief, and after Respondent had objected to and the Court had denied Complaint Counsel’s request to take additional discovery of Tiversa on the issues to which the documents relate. In contrast, however, Respondent has not rested its defense, has not sought to compel compliance with its subpoena to Tiversa, and has not sought leave to take further discovery related to the documents or any other such documents that may be in Tiversa’s possession.<sup>4</sup> Respondent is no more prejudiced by the timing of Tiversa’s production than Complaint Counsel. Therefore, the Court should not preemptively exclude the documents on the basis of unfair prejudice.

## **II. The Documents Will Not Create Confusion of the Issues**

The potential probative value of the documents is not “substantially outweighed by the danger of . . . confusion of the issues.” Rule 3.43(b). Respondent has offered no explanation of how the documents may confuse the issues in this case. Respondent’s own Motion refers to these documents as “critical” and “key.” Resp’t Motion at 6, 8. Further, Respondent has stated that Mr. Wallace’s expected testimony will relate to how the 1718 File

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<sup>4</sup> If Respondent were to seek such discovery of Tiversa for documents related to LabMD or the 1718 File, Complaint Counsel would not oppose, provided that Complaint Counsel were given a similar opportunity.

was obtained and that his testimony “goes to the heart of this administrative action.” Resp’t Revised Unopposed Motion for an Order Requiring Richard Wallace to Testify at 1. Therefore, documents relating to how, when, and where Tiversa found the 1718 File will not confuse the issues in this case and should not be preemptively excluded on that basis.

### **III. The Documents at Issue Will Not Result in Undue Delay**

The potential probative value of the documents is not “substantially outweighed by . . . considerations of undue delay.” Rule 3.43(b). Respondent argues that Complaint Counsel “unduly delayed enforcing its . . . subpoena” and therefore should be preemptively prevented from introducing the documents. However, the relevant language in Rule 3.43(b) is intended to prevent delays at trial. *See In the Matter of Natural Organics Inc.*, 2001 FTC LEXIS 49, at \*2 (Apr. 5, 2001) (stating “when [the Commission] included this language [relating to undue delay, waste of time, or needless presentation of cumulative evidence] in its Rules of Practice, [it] explained: ‘the amended rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay trial.’” (quoting 61 Fed. Reg. 50640, 50644 (Sept. 26, 1999))). In fact, Complaint Counsel has sought to authenticate these documents precisely to prevent any undue delay should they become relevant at trial. As a result, the documents should not be preemptively excluded on the basis of undue delay.

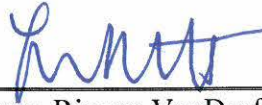
### **CONCLUSION**

For the foregoing reasons, Complaint Counsel respectfully requests that the Court deny Respondent’s Rule 3.43(b) Motion to Exclude.



Dated: April 6, 2015

Respectfully submitted,



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Laura Riposo VanDruff  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room CC-8232  
Washington, DC 20580  
Telephone: (202) 326-2999 - VanDruff  
Facsimile: (202) 326-3393  
Electronic mail: [lvandruff@ftc.gov](mailto:lvandruff@ftc.gov)

*Complaint Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 6, 2015, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

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

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

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

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

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*Counsel for Respondent LabMD, Inc.*

**CERTIFICATE FOR ELECTRONIC FILING**

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

April 6, 2015

By: 

\_\_\_\_\_  
Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection

# Exhibit A



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

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 'LRiposoVanDruff', with a long horizontal line 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 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>
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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>
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<p>6. SUBJECT OF PROCEEDING</p> <p>In the Matter of LabMD, Inc., Docket 9357</p>
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<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>
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<p>DATE SIGNED</p> <p>9/30/13</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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### GENERAL INSTRUCTIONS

#### APPEARANCE

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

#### MOTION TO LIMIT OR QUASH

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

#### TRAVEL EXPENSES

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

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

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

**RETURN OF SERVICE**

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

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

Tiversa Holding Corporation  
606 Liberty Avenue  
Pittsburgh, PA 15222  
vic FedEx for 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	)	
	)	
<b>LabMD, Inc.,</b>	)	DOCKET NO. 9357
<b>a corporation</b>	)	
	)	
	)	
	)	

**COMPLAINT COUNSEL’S NOTICE OF DEPOSITION  
PURSUANT TO SUBPOENA TO TIVERSA HOLDING CORPORATION**

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

**DEFINITIONS**

1. The term “**Communication**” includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
2. “**Company**” 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.
3. The term “**Containing**” means containing, describing, or interpreting in whole or in part.
4. 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.
5. “**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.
6. “**LabMD**” means LabMD, Inc., the named defendant in the above-captioned matter, and its directors, officers, and employees.

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 Corporation, 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](mailto: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)

1. TO

Tiversa Holding Corp.  
606 Liberty Avenue  
Pittsburgh, PA 15222

2. FROM

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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

3. PLACE OF PRODUCTION

Matthew Smith  
Federal Trade Commission  
601 New Jersey Avenue, N.W.  
Room NJ-8100  
Washington, D.C. 20001

4. MATERIAL WILL BE PRODUCED TO

Matthew Smith

5. DATE AND TIME OF PRODUCTION

October 30, 2013

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.

8. ADMINISTRATIVE LAW JUDGE

Chief Judge D. Michael Chappell

Federal Trade Commission  
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Laura Riposo VanDruff, Complaint Counsel  
Federal Trade Commission  
601 New Jersey Ave, NW, Room-8100  
Washington, DC 20001  
(202) 326-2999

DATE SIGNED

9/30/13

SIGNATURE OF COUNSEL ISSUING SUBPOENA

## GENERAL INSTRUCTIONS

### APPEARANCE

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

### MOTION TO LIMIT OR QUASH

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

### TRAVEL EXPENSES

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

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

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

**RETURN OF SERVICE**

I hereby certify that a duplicate original of the within subpoena was duly served: (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	)	
	)	
<b>LabMD, Inc.,</b>	)	DOCKET NO. 9357
<b>a corporation</b>	)	
	)	
	)	
	)	

**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](mailto: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**

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

In the Matter of )  
)  
)

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

DOCKET NO. 9357

**PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

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

ORDERED:

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

Date: August 29, 2013

## ATTACHMENT A

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

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

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

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

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

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

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

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

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

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

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

## **Exhibit B**

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

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

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

Executed on \_\_\_\_\_, 2013.

\_\_\_\_\_  
Signature



## **Exhibit C**

# **BCP PRODUCTION GUIDE**

## Bureau of Consumer Protection Production Guide

### An eDiscovery Resource

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

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

#### 1. Getting Started: Protocols for All Submissions

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

##### a. Concordance Version and Load Files

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

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

##### b. Virus Scanning

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

##### c. Extracted Text / OCR

Submit text:

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

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

**d. Deduplication**

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

**e. Labeling & Numbering Files**

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

Acceptable formats (as long as you are consistent)

- ABC-FTC0000001
- ABCFTC0000001

Unacceptable format

- ABC 0000001

**f. Recommended Delimiters**

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

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

**g. Image Files**

BCP only accepts image files that are:

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

**h. Date & Time Format**

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

**2. Preparing Collections**

**a. Preparing Scanned Documents**

Submit TIFF (or color JPEG) images with OCR text

## Metadata & Other Information Requirements

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

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

### b. Preparing Email & Attachments

**Email:** Submit TIFF images with extracted text of email

**Attachments:**

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

### Metadata & Other Information Requirements

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

#### Metadata for Emails

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

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

#### Metadata for Attachments

<u>Document Info / Metadata</u>	<u>Description</u>	<u>Concordance Field Name</u>
Beginning Bates number	The beginning bates number for the document	BEBATES
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**

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

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

### 3. Submitting Your Production

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

#### a. Media BCP Accepts

Submit any of the following:

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

#### b. Submit a Production Transmittal Letter

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

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



# Exhibit B



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

November 5, 2013

**VIA COURIER**

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

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

Dear Mr. Sherman:

Complaint Counsel issued a subpoena *duces tecum* to Tiversa Holding Corporation ("Tiversa") on September 30, 2013. On November 4, 2013, Tiversa produced documents in response to the subpoena.

Pursuant to our obligations under the Commission's Rules of Practice and Paragraph 14 of the Additional Provisions to the Administrative Law Judge's Scheduling Order, please find enclosed one disc containing the Tiversa production, which is Bates stamped TIVERSA-FTC\_RESPONSE-000001 through TIVERSA-FTC\_RESPONSE-006904. The files on the disc are in the format in which we received them.

Please notify me when you have received the enclosed disc, and I will then send you the encryption key. Please contact me at (202) 326-2282 if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Megan Cox".

Megan Cox

Enclosure (1)

cc: Reed D. Rubinstein (*via email*)  
Michael Pepson (*via email*)

# Exhibit C



November 13, 2012

**VIA FEDERAL EXPRESS**

Tiversa Holding Corporation  
606 Liberty Avenue  
Pittsburgh, PA 15222

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

Dear Sir or Madam:

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

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

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

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

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

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

Sincerely,



---

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

Enclosures:

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

cc (via email):

Alain Sheer  
Laura Riposo VanDruff  
Megan Cox  
Margaret Lassack  
Ryan Mehm



# SUBPOENA AD TESTIFICANDUM DEPOSITION

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

<p>1. TO</p> <p>Tiversa Holding Corp. 606 Liberty Avenue Pittsburgh, PA 15222</p>	<p>2. FROM</p> <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
---	---

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

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

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

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

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

### GENERAL INSTRUCTIONS

#### APPEARANCE

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

#### MOTION TO LIMIT OR QUASH

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

#### TRAVEL EXPENSES

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

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

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

**Return of Service**

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

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

Michael D. Pepson  
Counsel

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

In the Matter of	)	
	)	
<b>LabMD, Inc.,</b>	)	DOCKET NO. 9357
<b>a corporation.</b>	)	
	)	
	)	
	)	
	)	
	)	

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

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

**DEFINITIONS**

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



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

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

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

### **DEPOSITION TOPICS**

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

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

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

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

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

November 13, 2013

By: 

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

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

**CERTIFICATE OF SERVICE**

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

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

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

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

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

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

November 13, 2013

By:   
Michael D. Pepson



# SUBPOENA DUCES TECUM

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

1. TO

Tiversa Holding Corp.  
606 Liberty Avenue  
Pittsburgh, PA 15222

2. FROM

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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

3. PLACE OF PRODUCTION

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

4. MATERIAL WILL BE PRODUCED TO

Michael D. Pepson

5. DATE AND TIME OF PRODUCTION

November 19, 2013

6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc., Docket 9357

7. MATERIAL TO BE PRODUCED

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

8. ADMINISTRATIVE LAW JUDGE

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

9. COUNSEL AND PARTY ISSUING SUBPOENA

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

DATE SIGNED

November 13, 2013

SIGNATURE OF COUNSEL ISSUING SUBPOENA

## GENERAL INSTRUCTIONS

### APPEARANCE

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

### MOTION TO LIMIT OR QUASH

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

### TRAVEL EXPENSES

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

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

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

**Return of Service**

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



---

Michael D. Pepson  
Counsel



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

In the Matter of	)	
	)	
<b>LabMD, Inc.,</b>	)	DOCKET NO. 9357
<b>a corporation.</b>	)	
	)	
	)	
	)	
	)	

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

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

**DEFINITIONS**

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

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

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

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

### **INSTRUCTIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

## SPECIFICATIONS

Demand is hereby made for the following documents:

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

November 13, 2013

By: \_\_\_\_\_



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

**CERTIFICATE OF SERVICE**

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

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

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

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

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

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

November 13, 2013

By:   
Michael D. Pepson

## **Exhibit A**

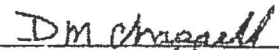
UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

**PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

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

ORDERED:

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

Date: August 29, 2013

## ATTACHMENT A

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

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

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



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

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

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

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

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

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

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

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

**Exhibit B**

**CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY**

**Pursuant to 28 U.S.C. § 1746**

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

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

Executed on \_\_\_\_\_, 2013.

\_\_\_\_\_  
Signature

---

**Exhibit C**

# **BCP PRODUCTION GUIDE**

## Bureau of Consumer Protection Production Guide

### An eDiscovery Resource

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

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

#### 1. Getting Started: Protocols for All Submissions

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

##### a. Concordance Version and Load Files

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

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

##### b. Virus Scanning

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

##### c. Extracted Text / OCR

Submit text:

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

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

**d. Deduplication**

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

**e. Labeling & Numbering Files**

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

Acceptable formats (as long as you are consistent)

- ABC-FTC0000001
- ABCFTC0000001

Unacceptable format

- ABC 0000001

**f. Recommended Delimiters**

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

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

**g. Image Files**

BCP only accepts image files that are:

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

**h. Date & Time Format**

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

**2. Preparing Collections**

**a. Preparing Scanned Documents**

Submit TIFF (or color JPEG) images with OCR text



## Metadata & Other Information Requirements

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

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

### b. Preparing Email & Attachments

**Email:** Submit TIFF images with extracted text of email

**Attachments:**

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

### Metadata & Other Information Requirements

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

#### Metadata for Emails

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

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

#### Metadata for Attachments

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

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

**c. Preparing Native Files**

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

**Metadata & Other Information Requirements**

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

**Metadata and other information requirements for native files**

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

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

### 3. Submitting Your Production

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

#### a. Media BCP Accepts

Submit any of the following:

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

#### b. Submit a Production Transmittal Letter

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

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

# Exhibit D

March 12, 2015

**VIA ELECTRONIC MAIL**

Laura Riposo VanDruff  
Division of Privacy and Identity Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Mail Stop NJ-8100  
Washington, D.C. 20580  
[mlassak@ftc.gov](mailto:mlassak@ftc.gov)

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

Dear Laura:

On March 11, 2015 we met and conferred concerning Respondent's intention to file a motion to quash the latest subpoena you served upon Tiversa. At that time you suggested that I hold off on filing the motion for 24 hours and you would advise as to whether the situation could be otherwise resolved. Is there an alternative you wish to propose?

We also discussed the issue of whether the FTC provided Respondent with copies of all documents it provided to OGR relevant to this litigation. You indicated that you would investigate and get back to me. You in turn inquired as to whether Tiversa produced to Respondent documents responsive to Respondent's subpoena. I am in the process of getting an answer for you.

Lastly we discussed whether the FTC would be willing to join us in filing a motion to compel Tiversa to provide each of us with documents responsive to our subpoenas including all relevant documents they provided to OGR. As we discussed it is clear that some of the documents attached to then Chairman Issa's letter are responsive to the subpoenas served on Tiversa in this litigation but which were not produced in response to those subpoenas. Will you join Respondent in a motion to compel, file one on your own, or not at all?

Sincerely,

  
William A. Sherman, II

WAS/jb

# Exhibit E

## VanDruff, Laura Riposo

---

**From:** Shaw, Jarrod D. <JShaw@ReedSmith.com>  
**Sent:** Tuesday, October 28, 2014 10:44 AM  
**To:** VanDruff, Laura Riposo; 'william.sherman@dinsmore.com'  
**Cc:** Liben, Lucas  
**Subject:** FTC v. LabMD Docket No. 9357  
**Attachments:** Filing Copy - Wallace Notice with Exhibits.pdf

Ms. Van Druff and Mr. Sherman,

Attached please find the attached document. My understanding is that the document may not have been received by you when it was filed and if that is the case I apologize for the oversight.

Jarrold

**Jarrold D. Shaw**  
[jshaw@reedsmith.com](mailto:jshaw@reedsmith.com)  
+1 412 288 3013

**Reed Smith LLP**  
Reed Smith Centre  
225 Fifth Avenue  
Pittsburgh, PA 15222-2716  
T: +1 412 288 3131  
F: +1 412 288 3063  
reedsmith.com

\* \* \*

This E-mail, along with any attachments, is considered confidential and may well be legally privileged. If you have received it in error, you are on notice of its status. Please notify us immediately by reply e-mail and then delete this message from your system. Please do not copy it or use it for any purposes, or disclose its contents to any other person. Thank you for your cooperation.

Disclaimer Version RS.US.201.407.01



# Exhibit F



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

March 9, 2015

**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 has 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 for your deposition, which is enclosed.

The attached subpoena *ad testificandum* is for a deposition "for purposes of [establishing] authenticity and admissibility of exhibits," which is permitted after the March 5, 2014 close of discovery. See Revised Scheduling Order at 1 (Oct. 22, 2013), available at <https://www.ftc.gov/sites/default/files/documents/cases/131022aljrevisedschedulingorder.pdf>.

I would be pleased to discuss any issues related to the deposition. You may reach me at (202) 326-2927.

Sincerely,

Jarad Brown

Enclosure

cc: Jarrod Shaw (via email)  
Hallee Morgan (via email)  
Daniel Epstein (via email)

March 9, 2015  
Tiversa Holding Corporation  
Page 2

Patrick Massari (*via email*)  
Prashant Khetan (*via email*)  
Reed Rubinstein (*via email*)  
William A. Sherman, II (*via email*)  
Sunni Harris (*via email*)



# SUBPOENA AD TESTIFICANDUM DEPOSITION

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

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


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

<p>3. PLACE OF DEPOSITION</p> <p>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>March 16, 2015 10:00 AM</p>
--	--

6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc.  
Docket No. 9357

<p>7. ADMINISTRATIVE LAW JUDGE</p> <p>D. Michael Chappell Chief Administrative Law Judge</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>8. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Jarad Brown Complaint Counsel Federal Trade Commission 600 Pennsylvania Ave, NW, Mailstop CC-8232 Washington, DC 20580 (202) 326-2927</p>
---	---

<p>DATE SIGNED</p> <p>3/9/2015</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
------------------------------------	--

## GENERAL INSTRUCTIONS

### APPEARANCE

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

### MOTION TO LIMIT OR QUASH

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

### TRAVEL EXPENSES

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

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

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1995.

**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 Federal Express delivery, sent March 9, 2015 pursuant to Commission Rule 4.4(a)(2)**
- by leaving copy at principal office or place of business, to wit:*

Tiversa Holding Corporation  
606 Liberty Avenue  
Pittsburgh, PA 15222

*on the person named herein on:*

**March 9, 2015**

(Month, day, and year)

**Jarad Brown**

(Name of person making service)

**Attorney**

(Official title)

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

In the Matter of	)	
	)	
<b>LabMD, Inc.,</b>	)	DOCKET NO. 9357
<b>a corporation</b>	)	
	)	
	)	
	)	
	)	
	)	

**COMPLAINT COUNSEL’S NOTICE OF DEPOSITION PURUANT TO  
SUBPOENA TO TIVERSA HOLDING CORPORATION**

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

**DEFINITIONS**

1. “**Tiversa**” shall mean Tiversa Holding Corporation, 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.
2. “**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.
3. 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.
4. The use of the singular includes the plural, and the plural includes the singular.
5. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

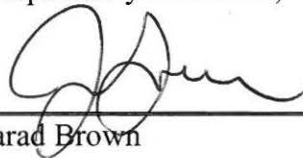
## DEPOSITION TOPICS

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 topic:

1. The authenticity and admissibility under provisions of Rule 3.43 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.43, of the following documents:
  - a. Email from R. Wallace to R. Wallace, subject: IPs (Nov. 6, 2012) (attached as proposed CX1007);
  - b. Email from R. Wallace to R. Boback, subject: LAB MD Spread (Nov. 9, 2012) (attached as proposed CX1008);
  - c. LAB MD Spread.doc (Nov. 9, 2012) (attached as proposed CX1009);
  - d. Tiversa Investigation Request Form, Tiversa\_OGR\_0017460 (Apr. 18, 2008) (attached as proposed CX1015);
  - e. Tiversa Incident Record Form, Tiversa\_OGR\_0017458-69 (Apr. 18, 2008) (attached as proposed CX1016); and
  - f. Tiversa Forensic Investigation Report for Ticket #CIG00081, Tiversa\_OGR\_0017461-65 (Aug. 12, 2008) (attached as proposed CX1017).

Dated: March 9, 2015

Respectfully submitted,



---

Jarad Brown

Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room CC-8232  
Washington, DC 20580  
Telephone: (202) 326-2927  
Facsimile: (202) 326-3062  
Electronic mail: [jbrown4@ftc.gov](mailto:jbrown4@ftc.gov)

*Complaint Counsel*

**CERTIFICATE OF SERVICE**

This is to certify that on March 9, 2015, I served *via* electronic mail delivery a copy of the foregoing document to:

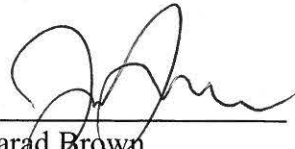
Hallee Morgan  
Daniel Epstein  
Patrick Massari  
Prashant Khetan  
Cause of Action  
1919 Pennsylvania Avenue, NW, Suite 650  
Washington, DC 20006  
hallee.morgan@causeofaction.org  
daniel.epstein@causeofaction.org  
patrick.massari@causeofaction.org  
prashant.khetan@causeofaction.org

Reed Rubinstein  
William A. Sherman, II  
Sunni Harris  
Dinsmore & Shohl, LLP  
801 Pennsylvania Avenue, NW, Suite 610  
Washington, DC 20004  
reed.rubinstein@dinsmore.com  
william.sherman@dinsmore.com  
sunni.harris@dinsmore.com  
*Counsel for Respondent LabMD, Inc.*

Jarrold Shaw  
Reed Smith LLP  
Reed Smith Centre  
225 Fifth Avenue  
Pittsburgh, PA 15222-2716  
jshaw@reedsmith.com  
*Counsel for Tiversa Holding Corp.*

March 9, 2015

By:



\_\_\_\_\_

Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection



**From:** Rick Wallace <rwallace@tiversa.com>  
**Sent:** Tuesday, November 06, 2012 4:05 PM  
**To:** Rick Wallace  
**Subject:** IPs

173.16.148.85  
68.107.85.250  
71.59.18.187  
90.215.200.56  
201.194.118.82  
173.16.83.112  
70.173.76.192

Rick Wallace

**Director of Special Operations**

**Tiversa**  
*The Cyberintelligence Experts*

**606 Liberty Avenue**  
**Pittsburgh, Pennsylvania 15222**

| 724-940-9030 Office | 703-232-6415 Mobile |

[www.tiversa.com](http://www.tiversa.com)


**From:** Rick Wallace <rwallace@tiversa.com>  
**Sent:** Friday, November 9, 2012 12:08 PM  
**To:** Robert Boback <rboback@tiversa.com>  
**Subject:** LAB MD Spread  
**Attach:** LAB MD Spread.doc

---


Rick Wallace  
**Director of Special Operations**  
**Tiversa**  
*The Cyberintelligence Experts*

**606 Liberty Avenue**  
**Pittsburgh, Pennsylvania 15222**  
| 724-940-9030 Office | 703-232-6415 Mobile |  
[www.tiversa.com](http://www.tiversa.com)


[Share this Result](#) IP Address: 173.16.148.85

**Location**  UNITED STATES, NEW YORK, MIDDLETOWN  
**Latitude, Longitude** 41.44593, -74.42293 (41°26'45"S -74°25'23"E)  
**Connection through** MEDIACOM COMMUNICATIONS CORP  
**Local Time** 08 Nov, 2012 11:00 PM (UTC -04:00)  
**Domain** MEDIACOMCC.COM  
**Net Speed** DSL  
**Area Code** 845/914  
**IDD Code** 1  
**ZIP Code** 10941  
**Weather Station** MIDDLETOWN (USNY0916)  
**Mobile Country Code (MCC)** -  
**Mobile Network Code (MNC)** -  
**Carrier Name** -

[Share this Result](#) IP Address: 68.107.85.250

**Location**  UNITED STATES, CALIFORNIA, SAN DIEGO  
**Latitude, Longitude** 32.71533, -117.15726 (32°42'55"S -117°9'26"E)  
**Connection through** COX COMMUNICATIONS INC.  
**Local Time** 09 Nov, 2012 02:00 AM (UTC -07:00)  
**Domain** COX.NET  
**Net Speed** COMP  
**Area Code** 619/858  
**IDD Code** 1  
**ZIP Code** 92101  
**Weather Station** SAN DIEGO (USCA0982)  
**Mobile Country Code (MCC)** -  
**Mobile Network Code (MNC)** -  
**Carrier Name** -


[Share this Result](#) IP Address: 71.59.18.187

**Location**  UNITED STATES, GEORGIA, ALPHARETTA  
**Latitude, Longitude** 34.07538, -84.29409 (34°4'31"S -84°17'39"E)  
**Connection through** COMCAST CABLE COMMUNICATIONS HOLDINGS


[Share this Result](#) IP Address: 71.59.18.187

**Local Time** 08 Nov, 2012 11:00 PM (UTC -04:00)  
**Domain** COMCAST.NET  
**Net Speed** DSL  
**Area Code** 404/770  
**IDD Code** 1  
**ZIP Code** 30004  
**Weather Station** ALPHARETTA (USGA0013)  
**Mobile Country Code (MCC)** -  
**Mobile Network Code (MNC)** -  
**Carrier Name** -

[Share this Result](#) IP Address: 90.215.200.56

**Location**  UNITED KINGDOM, ENGLAND, LONDON  
**Latitude, Longitude** 51.50853, -0.12574 (51°30'31"S -0°7'33"E)  
**Connection through** EASYNET LTD  
**Local Time** 08 Nov, 2012 07:00 PM (UTC +00:00)  
**Domain** EASYNET.COM  
**Net Speed** DSL  
**Area Code** -  
**IDD Code** 44  
**ZIP Code** -  
**Weather Station** LONDON (UKXX0085)  
**Mobile Country Code (MCC)** -  
**Mobile Network Code (MNC)** -  
**Carrier Name** -


[Share this Result](#) IP Address: 201.194.118.82

**Location**  COSTA RICA, HEREDIA, HEREDIA  
**Latitude, Longitude** 10, -84.11667 (10°0'0"S -84°7'0"E)  
**Connection through** SAN JOSE


[Share this Result](#) IP Address: 201.194.118.82

**Local Time** 09 Nov, 2012 01:00 AM (UTC -06:00)  
**Domain** SANJOSECA.GOV  
**Net Speed** DSL  
**Area Code** -  
**IDD Code** 506  
**ZIP Code** -  
**Weather Station** HEREDIA (CSXX0013)  
**Mobile Country Code (MCC)** -  
**Mobile Network Code (MNC)** -  
**Carrier Name** -

[Share this Result](#) IP Address: 173.16.83.112

**Location**  UNITED STATES, IOWA, DAVENPORT  
**Latitude, Longitude** 41.52364, -90.57764 (41°31'25"S -90°34'40"E)  
**Connection through** MEDIACOM COMMUNICATIONS CORP  
**Local Time** 09 Nov, 2012 12:00 AM (UTC -05:00)  
**Domain** MEDIACOMCC.COM  
**Net Speed** DSL  
**Area Code** 563  
**IDD Code** 1  
**ZIP Code** 52801  
**Weather Station** ROCK ISLAND (USIL1011)  
**Mobile Country Code (MCC)** -  
**Mobile Network Code (MNC)** -  
**Carrier Name** -

[Share this Result](#) IP Address: 70.173.76.192

**Location**  UNITED STATES, NEVADA, LAS VEGAS  
**Latitude, Longitude** 36.17497, -115.13722 (36°10'30"S -115°8'14"E)  
**Connection through** COX COMMUNICATIONS  
**Local Time** 09 Nov, 2012 02:00 AM (UTC -07:00)  
**Domain** COX.COM  
**Net Speed** COMP

 IP Address: 70.173.76.192

<b>Area Code</b>	702
<b>IDD Code</b>	1
<b>ZIP Code</b>	89044
<b>Weather Station</b>	LAS VEGAS (USNV0049)
<b>Mobile Country Code (MCC)</b>	-
<b>Mobile Network Code (MNC)</b>	-
<b>Carrier Name</b>	-



## INVESTIGATION REQUEST FORM

Section 1 Customer Information	
Organization Name	CIGNA
Contact Name	Sean Ryan
Contact Phone Number	(860) 226-7107
Contact Email Address	sean.ryan@cigna.com

Section 2 Incident Information	
Tiversa Incident Number	CIG00081
Date of Incident	4/18/2008

Section 3 Requested Forensic Services	
<b>File Disclosure Investigation</b>	<b>Search Investigation</b>
<input type="checkbox"/> 1. Disclosure Source Identification <input type="checkbox"/> 2. Disclosure Source Geo-location <input type="checkbox"/> 3. Identify Additional Disclosure Source Files <input type="checkbox"/> 4. File Proliferation Assessment <input type="checkbox"/> 5. Proliferation Point Identification <input type="checkbox"/> 6. Proliferation Point Geo-location <input type="checkbox"/> 7. Proliferation Point Associated Files	<input type="checkbox"/> 12. Review Stored Searches For File Targeting <input type="checkbox"/> 13. Track Searches for Specific File or Term
<b>Persons of Interest (PoI)</b>	<b>Miscellaneous</b>
<input type="checkbox"/> 8. Identify Persons of Interest <input type="checkbox"/> 9. Track Specific Behavior of Persons of Interest <input type="checkbox"/> 10. Identify Files Associated with Persons of Interest <input type="checkbox"/> 11. Track Persons of Interest Download Behavior	<input type="checkbox"/> 14. Prosecution Support (Complete Section 4) <input type="checkbox"/> 15. Other (Complete Section 4)

Section 4 Specific Information Related to Request

**TIVERSA – CUSTOMER RESTRICTED**



## INCIDENT RECORD FORM

Section 1 Customer Information	
Organization Name	CIGNA
Contact Name	Sean Ryan
Contact Phone Number	(860) 226-7107
Contact Email Address	sean.ryan@cigna.com

Section 2 Incident Information	
Tiversa Incident Number	CIG00081
Related Tiversa Incident Numbers	None
Date of Incident	4/18/2008
Severity	Urgent

Section 3 Disclosure Information	
IP Address	64.190.82.42
Disclosure Type	Partner / Provider
Summary Disclosure Name/ID	LAB MD
Filenames	[64.190.82.42]insuranceaging_6.05.071.pdf

Section 4 Incident Summary	
<p>On 4/18/2008, 1 file was detected being disclosed by what appears to be a potential provider of services for CIGNA.</p> <p>The information appears to be a single Portable Document Format (PDF) file that contains sensitive data on over 8,300 patients. Some of the information includes: Patients Full Name, SSN, DOB, Insurance Policy Numbers, Patient Diagnostic Codes, and other information. Of the 8,342 patient records, at least 113 appear to be listed as insured by CIGNA.</p> <p>After reviewing the IP address resolution results, meta-data and other files, Tiversa believes it is likely that Lab MD near Atlanta, Georgia is the disclosing source.</p>	

**TIVERSA – CUSTOMER RESTRICTED**



**Section 5 Additional Questions That Tiversa Can Address**

More information can be gathered related to this disclosure by leveraging Tiversa's P2P File Sharing Forensic Investigation Services. If requested, please fill out the Investigation Request form located below and submit to your Account Manager.

**Who is the individual disclosing the information?**

Select investigation services #1 and #3

**What else is this individual sharing or disclosing?**

Select investigation service #3

**Where is this individual located in the world?**

Select investigation service #2

**Did the files spread to other users of the network?**

Select investigation services #4

**TIVERSA – CUSTOMER RESTRICTED**



*Forensic Investigation Report for Ticket #CIG00081*

*August 12, 2008*

CONFIDENTIAL

## 1. Introduction

Tiversa monitors peer-to-peer file sharing networks (P2P) for CIGNA 24/7/365 to identify disclosed sensitive or confidential CIGNA-related information and to record P2P users searching for this information. For each file disclosure, Tiversa provides a disclosure ticket to CIGNA. Each ticket includes the name of the file(s) disclosed, IP on which the files were obtained, the likely source of the disclosure, and copies of the disclosed files. In some cases, more information is required in order to decide what actions to take or to determine if remedial actions have worked. In these instances, Forensic Investigation Services are required.

This Forensic Investigation Report (FIR) summarizes the results and suggested actions of Tiversa's Forensic Investigation Services for Ticket CIG00081, as requested by CIGNA.

### 1.1 Ticket CIG00081 Summary

The specifics of this ticket as reported were as follows:

- Date Submitted: 4/18/2008
- Disclosing IP Location: 64.190.82.42
- Number of Files Disclosed: 1 CIGNA file (19 total files)
- Probable Disclosure Source: Partner/Provider
- Probable Disclosure Name/ID: Lab MD
- Severity: Urgent

Ticket Write-up Copy:

*On 4/18/2008, 1 file was detected being disclosed by what appears to be a potential provider of services for CIGNA.*

*The information appears to be a single Portable Document Format (PDF) file that contains sensitive data on over 8,300 patients. Some of the information includes: Patients Full Name, SSN, DOB, Insurance Policy Numbers, Patient Diagnostic Codes, and other information. Of the 8,342 patient records, at least 113 appear to be listed as insured by CIGNA.*

*After reviewing the IP address resolution results, meta-data and other files, Tiversa believes it is likely that Lab MD near Atlanta, Georgia is the disclosing source.*

CIGNA asked Tiversa to perform Forensic Investigation activities related to the above ticket in order to ascertain if any of the disclosed files have proliferated across the P2P.

## 2. Investigation Findings

## 2.1 File Proliferation Analysis

The CIGNA-related file identified in Ticket #81, as well as some of the files not related to CIGNA, have been observed by Tiversa at additional IP addresses on the P2P. However, network constraints and/or user behavior prevented Tiversa from downloading the files from these additional sources. Most likely, the user logged off the P2P prior to or while Tiversa was attempting to acquire the files.

Regardless, information regarding these new observations is included in Figure 2-1-1 immediately below.

**Figure 2-1-1:  
File Proliferation Details**

Proliferation Point	File Title	IP Address	Date Observed	IP Geo-Location	ISP	Source
0	insuranceaging_6.05.071.pdf	64.190.82.42	4/18/08	Atlanta, GA	Cypress Communications	Original Source from Ticket #81
1	insuranceaging_6.05.071.pdf	64.190.79.36	8/1/08	Oakwood, GA	Cypress Communications	Probably an IP shift of original source
2	insuranceaging_6.05.071.pdf	68.8.250.203	8/5/08	San Diego, CA	Cox Communications	Unknown (based on other files observed, possible Information Concentrator)

Based on the other files available at the new IP addresses, Proliferation Point #1 (from Figure 2-1-1 above) is most likely an IP shift from the original disclosing source identified in Ticket #81. However, the other files present at Proliferation Point #2 suggest that this source could be an Information Concentrator. Because Tiversa analysts were only able to visually observe these new sources, rather than actually download files, further data collection and analysis may be required for full source identification of the proliferation points.

## 2.2 Additional Data Collection/Analysis

Tiversa is currently attempting to re-acquire these sources and download any relevant files from them.

## 3. Conclusions/ Suggested Actions

It appears evident that the files from Ticket #81 have proliferated across the P2P and are available from additional IP addresses. However, clear identification of these new sources is not conclusive at this time. Tiversa will update this report as new information becomes available.

In the meantime, CIGNA and/or LabMD investigations of the data currently available could be executed. If additional data from Tiversa is required, it can be provided -- for instance, a full listing of files disclosed from the original source (even if those files are not related to CIGNA) can be made available.



2000 Corporate Drive, Suite 300  
Wexford, Pennsylvania 15090

724 940-9030  
724 940-9033

[www.tiversa.com](http://www.tiversa.com)

# Exhibit G



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

March 12, 2015

**VIA EMAIL**

Jarrold Shaw  
Reed Smith LLP  
225 Fifth Avenue  
Pittsburgh, PA 15222

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

Dear Mr. Shaw:

I am writing to follow up on our conversation earlier today in which you indicated that your client, Tiversa Holding Corporation, has agreed to supply Complaint Counsel with declaration(s) sufficient to establish the authenticity and admissibility of the documents specified in Complaint Counsel's March 9, 2015 subpoena *ad testificandum* to your client.

In light of this offer, Complaint Counsel is withdrawing its March 9, 2015 subpoena *ad testificandum*. Accordingly, we will not proceed with the March 16, 2015 deposition noticed in the subpoena.

Please advise me at your earliest convenience if your client will not be able to supply the declaration(s) by March 19, 2015.

Sincerely,

A handwritten signature in blue ink, appearing to read "L. Riposo".

Laura Riposo VanDruff

cc: William Sherman (*via email*)  
Reed Rubenstein (*via email*)  
Prashant Khetan (*via email*)  
Patrick Massari (*via email*)  
Hallee Morgan (*via email*)



# Exhibit H



FOIA 2014-00875

May 2, 2014

FEDERAL TRADE COMMISSION  
RECEIVED

MAY 02 2014

FOIA BRANCH  
GENERAL COUNSEL

VIA EMAIL

Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: FOIA@FTC.gov

**RE: Freedom of Information Act Request**

Dear Sir/Madam:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Cause of Action hereby requests all records reflecting the official travel of Alain Sheer, Attorney, Bureau of Consumer Protection, from October 15, 2013 to October 17, 2013.

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, email, pdf). If a certain set of responsive records can be produced more readily, we respectfully request that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

Cause of Action agrees in this instance to pay reasonable fees associated with this request. If applicable fees will exceed \$250, please inform me first before further processing the request.

If you have any questions about this request, please contact me by email at [Allan.Blutstein@causeofaction.org](mailto:Allan.Blutstein@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

ALLAN BLUTSTEIN  
MANAGING COUNSEL



May 2, 2014

FEDERAL TRADE COMMISSION  
RECEIVED

**VIA EMAIL**

Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: FOIA@FTC.gov

MAY 02 2014

FOIA BRANCH  
GENERAL COUNSEL

**RE: Freedom of Information Act Request**

Dear Sir/Madam:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Cause of Action hereby requests access to the work calendar(s) of Alain Sheer, Attorney, Bureau of Consumer Protection, for October 16, 2013.

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, email, pdf). If a certain set of responsive records can be produced more readily, we respectfully request that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

Cause of Action agrees in this instance to pay reasonable fees associated with this request. If applicable fees will exceed \$250, please inform me first before further processing the request.

If you have any questions about this request, please contact me by email at [Allan.Blutstein@causeofaction.org](mailto:Allan.Blutstein@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

ALLAN BLUTSTEIN  
MANAGING COUNSEL

2014-00929



CAUSE  
of  
ACTION

Advocates for Government Accountability

A 501(c)(3) Nonprofit Corporation

May 21, 2014

FEDERAL TRADE COMMISSION  
RECEIVED

MAY 21 2014

FOIA BRANCH  
GENERAL COUNSEL

**VIA EMAIL & CERTIFIED MAIL**

Jonathan E. Nuecherlein, General Counsel  
Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: FOIA@FTC.gov

**RE: Freedom of Information Act Request**

Dear Mr. Nuecherlein:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Cause of Action hereby requests the Federal Trade Commission (FTC) to disclose records that reflect the amount of resources, time, and money, including but not limited to travel time, staff time, salaries, fees, and costs, spent in all matters concerning LabMD, including all non-adjudicative procedures, all adjudicative procedures, any agency proceedings before the FTC, the U.S. Department of Health and Human Services, or any other federal or state agency, and any federal litigation before the U.S. District Court for the District of Columbia, the U.S. District Court for the Northern District of Georgia, and the U.S. Court of Appeals for the Eleventh Circuit.

Cause of Action is willing to pay fees up to \$1,500.00. If you expect the fees will exceed this, please contact us before proceeding.

**Record production and contact information**

In an effort to facilitate record production, please provide the responsive records in electronic format (e.g., email, .pdf) to [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org). If a certain set of responsive records can be produced more readily, we respectfully request that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by email at [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Patrick J. Massari, Counsel



2014-00959

June 2, 2014

**VIA EMAIL & CERTIFIED MAIL**

Jonathan E. Nuecherlein, General Counsel  
Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Email: FOIA@FTC.gov

FEDERAL TRADE COMMISSION  
RECEIVED

JUN 2 2014

FOIA BRANCH  
GENERAL COUNSEL

**RE: Freedom of Information Act Request**

Dear Mr. Nuecherlein:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Cause of Action hereby requests the Federal Trade Commission (FTC) to disclose records that reflect the amount of money, compensation, payments, contracts, fees, costs, and/or grants spent in all matters concerning:

- (1) Tiversa or Tiversa Inc.;
- (2) Privacy Institute or The Privacy Institute; and/or
- (3) Ponemon Institute, Ponemon Institute, Ponemon Institute, LLC, or Ponemon Privacy Institute.

The time period for this request is January 1, 2005 to the present.

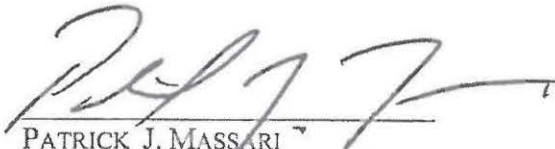
Cause of Action is willing to pay fees up to \$1,500.00. If you expect the fees to exceed this amount, please contact use before proceeding.

**Record production and contact information**

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, email, .pdf) to [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org). If a certain set of responsive records can be produced more readily, we respectfully request that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by email at [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Jonathan E. Nuecherlein, General Counsel  
June 2, 2014  
Page 2



PATRICK J. MASSARI  
COUNSEL



FOIA 2014-00966

June 2, 2014

VIA EMAIL

Jonathan E. Nuechterlein, General Counsel  
Office of General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580  
Email: FOIA@FTC.gov

FEDERAL TRADE COMMISSION  
RECEIVED

JUN 3 2014

FOIA BRANCH  
GENERAL COUNSEL

**RE: Freedom of Information Act Request**

Dear Mr. Nuechterlein:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Cause of Action hereby requests that the Federal Trade Commission (FTC) disclose certain video recordings generated by the security cameras in the FTC's Headquarters, 600 Pennsylvania Avenue, NW, Washington, D.C. Specifically, Cause of Action requests all security camera footage generated by the security cameras located in the public areas on the fifth floor (including all footage generated by security cameras in or within the view of Courtroom Room 532 and the public elevators on the fifth floor); all footage generated by security cameras located on or near the first floor entrances and exits; and all footage generated by security cameras in the public elevators.

The time period for this request is May 30, 2014, from 10:00 a.m. to 1:00 p.m.

**Record production and contact information**

Cause of Action is willing to pay applicable fees up to \$1,500. If you expect the fees to exceed this amount, please contact me before proceeding. In an effort to facilitate record production, please provide the responsive records in electronic format (e.g., CDs containing copies of the video footage). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact me by email at [allan.blutstein@causeofaction.org](mailto:allan.blutstein@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

ALLAN BLUTSTEIN  
MANAGING COUNSEL



July 25, 2014

FEDERAL TRADE COMMISSION  
RECEIVED

JUL 28 2014

FOIA BRANCH  
GENERAL COUNSELVIA E-MAIL

Mr. Jonathan E. Nuechterlein  
Office of the General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
E-mail: FOIA@ftc.gov

**Re: Freedom of Information Act Request**

Dear Mr. Nuechterlein:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), Cause of Action hereby requests that the Federal Trade Commission (FTC) release all records reflecting communications between any person with an e-mail address hosted by a Congressional domain (e.g., "mail.house.gov" or "senate.gov") and the following individuals:

- a. Chairwoman Edith Ramirez, or her staff;
- b. Commissioner Julie Brill, or her staff;
- c. Commissioner Maureen K. Ohlhausen, or her staff;
- d. Jeanne Bumpus, Director of Congressional Relations;
- e. Kim Vandecar, Congressional Liaison Specialist;
- f. Justin Cole, Director of Public Affairs;
- g. Peter P. Kaplan, Deputy Director of Public Affairs;
- h. Rachel Miller Dawson, Assistant General Counsel;
- i. Alain Sheer, Attorney;
- j. Laura Riposo VanDruff, Attorney;
- k. Megan Cox, Attorney;
- l. Margaret L. "Maggie" Lassack, Attorney;
- m. Ryan Mehm, Attorney;
- n. John Krebs, Attorney; or,
- o. Jarad Brown, Attorney.

Please restrict this search to records containing the following names, words, or phrases, and reasonable variations thereof: (1) Congressman Darrell Issa (R-CA); (2) the U.S. House Committee on Oversight and Government Reform or OGR; (3) Robert Boback; (4) Tiversa, Inc.; (5) The



Privacy Institute, Inc.; (6) Michael Daugherty; (7) LabMD, Inc.; (8) Daniel Epstein; (9) Reed Smith; (10) Reginald J. "Reg" Brown; (11) Wilmer Hale; and (12) Cause of Action.

The time period for this request is January 1, 2014 to the present.

### **Request for News Media Status**

For fee purposes, Cause of Action qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.<sup>1</sup> These distinct works are distributed to the public through various media, including Cause of Action's website, which has been viewed just under 120,000 times in the past year alone.<sup>2</sup> Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a "representative of the news media" unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via "alternative media[,] shall be considered to be news-media entities." 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action's news media status in connection with its FOIA requests.<sup>3</sup>

### **Request for Expedited Processing**

Pursuant to 5 U.S.C. § 552(a)(6)(E)(v)(II), Cause of Action respectfully requests expedited processing of its request because: (1) it is "primarily engaged in disseminating information;" and (2) the requested records pertain to "actual or alleged Federal government activity," about which there exists an "urgency to inform the public."

---

<sup>1</sup> See, e.g., CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://causeofaction.org/grading-government-white-house-targets-document-requesters/>; see also CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://causeofaction.org/2013/09/23/greentech-automotive-a-venture-capitalized-by-chronyism-2/>; see also CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://causeofaction.org/2013/08/02/political-profiteering-how-forest-city-enterprises-makes-private-profits-at-the-expense-of-americas-taxpayers/>.

<sup>2</sup> Google Analytics for <http://www.causeofaction.org> (on file with Cause of Action).

<sup>3</sup> See, e.g., FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QFO-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep't of Energy (July 1, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).

**1. Cause of Action is primarily engaged in disseminating information as a representative of the news media.**

As discussed above, Cause of Action is primarily engaged in disseminating information because it qualifies as a news media organization.<sup>4</sup> Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

**2. There is an urgent need to inform the public about actual or alleged Federal government activity.**

In *Al-Fayed v. Central Intelligence Agency*, the U.S. Court of Appeals for the District of Columbia established a multi-factor test to determine whether a FOIA requester has properly satisfied the “urgency to inform” standard.<sup>5</sup> These factors include: (1) whether a request concerns a “matter of current exigency to the American public;” (2) whether the consequences of delaying a response would “compromise a significant recognized interest;” (3) whether the request concerns “federal government activity;” and, (4) whether the requester has proffered credible “allegations regarding governmental activity.”<sup>6</sup>

In this case, the requested records pertain to FTC’s ongoing enforcement proceeding against LabMD, Inc. (LabMD), which has been widely covered by the news media<sup>7</sup> and has even been a topic covered in a Congressional hearing regarding FTC generally and, more specifically, FTC’s relationship with and reliance on a third-party.<sup>8</sup> Moreover, some portion of the requested records are likely to concern communications between FTC employees and Senator John D. Rockefeller, who commented earlier this week on the propriety of Representative Darrell Issa’s interest in FTC’s enforcement action against LabMD in a letter that has been covered by the news media,<sup>9</sup> and which implicates his position on the Federal government’s regulation of data-security practices – a topic of national debate and current interest to the American public.<sup>10</sup> Finally, the requested records would shed light on the extent to which FTC employees have communicated with other Congressional members and their staffs about the foregoing topics. In short, Cause of Action’s request does not seek records of merely “newsworthy” topics, but rather “subject[s] of a currently unfolding story,”<sup>11</sup> and any delay in the production of these records could impact the pending case against LabMD and pending investigation by a Congressional Committee.

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<sup>4</sup> *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (citing *Elec. Privacy Info., Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

<sup>5</sup> 254 F.3d 300, 310-11 (D.C. Cir. 2001).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Marianne Kolbasuk McGee, *FTC v. LabMD: The Next Battle Begins*, DATA BREACH TODAY (May 19, 2014), <http://www.databreachtoday.com/ftc-vs-labmd-next-battle-begins-a-6852>.

<sup>8</sup> See *The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury*, COMM. ON OVERSIGHT & GOV’T REFORM, <http://oversight.house.gov/hearing/federal-trade-commission-section-5-authority-prosecutor-judge-jury-2/> (last visited July 24, 2014); see also Julian Hattem, *Sparks Fly Over FTC Whistleblower*, THE HILL (July 24, 2014), <http://thehill.com/policy/technology/213228-sparks-fly-over-ftc-whistleblower>.

<sup>9</sup> Judy Greenwald, *Senator Balks at House Hearing on FTC Data-Breach Case Against LabMD*, BUS. INS. (July 24, 2014), <http://www.businessinsurance.com/article/20140724/NEWS07/140729893?tags=%7C299%7C303#>.

<sup>10</sup> See Letter from Hon. John D. Rockefeller IV, U.S. S., to Hon. Darrell E. Issa, Chairman, U.S. House Comm. on Oversight & Gov’t Reform (July 23, 2013), available at <http://www.nationaljournal.com/free/document/5476>.

<sup>11</sup> *Al-Fayed*, 254 F.3d at 311.

Cause of Action seeks records that unquestionably concern the activity of the Federal government, insofar as they reflect communications between FTC employees and Members of Congress. Further, these communications may reveal potential impropriety in the manner and content of Senator Rockefeller's correspondence, as well as politicization through efforts to affect public perception of FTC's enforcement proceeding against LabMD, or as it relates to the Committee on Oversight and Government Reform's recent hearing.

The Supreme Court has stated that the "core purpose of the FOIA" is to allow the American people access to information that might "contribute significantly to public understanding of the operations or activities of the government."<sup>12</sup> The ability of a government "watchdog" – Cause of Action – to secure such records as those sought in the instant request for the purposes of government accountability,<sup>13</sup> especially where a current exigency and unfolding story exists, thus weighs in favor of expedited processing.

### Record Production and Contact Information

In the event that Cause of Action's request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to \$1,500. However, if you expect the fees to exceed \$1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Prashant Khetan or Ryan Mulvey by e-mail at [prashant.khetan@causeofaction.org](mailto:prashant.khetan@causeofaction.org) or [ryan.mulvey@causeofaction.org](mailto:ryan.mulvey@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

CAUSE OF ACTION

BY:



PRASHANT K. KHETAN, ESQ.  
RYAN P. MULVEY, ESQ.

<sup>12</sup> *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 775 (1989).

<sup>13</sup> *See Balt. Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001) ("[O]btaining information to act as a 'watchdog' of the government is a well-recognized public interest in the FOIA."); *see also Cit. to Prevent Handgun Violence v. Dep't of the Treasury*, 981 F. Supp. 20, 24 (D.D.C. 1997) ("This self-appointed watchdog role is recognized in our system.").



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FEDERAL TRADE COMMISSION  
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OCT 30 2014

October 30, 2014

FOIA 2015-00108

FOIA BRANCH  
GENERAL COUNSEL

VIA E-MAIL

Mr. Jonathan E. Nuechterlein  
Office of the General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
E-mail: FOIA@ftc.gov

**Re: Freedom of Information Act Request**

Dear Mr. Nuechterlein:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile) regarding the withdrawal of Margaret (or Maggie) Lassack as Complaint Counsel in connection with the matter captioned *In re: LabMD, Inc.*, FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

**Request for News Media Status**

For fee purposes, Cause of Action qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.<sup>1</sup> These distinct works are distributed to the public through various media, including Cause of Action's website,

<sup>1</sup> See, e.g., CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://causeofaction.org/grading-government-white-house-targets-document-requesters/>; see also CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://causeofaction.org/2013/09/23/greentech-automotive-a-venture-capitalized-by-cronyism-2/>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://causeofaction.org/2013/08/02/political-rofiteering-how-forest-city-enterprises-makes-private-profits-at-the-expense-of-americas-taxpayers/>.

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which has been viewed just under 120,000 times in the past year alone.<sup>2</sup> Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.<sup>3</sup>

### **Record Production and Contact Information**

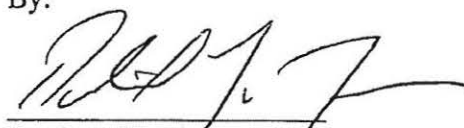
In the event that Cause of Action’s request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to \$1,500. However, if you expect the fees to exceed \$1,500, please contact us before proceeding.

In an effort to facilitate record production, please provide the responsive records in electronic format (*e.g.*, PDFs). If a certain set of responsive records can be produced more readily, Cause of Action respectfully requests that those records be produced first and that the remaining records be produced on a rolling basis as circumstances permit.

If you have any questions about this request, please contact Patrick Massari by e-mail at [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:



Prashant K. Khetan, Esq.

Patrick J. Massari, Esq.

---

<sup>2</sup> *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

<sup>3</sup> *See, e.g.*, FOIA Request CFPB-2014-303-F, Consumer Fin. Prot. Bureau (Sept. 15, 2014); FOIA Request GO-14-307, Dep’t of Energy (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep’t of Energy (Aug. 14, 2014); FOIA Request LR-20140441, Nat’l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm’n (May 7, 2014); FOIA Request 2014-4QF0-00236, Dep’t of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep’t of Energy (July 1, 2013); FOIA Request 2013-073, Dep’t of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep’t of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep’t of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep’t of Educ. (Jan. 20, 2012).



**CAUSE  
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ACTION**  
Advocates for Government Accountability  
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10f4

October 30, 2014

**VIA E-MAIL**

FOIA 2015-00109

FEDERAL TRADE COMMISSION  
RECEIVED

OCT 30 2014

FOIA BRANCH  
GENERAL COUNSEL

Ms. Kelly Tshibaka  
Acting Inspector General  
Federal Trade Commission  
Room CC-5206  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
E-mail: FOIA@ftc.gov

**Re: Freedom of Information Act Request**

Dear Ms. Tshibaka:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile) regarding the matter captioned *In re: LabMD, Inc.*, FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

**Request for News Media Status**

For fee purposes, Cause of Action qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

Cause of Action gathers news that it regularly publishes from a variety of sources, including FOIA requests, whistleblowers/insiders, and scholarly works. Cause of Action does not merely make raw information available to the public, but rather distributes distinct work products, including articles, blog posts, investigative reports, and newsletters.<sup>1</sup> These distinct works are distributed to the public through various media, including Cause of Action's website,

<sup>1</sup> See, e.g., CAUSE OF ACTION, GRADING THE GOVERNMENT: HOW THE WHITE HOUSE TARGETS DOCUMENT REQUESTERS (Mar. 18, 2014), available at <http://causeofaction.org/grading-government-white-house-targets-document-requesters/>; see also CAUSE OF ACTION, GREENTECH AUTOMOTIVE: A VENTURE CAPITALIZED BY CRONYISM (Sept. 23, 2013), available at <http://causeofaction.org/2013/09/23/greentech-automotive-a-venture-capitalized-by-cronyism-2/>; CAUSE OF ACTION, POLITICAL PROFITEERING: HOW FOREST CITY ENTERPRISES MAKES PRIVATE PROFITS AT THE EXPENSE OF AMERICAN TAXPAYERS PART I (Aug. 2, 2013), available at <http://causeofaction.org/2013/08/02/political-rofiteering-how-forest-city-enterprises-makes-private-profits-at-the-expense-of-americas-taxpayers/>.

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Kelly Tshibaka  
October 30, 2014  
Page 2

which has been viewed just under 120,000 times in the past year alone.<sup>2</sup> Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.<sup>3</sup>

**Record Production and Contact Information**

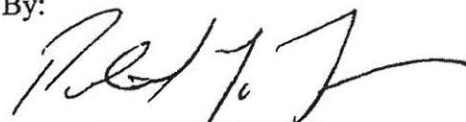
In the event that Cause of Action’s request for news media status is denied, Cause of Action, without waiving its right to appeal, would be willing to pay applicable fees up to \$1,500. However, if you expect the fees to exceed \$1,500, please contact us before proceeding.

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If you have any questions about this request, please contact Patrick Massari by e-mail at [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:



Prashant K. Khetan, Esq.  
Patrick J. Massari, Esq.

<sup>2</sup> *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

<sup>3</sup> *See, e.g.*, FOIA Request CFPB-2014-303-F, Consumer Fin. Prot. Bureau (Sept. 15, 2014); FOIA Request GO-14-307, Dep’t of Energy (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep’t of Energy (Aug. 14, 2014); FOIA Request LR-20140441, Nat’l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm’n (May 7, 2014); FOIA Request 2014-4QF0-00236, Dep’t of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep’t of Energy (July 1, 2013), FOIA Request 2013-073, Dep’t of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep’t of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep’t of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep’t of Educ. (Jan. 20, 2012).



3 of 4

October 30, 2014

**VIA E-MAIL**

Mr. Christian S. White  
Chief Ethics Officer  
Office of the General Counsel  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
E-mail: FOIA@ftc.gov

**Re: Freedom of Information Act Request**

Dear Mr. White:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile) regarding the matter captioned *In re: LabMD, Inc.*, FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

**Request for News Media Status**

For fee purposes, Cause of Action qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

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Christian S. White  
October 30, 2014  
Page 2

which has been viewed just under 120,000 times in the past year alone.<sup>2</sup> Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

The statutory definition of a “representative of the news media” unequivocally contemplates that organizations such as Cause of Action, which electronically disseminate information and publications via “alternative media[,] shall be considered to be news-media entities.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). In light of the foregoing, federal agencies have appropriately recognized Cause of Action’s news media status in connection with its FOIA requests.<sup>3</sup>

**Record Production and Contact Information**

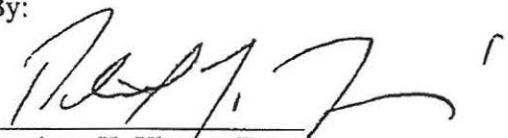
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If you have any questions about this request, please contact Patrick Massari by e-mail at [patrick.massari@causeofaction.org](mailto:patrick.massari@causeofaction.org), or by telephone at (202) 499-4232. Thank you for your attention to this matter.

Cause of Action

By:



Prashant K. Khetan, Esq.  
Patrick J. Massari, Esq.

<sup>2</sup> *Google Analytics* for <http://www.causeofaction.org> (on file with Cause of Action).

<sup>3</sup> *See, e.g.*, FOIA Request CFPB-2014-303-F, Consumer Fin. Prot. Bureau (Sept. 15, 2014); FOIA Request GO-14-307, Dep’t of Energy (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep’t of Energy (Aug. 14, 2014); FOIA Request LR-20140441, Nat’l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm’n (May 7, 2014); FOIA Request 2014-4QF0-00236, Dep’t of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep’t of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep’t of Energy (July 1, 2013); FOIA Request 2013-073, Dep’t of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep’t of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep’t of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep’t of Educ. (Jan. 20, 2012).



2015-110

October 30, 2014

VIA E-MAIL

**FOIA 2015-00110**

FEDERAL TRADE COMMISSION  
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OCT 30 2014

FOIA BRANCH  
GENERAL COUNSEL

Ms. Claudia Simons  
Legislative Counsel  
Office of Congressional Relations  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
E-mail: FOIA@ftc.gov

**Re: Freedom of Information Act Request**

Dear Ms. Simons:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), Cause of Action hereby requests access to all documents (including, but not limited to, communications via e-mail, text, or facsimile): (1) regarding Margaret (or Maggie) Lassack or Alain Sheer; and (2) reflecting communications (including, but not limited to, via e-mail, text, or facsimile) with the United States House of Representatives Committee on Oversight and Government Reform regarding the matter captioned *In re: LabMD, Inc.*, FTC Docket No. 9357.

The time period for this request is August 28, 2013 to the present.

**Request for News Media Status**

For fee purposes, Cause of Action qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II). Specifically, Cause of Action gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

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works are distributed to the public through various media, including Cause of Action's website, which has been viewed just under 120,000 times in the past year alone.<sup>2</sup> Cause of Action also disseminates news to the public via Twitter and Facebook, and it provides news updates to subscribers via e-mail.

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### **Record Production and Contact Information**

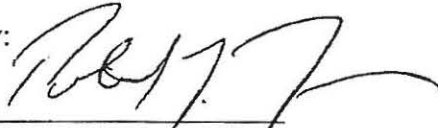
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Cause of Action

By:



Prashant K. Khetan, Esq.  
Patrick J. Massari, Esq.

---

2013), available at <http://causeofaction.org/2013/08/02/political-rofitteering-how-forest-city-enterprises-makes-private-profits-at-the-expense-of-americas-taxpayers/>.

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<sup>3</sup> See, e.g., FOIA Request CFPB-2014-303-F, Consumer Fin. Prot. Bureau (Sept. 15, 2014); FOIA Request GO-14-307, Dep't of Energy (Aug. 28, 2014); FOIA Request HQ-2014-01580-F, Dep't of Energy (Aug. 14, 2014); FOIA Request LR-20140441, Nat'l Labor Relations Bd. (June 4, 2014); FOIA Request 14-01095, Sec. & Exch. Comm'n (May 7, 2014); FOIA Request 2014-4QF0-00236, Dep't of Homeland Sec. (Jan. 8, 2014); FOIA Request DOC-OS-2014-000304, Dep't of Commerce (Dec. 30, 2013); FOIA Request 14F-036, Health Res. & Serv. Admin. (Dec. 6, 2013); FOIA Request CFPB-2014-010-F, Consumer Fin. Prot. Bureau (Oct. 7, 2013); FOIA Request 2013-01234-F, Dep't of Energy (July 1, 2013); FOIA Request 2013-073, Dep't of Homeland Sec. (Apr. 5, 2013); FOIA Request 2012-RMA-02563F, Dep't of Agric. (May 3, 2012); FOIA Request 2012-00270, Dep't of Interior (Feb. 17, 2012); FOIA Request 12-00455-F, Dep't of Educ. (Jan. 20, 2012).