

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



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

RESPONDENT’S MOTION TO ADMIT RX-542

Pursuant to Additional Provision 16 to this Court’s Scheduling Order, and Commission Rule 3.43 (16 C.F.R. § 3.43), Respondent LabMD, Inc. (“LabMD”) moves for admission of RX-542 into evidence.

RX-542 is a relevant and probative June 11, 2014 letter from Chairman Darrell Issa of the U.S. House of Representatives, Committee on Oversight and Government Reform (“OGR”), to Chairwoman Edith Ramirez of the Federal Trade Commission (“FTC”) (Ex. 1; the “OGR Letter”).¹ Citing testimony given to OGR by Robert Boback, the CEO of Tiversa, the OGR Letter states that evidence given to FTC by Tiversa, including evidence regarding the origin of the 1718 File, is “incomplete and inaccurate.” *Id.* It also states that Tiversa “may not have been truthful” with federal agencies. It concludes that OGR expects FTC to “cooperate fully with any subsequent requests for documents or transcribed witness interviews [of FTC employees].” *Id.*

FTC admits that the 1718 File’s supposed exposure on peer-to-peer (“P2P”) networks is the reason for its three year, eight month investigation of LabMD and the lynchpin of this

¹ The OGR Letter was brought to the attention of this Court by counsel for Richard Wallace, a former Tiversa, Inc. (“Tiversa”) employee who is negotiating immunity with OGR in connection with its investigation of Tiversa’s activities. Rough Trial Tr. at 13 (June 12, 2014).

enforcement case. *See* Trial Tr. at 31 (May 20, 2014); Hill Expert Rep. at 15 ¶¶ 43-44; Hill Trial Tr. at 218-20; Van Dyke Trial Tr. at 643, 679; Shields Expert Rep. at 11; Kam Expert Rep. at 6.² Although Mr. Boback may now state otherwise, sometime in 2009, FTC and Tiversa cut a deal under which Tiversa funneled the 1718 File to FTC after FTC sent a civil investigative demand to Tiversa's sham corporation, "The Privacy Institute." *See* CX-703 at 142-43; RX-526 at 16 (FTC's Amended Response to RFA No. 20).

From the outset, LabMD has vigorously contended that Tiversa took the 1718 File directly from a LabMD workstation. If Tiversa did so, whether through LimeWire or otherwise, then the 1718 File was obtained illegally. *See* O.C.G.A. §§ 16-9-93(a), (c). And if the 1718 File was acquired illegally or improperly, then it and all derivative evidence including the Day Sheets and everything else from FTC's investigation should be excluded, and the case dismissed. *See Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 651 (5th Cir. 1977) ("[I]f the FTC act[ed] improperly or illegally in obtaining evidence for the adjudicative proceeding ... [Respondent] should be entitled to have any evidence so obtained -- as well as its 'fruits' -- excluded from the proceeding or to obtain a reversal of any adverse judgment founded upon improperly admitted 'tainted' evidence."); *Knoll Associates v. FTC*, 397 F.2d 530, 537 (7th Cir. 1968) (remanding case to FTC with instruction to reconsider evidence without documents and testimony given or produced by or through witness who stole materials from respondent); *see also Rochin v. California*, 342 U.S. 165, 172-74 (1952).

Although FTC's case is premised on Tiversa's claim that the 1718 File was found on P2P networks, FTC has offered no evidence of authentication. CX-19, the only document "proving"

² Among other things, FTC's 1718 File investigation was the reason the Sacramento police called Complaint Counsel when police officers discovered, during the arrest of municipal-utility-fraud-suspects, that approximately 40 LabMD Day Sheets had been dropped in the spare bedroom of a house. *See* CX-720 at 27 (Dec. 17, 2013); CX-90; CX-94 at 2; *see also* RX-468; RX-472.

that the 1718 File was found on a P2P network, is a one-page document obtained by FTC from Tiversa and cited as “evidence” without any foundation or authentication. *See* CX-19. In fact, this document supposedly was prepared by Richard Wallace, who has asserted his Fifth Amendment privilege against self-incrimination and is awaiting an immunity grant before testifying in this action. *See* RX-541 at 29 (Boback testifying that Rick Wallace “could have” “made up” CX-19). Critically, at all times relevant, FTC knew that Tiversa had a commercial interest in FTC enforcement actions.³ But it appears FTC never “checked” Tiversa’s work.”⁴

FTC’s case therefore depends, as a threshold matter, on Robert Boback’s credibility and the veracity of his story about the origin of the 1718 File. Yet Boback has testified

³ *See* 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) (stating “Tiversa ... 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”); *see also* Jaikumar Vijayan, *FTC seeks extensive information from firms being investigated for p2p breaches*, ComputerWorld (Feb. 25, 2010), available at http://www.computerworld.com/s/article/9162560/FTC_seeks_extensive_information_from_firms_being_investigated_for_P2P_breaches?pageNumber=2 (concluding, after interview of Boback regarding FTC’s investigation into P2P breaches, that a “crackdown by the FTC against those involved in such breaches could benefit companies such as Tiversa, which help businesses figure out if they are leaking protected data on P2P networks”).

⁴ FTC’s investigation of LabMD was harshly criticized by Judge Duffey in the U.S. District Court for the Northern District of Georgia. *See generally LabMD v. FTC*, No. 1:14-cv-810, Hr’g. Tr. at 77, 80-81 (May 9, 2014) (Court exclaiming “holy cow” in response to FTC’s failure to prove chain of custody with respect to Day Sheets, and “Boy, that’s a sad comment on your agency,” in response to FTC’s failure to interview the people who had the Day Sheets). FTC’s apparent failure to authenticate Tiversa’s claims regarding the exposure of the 1718 File on P2P networks is even more troubling given that FTC has the burden of proof and that federal lawyers with prosecutorial powers have heightened responsibilities. *See, e.g.,* James E Moliterno, *The Federal Government Lawyer’s Duty to Breach of Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633, 639 (2006) (“Courts expect that when dealing with a government lawyer, they get a more candid picture of the facts and the legal principles governing the case.”). FTC’s prosecutorial power should have been treated as a responsibility, not a license. Given that FTC obtained the 1718 File in 2009 (*see* CX-703 at 142-43), it strains credulity to suggest that the FTC *never* independently verified where Tiversa “found” the 1718 File and that this matter never came up again until the eve of Mr. Boback’s testimony in November, 2013 or on May 30, 2014.

inconsistently, telling any number of different origin stories without any competent, authenticated documentary evidence backing up any of his various claims.⁵

Unless one of Mr. Boback's many stories about the 1718 File's origin is to be believed, FTC's case against LabMD is based on a crime (Tiversa's take of the 1718 File from LabMD's workstation) and a lie (the claim that the 1718 File was found on a P2P network). Consequently, the OGR Letter is highly relevant and probative, and it has a direct bearing on the very foundation of FTC's case.

FTC argues only that the OGR Letter should be excluded from evidence on the ground of hearsay. Rough Trial Tr. at 18, 22, 24 (June 12, 2014). However, in doing so it ignores 16 C.F.R. § 3.43(b), which provides that "if otherwise meeting the standards for admissibility described in this paragraph, depositions, investigational hearings, prior testimony in Commission or other proceedings, expert reports, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay."⁶ *See also in re Polypore Int'l, Inc.*, 2010 FTC LEXIS 62, at *6-7 (July 10, 2010) (noting that hearsay evidence may be received in FTC proceedings).

⁵ *Compare*, respectively, CX-703 (excerpts of Deposition Testimony of Robert Boback dated Nov. 21, 2013) at 50-51, 60-64; 40; 73; 9; 42; 112-15; 50; *with* RX-541 (excerpts of Deposition Testimony of Robert Boback dated June 7, 2014) at 22, 29; 42; 67, 74, 80; 82; 61-62; 29; 81 (offering different testimony regarding how CX-19 was prepared; whether Tiversa searched for File 1718's hash; whether Tiversa downloaded files to find the 1718 File; whether Tiversa searched P2P networks or its own system to find the 1718 File; whether Tiversa spoke with FTC specifically about LabMD; whether the 1718 File escaped via a thumb drive or if Wallace made up the IP addresses; whether Tiversa found the 1718 File at four IP addresses). Tellingly, FTC has not identified a single consumer "victim" in this case. Yet, FTC's experts testified that at least 3,000 people should have suffered identity theft from the 1718 File and 164 people from the Day Sheets. *See* Kam Trial Tr. at 522-24; Van Dyke Trial Tr. at 619. Therefore, either FTC's experts' analyses are terribly wrong or the 1718 File was taken from LabMD's workstation by Tiversa and not "found" on P2P networks, precisely as LabMD has contended all along.

⁶ FTC did not claim admission of the OGR Letter would be duplicative, present hardship to a party or delay the proceedings. *See* 16 C.F.R. § 3.43(b).

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Under this relaxed standard, the sworn testimony quoted in the OGR Letter – which directly relate to the credibility of prior statements made by Tiversa and Mr. Boback – are admissible. *See* 16 C.F.R. §§ 3.43(b), (d)(1). Furthermore, OGR’s statements in the letter are admissible as part of a congressional investigation, where the circumstances do not indicate a lack of trustworthiness. *See* F.R.E. 803(8) (exception to hearsay for public records).

Therefore, Respondent respectfully requests that the Court admit RX-542.

Dated: June 16, 2014

Respectfully submitted,

/s/ Reed D. Rubinstein

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EXHIBIT

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June 11, 2014

The Honorable Edith Ramirez
Chairwoman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Madam Chairwoman:

The Committee on Oversight and Government Reform is investigating the activities of Tiversa, Inc., a company upon which the Federal Trade Commission (“FTC”) relied as a source of information in its enforcement action against LabMD, Inc.¹ Information the Committee recently obtained indicates that the testimony provided by company officials to federal government entities may not have been truthful.

The Committee’s ongoing investigation has shown that competing claims exist about the culpability of those responsible for the dissemination of false information. It is clear at this point, however, that the information provided to the FTC is incomplete and inaccurate. A witness in the proceedings against LabMD, Inc. recently testified to the Committee that he provided incomplete or inaccurate information to the FTC regarding the origin of a “1718” document. In a transcribed interview with Committee staff, Tiversa’s Chief Executive Officer, Robert Boback, testified that he received “incomplete information with regard to my testimony of FTC and LabMD.”² He further stated that the “the original source of the disclosure was incomplete.”³ Mr. Boback testified:

Q How did you determine that it was incomplete or that there was a problem with the spread analysis?

A I had . . . [Tiversa Employee A], perform[] an analysis, again, remember, data store versus the peer to peer. So the information in the data store, [Tiversa Employee B] performed another analysis to say, what was the original source of the file from LabMD and what

¹ See *In re LabMD, Inc.*, No. 9357 (Fed. Trade Comm’n Aug. 29, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130829labmdpart3.pdf>.

² Transcribed Interview of Robert Boback, Transcript at 129-130 (June 5, 2014) [hereinafter Boback Tr.].

³ *Id.*

was the disclosure, a full analysis of it which then provided to me, which expanded upon what [Tiversa Employee B] had told me when I asked [Tiversa Employee B] prior to my testimony. And the only reason why I asked [Tiversa Employee B] in the first place was because [Tiversa Employee B] was the analyst on it at the time when it was found, so I asked the analyst who was most familiar with this. I didn't know [Tiversa Employee B] was going to provide me with less than accurate information.

* * *

Q So at the time that you were first made aware of the 1718 document in April, May of 2008, Tiversa employees had not conducted the spread analysis?

A No.

Q And you did not know the original source of the 1718 document?

A I did not. No.

* * *

Q Did there come a point at which a Tiversa employee determined who the original source of the 1718 document was?

A Well, that's – yes. A Tiversa employee told me who the original source was . . . just before I testified . . . in the deposition [in the FTC LabMD case] in November of last year. And, subsequently, we have done a new search and found that the origin was different than what was provided to me . . . in November.

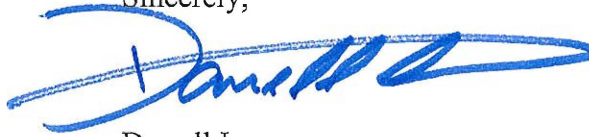
The Committee brings this matter to your attention because this information bears directly on the ongoing proceeding against LabMD, Inc. The Committee is currently considering next steps with regard to its own investigation, including the possibility of holding hearings, agreeing to hear certain testimony in executive session, and, based on information provided, to immunize certain future testimony pursuant to 18 U.S.C. § 6005. The Committee may request documents and access to relevant FTC witnesses. It is my expectation that you and your staff will cooperate fully with any subsequent requests for documents or transcribed witness interviews.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X.

The Honorable Edith Ramirez
June 11, 2014
Page 3

If you have any questions, please contact the Committee staff at (202) 225-5074.
Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa", written over a horizontal line.

Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
William A. Sherman II, Counsel, LabMD, Inc.
Laura Riposo VanDruff, Complain Counsel, U.S. Federal Trade Commission
William A. Burck, Quinn Emanuel Urquhart & Sullivan LLP

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

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

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.'S
MOTION TO ADMIT RX-542**

Having considered Respondent LabMD, Inc.'s Motion to Admit RX-542 and all supporting and opposition papers, and good cause appearing, it is hereby ORDERED that Respondent's Motion is GRANTED and RX-542 is admitted into evidence.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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

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

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

Dated: June 16, 2014

By: /s/ Michael D. Pepson