

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



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

PUBLIC

Docket No. 9357

ORIGINAL

**COMPLAINT COUNSEL’S MOTION FOR LEAVE
TO ISSUE SUBPOENAS FOR REBUTTAL EVIDENCE**

Complaint Counsel respectfully moves for leave to issue narrowly tailored subpoenas to Tiversa Holding Corporation (“Tiversa”) and its employee, Keith Tagliaferri, seeking rebuttal evidence that will refute the anticipated testimony of Respondent’s witness, Richard Wallace, regarding evidence showing the availability of the 1718 File on P2P networks, and demonstrate his bias. Complaint Counsel only learned of this anticipated testimony by [REDACTED]. Complaint Counsel met and conferred with counsel for Respondent on this motion, but was unable to reach agreement. *See* Meet and Confer Statement (attached as Exhibit A). In the interests of justice and disposition of this case on the merits, the Court should grant Complaint Counsel leave to issue the requested subpoenas for rebuttal evidence.

BACKGROUND

On May 27, 2014, Respondent issued a trial subpoena to Richard Wallace, a former employee of Tiversa, to testify at the evidentiary hearing on May 30, 2014.¹ Respondent’s Final

¹ Respondent issued a deposition subpoena to Mr. Wallace on January 30, 2014 and, in consultation with counsel for Tiversa, scheduled his deposition for March 4, 2014. *See* 2014 email correspondence between J. Shaw and W. Sherman regarding Wallace Deposition (attached

Witness List states that Mr. Wallace will testify about “Tiversa’s communications with” the FTC and “facts relating to” the 1718 File but provides no detail about the nature of those “communications” or “facts.” Resp’t Final Witness List (Apr. 9, 2014) at 4-5.

During the evidentiary hearing on May 30, 2014, counsel for Mr. Wallace provided the Court a copy of a letter, dated May 29, 2014, from Representative Darrell Issa, Chairman of the U.S. House of Representatives Committee on Oversight and Government Reform (“Oversight Committee”). The letter asks Mr. Wallace to make himself “available for a transcribed interview by Committee staff” in connection with an Oversight Committee investigation into the activities of “Tiversa, Inc. in conjunction with federal government agencies.” *See* JX3. Counsel for Mr. Wallace informed the Court that Mr. Wallace would invoke his Fifth Amendment right against self-incrimination if required to testify in this proceeding, and that Mr. Wallace was requesting immunity from the Oversight Committee. Trial Tr. at 1249.

Counsel for Mr. Boback learned of the Oversight Committee’s investigation of Tiversa during the May 30, 2014 evidentiary hearing, and requested from the Court a recess for his client to consider its implications. *Id.* at 1245-46. The Court ordered a recess until June 12, 2014, and ordered that Respondent depose Mr. Boback before June 8, 2014 because of Mr. Boback’s unavailability between June 8 and 24, 2014. *Id.* at 1251-53.

Respondent deposed Mr. Boback on June 7, 2013. During its examination, Complaint Counsel asked Mr. Boback about the locations at which Tiversa found the 1718 File on P2P networks. RX541 (Boback Dep. Tr.) (excerpts attached as Exhibit C) at 74-82. Mr. Boback

as Exhibit B) at 4. However, on February 26, 2014, counsel for Tiversa notified the parties that Mr. Wallace would be unable to attend due to an unexpected medical issue. *See id.* at 3-4. Respondent contacted counsel for Tiversa on April 3, 2014 to arrange Mr. Wallace’s deposition after close of discovery, but was informed that Mr. Wallace was no longer a Tiversa employee. *See id.* at 1. Thereafter, the parties did not depose Mr. Wallace. *See* Trial Tr. at 1227.

testified that, prior to his November 2013 deposition as Tiversa's Rule 3.33 designee, Mr. Wallace prepared CX0019, a document indicating where and when Tiversa found the 1718 File. *See Ex. C* at 85. Mr. Boback further testified that, prior to his June 7, 2014 deposition, another Tiversa employee, Keith Tagliaferri, performed a search to confirm the information contained in CX0019. *See id.* at 85. Mr. Boback testified that Mr. Tagliaferri confirmed that Tiversa found the 1718 File at the four IP addresses listed on CX0019, as well as at three additional IP addresses. *See id.* at 76-78, 85. Mr. Boback also testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

During the evidentiary hearing on June 12, 2014, counsel for Mr. Wallace informed the Court that her law firm was continuing to work with the Oversight Committee regarding Mr. Wallace's request for immunity but had no guarantee that he would receive immunity. Trial Tr. at 1274. Mr. Wallace then testified briefly before invoking his Fifth Amendment rights. *Id.* at 1301-02.

During an *in camera* bench conference prior to Mr. Wallace's June 12, 2014 testimony,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Respondent did not request immunity for Mr. Wallace pursuant to the procedure in Rule 3.39(b). *Id.* at 1302-03. Instead, Respondent requested a recess for the Oversight Committee to continue considering Mr. Wallace's request for immunity. *Id.* at 1261, 1303. The Court recessed and ordered the parties to provide weekly status updates on Mr. Wallace's request for immunity. *Id.* at 1303-04.

In light of the [REDACTED], Complaint Counsel now seeks leave to issue subpoenas for evidence rebutting Mr. Wallace's anticipated testimony and establishing his bias against Tiversa. Specifically, Complaint Counsel seeks to depose Mr. Tagliaferri and a designee of Tiversa on the narrow issues of how, when, and where Tiversa found the 1718 File on P2P networks. Complaint Counsel also seeks to subpoena Tiversa for (1) all documents that show how, when, and where Tiversa found the 1718 File on P2P networks, and (2) Mr. Wallace's personnel records and other documents related to his termination from Tiversa for cause.

ARGUMENT

There is good cause for the Court to grant Complaint Counsel's request for leave to issue the requested subpoenas, which are narrowly tailored to obtain rebuttal evidence to refute the anticipated testimony of Mr. Wallace and demonstrate his bias against Tiversa. First, Complaint Counsel could not have reasonably anticipated the substance of Mr. Wallace's expected testimony during discovery or at any point prior to the evidentiary hearing. Second, the requested subpoenas will serve the interest of justice by obtaining evidence necessary to determine the truth about how, when, and where Tiversa found the 1718 File. Third, issuing the subpoenas will materially expedite the ultimate disposition of the case and will not prejudice Respondent.

I. THE COURT HAS AUTHORITY TO PERMIT THE REQUESTED DISCOVERY

Commission Rules of Practice 3.21(c)(2) and 3.41(b)(1) provide the Court authority to permit additional discovery at this stage of the proceeding. Rule 3.21(c)(2) provides that “[t]he Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing”; and Rule 3.41(b)(1) states that the Administrative Law Judge may “grant a reasonable recess at the end of a case-in-chief for the purpose of discovery deferred during the prehearing procedure if the Administrative Law Judge determines that such recess will materially expedite the ultimate disposition of the proceeding.”

II. COMPLAINT COUNSEL COULD NOT HAVE REASONABLY ANTICIPATED THE [REDACTED] WALLACE TESTIMONY DURING DISCOVERY

There is good cause to permit Complaint Counsel to take the requested discovery because Complaint Counsel could not have reasonably anticipated the need for the evidence it seeks before the March 5, 2014 close of discovery or the start of the evidentiary hearing in this matter.² Complaint Counsel did not learn of the substance of Mr. Wallace’s anticipated testimony until [REDACTED] during the evidentiary hearing on June 12, 2014.³ Prior to the evidentiary hearing, Complaint Counsel was not on notice to seek discovery related to the substance of Mr. Wallace’s anticipated testimony or his bias against Tiversa. The substance of Mr. Wallace’s anticipated testimony was not disclosed or implied by

² In addition, even if Complaint Counsel had anticipated the need for such evidence during discovery, Mr. Wallace was not available to be deposed during discovery. *See supra* note 1.

³ As discussed in Section III.A, below, at the June 7, 2014 deposition of Mr. Boback, Complaint Counsel had no knowledge of Mr. Wallace’s anticipated testimony.

Respondent's witness lists or discovery produced or conducted in this matter, and it is directly contradicted by sworn testimony and other evidence in the record.

III. THE REQUESTED SUBPOENAS ARE NARROWLY TAILORED

Complaint Counsel's requested subpoenas are narrowly tailored to obtain rebuttal evidence regarding (1) how, when, and where Tiversa found the 1718 File on P2P networks, and (2) [REDACTED]. This evidence will refute the anticipated testimony of Mr. Wallace that [REDACTED] and demonstrate his bias against Tiversa. Permitting Complaint Counsel to obtain this rebuttal evidence during the current recess will serve the interest of justice by providing relevant evidence necessary for the Court to ascertain the truth of facts at issue, while not delaying the proceeding.

A. Evidence Regarding How, When, and Where Tiversa Found the 1718 File

Complaint Counsel seeks leave to issue subpoenas to Tiversa and its employee, Keith Tagliaferri, to obtain rebuttal evidence regarding how, when, and where Tiversa found the 1718 File on P2P networks. At his June 7, 2014 deposition, Mr. Boback testified that Mr. Tagliaferri verified the four IP addresses, dates, and times where Tiversa found the 1718 File, which are listed on CX0019, and found an additional three. *See* Ex. C at 76-78, 85. But after Complaint Counsel elicited that testimony from Mr. Boback—which is consistent with prior testimony and evidence—[REDACTED]

[REDACTED]. *See* Trial Tr. at 1293.

To ascertain the truth regarding how, when, and where Tiversa found the 1718 File, the Court should grant Complaint Counsel leave to issue: (1) a subpoena *ad testificandum* to Tiversa

under Rule 3.33 that is limited to topics concerning how, when, and where Tiversa found the 1718 File on P2P networks⁴; (2) a subpoena *ad testificandum* to Keith Tagliaferri⁵; and (3) a subpoena *duces tecum* to Tiversa, which seeks documents related to how, when, and where Tiversa found the 1718 File on P2P networks.⁶

B. Evidence Regarding Mr. Wallace’s Bias Against Tiversa

Complaint Counsel’s requested subpoena *duces tecum* to Tiversa also seeks Mr. Wallace’s personnel files and other documents regarding the [REDACTED] [REDACTED], *see* Ex. E at 5, which will demonstrate his bias against Tiversa. *See United States v. Abel*, 469 U.S. 45, 52 (1984) (evidence of a witness’s bias has “a tendency to make the facts to which he testified less probable in the eyes of the [finder of fact]”). Mr. Boback testified during his June 7, 2014 deposition that Mr. Wallace was [REDACTED] [REDACTED] [REDACTED]. *See* Ex. C at 101, 103-04.

⁴ *See* [Proposed] Complaint Counsel’s Notice of Deposition Pursuant to Subpoena to Tiversa Holding Corporation (attached as Exhibit D) at 2.

⁵ Complaint Counsel seeks a limited deposition of Mr. Tagliaferri on the topics on which it seeks leave to depose Tiversa. *See id.*

⁶ *See* [Proposed] Complaint Counsel’s Schedule for Production of Documents Pursuant to Subpoena to Tiversa Holding Corporation (attached as Exhibit E) at 5. Complaint Counsel subpoenaed Tiversa in September 2013 for “Documents Sufficient to Show the time, date, Internet Protocol address, and networks on which” the 1718 File was shared, *see* Complaint Counsel’s Subpoena *Duces Tecum* to Tiversa (Sept. 30, 2013) (attached as Exhibit F) at 10, which was further narrowed in discussions with counsel for Tiversa. Given the unanticipated, eleventh-hour attack on the information provided by Tiversa during discovery, however, Complaint Counsel requests leave to subpoena “[a]ll documents” related to how, when, and where Tiversa found the 1718 File to ascertain the truth. *See* Ex. E at 5.

[REDACTED]—which reasonably support an inference of bias—are relevant to the credibility of his anticipated testimony regarding his former employer Tiversa and its role in this case. To fully assess the truth regarding how, when, and where Tiversa found the 1718 File, the Court should grant Complaint Counsel leave to seek Mr. Wallace’s personnel files and other documents regarding [REDACTED].
 [REDACTED]. *See* Ex. E at 5.

IV. THE REQUESTED DISCOVERY WILL EXPEDITE THE ULTIMATE DISPOSITION OF THIS PROCEEDING AND NOT PREJUDICE RESPONDENT

Allowing Complaint Counsel to seek the requested rebuttal evidence at this time will materially expedite the ultimate disposition of the proceeding and will not prejudice Respondent. As Respondent requested, this proceeding is in recess due to Mr. Wallace’s pending request for immunity from the Oversight Committee, and the record is not yet closed. *See* Trial Tr. at 1261, 1307. Granting Complaint Counsel leave to issue the requested subpoenas during this recess will enable Complaint Counsel—based on [REDACTED]—to obtain the evidence necessary to continue its rebuttal case promptly after Respondent rests.⁷ This will materially expedite the ultimate disposition of this proceeding by forgoing the need for Complaint Counsel to move later to reopen the record. *See* 16 C.F.R. 3.51(e) (“At any time from the close of the hearing record . . . until the filing of his or her initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence for good cause shown.”). In addition, given the current recess, issuance of the requested subpoenas will not unnecessarily delay the proceeding, and Respondent will have sufficient time to respond to the evidence obtained from

⁷ The Court permitted Complaint Counsel to present its first rebuttal witness, Professor Clay Shields, at the conclusion of Complaint Counsel’s case in chief on May 23, 2014. *See* Trial Tr. at 806-08.

the subpoenas before the record closes. Therefore, Respondent will not be prejudiced by the granting of Complaint Counsel's Motion.

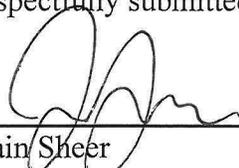
CONCLUSION

For the foregoing reasons, the Court should grant Complaint Counsel leave to issue the requested subpoenas, which seek evidence rebutting the anticipated testimony of Mr. Wallace and demonstrating his bias against Tiversa.

In the alternative, should the Court find this Motion to be premature, Complaint Counsel respectfully requests that the Court grant Complaint Counsel leave to issue the requested subpoenas after Mr. Wallace is granted immunity or provides testimony in this case.

Dated: July 8, 2014

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown

Federal Trade Commission
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Complaint Counsel

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

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

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S
MOTION FOR LEAVE TO ISSUE SUBPOENAS FOR REBUTTAL EVIDENCE**

Upon consideration of Complaint Counsel’s Motion for Leave to Issue Subpoenas for Rebuttal Evidence, it is hereby

ORDERED, that Complaint Counsel is granted leave to issue subpoenas *duces tecum* and *ad testificandum* to Tiversa Holding Corporation, and a subpoena *ad testificandum* to Keith Tagliaferri.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2014, 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 Tiversa Holding Corp.

CERTIFICATE FOR ELECTRONIC FILING

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

July 8, 2014

By: 

Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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

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

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

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion for Leave to Issue Subpoenas for Rebuttal Evidence, on July 2, 2014 Complaint Counsel requested a teleconference to meet and confer on the subject of this motion by email to counsel for Respondent. On July 7, 2014, Complaint Counsel Laura Riposo VanDruff, Jarad Brown, and Megan Cox met and conferred with counsel for Respondent Reed Rubinstein, Kent Huntington, and Hallee Morgan by teleconference in a good faith effort to resolve by agreement the issues raised by the motion.

The parties did not come to a resolution during the teleconference, but, at the request of Mr. Rubinstein, Complaint Counsel emailed William Sherman on July 7, 2014, attaching the proposed subpoenas Complaint Counsel seeks leave to issue (*see* Exhibits D and E) for counsel for Respondent's further consideration. On July 8, 2014, Mr. Rubinstein confirmed by email that Respondent did not agree to the proposed subpoenas. Thus, the parties have not been able to come to agreement on the subject of the motion.

Dated: July 8, 2014

Respectfully submitted,



Alain Sheer

Laura Riposo VanDruff

Megan Cox

Margaret Lassack

Ryan Mehm

John Krebs

Jarad Brown

Federal Trade Commission

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Electronic mail: jbrown4@ftc.gov

Complaint Counsel

Exhibit B

VanDruff, Laura Riposo

From: Shaw, Jarrod D. <JShaw@ReedSmith.com>
Sent: Monday, April 07, 2014 8:28 AM
To: 'Sherman, William'; VanDruff, Laura Riposo
Cc: Harris, Sunni; Sheer, Alain; Rubinstein, Reed
Subject: RE: FTC Docket No. 9357 - Wallace deposition

William,

Mr. Wallace no longer is employed by Tiversa. Accordingly, Tiversa nor its counsel can coordinate his deposition or require him to appear.

Jarrold

From: Sherman, William [mailto:william.sherman@dinsmore.com]
Sent: Thursday, April 03, 2014 10:33 AM
To: 'VanDruff, Laura Riposo'; Shaw, Jarrod D.
Cc: Harris, Sunni; Sheer, Alain; Rubinstein, Reed
Subject: RE: FTC Docket No. 9357 - Wallace deposition

Jarrold,

We have several deadlines approaching in the LabMD matter according to the scheduling order. Particularly we are required to designate all witnesses by April 9th and have all expert witness depositions concluded by April 18. I am inquiring as to the condition of Mr. Wallace and whether his medical condition has improved sufficiently enough for him to sit for his deposition. Please advise.

Regards,

William

The logo for Dinsmore, featuring the word "Dinsmore" in a blue serif font with a small blue triangle above the letter 'i'.

William A. Sherman, II
Partner

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From: VanDruff, Laura Riposo [<mailto:lvandruff@ftc.gov>]
Sent: Friday, February 28, 2014 2:20 PM
To: Sherman, William; 'Shaw, Jarrod D.'
Cc: Harris, Sunni; Sheer, Alain
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Good afternoon, counsel.

Complaint Counsel accepts Mr. Shaw's representations regarding Mr. Wallace's medical issue.

Best regards,

Laura

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 28, 2014 1:56 PM
To: 'Shaw, Jarrod D.'
Cc: Harris, Sunni; VanDruff, Laura Riposo
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

My reading of the FTC's letter is that they will consider it, which is different than they have no objection. If they object later I want to be able to show the ALJ that it was not through some fault of mine that this deposition was not taken within the discovery deadline, and that I vigorously pursued the deposition until.

William

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Friday, February 28, 2014 1:30 PM
To: Sherman, William
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

I guess my question is to whom do you need to make that showing? If the FTC does not have an objection, then what is the issue?

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 28, 2014 1:29 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

I'm not asking for a diagnosis just something to indicate that he is not avoiding the subpoena. I need to demonstrate that I made reasonable efforts to take and or preserve his testimony prior to the close of discovery. An Affidavit from him would suffice.

William

The logo for Dinsmore & Shohl LLP, featuring the word "Dinsmore" in a blue, sans-serif font with a stylized "ô" that has a small triangle above it.

William A. Sherman, II
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From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Friday, February 28, 2014 1:22 PM
To: Sherman, William
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

I am unclear from your email below why you “anticipate” needing information to preserve your right to depose Mr. Wallace. Is this a condition the FTC has requested to preserve that right? As you know, Mr. Wallace has a right to privacy and I am unwilling to disclose any additional information based on some perceived anticipated need.

Please clarify when you have a moment.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 28, 2014 8:47 AM
To: Shaw, Jarrod D.
Cc: Harris, Sunni; 'VanDruff, Laura Riposo'
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

Please forward some documentation that Mr. Wallace is unable to comply with the subpoena *ad testificandum* due to a medical condition. I anticipate that I will need this information in order to preserve my right to depose Mr. Wallace prior to the hearing in this matter which is scheduled to begin on May 15, 2014. I have informed Complaint Counsel of your email and you have received their latest communication to me regarding same. Thank you

William

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William A. Sherman, II
Partner

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From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Wednesday, February 26, 2014 4:07 PM
To: Sherman, William
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Unfortunately, Mr. Wallace is no longer available to appear for the deposition on March 4 as a result of an unexpected medical issue. I am uncertain when he will become available, but at this time he is unable to appear and I will let you know when his condition changes.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 21, 2014 7:50 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

See attached letter regarding deposition of Rick Wallace. Call if you have questions.

Regards,

William

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Monday, February 17, 2014 9:07 AM
To: Sherman, William
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Either day works for the deposition.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Sunday, February 16, 2014 1:23 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

Is it possible to schedule Mr. Wallace's deposition during the first week of March (4th or 5th)?

William

The logo for Dinsmore, featuring the word "Dinsmore" in a blue, sans-serif font with a stylized blue triangle above the letter 'i'.

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From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Saturday, February 15, 2014 1:53 PM
To: Sherman, William
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Please confirm the status of the Wallace deposition.

Thanks,

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, February 07, 2014 4:54 PM
To: Shaw, Jarrod D.
Cc: Harris, Sunni
Subject: RE: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

Jarrold,

Thank you for your letter of Feb. 4, 2014. I am in the process of confirming Feb. 27th as the Wallace depo date. Apparently the Hopkins subpoena was delivered to Tiversa. Please arrange to have it returned to me at my address below. Thank you.

William

The logo for Dinsmore, featuring the word "Dinsmore" in a blue, sans-serif font with a stylized "D" and "A" that are connected.

William A. Sherman, II
Partner

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E william.sherman@dinsmore.com • dinsmore.com

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Tuesday, February 04, 2014 3:02 PM
To: Sherman, William
Subject: FTC Docket No. 9357 - Wallace and Hopkins subpoenas

William,

Please see attached.

Jarrold

Jarrold D. Shaw

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* * *

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Exhibit C

Transcript of the Testimony of **Robert J. Boback**

Date: June 7, 2014

Case: In the Matter of: LabMD, Inc.



Ace-Federal Reporters, Inc.
Phone: 202-347-3700
Fax: 202-737-3638
Email: info@acefederal.com
Internet: www.acefederal.com

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1 MR. SHERMAN: I do.
2 - - - -
3 EXAMINATION
4 - - - -
5 BY MS. VANDRUFF:
6 Q. Good afternoon, Mr. Boback.
7 A. Good afternoon.
8 Q. I am Laura VanDruff. I represent complaint
9 counsel in the ongoing litigation in re: LabMD. I'd
10 like to turn your attention to CX-19 and your testimony
11 from immediately prior to our last break, which related
12 to Mr. Tagliaferri.
13 Am I pronouncing his name correctly?
14 A. You are.
15 Q. Okay. And I believe it is your testimony that
16 Mr. Tagliaferri did an analysis to perform spread of the
17 1718 file; is that correct?
18 A. That is correct.
19 Q. What does that mean?
20 A. The spread is the -- where all the files, or
21 where the 1718 file has been downloaded across the
22 internet.

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1 MR. SHERMAN: I'm going to object to the
2 extent that I believe his answer was that that spread
3 did not relate to CX-19.
4 MR. VANDRUFF: Well, I'm exploring that, Mr.
5 Sherman.
6 THE WITNESS: I'm sorry?
7 MS. VANDRUFF: May I ask that the last
8 answer be read back, please?
9 MR. SHAW: Actually, can you start with the
10 question and then the answer?
11 MS. VANDRUFF: I have no objection to that.
12 (The court reporter read back the requested
13 material.)
14 BY MS. VANDRUFF:
15 Q. What were the results of Mr. Tagliaferri's
16 analysis?
17 MR. SHERMAN: Objection. It is not related
18 to CX-19. You haven't laid even the proper foundation
19 that it is related to CX-19. His answer really wasn't
20 responsive to the question I asked him. Objection.
21 BY MS. VANDRUFF:
22 A. What were the results of Mr. Tagliaferri's or

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1 CX-19?
2 Q. Let's back up. Earlier today you, in response to
3 a question about CX-19, indicated that Mr. Tagliaferri
4 performed a spread of the 1718 file; is that correct?
5 A. Yes, that is correct.
6 MR. SHAW: Objection. That question was not
7 -- that answer was nonresponsive to the question. You
8 may continue.
9 MS. VANDRUFF: And to be clear, Mr. Sherman,
10 you did not object to Mr. Boback's answer as being
11 nonresponsive, so allow me to continue.
12 BY MS. VANDRUFF:
13 Q. Which is, what were the results of Mr.
14 Tagliaferri's analysis?
15 MR. SHAW: Objection. Relevance. You may
16 answer.
17 BY MS. VANDRUFF:
18 A. Mr. Tagliaferri found, located these sources
19 listed on CX-19, all of the sources that were provided
20 as spread on CX-19 as well as, I believe, three
21 additional IP addresses.
22 Q. How did Mr. Tagliaferri perform the spread of the

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1 1718 file?
2 MR. SHAW: Objection. Irrelevant. You may
3 answer.
4 BY MS. VANDRUFF:
5 A. Mr. Tagliaferri performed a, to my understanding,
6 performed a search in the Tiversa data store inquiring
7 the system as to who, or as to which IP addresses the
8 1718 file was located on.
9 Q. When you say, in the data store, to what are you
10 referring?
11 A. Tiversa maintains a very large data store of
12 files that were downloaded from file sharing networks.
13 It is not the file sharing network itself. It is the
14 outcome of the searches or the downloads in the
15 downloads that are now in the data store, so --
16 Q. When did Mr. Tagliaferri perform his spread of
17 the 1718 file?
18 68
19
20 A. I believe he performed that on the -- he began
21 performing it on the 3rd of June of this year.
22 Q. When did he conclude his analysis?

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1 A. I believe it was on the 3rd of 4th of June.
2 Q. What were the three additional IP addresses at
3 which Tiversa has downloaded the 1718 file?
4 A. I don't know the numbers offhand.
5 Q. Am I correct that Mr. Tagliaferri's spread of the
6 1718 file concluded that in addition to the four IP
7 addresses identified in CX-19, that Tiversa also
8 identified three additional IP addresses at which the
9 1718 file had been -- from which the 1718 file had been
10 downloaded?
11 A. You are correct.
12 Q. On which dates were those three additional
13 instances of the 1718 file downloaded?
14 A. I don't know.
15 Q. Was it subsequent to November, excuse me,
16 subsequent to June of 2011?
17 A. I don't know.
18 Q. Did Mr. Tagliaferri or anyone at Tiversa perform
19 any searches to determine whether the 1718 file is
20 currently located on peer-to-peer networks?
21 MR. SHERMAN: Objection. Beyond the scope
22 of direct.

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1 BY MS. VANDRUFF:
2 A. I don't believe he did.
3 Q. Did anyone else at Tiversa perform any searches
4 to determine whether the 1718 file is located, currently
5 located on peer-to-peer networks?
6 MR. SHAW: Objection. Beyond the scope of
7 the direct, or, actually, my cross. You can answer.
8 BY MS. VANDRUFF:
9 A. I don't believe any other employee did, other
10 than, there was a brief search -- I should correct that.
11 MR. SHERMAN: Let the record reflect that
12 Mr. Boback looked at his attorney to his left and then
13 was suddenly reminded that he had additional
14 information. You may testify.
15 BY MS. VANDRUFF:
16 A. I wasn't reminded. So, there --
17 Q. Would it be helpful, Mr. Boback, to have the
18 question read back?
19 A. Sure.
20 MR. SHAW: Just let the record reflect that
21 I disagree with Mr. Sherman. That is no surprise, I'm
22 sure, to anyone.

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1 (The court reporter read back the requested
2 material.)
3 MR. SHERMAN: Objection. Beyond the scope
4 of direct or cross. You can answer.
5 BY MS. VANDRUFF:
6 A. There may have been, although I wasn't -- I did
7 not, but there may have been another search online to
8 see additional LabMD files that may have included the
9 1718 file, to see what was out there on the
10 peer-to-peer, but nothing else was downloaded, no
11 additional files were downloaded to our system. That
12 was not in our data store. That was on the peer-to-peer
13 network itself, but I was not present for that, nor can
14 I confirm or deny that that had taken place.
15 Q. To your knowledge, when was the 1718 file most
16 recently available on the peer-to-peer network?
17 MR. SHERMAN: Objection. Beyond the scope
18 of cross.
19 BY MS. VANDRUFF:
20 A. I do not know.
21 Q. Mr. Sherman asked you about your deposition in
22 November of 2013, do you remember, there were a series

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1 of questions about that?
2 A. Yes.
3 Q. Let me ask you, in the time since your deposition
4 on November 21st of 2013, have you reviewed your
5 deposition transcript?
6 A. I have (indicating).
7 Q. I'd like to direct your attention to Page 9 of
8 your deposition transcript. Let me know when you are
9 there, Mr. Boback.
10 A. I'm there.
11 Q. And, specifically, I'd like to direct your
12 attention to the question that begins on Line 13. You
13 were asked a series of questions you provided the
14 following answer.
15 Question: How did you prepare to testify today
16 setting aside discussions with your counsel? Answer: I
17 reviewed some documents.
18 Question: Which documents did you review?
19 Answer: I reviewed the e-mails that were shared between
20 LabMD and Tiversa.
21 Question: Anything else? Answer: We also
22 prior, several weeks ago, we also performed a search to

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1 find the 1718 document to find if it was located
2 anywhere else through the peer-to-peer networks.
3 Question: And what did you find out? Answer:
4 We found this in multiple locations.
5 Mr. Boback, is your testimony at Page 9 of your
6 deposition transcript a complete and correct summary of
7 what Tiversa did in the weeks prior to your November 21,
8 2013 deposition, as it relates to the 1718 file?
9 MR. SHERMAN: Objection. Beyond the scope
10 of the cross. You may answer.
11 MS. VANDRUFF: And to be clear, Mr. Sherman,
12 I'm trying to discharge my obligation under rule 3.3.
13 MR. SHERMAN: I understand.
14 BY MS. VANDRUFF:
15 A. My testimony is accurate, although I could have
16 qualified it more to say that my searching on the
17 peer-to-peer networks wasn't an outbound search.
18 Tiversa never performed a search in the peer-to-peer
19 networks to find the information or the spread. We
20 performed a search on the -- on our data store, which is
21 a direct reflection of what comes from peer-to-peer
22 networks. So, maybe I could have qualified that better

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1 at that time.
2 Q. Mr. Boback, on June 5th of 2014 at 1:11 p.m.,
3 counsel for Respondent and Complaint counsel received an
4 e-mail from your counsel, Mr. Liben, who is not present
5 today, but who is a colleague of Mr. Shaw's, attaching a
6 supplemental production --
7 MS. VANDRUFF: Sorry?
8 MR. SHAW: Luke Liben? Sorry.
9 MS. VANDRUFF: Yes, Mr. Liben. Sorry if I
10 pronounced his name incorrectly.
11 BY MS. VANDRUFF:
12 Q. So, again, Mr. Liben produced to counsel for
13 Respondent and to myself a supplemental production of 19
14 documents.
15 Are you familiar with the June 5, 2014,
16 production?
17 MR. SHERMAN: Objection. Beyond the scope
18 of cross. Irrelevant.
19 BY MS. VANDRUFF:
20 A. I am.
21 Q. Why did Tiversa make a supplemental production of
22 documents on June 5, 2014?

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1 MR. SHERMAN: Objection. Beyond the scope
2 of the cross and irrelevant. You can answer.
3 MR. SHAW: I want to caution the witness not
4 to disclose conversations with your attorney as to why
5 you responded for supplemented documents, but I will let
6 you answer to the extent that you have information
7 outside of those conversations.
8 BY MS. VANDRUFF:
9 Q. I would be happy to rephrase the question, Mr.
10 Boback, if that would be helpful.
11 A. Okay. Thank you.
12 Q. There were 19 documents that were produced on
13 June 5, 2014.
14 You are familiar with those documents; correct?
15 MR. SHAW: Objection.
16 BY MS. VANDRUFF:
17 Q. I am.
18 MR. SHERMAN: Beyond the scope of the cross.
19 You may answer.
20 BY MS. VANDRUFF:
21 Q. How did Tiversa come to possess the documents
22 that were produced on June 5, 2014?

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1 MR. SHAW: Objection. Beyond the scope of
2 the cross.
3 BY MS. VANDRUFF:
4 A. Tiversa performed a, via Keith Tagliaferri. It
5 is my understanding that Keith Tagliaferri performed a
6 search in the data store for all of the spread of the
7 1718 file and any additional LabMD information that
8 resides in our data store to verify the accuracy of
9 information that was provided to me prior to my
10 deposition by -- that is identified as CX-19 by Richard
11 Wallace, which resulted in the files and the additional
12 IP addresses.
13 Q. When you say, the additional IP addresses, to
14 what are you referring?
15 MR. SHERMAN: Objection. Beyond the scope
16 of cross.
17 BY MS. VANDRUFF:
18 A. CX-19 shows four distinct IP addresses and Mr.
19 Tagliaferri's analysis shows 7, inclusive of the four on
20 CX-19.
21 Q. Were the 19 documents that were produced on
22 June 5, 2014, downloaded by Tiversa?

1 The time is approximately 4:23 p.m.
 2 (There was a brief recess in the
 3 proceeding.)
 4 THE VIDEOGRAPHER: Going back on the record.
 5 The time is approximately 4:29 p.m. You may proceed.
 6 BY MS. VANDRUFF:
 7 Q. Mr. Boback, has Tiversa ever received any money
 8 from the Federal Trade Commission?
 9 A. No.
 10 Q. You've described the work of a Tiversa employee,
 11 Mr. Richard Wallace. What did Mr. Wallace do at
 12 Tiversa?
 13 A. Mr. Wallace was an analyst at Tiversa. So, he
 14 reviewed documents, he also performed, you know, tasks
 15 for Tiversa, investigating and downloading child
 16 pornography as a confidential informant for the FBI.
 17 MR. SHAW: Please, Mr. Daugherty, let him
 18 answer the questions so we can get out of here. That is
 19 all I ask.
 20 BY MS. VANDRUFF:
 21 Q. Was Mr. Wallace always employed as an analyst at
 22 Tiversa, was that his title the entire time he worked at

1 Tiversa?
 2 A. I'm not sure of his title the entire time. I'm
 3 not sure. He was hired as an analyst and then his role
 4 transformed a little bit in the later years, or over the
 5 years.
 6 Q. How did his role transform?
 7 A. He started to do -- he didn't do work on the
 8 Tiversa network using the Tiversa technology. He began
 9 working on a LimeWire client issuing his own searches
 10 and downloads at his discretion, because we did not want
 11 to -- we did not want to download child pornography onto
 12 our Tiversa data store.
 13 Q. With respect to Mr. Wallace's discretion to run
 14 searches, was that limited to child pornography?
 15 A. No, it was not.
 16 Q. What was the scope of his discretion?
 17 A. As he was in front of the computer, he could, not
 18 at Tiversa's direction, but he could search for whatever
 19 he wanted to essentially. He had the ability and he had
 20 really very little oversight.
 21 Q. During what period was Mr. Wallace given this
 22 discretion that you described?

1 A. I'm not sure. It was in the -- in the beginning
 2 he was an analyst, and maybe sometime in, again, it was
 3 several years ago it started to transform to where he
 4 did things outside of that, and more focused on the
 5 child pornographer aspects of it. Again, he is a former
 6 employee.
 7 Q. When did Tiversa first employ Mr. Wallace?
 8 A. I don't recall. Sometime, maybe 2007, maybe.
 9 Q. And when he was first employed at Tiversa, he did
 10 not have the broad discretion that you described; is
 11 that correct?
 12 A. He worked as a, solely as an analyst when he
 13 started at Tiversa. And he was reviewing files that
 14 were downloaded into our system during the normal course
 15 of our business. However, prior to his employment at
 16 Tiversa, he was using LimeWire to search for and
 17 download files at his own discretion. And I believe he
 18 continued to do that on his own, outside of his course
 19 of work at Tiversa.
 20 Q. With respect to the searches that Mr. Wallace
 21 performed at his discretion at Tiversa, were the results
 22 of those searches downloaded into Tiversa's data store?

1 A. In the early years, when he started to do that,
 2 yes. But, then, in the last -- none have been in the
 3 last three or four years. So, in the very early years,
 4 maybe 2008 and '09, possibly. Although I don't recall
 5 when that stopped.
 6 Q. You said that Mr. Wallace had very little
 7 oversight. Why is that?
 8 A. Mr. Wallace was a confidential informant for the
 9 FBI. So, therefore, his activities were only in
 10 conjunction, or to my knowledge, his activities were
 11 only in conjunction with work with the FBI. And, then,
 12 we'd see what searches he searched outside, or the
 13 outcome of the searches that he, or the downloads that
 14 he would make outside of that on occasion.
 15 Q. So, with respect to the discretion that Mr.
 16 Wallace exercised, that was in furtherance of his work
 17 as a confidential informant for the FBI?
 18 A. It was my understanding of that, yes.
 19 Q. Does Mr. Wallace still work for Tiversa?
 20 A. Mr. Wallace was terminated for cause on
 21 2/28/2014.
 22 [REDACTED]

Exhibit D

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

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

**[PROPOSED] 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. “**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.
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. “**1718 File**” means the 1,718 page file, bearing the filename “insuranceaging_6.05.071.pdf,” which the Company found on a peer-to-peer network.
5. The use of the singular includes the plural, and the plural includes the singular.
6. 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 times, dates, Internet Protocol addresses, geographic locations, and networks on or from which Tiversa obtained copies of the 1718 File, and how Tiversa obtained and maintained that information.
2. The times, dates, Internet Protocol addresses, geographic locations, and networks on or at which Tiversa located the 1718 File, and how Tiversa obtained and maintained that information.

Dated: July XX, 2014

Respectfully submitted,

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown

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Complaint Counsel

Exhibit E

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

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

**[PROPOSED] 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 July XX, 2014, under Commission Rule of Practice § 3.34(b), Complaint Counsel requests that the following material be produced to the Federal Trade Commission, 600 Pennsylvania Ave NW, Mailstop CC-8232, Washington, DC 20580.

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. “**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.

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. **“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 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.
9. **“Subpoena”** means the Subpoena to Tiversa Holding Corporation, including this Schedule and Exhibits, and including the Definitions, Instructions, and Specifications.
10. **“You”** or **“Your”** means Tiversa Holding Corporation, or the “Company.”
11. **“1718 File”** means the 1,718 page file, bearing the filename “insuranceaging_6.05.071.pdf,” which the Company found on a peer-to-peer network.
12. The use of the singular includes the plural, and the plural includes the singular.
13. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

INSTRUCTIONS

1. **Transmission of Sensitive Personally Identifiable Information:** Because material called for by this request may contain sensitive personally identifiable information or sensitive health information, materials responsive to this request shall be submitted by Accellion file transfer or another encrypted method of transmission.
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. **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.
5. **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.
6. **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.

7. **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.
8. **Questions:** Any questions you have relating to the scope or meaning of anything in this request or suggestions for possible modifications thereto, or questions regarding the encrypted transmission of electronically stored information should be directed to Laura Riposo VanDruff, at (202) 326-2999.

SPECIFICATIONS

Demand is hereby made for the following documents:

1. All documents that relate to how the Company obtained and maintained the 1718 File, including: all documents that relate to the times, dates, Internet Protocol addresses, geographic locations, and networks on or from which the Company obtained the 1718 File.
2. All documents that relate to the times, dates, Internet Protocol addresses, geographic locations, and networks on or at which the Company located the 1718 File.
3. All documents, including personnel files, that relate to the duties, formal or informal performance evaluations, disciplinary records, drug or alcohol test results, and promotion, demotion, or termination of Richard Wallace, including all documents related to the reasons for the termination of Richard Wallace.

Dated: July XX, 2014

Respectfully submitted,

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown

Federal Trade Commission
600 Pennsylvania Ave., NW
Room CC-8232
Washington, DC 20580
Telephone: (202) 326-2999 – VanDruff
Facsimile: (202) 326-3062
Electronic mail: lvandruff@ftc.gov

Complaint Counsel

Exhibit F



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)

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

13. **“Personal Information”** means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
14. The terms **“Relate”** or **“Relating to”** mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
15. **“Subpoena”** means the Subpoena to Tiversa Holding Corporation, including this Schedule and Exhibits, and including the Definitions, Instructions, and Specifications.
16. **“You”** or **“Your”** means Tiversa Holding Corporation, or the “Company.”
17. **“1,718 File”** means the 1,718 page file the Company found on a peer-to-peer network in 2008 and identified as having been created and stored on a LabMD computer
18. The use of the singular includes the plural, and the plural includes the singular.
19. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

INSTRUCTIONS

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

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

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

in electronic form); (c) a description of the material withheld (for example, a letter, memorandum, or email), including any attachments; (d) the date the material was created; (e) the date the material was sent to each recipient (if different from the date the material was created); (f) the email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent; (g) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors; (h) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material; (i) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material; (j) the factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and (k) any other pertinent information necessary to support the assertion of protected status by operation of law. If only part of a responsive document is privileged, all non-privileged portions of the document must be produced.

9. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish the admissibility of documents produced in response to this subpoena. You are asked to execute this Certification and provide it with your response.
10. **Continuing Nature of Requests:** This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by you prior to the close of discovery, which is February 12, 2014.
11. **Document Retention:** The Company shall retain all documentary materials used in the preparation of responses to the specifications of this Subpoena. We may require the submission of additional documents at a later time. Accordingly, the Company should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this litigation during its pendency, irrespective of whether the Company believes such documents are protected from discovery by privilege or otherwise.
12. **Electronic Submission of Documents:** The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, you must confirm with Commission counsel named above that the proposed formats and media types will be acceptable to the Commission. The FTC requests Concordance load-ready electronic productions, including DAT and OPT load files.

- (1) **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC as follows:
 - (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;
 - (b) All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (“OCR”) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (“TIFF”) or as color JPEG images (where color is necessary to interpret the contents); and
 - (c) Each electronic file should be assigned a unique document identifier (“DocID”) or Bates reference.
- (2) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:
 - (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (3) For each document electronically submitted to the FTC, you should include the following metadata fields in a standard ASCII delimited Concordance DAT file:

- (a) **For electronic mail:** begin Bates or unique document identification number (“DocID”), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (“AttachIDs”) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) **For email attachments:** begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) **For loose electronic documents** (as retrieved directly from network file stores, hard drives, etc.): begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file; and
 - (d) **For imaged hard-copy documents:** begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.
- (4) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact the Commission counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to this Subpoena.
- (5) Submit electronic productions as follows:
- (a) With passwords or other document-level encryption removed or otherwise provided to the FTC;
 - (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible, media;
 - (c) All electronic media shall be scanned for and free of viruses;
 - (d) Data encryption tools may be employed to protect privileged or other personal or private information. The FTC accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in

advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by the FTC; and

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

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

- (6) All electronic files and images shall be accompanied by a production transmittal letter, which includes:
 - (a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and
 - (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that the Commission counsel named above determines prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission counsel named above will provide a sample index upon request.

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

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

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

SPECIFICATIONS

Demand is hereby made for the following documents:

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

September 30, 2013

By:



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

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

CERTIFICATE OF SERVICE

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

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

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

Counsel for Respondent LabMD, Inc.

September 30, 2013

By:



Laura Riposo VanDruff
Federal Trade Commission
Bureau of Consumer Protection