

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



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

PUBLIC  
Docket No. 9357

**RESPONDENT LABMD, INC.’S RULE 3.43(b) MOTION TO EXCLUDE**

In cooperation with Tiversa Holdings Corp. (“Tiversa”), Complaint Counsel aims to “authenticate” proposed exhibits CX1007, CX1008, CX1009, CX1015, CX1016, and CX1017. *See Exhibit 1* (Letter from Laura VanDruff, FTC, to Jarrod Shaw, Counsel for Tiversa (Mar. 12, 2015)). Proposed CX1007, CX1008, and CX1009 were not produced to Respondent LabMD, Inc. (“LabMD”) and, presumably, Complaint Counsel, until October 14, 2014, when Tiversa improperly tried to smear Mr. Richard Wallace. Proposed CX1015, CX1016, and CX1017 were not produced to LabMD and, presumably, Complaint Counsel, until December 1, 2014, when they were disclosed by Congress.

Each proposed exhibit should have been produced pursuant to the Federal Trade Commission’s (“FTC”) September 30, 2013, subpoena to Tiversa for “[a]ll documents related to LabMD.” *See Exhibit 2* (FTC Subpoena to Tiversa, September 30, 2013). Complaint Counsel, knowing that Tiversa obstructed this proceeding by withholding critical responsive documents, chose not to enforce this subpoena. Commission Rule 3.43(b) therefore bars Complaint Counsel from offering the proposed exhibits and any other evidence covered by that subpoena for admission in this case. LabMD would be unfairly prejudiced if Complaint Counsel is allowed to

ignore Tiversa's misconduct while making yet another attempt to rehabilitate its case long after it closed.

## BACKGROUND

In January, 2010, FTC began investigating respondent LabMD, Inc. ("LabMD"). This investigation was not triggered by a consumer complaint. Instead, the 1718 File, obtained from Tiversa through a front company called "the Privacy Institute" created in collusion with FTC, was the sole pretext. *See* Boback Dep., at 142:10 – 143:13 (Nov. 21, 2013).

At all times relevant, FTC knew LabMD's evidence was that Tiversa had stolen the 1718 File from a LabMD workstation in Atlanta, Georgia, in violation of Georgia law.

At all times relevant, FTC knew that Tiversa had "a financial interest in intentionally exposing and capturing sensitive files on computer networks." 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).

At all times relevant, FTC knew that there were no consumer "victims."

Yet, FTC never asked Tiversa for the 1718 File's chain of custody nor took any steps to independently verify the 1718 File's origin or Tiversa's veracity.<sup>1</sup>

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<sup>1</sup> FTC assumed that Tiversa's unsubstantiated claims were true. *See, e.g.*, Expert Report of Raquel Hill (CX0740), at 1, 15; Expert Report of James Van Dyke (CX0741), at 2, 4, 7, 8; Expert Report of Rick Kam (CX0742), at 6, 9, 18,19; Rebuttal Expert Report of Clay Shields (CX0738), at 3, 25. It had no independent evidence, in the form of consumer complaints, screen shots, or metadata, establishing the 1718 File's origin. It did nothing to check Tiversa's story. Yet the Commission turned the full weight of the federal government against a small cancer-detection business and destroyed it. No professional law enforcement agency would conduct itself in this fashion. *See, e.g.* Lieberman, "Ethical Issues in the Use of Confidential Informants for Narcotic Operations," The Police Chief, [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=1210&issue\\_id=62007](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1210&issue_id=62007) ("It is imperative to understand the motivation of informants who come forward with information" and information from informants "must be corroborated using other resources."); *United States v. Lumpkin*, 159 F.3d 983, 986 (6th Cir. 1998) (information from

In 2012, LabMD's CEO Michael Daugherty began speaking out against FTC. Retaliating for this, FTC began monitoring his website, and eventually commenced the administrative case on August 28, 2013.<sup>2</sup> See Hearing Trans., *LabMD v. FTC*, No. 1:14-CV-810-WSD, at 18:24-19:24, 20:10-22, 23:14-20 (N.D. Ga. May 7, 2014); Verified Compl., *LabMD v. FTC*, No. 1:14-CV-810-WSD, at ¶¶ 35-60 (N.D. Ga. Mar. 20, 2014).

On September 30, 2013, Complaint Counsel subpoenaed Tiversa for "All documents related to LabMD." Exhibit 2. Essentially, Tiversa only produced two copies of the 1718 File and CX0019. CX0019 is one page, typewritten list of IP addresses, prepared specifically for Tiversa's deposition, Boback Dep. at 19:13 – 21:15 (Jun. 7, 2014), and it was Tiversa's (and FTC's) only written evidence "proving" that the 1718 File had been found somewhere other than LabMD's Atlanta workstation.

On October 14, 2014, Tiversa filed a "Notice of Information" containing proposed CX1007 (purported email from Wallace to self, "IPs," Nov. 6, 2012), CX1008 (purported email from Wallace to Boback, "LabMD Spread," Nov. 9, 2012), and CX1009 (purported document, "LabMD Spread.doc" Nov. 9, 2012) to impeach Richard Wallace. These documents were responsive to Complaint Counsel's September 30, 2013, subpoena, but had not been produced. Complaint Counsel filed a brief supporting Tiversa's smear job, but did nothing to enforce its subpoena.

On December 1, 2014, the U.S. House of Representatives Committee on Oversight and Government Reform ("OGR") sent the Commission a letter containing proposed CX1015

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confidential informants may be used to obtain a search warrant if it is corroborated by independent investigation) (citations omitted).

<sup>2</sup> LabMD was denied the opportunity to take discovery regarding this retaliation. Order Denying Respondent's Motion for a Rule 3.36 Subpoena, *In the Matter of LabMD, Inc.*, Dkt. No. 9357, at \*5-6 (Feb. 21, 2014).

(“Tiversa Investigation Request Form, Apr. 18, 2008), CX1016 (“Tiversa Incident Record Form,” Apr. 18, 2008), and CX1017 (“Tiversa Forensic Investigation Report,” Aug. 12, 2008), among other documents. *See Exhibit 3* (“OGR’s Letter”). OGR’s letter said that Tiversa “withheld responsive information” contradicting its testimony about the 1718 File and it was “likely” Tiversa withheld documents from FTC and from Congress.<sup>3</sup> *Exhibit 3*. These documents (bates stamped by Tiversa) were responsive to Complaint Counsel’s September 30, 2013, subpoena, but not produced. Again, Complaint Counsel did nothing to enforce its subpoena.<sup>4</sup>

On March 9, 2015, Complaint Counsel issued a subpoena *ad testificandum deposition* to Tiversa together with two subpoenas for live testimony from Tiversa’s CEO and an employee. *See Exhibit 4*. The subpoena *ad testificandum* noticed a deposition of a Tiversa representative in Pittsburgh on March 16, 2015, for the purpose of establishing the “authenticity and admissibility under provisions of Rule § 3.43” of the six proposed exhibits. *Id.*

On March 11, 2015, in a meet-and-confer, LabMD informed Complaint Counsel that it intended to file a motion to quash the subpoena. Complaint Counsel asked LabMD to delay filing the motion for 24 hours.

On March 12, 2015, LabMD wrote Complaint Counsel asking for an update about the subpoena. It also asked FTC to confirm it provided LabMD with “copies of all documents it

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<sup>3</sup> Such “withholding” violates 18 U.S.C. § 1505.

<sup>4</sup> Strangely, Complaint Counsel does not ask Tiversa to authenticate *all* of the OGR Letter documents, although all are critically relevant to this case. *See, e.g.*, Email from Robert Boback to Dan Kopchak and Molly Trunzo (September 5, 2013) (Proposed RX547) (contradicting Boback’s testimony that Tiversa’s initial download of the 1718 File was from San Diego, California, and showing that it was in fact from Atlanta, Georgia); “Forensic Investigation Report – LABMD001 Prepared for LabMD” (June 4, 2014) (Proposed RX548) (contradicting other accounts of Tiversa’s alleged discovery of the 1718 File).

provided to OGR relevant to this litigation” and if “FTC would be willing to join us in filing a motion to compel Tiversa to provide each of us with documents responsive to our subpoenas including all relevant documents they provided to OGR . . . Will you join Respondent in a motion to compel, file one on your own, or not at all?” See Exhibit 5 (Letter from William Sherman, LabMD to Laura Van Druff, FTC (March 12, 2015)).

On March 12, 2015, Complaint Counsel withdrew the subpoena *ad testificandum deposition* because it had made a deal with Tiversa to provide “declaration(s) sufficient to establish the authenticity and admissibility” of the subject documents. Exhibit 1. From the very outset of FTC’s investigation, Complaint Counsel and Tiversa have collaborated against LabMD.<sup>5</sup> See, e.g., Exhibit 6 (emails showing bias of the Commission in their effort to respond to congressional investigation into Tiversa); Exhibit 7 (emails between Laura VanDruff, FTC, Jarrod Shaw, Tiversa, and William Sherman, LabMD, regarding the Wallace deposition); Exhibit 8 (Dec. 2, 2014, email from Laura VanDruff to ALJ Chappell, seeking *in camera* treatment of December 1 OGR letter contrary to the Rules); Exhibit 9 (December 22, 2014, email from Jennifer Barblan, OGR, to Reed Rubinstein, LabMD); Complaint Counsel’s Opposition To Respondent’s Motion To Strike Tiversa Holding Corp.’s Notice Of Information, *In the Matter of LabMD, Inc.*, Dkt. No. 9357 (Nov. 14, 2014); Verified Compl., *Tiversa v. LabMD, Michael*

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<sup>5</sup> In February, 2010, FTC issued a press release bragging that the Commission had “uncovered” what it called “Widespread Data Breaches,” sending “almost 100” letters to offending companies. Press Release, FTC, Widespread Data Breaches Uncovered by FTC Probe (Feb. 22, 2010) <https://www.ftc.gov/news-events/press-releases/2010/02/widespread-data-breaches-uncovered-ftc-probe>. LabMD, however, believes that the evidence will show the “data breaches” in question were “uncovered” by Tiversa and that FTC obtained the information through the Privacy Institute. Compare CX 307 (redacted spreadsheet from the Privacy Institute, listing companies and files allegedly breached), with Press Release, *supra*.

*Daugherty*, Edward Wallace, and Cause of Action, No. GD-14-016497 (Oct. 30, 2014).

However, Complaint Counsel has not responded to LabMD's other queries.

### ARGUMENT

Rule 3.42(b) provides that evidence, even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, *or* based on considerations of undue delay. . . ." Complaint Counsel has chosen not to enforce its September 30, 2013, subpoena although Tiversa has withheld critical exculpatory evidence and obstructed this proceeding. Therefore, Complaint Counsel should be barred from offering into evidence the proposed exhibits and all other documents that should have been produced by Tiversa pursuant to that subpoena, to prevent unfair prejudice and confusion and due to Complaint Counsel's undue delay.

Complaint Counsel knew that Tiversa withheld critical documents and interfered with the integrity of this proceeding no later than October 14, 2014.<sup>6</sup> Given its primary duty to the truth, *see* 5 C.F.R. § 2635.101(b)(5), (8), (14); 16 C.F.R. § 5.1 (cross-referencing executive branch-wide standards of conduct), a motion from Complaint Counsel asking for an order compelling Tiversa to turn over all relevant documents should have been expected in the normal course.

Instead, as to proposed CX1007, CX1008 and CX1009, Complaint Counsel merely supported their admission to damage Mr. Wallace's credibility. *See* Complaint Counsel's Opposition To Respondent's Motion To Strike Tiversa Holding Corp.'s Notice Of Information,

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<sup>6</sup> Proposed CX1007, CX1008 and CX 1009 came to Complaint Counsel's attention no later than October 14, 2014, when Tiversa filed its "Notice of Information" against Mr. Wallace. Proposed CX1015, CX1016 and CX1017, demonstrating FTC's case against LabMD is indeed based on a crime (the 1718 File's download from Georgia) and a lie (that the 1718 File was found outside LabMD on P2P networks) came to Complaint Counsel's attention no later than December 1, 2014, the date of OGR's Letter.

*In the Matter of LabMD, Inc.*, Dkt. No. 9357 (Nov. 14, 2014). As to proposed CX1015, CX1016 and CX1017, Complaint Counsel, frustrating Congress and contrary to the public's right to know, declared the OGR letter confidential and subject to provisional *in camera* treatment, and then, contrary to the rules of this Court, shared it with Tiversa for that company's sole benefit. See Exhibit 8; Rule 3.45.

Complaint Counsel's conduct makes no sense. *Cf.* Hearing., *LabMD v. FTC*, 1:14-CV-810-WSD, 77:9-15 (May 7, 2014) (FTC's actions were a "sad comment" on the agency and almost "unconscionable"). Tiversa, a data-security company, cannot reasonably be said to have "misplaced" the proposed exhibits or any of the other documents attached to OGR's Letter. Rather, Tiversa intentionally withheld critical exculpatory documents from FTC, LabMD, and this Court. The evidence that Congress found, but that Complaint Counsel missed, proves FTC has engaged in five-and-one-half years of inquisition, and spent millions in taxpayer dollars, against a crime victim, *precisely as LabMD has said all along*. Yet, Complaint Counsel stands silent.

Complaint Counsel's conduct is particularly problematic in light of its discovery assault against LabMD. See Respondent LabMD, Inc.'s Motion for a Protective Order, *In the Matter of LabMD, Inc.*, Dkt. No. 9357 (Nov. 5, 2013). Complaint Counsel has compelled production of thousands of documents, issued broad and intrusive civil investigative demands, conducted multiple investigatory hearings, and vigorously sought discovery compliance orders from LabMD, crippling its management's ability to run the cancer detection laboratory. See Complaint Counsel's Motion for Discovery Sanctions Against Respondent LabMD, Inc., for Failing to Comply with Discovery Obligations, *In the Matter of LabMD, Inc.*, Dkt. No. 9357

(Feb. 10, 2014). But Complaint Counsel has compelled nothing from Tiversa, a company proven to have withheld key documents. Here again, FTC has given Tiversa preferential treatment.<sup>7</sup>

Because Complaint Counsel has chosen not to enforce its subpoena, it ought to be barred from using the proposed exhibits and all other evidence that Tiversa should have produced but withheld in response to the September 30, 2013 subpoena. It would be unfairly prejudicial and confuse the issues if Complaint Counsel, having chosen to see and say nothing about Tiversa's misconduct, is allowed to cherry-pick documents in yet another effort to rehabilitate its case long after it closed. *See* Trial Tr., at 1229:2-15 (May 30, 2014) ("the record is what it is"). Furthermore, Rule 3.42(b) provides for the exclusion of evidence "based on considerations of undue delay." Complaint Counsel unduly delayed enforcing its September 30, 2013 subpoena, despite having knowledge of its violation, and so it should be barred from introducing the proposed exhibits into evidence and taking their benefit.<sup>8</sup>

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<sup>7</sup> This sharpens serious and long-standing questions about improper collaboration. *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); Exhibit 6 (emails showing Commission effort to counter congressional investigation into Tiversa).

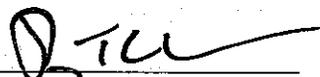
<sup>8</sup> At a minimum, given the remarkable circumstances here, Complaint Counsel ought to be required to show cause and explain why it has failed to demand that Tiversa come clean and produce all responsive documents before being allowed to seek admission of any such evidence. Complaint Counsel's obligations to this Court and to LabMD's due process rights should take precedence over whatever tactical advocacy benefit it may be trying to gain.

CONCLUSION

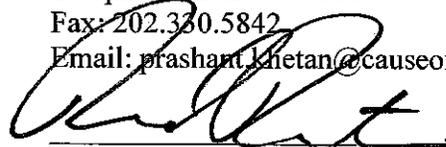
For the foregoing reasons, LabMD respectfully requests that the Court exclude and bar Complaint Counsel from offering proposed exhibits CX1007, CX1008, CX1009, CX1015, CX1016, CX1017, and all other documents or evidence that was responsive to Complaint Counsel's September 30, 2013, subpoena but not produced.

Dated: March 25, 2015

Respectfully submitted,



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*Counsel for Respondent, LabMD*

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

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

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.’S  
RULE 3.43(b) MOTION TO EXCLUDE**

Upon consideration of Respondent LabMD, Inc.’s Rule 3.43(b) Motion To Exclude:

It is hereby ORDERED that LabMD’s Motion is GRANTED, and Complaint Counsel is barred from seeking to use or offer into evidence proposed exhibits CX1007, CX1008, CX 1009, CX 1015, CX 1016, and CX 1017.

SO ORDERED:

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

Date:



**CERTIFICATE OF SERVICE**

I hereby certify that on March 25, 2015, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

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

Dated: March 24, 2015

By: /s/ Hallee K. Morgan

**CERTIFICATE OF ELECTRONIC FILING**

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

Dated: March 25, 2015

By: /s/ Hallee K. Morgan

# Exhibit 1



PUBLIC

United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

March 12, 2015

**VIA EMAIL**

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

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

Dear Mr. Shaw:

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

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

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

Sincerely,

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

Laura Riposo VanDruff

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

# Exhibit 2



# SUBPOENA DUCES TECUM

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

<p>1. TO</p> <p>Tiversa Holding Corp. 606 Liberty Avenue Pittsburgh, PA 15222</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

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

In the Matter of LabMD, Inc., Docket 9357

7. MATERIAL TO BE PRODUCED

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

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>Chief Judge D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Laura Riposo VanDruff, Complaint Counsel Federal Trade Commission 601 New Jersey Ave, NW, Room-8100 Washington, DC 20001 (202) 326-2999</p>
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<p>DATE SIGNED</p> <p>9/30/13</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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## GENERAL INSTRUCTIONS

### APPEARANCE

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

### MOTION TO LIMIT OR QUASH

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

### TRAVEL EXPENSES

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

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

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

RETURN OF SERVICE

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

in person.

by registered mail.

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

TNessa Holdings Corporation

606 Liberty Avenue

Pittsburgh, PA 15222

via FedEx Air delivery on 10/1/13

on the person named herein on:

October 1, 2013

(Month, day, and year)

Laura Riposo Vanduff

(Name of person making service)

General Attorney

(Official title)

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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

Pursuant to Complaint Counsel’s attached Subpoena Duces Tecum issued September 30, 2013, under Commission Rule of Practice § 3.34(b), Complaint Counsel requests that the following material be produced to the Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, DC 20001.

DEFINITIONS

1. “**All documents**” means each document, as defined below, that can be located, discovered or obtained by reasonable, diligent efforts, including without limitation all documents possessed by: (a) you, including documents stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or which you have a legal right to bring within your possession by demand.
2. The term “**Communication**” includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
3. “**Company**” shall mean Tiversa Holding Corporation (“Tiversa”), its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.
4. “**Complaint**” means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.

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

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

### INSTRUCTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SPECIFICATIONS

Demand is hereby made for the following documents:

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

September 30, 2013

By:



Alain Sheer  
Laura Riposo VanDruff  
Megan Cox  
Margaret Lassack  
Ryan Mehm

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

CERTIFICATE OF SERVICE

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

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

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

*Counsel for Respondent LabMD, Inc.*

September 30, 2013

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

# Exhibit 3

JOHN L. MICA, FLORIDA  
MICHAEL R. TURNER, OHIO  
JOHN J. DUNCAN, JR., TENNESSEE  
PATRICK T. McHENRY, NORTH CAROLINA  
JIM JORDAN, OHIO  
JASON CHAFFETZ, UTAH  
TIM WALBERG, MICHIGAN  
JAMES LANKFORD, OKLAHOMA  
JUSTIN AMASH, MICHIGAN  
PAUL A. GOSAR, ARIZONA  
PATRICK MEEHAN, PENNSYLVANIA  
SCOTT DesJARLAIS, TENNESSEE  
TREY GOWDY, SOUTH CAROLINA  
BLAKE FARENTHOLD, TEXAS  
DOC HASTINGS, WASHINGTON  
CYNTHIA M. LUMMIS, WYOMING  
ROB WOODALL, GEORGIA  
THOMAS MASSIE, KENTUCKY  
DOUG COLLINS, GEORGIA  
MARK MEADOWS, NORTH CAROLINA  
KERRY L. BENTIVOLIO, MICHIGAN  
RON DeSANTIS, FLORIDA

Congress of the United States  
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

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JACKIE SPEIER, CALIFORNIA  
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L. TAMMY DUCKWORTH, ILLINOIS  
ROBIN L. KELLY, ILLINOIS  
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PETER WELCH, VERMONT  
TONY CARDENAS, CALIFORNIA  
STEVEN A. HORSFORD, NEVADA  
MICHELLE LUJAN GRISHAM, NEW MEXICO  
VACANCY

LAWRENCE J. BRADY  
STAFF DIRECTOR

December 1, 2014

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

Dear Ms. Ramirez:

The Committee on Oversight and Government Reform has been investigating the activities of Tiversa, Inc., a Pittsburgh-based company that purportedly provides peer-to-peer intelligence services. The Federal Trade Commission has relied on Tiversa as a source of information in its enforcement action against LabMD, Inc., a Georgia-based medical testing laboratory. The Committee has obtained documents and information indicating Tiversa failed to provide full and complete information about work it performed regarding the inadvertent leak of LabMD data on peer-to-peer computer networks. In fact, it appears that, in responding to an FTC subpoena issued on September 30, 2013, Tiversa withheld responsive information that contradicted other information it did provide about the source and spread of the LabMD data, a billing spreadsheet file.

**Despite a broad subpoena request, Tiversa provided only summary information to the FTC about its knowledge of the source and spread of the LabMD file.**

Initially, Tiversa, through an entity known as the Privacy Institute, provided the FTC with information about peer-to-peer data leaks at nearly 100 companies, including LabMD.<sup>1</sup> Tiversa created the Privacy Institute for the specific purpose of providing information to the FTC. Despite Tiversa's claims that it is a trusted government partner, it did not want to disclose that it provided information to the FTC.<sup>2</sup>

After the FTC filed a complaint against LabMD, the agency served Tiversa with a subpoena for documents related to the matter. Among other categories of documents, the subpoena requested "all documents related to LabMD."<sup>3</sup> In a transcribed interview, Alain Sheer,

<sup>1</sup> H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Robert Boback, Chief Executive Officer, Tiversa, Inc., Transcript at 42 (June 5, 2014) [hereinafter Boback Tr.].

<sup>2</sup> See Tiversa, Industry Outlook, Government/Law Enforcement, available at <http://tiversa.com/explore/industry/gov> (last visited Nov. 21, 2014); Boback Tr. at 42-43.

<sup>3</sup> Fed. Trade Comm'n, Subpoena to Tiversa Holding Corp. (Sept. 30, 2013) [hereinafter Tiversa FTC Subpoena].

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an attorney with the FTC's Bureau of Consumer Protection, told the Committee that the FTC did not narrow the subpoena for Tiversa. Sheer stated:

Q This is the specifications requested of Tiversa. No. 4 requests all documents related to LabMD. Do you know if Tiversa produced all documents related to LabMD?

A I am not sure what your question is.

Q Let me ask it a different way. Was the subpoena narrowed in any way for Tiversa?

A Not that I am aware of.<sup>4</sup>

In total, Tiversa produced 8,669 pages of documents in response to the FTC's subpoena. Notably, the production contained five copies of the 1,718-page LabMD Insurance Aging file that Tiversa claimed to have found on peer-to-peer networks and only 79 pages of other materials, none of which materially substantiated Tiversa's claims about the discovery of the file.

The information Tiversa gave the FTC included the IP address from which Tiversa CEO Robert Boback has claimed the company first downloaded the LabMD file, as well as other IP addresses that Tiversa claims also downloaded the file. The origin of the IP address from which Tiversa first downloaded the LabMD file was in dispute in other litigation between LabMD and Tiversa. On numerous occasions, including before the FTC, Boback maintained that Tiversa first downloaded the LabMD file from an IP address in San Diego, California. Boback stated:

Q What is the significance of the IP address, which is 68.107.85.250?

A That would be the IP address that we downloaded the file from, I believe.

Q Going back to CX 21. Is this the initial disclosure source?

A If I know that our initial disclosure source believed that that was it, yes. I don't remember the number specifically, but if that IP address resolves to San Diego, California, then, yes, that is the original disclosure source.

Q When did Tiversa download [the LabMD file]?

A I believe it was in February of 2008.<sup>5</sup>

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<sup>4</sup> H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Alain Sheer, Fed. Trade Comm'n, Transcript at 147 (Oct. 9, 2014).

<sup>5</sup> In the matter of LabMD, Inc., Deposition of Robert J. Boback, CEO, Tiversa, transcript at 24-25 (Nov. 21, 2013) [hereinafter Boback Nov. 2013 FTC Tr.].

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December 1, 2014  
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Boback also testified that Tiversa performed an investigation into the LabMD file at the request of a client.<sup>6</sup> In the course of this investigation, Tiversa concluded that an IP address in Atlanta, Georgia, where LabMD was headquartered, was the initial disclosure source of the document. Boback stated:

Q There is an IP address on the right-hand side, it is 64.190.82.42. What is that?

A That, if I recall, is an IP address that resolves to Atlanta, Georgia.

Q Is that the initial disclosure source?

A We believe that it is the initial disclosure source, yes.

Q And what is that based on?

A The fact that the file, the 1,718 file, when we searched by hash back in that time for our client, we received a response back from 64.190.82.42 suggesting that they had the same file hash as the file that we searched for. We did not download the file from them.

\* \* \*

Q So, I think you are telling me that chronologically this was the first other location for that file in juxtaposition of when you found the file at 68.107.85.250?

A We know that the file in early February, prior to this February 25 date, was downloaded from the 68.107.85.250. Upon a search to determine other locations of the file across the network, it appears that on 2/25/2008 we had a hash match search at 64.190.82.42, which resolved to Atlanta, which led us to believe that without further investigation, that this is most likely the initial disclosing source.

Q What other information do you have about 64.190.82.42?

A I have no other information. I never downloaded the file from them. They only responded to the hash match.<sup>7</sup>

Boback's testimony before the FTC in November 2013 made clear that Tiversa first downloaded the LabMD file from an IP address in San Diego, California, in February 2008, that it only identified LabMD as the disclosing source after performing an investigation requested by a client, and that it never downloaded the file from LabMD.

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<sup>6</sup> Boback Nov. 2013 FTC Tr. at 72-73 ("In 2008, when working for another client, we were attempting to identify the original disclosure source of the file that we discovered from 1 the San Diego IP address.").

<sup>7</sup> Boback Nov. 2013 FTC Tr. at 41.

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**Tiversa withheld responsive documents from the FTC, despite the issuance of the September 2013 subpoena. These documents contradict the account Boback provided to the FTC.**

On June 3, 2014, the Committee issued a subpoena to Tiversa requesting, among other information, “[a]ll documents and communications referring or relating to LabMD, Inc.”<sup>8</sup> This request was very similar to the FTC’s request for “all documents related to LabMD.”<sup>9</sup> Despite nearly identical requests from the FTC and the Committee to Tiversa, Tiversa produced numerous documents to the Committee that it does not appear to have produced to the FTC. Information contained in the documents Tiversa apparently withheld contradicts documents and testimony Tiversa did provide to the FTC.

An internal Tiversa document entitled “Incident Record Form,” dated April 18, 2008, appears to be the earliest reference to the LabMD file in Tiversa’s production to the Committee.<sup>10</sup> This document states that on April 18, 2008, Tiversa detected a file “disclosed by what appears to be a potential provider of services for CIGNA.”<sup>11</sup> The Incident Record described the document as a “single Portable Document Format (PDF) that contain[ed] sensitive data on over 8,300 patients,” and explained that “[a]fter reviewing the IP address, resolution results, meta-data and other files, Tiversa believes it is likely that Lab MD near Atlanta, Georgia is the disclosing source.”<sup>12</sup> The name of the file was “insuranceaging\_6.05.071.pdf,” which is the same name as the file in question in the FTC proceeding. According to the Incident Record, the IP address disclosing the file was 64.190.82.42—later confirmed to be a LabMD IP address.<sup>13</sup> Upon learning about the file, CIGNA, a Tiversa client, “asked Tiversa to perform Forensic Investigation activities” on the insurance aging file to determine the extent of proliferation of the file over peer-to-peer networks.<sup>14</sup>

An August 2008 Forensic Investigation Report provided the analysis CIGNA requested. This report identified IP address 64.190.82.42—the Atlanta IP address—as proliferation point zero, and the “original source” of the Incident Record Form.<sup>15</sup> A spread analysis included in the August 2008 forensic report stated that the file had been “observed by Tiversa at additional IP addresses” but made clear that Tiversa had not downloaded the file from either additional source because of “network constraint and/or user behavior.”<sup>16</sup> Thus, according to this report, Tiversa had only downloaded the LabMD file from one source in Atlanta, Georgia by August 2008. This contradicts Boback’s testimony that Tiversa first downloaded the LabMD file from an IP address

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<sup>8</sup> H. Comm. on Oversight & Gov’t Reform, Subpoena to Robert Boback, Chief Exec. Officer, Tiversa, Inc. (June 3, 2014).

<sup>9</sup> Tiversa FTC Subpoena.

<sup>10</sup> Tiversa Incident Record Form, ID # CIG00081 (Apr. 18, 2008).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> *Id.*

<sup>14</sup> Tiversa, Forensic Investigation Report for Ticket #CIG00081 (Aug. 12, 2008). This letter uses the phrase “forensic report” to describe this and a second report created by Tiversa about the LabMD file because that is the title used by Tiversa. It is not clear what, if any, forensic capabilities Tiversa possesses.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

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in San Diego, California. If Tiversa had in fact downloaded the LabMD file from a San Diego IP address in February 2008, then that fact should be included in this 2008 forensic report. It is not.

One of the two additional IP addresses is located in San Diego, California. It is a different IP address, however, than the one from which Tiversa claims to have originally downloaded the file.<sup>17</sup> Further, Tiversa did not observe that this San Diego IP address possessed the LabMD file until August 5, 2008.<sup>18</sup> Thus, according to this report, Tiversa did not observe any San Diego IP address in possession of the LabMD file until August 2008. Again, the report stands in stark contrast to Boback's testimony that Tiversa first downloaded the LabMD file from a different San Diego IP address in February 2008.

In addition, both the April 2008 Incident Record Form and the August 2008 Forensic Investigative Report stated that the LabMD file was "detected being disclosed" in April 2008. Neither report indicated that Tiversa first downloaded the file from the San Diego IP address—an IP address not listed on either report—on February 5, 2008. Boback's deposition testimony and a cursory four-line document marked as exhibit CX-19 seem to be the only evidence that Tiversa first downloaded the LabMD file from a San Diego IP address in February 2008.

These documents contradict the information Tiversa provided to the FTC about the source and spread of the LabMD file. If Tiversa had, in fact, downloaded the LabMD file from the San Diego IP address and not from the Georgia IP address, then these reports should indicate as such. Instead, the San Diego IP address is nowhere to be found, and the Georgia IP address appears as the initial disclosing source on both reports.

Tiversa also produced an e-mail indicating that it originally downloaded the LabMD file from Georgia – and not from San Diego as it has steadfastly maintained to the FTC and this Committee. On September 5, 2013, Boback e-mailed Dan Kopchak and Molly Trunzo, both Tiversa employees, with a detailed summary of Tiversa's involvement with LabMD. Why Boback drafted the e-mail is unclear. He wrote, "[i]n 2008, while doing work for a client, our systems downloaded a file (1,718 page pdf) that contained sensitive information including SSNs and health information for over 9000 people. The file had the name 'LabMD' in both the header of the file and the metadata. The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD's office to be located."<sup>19</sup>

As noted above, according to Alain Sheer, a senior FTC attorney assigned to the LabMD matter, the FTC did not narrow the September 2013 subpoena requiring Tiversa to produce, among other documents, "all documents related to LabMD."<sup>20</sup> Tiversa withheld these relevant

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<sup>17</sup> The IP address reported on the August 2008 forensic report that resolves to San Diego, California is 68.8.250.203. Boback testified, however, that Tiversa first downloaded the LabMD file from IP address 68.107.85.250 on February 5, 2008. Tiversa concluded in the report that the second IP address on which it observed the file was "most likely an IP shift from the original disclosing source."

<sup>18</sup> *Id.*

<sup>19</sup> E-mail from Robert Boback, CEO, Tiversa, to Dan Kopchak & Molly Trunzo (Sept. 5, 2013) (emphasis added) [TIVERSA-OGR-0028866-67].

<sup>20</sup> Tiversa FTC Subpoena.

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December 1, 2014  
Page 6

documents about its discovery and early forensic analysis of the LabMD file from the FTC. These documents directly contradict testimony that Boback provided to the FTC, and call Tiversa's credibility into question. Boback has not adequately explained why his company withheld documents, and why his testimony is not consistent with reports Tiversa created at the time it discovered the LabMD file.

It is unlikely that the LabMD file analyzed in the April 2008 Incident Record Form and the August 2008 Forensic Investigative Report is different from the so-called "1718 file" at issue in the FTC proceeding, particularly given Boback's testimony to the FTC about how Tiversa's system names files.<sup>21</sup> If, however, the earlier reports do refer to a different file, then Tiversa neglected to inform the FTC of a second, similarly sized leak of LabMD patient information.

**Tiversa's June 2014 forensic report is the only report provided to this Committee that substantiates Boback's claims.**

Tiversa produced to the Committee a forensic report on the LabMD file that it created in June 2014. Tiversa created this report and others related to testimony previously provided to the Committee after the investigation began. While outside the scope of the FTC's subpoena due to the date of the document, this is the only report supporting Tiversa's claim that it first downloaded the file from the San Diego IP address. This report contradicts information Tiversa provided to CIGNA in the April 2008 Incident Record Form and August 2008 Forensic Investigative Report—documents created much closer to when Tiversa purportedly discovered the LabMD document on a peer-to-peer network. The fact that Tiversa created the only forensic report substantiating its version of events after the Committee began its investigation raises serious questions.

This most recent report states that Tiversa's systems first detected the file on February 5, 2008, from a San Diego IP address (68.107.85.250) not included in either of the 2008 documents. According to the spread analysis, this San Diego IP shared the file from February 5, 2008, until September 20, 2011. Yet, despite allegedly being downloaded before both the April or August 2008 reports, neither 2008 document mentions that Tiversa downloaded this document.

The June 2014 report also states that the LabMD IP address (64.190.82.42) shared the file between March 7, 2007, and February 25, 2008. Thus, according to this report, by the time Tiversa submitted an Incident Record Form to CIGNA in April 2008, the LabMD IP address was no longer sharing the file. Furthermore, the report does not describe why Tiversa's system did not download the file from the Georgia IP address, even though the technology should have downloaded a file that hit on a search term, in this case "CIGNA," each time a different computer shared the document. The June 2014 report includes no reference to the other San Diego IP address discussed in the August 2008 forensic report as being in possession of the LabMD file.

---

<sup>21</sup> Boback Nov. 2013 FTC Tr. at 40-41 (describing that a file's "hash" or title identifies "exactly what that file is." The title of the LabMD document described in the April and August 2008 documents is the same as the title of the document in the FTC proceeding).

**Tiversa did not make a full and complete production of documents to this Committee. It is likely that Tiversa withheld additional documents from both this Committee and the FTC.**

On October 14, 2014, Tiversa submitted a Notice of Information Pertinent to Richard Edward Wallace's Request for Immunity.<sup>22</sup> Chief Administrative Law Judge D. Michael Chappell has since ordered that the assertions and documents contained in the Notice of Information will be "disregarded and will not be considered for any purpose."<sup>23</sup> Tiversa included two e-mails from 2012 as exhibits to the Notice of Information. According to Tiversa, these e-mails demonstrate that Wallace could not have fabricated the IP addresses in question in October 2013, because he previously included many of them in e-mails to himself and Boback a year prior.<sup>24</sup>

Tiversa did not produce these documents to the Committee even though they are clearly responsive to the Committee's subpoena. Their inclusion in a submission in the FTC proceeding strongly suggests that Tiversa also never produced these documents to the FTC. In its Notice of Information, Tiversa did not explain how and when it identified these documents, why it did not produce them immediately upon discovery, and what additional documents it has withheld from both the FTC and the Committee. The e-mails also contain little substantive information and do not explain what exactly Wallace conveyed to Boback in November 2012 or why he conveyed it.

If Boback did in fact receive this information in November 2012, his June 2013 deposition testimony is questionable. It is surprising that Tiversa would have supplied inaccurate information to the FTC when Boback himself apparently received different information just months prior. Tiversa should have located and produced these e-mails pursuant to the September 2013 subpoena, and it should have been available for Boback's June 2013 deposition.

Tiversa's failure to produce numerous relevant documents to the Commission demonstrates a lack of good faith in the manner in which the company has responded to subpoenas from both the FTC and the Committee. It also calls into question Tiversa's credibility as a source of information for the FTC. The fact remains that withheld documents contemporaneous with Tiversa's discovery of the LabMD file directly contradict the testimony and documents Tiversa did provide. In the Committee's estimation, the FTC should no longer consider Tiversa to be a cooperating witness. Should the FTC request any further documents from Tiversa, the Commission should take all possible steps to ensure that Tiversa does not withhold additional documents relevant to the proceeding.

---

<sup>22</sup> Tiversa Holding Corp.'s Notice of Information Pertinent to Richard Edward Wallace's Request For Immunity, In the Matter of Lab MD, Inc., No. 9357 (U.S. Fed. Trade Comm'n, Oct. 14, 2014), <http://www.ftc.gov/system/files/documents/cases/572572.pdf> [hereinafter Notice of Information].

<sup>23</sup> *LabMD Case: FTC gets green light to grant former Tiversa employee immunity in data security case*, PHIPrivacy.net, Nov. 19, 2014, <http://www.phiprivacy.net/labmd-case-ftc-gets-green-light-to-grant-former-tiversa-employee-immunity-in-data-security-case/>.

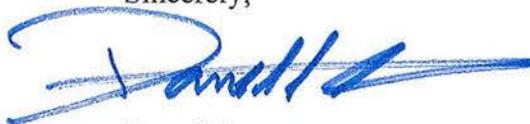
<sup>24</sup> Notice of Information at 4.

The Honorable Edith Ramirez  
December 1, 2014  
Page 8

I have enclosed the documents discussed herein with this letter, so that your staff may examine them. All documents are provided in the same form in which Tiversa produced them to the Committee.

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

Sincerely,



Darrell Issa  
Chairman

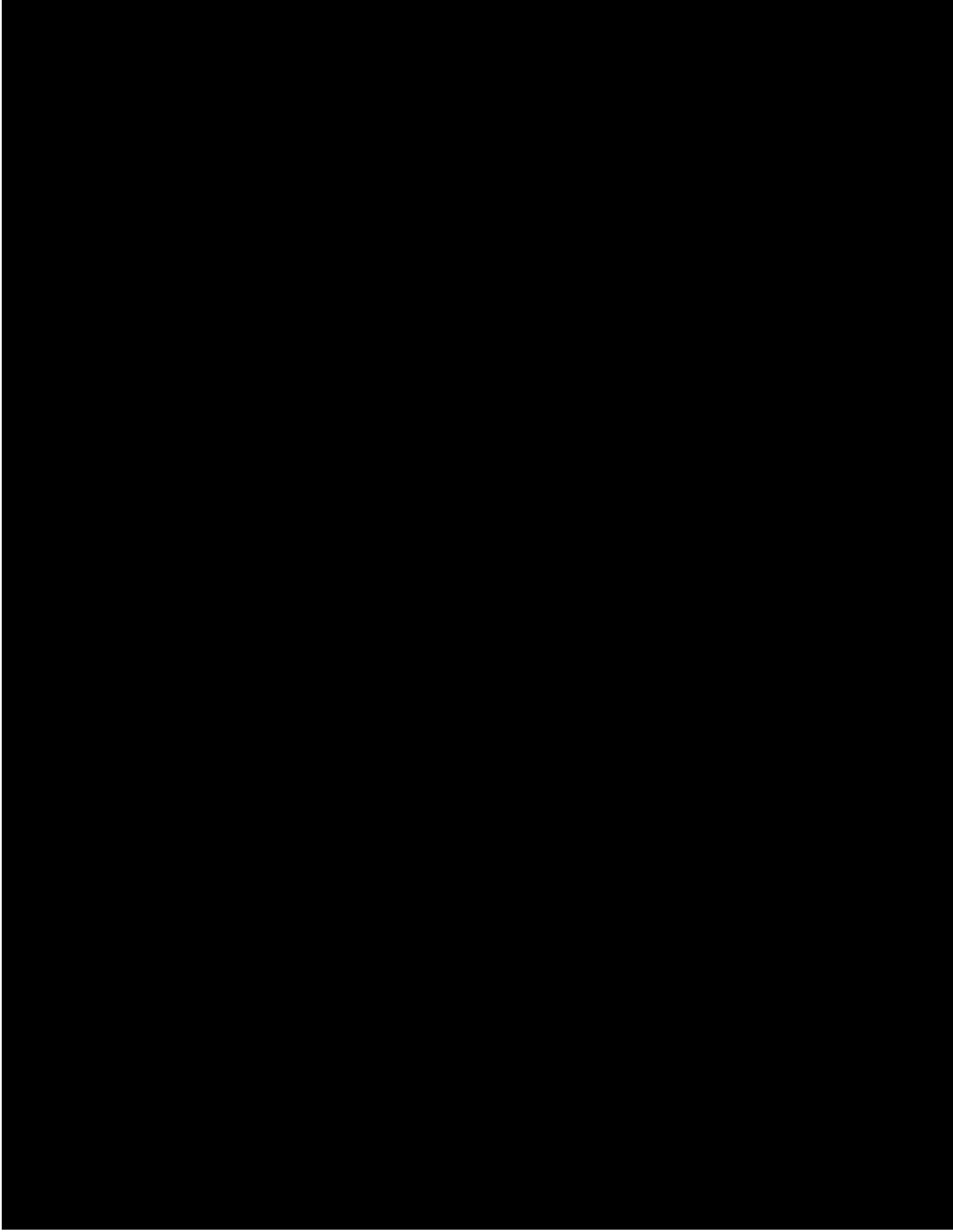
Enclosures

cc: The Honorable Elijah E. Cummings, Ranking Minority Member  
Ms. Kelly Tshibaka, Acting Inspector General, U.S. Federal Trade Commission  
Ms. Laura Riposo VanDruff, Complaint Counsel, U.S. Federal Trade Commission





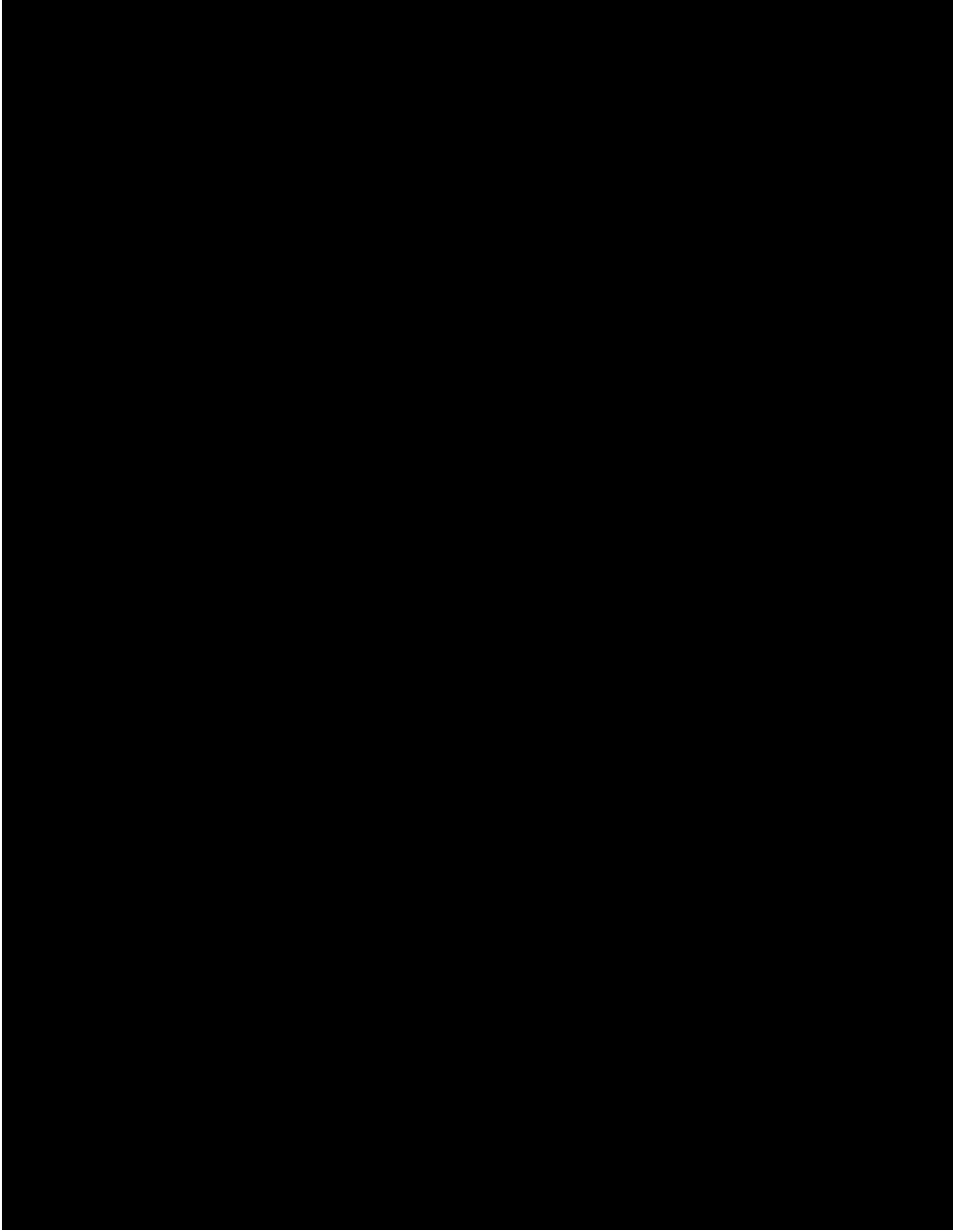
















































# Exhibit 4



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

March 9, 2015

**VIA FEDERAL EXPRESS**

Tiversa Holding Corporation  
606 Liberty Avenue  
Pittsburgh, PA 15222

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

To Whom It May Concern:

The Commission has initiated an adjudicative proceeding against LabMD, Inc. The Commission's Rules of Practice state that "[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary [of the Commission], requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena. . . ." 16 C.F.R. § 3.34(a). This letter is to notify you that Complaint Counsel has issued a subpoena for your deposition, which is enclosed.

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

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

Sincerely,

Jarad Brown

Enclosure

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

March 9, 2015  
Tiversa Holding Corporation  
Page 2

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



# SUBPOENA AD TESTIFICANDUM DEPOSITION

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

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

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

<p>3. PLACE OF DEPOSITION</p> <p>Tiversa Holding Corp. 606 Liberty Avenue Pittsburgh, PA 15222</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>Laura Riposo VanDruff or other designated counsel</p>
	<p>5. DATE AND TIME OF DEPOSITION</p> <p>March 16, 2015 10:00 AM</p>

6. SUBJECT OF PROCEEDING

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

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

<p>DATE SIGNED</p> <p>3/9/2015</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> <p style="text-align: center;"></p>
------------------------------------	---

### GENERAL INSTRUCTIONS

#### APPEARANCE

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

#### MOTION TO LIMIT OR QUASH

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

#### TRAVEL EXPENSES

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

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

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

**RETURN OF SERVICE**

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

*in person.*

~~*by registered mail.*~~ **By Federal Express delivery, sent March 9, 2015 pursuant to Commission Rule 4.4(a)(2)**

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

Tiversa Holding Corporation  
606 Liberty Avenue  
Pittsburgh, PA 15222

*on the person named herein on:*

March 9, 2015

(Month, day, and year)

Jarad Brown

(Name of person making service)

Attorney

(Official title)

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

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

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

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

**DEFINITIONS**

1. “**Tiversa**” shall mean Tiversa Holding Corporation, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.
2. “**Or**” as well as “**and**” shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
3. The terms “**Relate**” or “**Relating to**” mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
4. The use of the singular includes the plural, and the plural includes the singular.
5. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

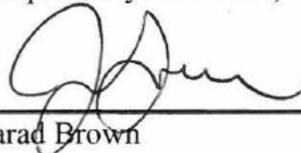
**DEPOSITION TOPICS**

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

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

Dated: March 9, 2015

Respectfully submitted,



---

Jarad Brown

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

*Complaint Counsel*

**CERTIFICATE OF SERVICE**

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

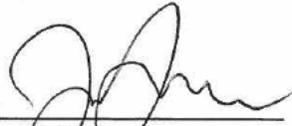
Hallee Morgan  
Daniel Epstein  
Patrick Massari  
Prashant Khetan  
Cause of Action  
1919 Pennsylvania Avenue, NW, Suite 650  
Washington, DC 20006  
hallee.morgan@causeofaction.org  
daniel.epstein@causeofaction.org  
patrick.massari@causeofaction.org  
prashant.khetan@causeofaction.org

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

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

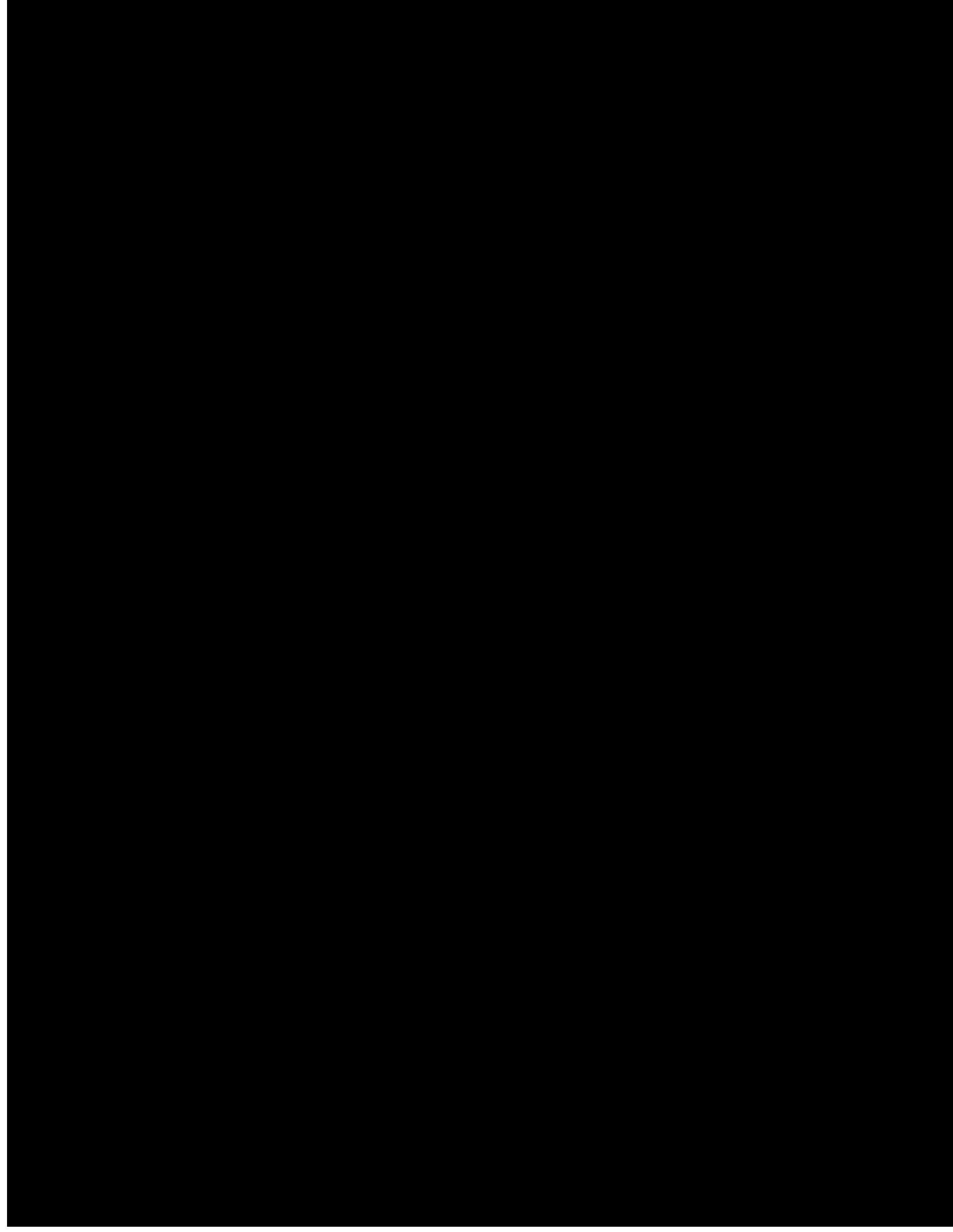
March 9, 2015

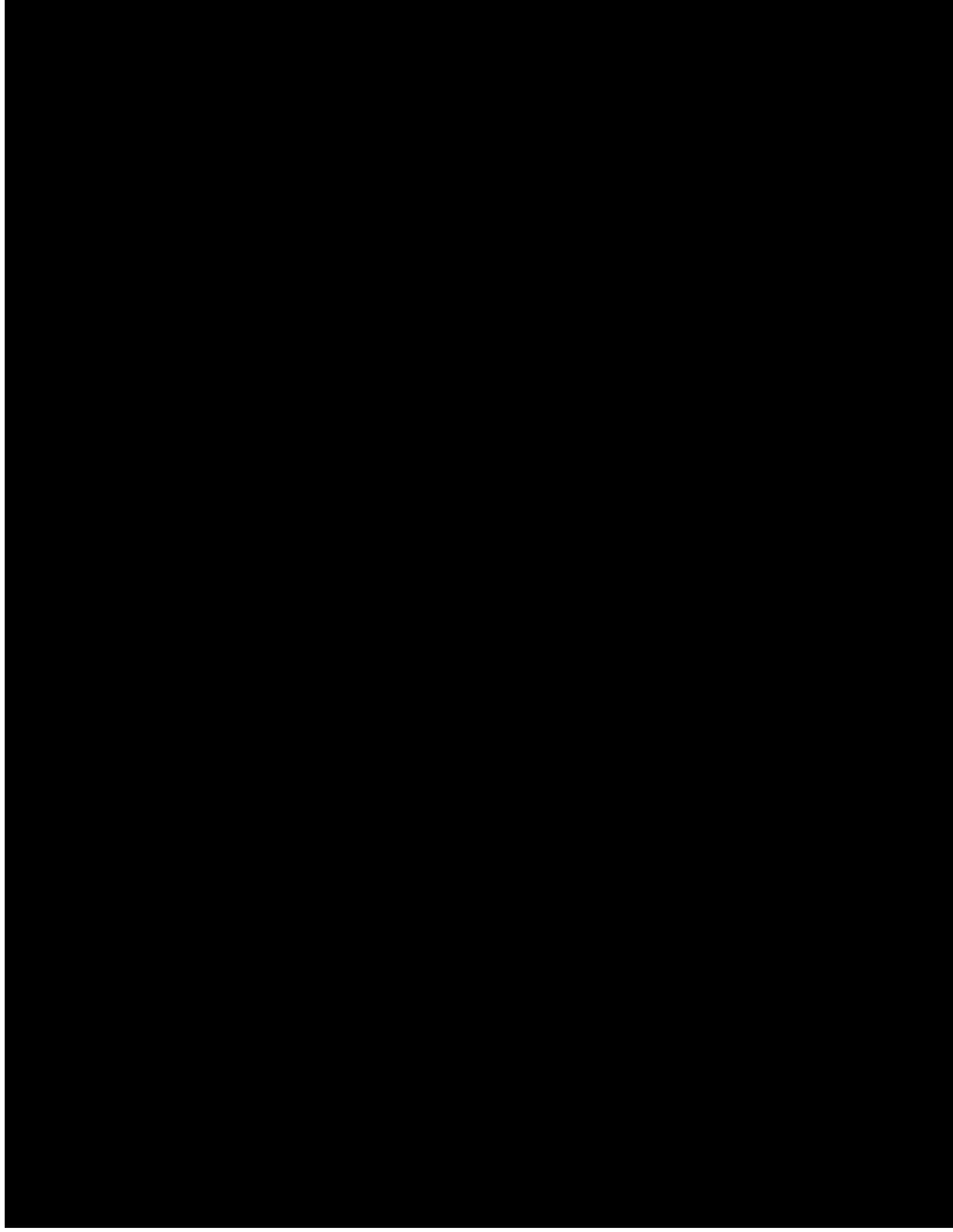
By:

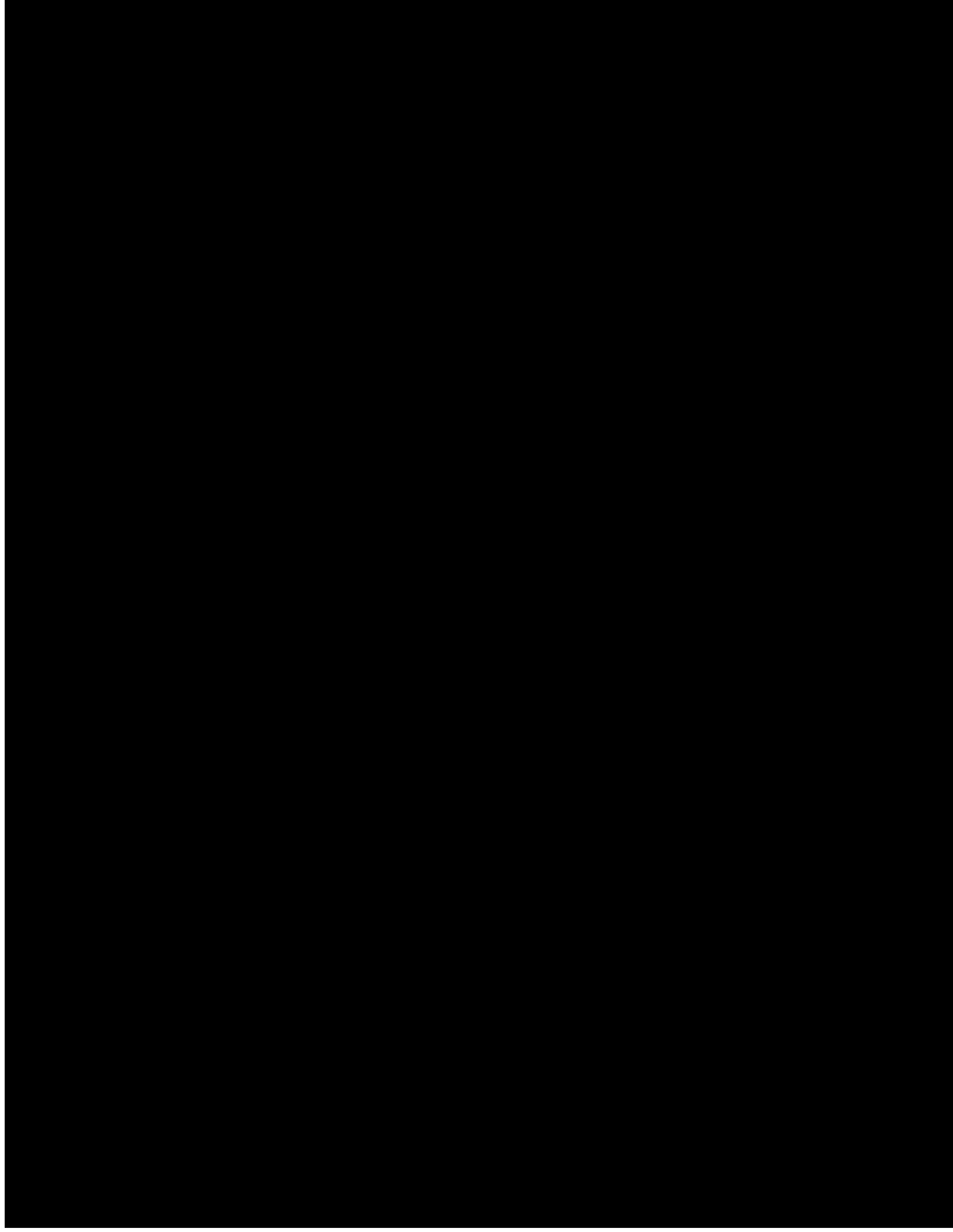


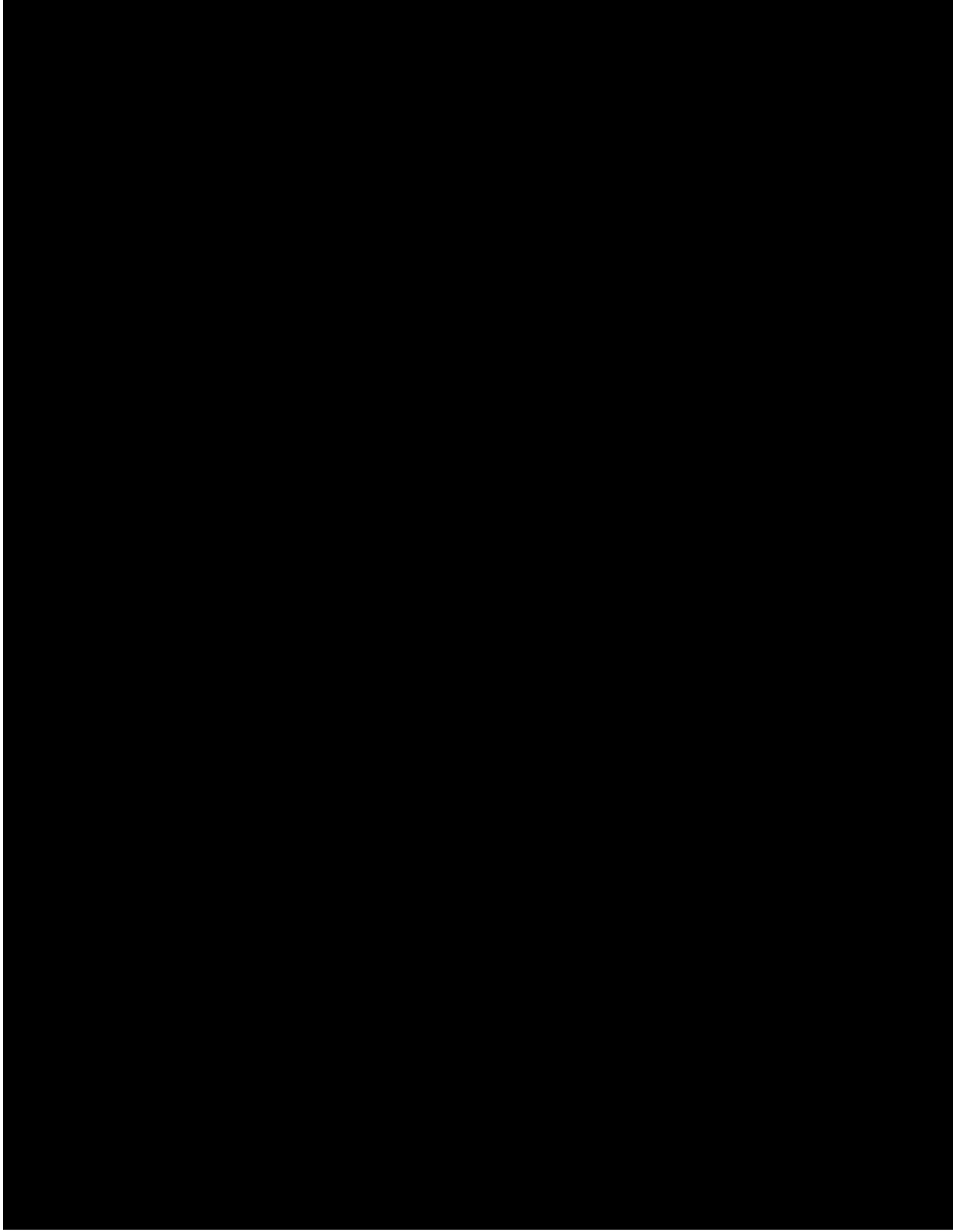
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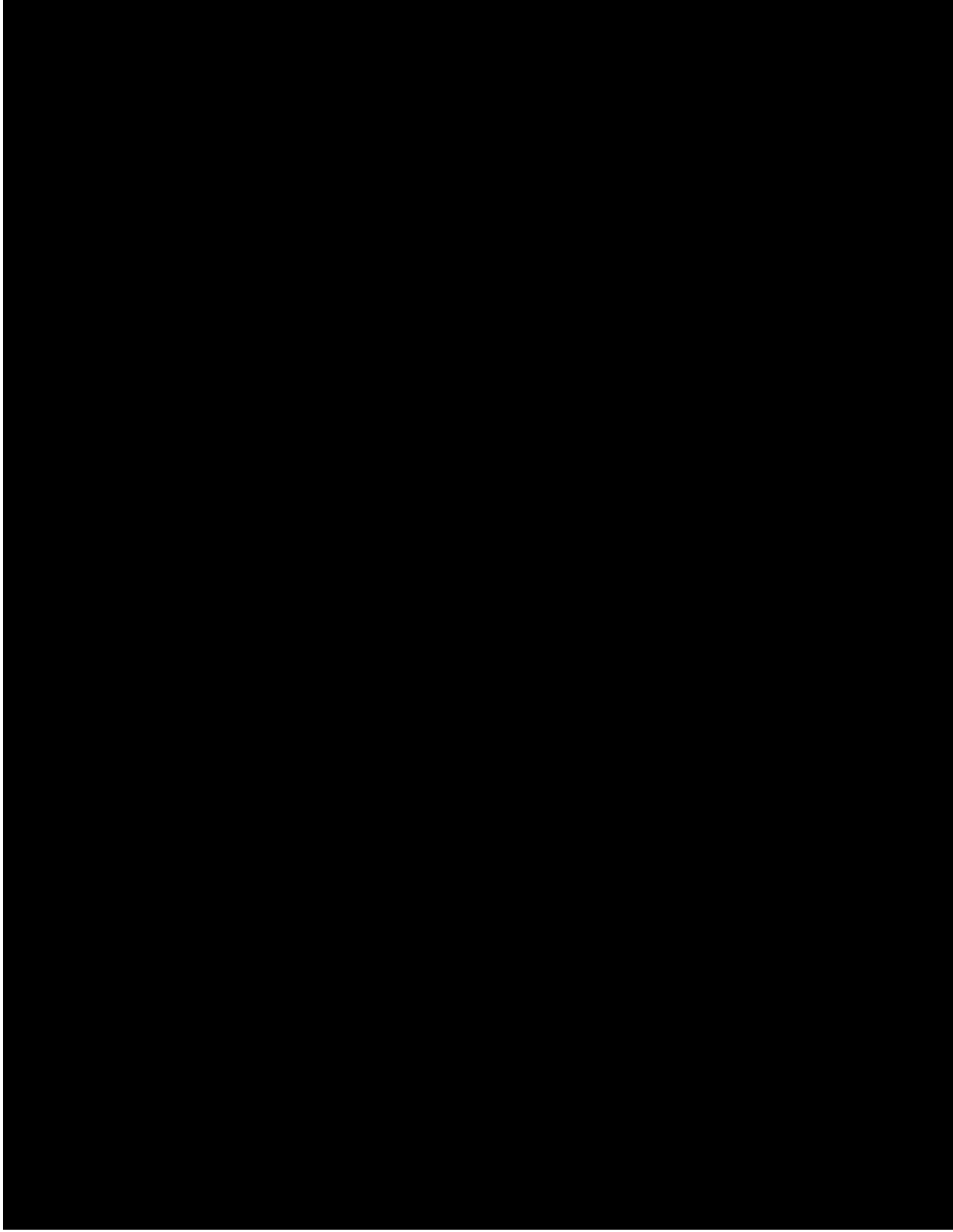
Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection





























# Exhibit 5

March 12, 2015

**VIA ELECTRONIC MAIL**

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

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

Dear Laura:

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

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

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

Sincerely,

  
William A. Sherman, II

WAS/jb

# Exhibit 6

**Kelly, Andrea**

---

**From:** Tshibaka, Kelly C.  
**Sent:** Wednesday, June 18, 2014 10:51 AM  
**To:** White, Christian S.  
**Subject:** RE: Notice of Request for Investigation

Can you please call me on this when you have a chance?

Kelly Tshibaka  
Acting Inspector General  
Federal Trade Commission  
202-326-3527

---

**From:** Hipsley, Heather  
**Sent:** Wednesday, June 18, 2014, 10:49 AM  
**To:** Tshibaka, Kelly C.  
**Cc:** White, Christian S.  
**Subject:** RE: Notice of Request for Investigation

Thank you for the heads up; Issa sent a letter to the Chairwoman which asked for our cooperation in any investigation he conducted and Don Clark answered the letter on behalf of the agency since there is a pending administrative litigation related to his concerns. (b)(5)

(b)(5)

(b)(5) Thanks so much, Heather

---

**From:** Tshibaka, Kelly C.  
**Sent:** Wednesday, June 18, 2014 10:40 AM  
**To:** Hipsley, Heather  
**Subject:** Notice of Request for Investigation

Heather,

I wanted to let you know that last night we received a request from Chairman Issa to investigate allegations regarding Tiversa and FTC employees' involvement with Tiversa. (b)(5)

(b)(5)

(b)(5) I will keep you posted as this progresses...

Kelly Tshibaka  
Acting Inspector General  
Federal Trade Commission  
202-326-3527

**Kelly, Andrea**

---

**From:** Clark, Donald S.  
**Sent:** Monday, June 16, 2014 2:50 PM  
**To:** Burstein, Aaron; Davis, Anna; Delaney, Elizabeth A; DeLorme, Christine Lee  
**Cc:** Hipsley, Heather; Bumpus, Jeanne; Vandecar, Kim; White, Christian S.  
**Subject:** Incoming Letter From Chairman Issa and Outgoing Response, Relating To In the Matter of LabMD, Docket No. 9357  
**Attachments:** Issa061314.pdf

Everyone, I've attached a letter from Chairman Issa which relates to the ongoing Part 3 proceeding in In the Matter of LabMD, Inc., Docket No. 9357. (b)(5)

(b)(5)

(b)(5) I've also attached a response we sent to Chairman Issa on Friday, advising him that the FTC stands ready to respond to any Committee requests.

Please let me know if you need any additional information; thanks!

Don

**Kelly, Andrea**

---

**From:** Clark, Donald S.  
**Sent:** Friday, June 13, 2014 2:57 PM  
**To:** Hipsley, Heather  
**Cc:** White, Christian S.; Vandecar, Kim  
**Subject:** RE: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

Heather, thanks; I just saw your message, as I was in a meeting; I'm signing the letter and taking it to OCR now.

Don

---

**From:** Hipsley, Heather  
**Sent:** Friday, June 13, 2014 2:06 PM  
**To:** Clark, Donald S.  
**Cc:** White, Christian S.; Vandecar, Kim  
**Subject:** Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx  
**Importance:** High

Oops; use this one please. I created a typo in the last version I just sent. Thanks, h.

**Kelly, Andrea**

---

**From:** Clark, Donald S.  
**Sent:** Thursday, June 12, 2014 11:26 PM  
**To:** Vandecar, Kim; Hipsley, Heather; White, Christian S.  
**Subject:** Re: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa

It looks good to me as well; thanks!

Don

---

**From:** Vandecar, Kim  
**Sent:** Thursday, June 12, 2014 09:43 PM  
**To:** Hipsley, Heather; Clark, Donald S.; White, Christian S.  
**Subject:** Re: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa

Looks good to me.

---

**From:** Hipsley, Heather  
**Sent:** Thursday, June 12, 2014 09:33 PM  
**To:** Clark, Donald S.; Vandecar, Kim; White, Christian S.  
**Subject:** Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa

Here's what I'll show Edith tomorrow. Any last thoughts? H.

**Kelly, Andrea**

---

**From:** Clark, Donald S.  
**Sent:** Thursday, June 12, 2014 4:52 PM  
**To:** White, Christian S.  
**Cc:** Hipsley, Heather; Bumpus, Jeanne; Vandecar, Kim  
**Subject:** Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa  
**Attachments:** Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

Chris, here's the current draft response to Chairman Issa; if it looks OK to you, Heather will forward it on to Edith for review; thanks!

Don

**Kelly, Andrea**

---

**From:** Harrison, Lisa M.  
**Sent:** Monday, July 21, 2014 8:55 AM  
**To:** White, Christian S.  
**Subject:** FW: Letter from Chairman Issa  
**Attachments:** 2014-07-18 DEI to Ramirez-FTC - spreadsheet request.pdf

You already have a copy of the Friday afternoon letter, but I am resending.

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

**From:** Shonka, David C.  
**Sent:** Friday, July 18, 2014 4:27 PM  
**To:** Harrison, Lisa M.  
**Subject:** FW: Letter from Chairman Issa

FYI, this is the Issa letter you don't have.

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

**From:** Vandecar, Kim  
**Sent:** Friday, July 18, 2014 2:07 PM  
**To:** White, Christian S.; Mithal, Maneesha; DeMartino, Laura; Kaufman, Daniel; Clark, Donald S.; Schoshinski, Robert; Rich, Jessica L.; Hipplesley, Heather; Shonka, David C.  
**Cc:** Bumpus, Jeanne  
**Subject:** FW: Letter from Chairman Issa

We have acknowledged receipt. Please let me know if this timetable (Monday at 5:00) is doable.

**From:** Barblan, Jennifer [<mailto:Jennifer.Barblan@mail.house.gov>]  
**Sent:** Friday, July 18, 2014 12:28 PM  
**To:** Simons, Claudia A.  
**Cc:** Grimm, Tyler <[Tyler.Grimm@mail.house.gov](mailto:Tyler.Grimm@mail.house.gov)>  
**Subject:** Letter from Chairman Issa

Claudia –

Attached please find a letter from Chairman Issa. Please confirm receipt at your earliest convenience.

Please feel free to call with any questions.

Thanks,  
Jen

Jennifer Barblan

Senior Counsel

Committee on Oversight and Government Reform

Rep. Darrell E. Issa, Chairman

(202) 225-5074

[Jennifer.Barblan@mail.house.gov](mailto:Jennifer.Barblan@mail.house.gov)

**Kelly, Andrea**

---

**From:** Harrison, Lisa M.  
**Sent:** Monday, July 21, 2014 5:26 PM  
**To:** White, Christian S.  
**Subject:** FW: Issa letter

**Importance:** High

Could you give me a call?  
x3204

---

**From:** Kaufman, Daniel  
**Sent:** Monday, July 21, 2014 5:17 PM  
**To:** Bumpus, Jeanne; Harrison, Lisa M.; Vandecar, Kim  
**Subject:** FW: Issa letter

FYI.

---

**From:** Kaufman, Daniel  
**Sent:** Monday, July 21, 2014 9:29 AM  
**To:** Kestenbaum, Janis; Davis, Anna; Chilson, Neil; Burstein, Aaron  
**Cc:** Delaney, Elizabeth A; DeLorme, Christine Lee  
**Subject:** RE: Issa letter

(b)(5)



(b)(5) . I'd be glad to talk to anyone about what's going on here..

Thanks  
Daniel

---

**From:** Kaufman, Daniel  
**Sent:** Monday, July 21, 2014 9:23 AM  
**To:** Kestenbaum, Janis; Davis, Anna; Chilson, Neil; Burstein, Aaron  
**Cc:** Delaney, Elizabeth A; DeLorme, Christine Lee  
**Subject:** Issa letter

In case you had not seen the letter. WE are drafting the Commission memo this morning...

# Exhibit 7

**Sherman, William**

---

**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

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

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 9<sup>th</sup> 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

Dinsmôre

**William A. Sherman, II**  
Partner

Dinsmore & Shohl LLP • Legal Counsel  
801 Pennsylvania Avenue, N.W.  
Suite 610  
Washington, DC 20004  
T (513) 977-8494 • F (202) 372-9141  
E william.sherman@dinsmore.com • dinsmore.com

---

**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

**Dinsmore**

**William A. Sherman, II**  
Partner

Dinsmore & Shohl LLP • Legal Counsel  
801 Pennsylvania Avenue, N.W.  
Suite 610

Washington, DC 20004  
T (202) 372-9117 • F (202) 372-9141  
E [william.sherman@dinsmore.com](mailto:william.sherman@dinsmore.com) • [dinsmore.com](http://dinsmore.com)

**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

**Dinsmore**

**William A. Sherman, II**  
Partner

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Washington, DC 20004  
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E [william.sherman@dinsmore.com](mailto:william.sherman@dinsmore.com) • [dinsmore.com](http://dinsmore.com)

**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

**Dinsmore**

**William A. Sherman, II**  
Partner

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801 Pennsylvania Avenue, N.W.  
Suite 610

Washington, DC 20004  
T (202) 372-9117 • F (202) 372-9141  
E [william.sherman@dinsmore.com](mailto:william.sherman@dinsmore.com) • [dinsmore.com](http://dinsmore.com)

**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. 27<sup>th</sup> 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

**Dinsmôre**

**William A. Sherman, II**  
Partner

Dinsmore & Shohl LLP • Legal Counsel  
801 Pennsylvania Avenue, N.W.  
Suite 610  
Washington, DC 20004  
T (202) 372-9117 • F (202) 372-9141  
E [william.sherman@dinsmore.com](mailto:william.sherman@dinsmore.com) • [dinsmore.com](http://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.

Jarrood

**Jarrood D. Shaw**  
[jshaw@reedsmith.com](mailto:jshaw@reedsmith.com)  
+1 412 288 3013  
**Reed Smith LLP**  
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\* \* \*

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# Exhibit 8

[REDACTED]

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**From:** VanDruff, Laura Riposo [mailto:[lvandruff@ftc.gov](mailto:lvandruff@ftc.gov)]

**Sent:** Tuesday, December 02, 2014 4:33 PM

**To:** OALJ

**Cc:** [reed.rubinstein@dinsmore.com](mailto:reed.rubinstein@dinsmore.com); William A. Sherman II ([william.sherman@dinsmore.com](mailto:william.sherman@dinsmore.com)); Prashant Khetan; Jarrod D. Shaw ([jshaw@reedsmith.com](mailto:jshaw@reedsmith.com))

**Subject:** FTC Docket No. 9357 -- letter from Chairman Darrell Issa

Dear Chief Administrative Law Judge Chappell:

Earlier this afternoon, staff of the House Committee on Oversight and Government Relations authorized Commission staff to share the attached letter (with exhibits) with the Court and with counsel for Tiversa.

The exhibits are stamped "Confidential – For Committee and Staff Use Only." Accordingly, we respectfully request that the Court grant this letter and its exhibits provisional *in camera* treatment. In addition, I have copied counsel for Tiversa on this email so that Tiversa may evaluate whether it wishes to request the protections of Rule 3.45.

Respectfully Submitted,

Laura Riposo VanDruff  
Complaint Counsel

-----  
Laura Riposo VanDruff  
Federal Trade Commission  
Division of Privacy and Identity Protection  
600 Pennsylvania Avenue, N.W., CC-8232  
Washington, DC 20580  
[202.326.2999](tel:202.326.2999) (direct)  
[202.326.3393](tel:202.326.3393) (facsimile)  
[lvandruff@ftc.gov](mailto:lvandruff@ftc.gov)

# Exhibit 9

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

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**From:** Barblan, Jennifer [Redacted]  
**Sent:** Monday, December 22, 2014 5:37 PM  
**To:** Rubinstein, Reed  
**Cc:** Grimm, Tyler  
**Subject:** Letter from Chairman Issa

Reed –

I hope you're doing well. We wanted to make sure you were aware of a recent letter Chairman Issa sent to the FTC. The letter includes several documents produced to the Committee by Tiversa that we believe were not produced to the FTC, despite their responsiveness to the September 2013 subpoena. Tiversa stamped the documents as "Confidential – For Committee and Staff Use Only." This is not a Committee marking, and the Committee does not consider the documents or the accompanying letter to be confidential.

Please don't hesitate to reach out if you have any questions.

Best,  
Jen and Tyler

**Jennifer Barblan**  
Committee on Oversight and Government Reform  
Rep. Darrell E. Issa, Chairman

(202) 225-5074



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Notice of Electronic Service

**I hereby certify that on March 25, 2015, I filed via hand a paper original and electronic copy of the foregoing LabMD Motion to Exclude, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on March 25, 2015, I filed via E-Service of the foregoing LabMD Motion to Exclude, with:**

John Krebs  
Attorney  
Federal Trade Commission  
jkrebs@ftc.gov  
Complaint

Hallee Morgan  
Cause of Action  
hallee.morgan@causeofaction.org  
Respondent

Jarad Brown  
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Federal Trade Commission  
jbrown4@ftc.gov  
Complaint

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Counsel  
Cause of Action  
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Respondent

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sunni.harris@dinsmore.com  
Respondent

Daniel Epstein  
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Respondent

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Complaint

Megan Cox  
Federal Trade Commission  
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Complaint

Ryan Mehm  
Federal Trade Commission  
rmehm@ftc.gov  
Complaint

**I hereby certify that on March 25, 2015, I filed via other means, as provided in 4.4(b) of the foregoing LabMD Motion to Exclude, with:**

Reed Rubinstein  
Dinsmore & Shohl LLP  
Respondent

William Sherman, II  
Attorney  
Dinsmore & Shohl, LLP  
william.sherman@dinsmore.com  
Respondent

Hallee Morgan  
Attorney