

ORIGINAL

PUBLIC

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



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

**RESPONDENT'S MOTION TO DISMISS**

The Federal Trade Commission ("FTC" or the "Commission") owes Respondent LabMD, Inc. ("LabMD") a constitutional duty of impartiality free from the taint of bias, prejudice or pre-decision. FTC's misconduct and indiscretions, from case inception through the U.S. House of Representatives Committee on Oversight and Government Reform ("OGR") investigation of Tiversa, Inc. ("Tiversa"), and the statistical certainty that it will find a Section 5 violation *regardless of this Court's factual and legal findings*, breach this duty. Therefore, LabMD moves to dismiss under 16 C.F.R. § 3.22(a).<sup>1</sup>

**FACTS**

**A. Background.**

Congress authorized the Department of Health and Human Services ("HHS") to regulate patient health information ("PHI") data security for medical companies. See Standards for Privacy of Individually Identifiable Health Information, 66 Fed. Reg. 12,434 (Feb. 26, 2001) (codified at 45 C.F.R. pts. 160 & 164).

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<sup>1</sup> The instant Motion in no way alters or effects Respondent's pending Motion to Dismiss for Complaint Counsel's failure to establish a *prima facie* case. See Resp. Mot. to Dismiss (May 27, 2014). LabMD files the instant Motion in order to apprise the Court of a number of new facts that have developed since May 27, 2014, which, when considered in light of prior facts and FTC conduct, warrant dismissal.

LabMD, an innovative cancer detection laboratory, began operating in or about 1996.<sup>2</sup> Through networked patient data, it provided uniquely rapid and cost-effective cancer screening, benefitting its doctor-customers and their patients.<sup>3</sup> At all times relevant, LabMD was subject to and complied with HHS's PHI regulations, a fact admitted by FTC at the outset of these proceedings.<sup>4</sup>

On or about June 23, 2005, FTC published "Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues" (the "Staff Report").<sup>5</sup> FTC said:

- P2P technology "can enhance efficiency;"
- Consumer risks, including "inadvertent file sharing," were "not unique to P2P," existing also when consumers are "surfing websites, downloading software, and using e-mail or instant messaging;"
- There was "little empirical evidence" whether P2P risks "are greater than, equal to, or less than" risks from other "Internet-related activities; and
- Government should act against copyright and pornography violators, and against P2P companies for bundling spyware and failing to make appropriate risk disclosures in violation of Section 5.

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<sup>2</sup> CX0447 at 1-2; Trial Tr. vol. 5 at 939:16-18 (Testimony of Michael J. Daugherty).

<sup>3</sup> Trial Tr. vol. 5 at 945:5-18; 949-950; 962:7-12, 14-18 (Testimony of Michael J. Daugherty).

<sup>4</sup> Initial Pretrial Conf. Tr. 22:9-13; Verified Compl. at ¶¶ 16-17; 42-43; 72, LabMD, Inc. v. Fed. Trade Comm'n, No. 14-810 (N.D. Ga. 2014).

<sup>5</sup> Fed. Trade Comm', Peer to File-Sharing Technology: Consumer Protection and Competition Issues (2005), *available at* <https://www.ftc.gov/sites/default/files/documents/reports/peer-peer-file-sharing-technology-consumer-protection-and-competition-issues/050623p2prpt.pdf>.

See Staff Report at 1-2, 20-22.

At this time, FTC did not warn LabMD and other similarly-situated businesses that P2P posed a data security risk, the conduct Section 5 prohibited or permitted with respect to P2P, or that failure to prevent an unauthorized employee P2P download could trigger administrative enforcement proceedings.

In 2008, LimeWire was found on a LabMD workstation at Internet Protocol address 64.190.82.42 in Atlanta, Georgia.<sup>6</sup> LimeWire was installed by a LabMD employee, without authorization and in violation of company policy.<sup>7</sup>

On July 24, 2007, FTC told Congress:

- “P2P file-sharing...is a ‘neutral’ technology;”
- There was “little empirical evidence” regarding relative P2P risks “compared to the risks from other Internet-related activities;”
- “FTC will continue to assess [P2P] risks..., educate consumers, monitor and encourage [P2P] industry self-regulation, and investigate and institute law enforcement actions [against P2P companies] when appropriate...;” and,
- FTC’s “twenty-first century law enforcement tools” included “Consumer Sentinel, a secure, online fraud and identity theft complaint database” containing “over 3.9 million fraud and identity theft complaints [that is] accessible to more than 1,650 law enforcement agencies, which use the database to share information, coordinate investigations, and pursue case leads,” as well as “Internet Lab, which provides FTC lawyers and investigators with high-tech tools to...capture web sites that come and go

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<sup>6</sup> Trial Tr. vol 5 at 982-85; 1087-88; 985-94 (Testimony of Michael J. Daugherty).

<sup>7</sup> *Id.*; CX0709, Michael J. Daugherty Dep. (Feb. 10, 2014).

quickly...[and] FTC staff with the necessary equipment to preserve evidence for presentation in court.”

*See Inadvertent File Sharing Over Peer-to-Peer Networks: Hearing Before the H. Comm. on Oversight and Gov't Reform, 110th Cong. (July 24, 2007) (statement of Mary Engle, Assoc. Dir. for Advertising Practices, Federal Trade Comm'n) at 3, 8 available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-peer-peer-file-sharing-technology-issues/p034517p2pshare.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-peer-peer-file-sharing-technology-issues/p034517p2pshare.pdf).<sup>8</sup>*

At this time, FTC did not warn LabMD and other similarly-situated businesses that P2P software was a qualitatively significant data security risk or that it violated Section 5 or could trigger administrative proceedings.

Tiversa, Inc. (“Tiversa”) is in the business of selling data breach “remediation” services to the government and corporations.<sup>9</sup> Tiversa did not supply “InternetLab”-style “chain of custody” evidence allowing independent verification of its findings. Instead, it would report downloading a sensitive file from one IP address and “observing,” but not downloading, the file from other “suspect” IP addresses. Then, it would recommend on-going “monitoring” at a price.<sup>10</sup>

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<sup>9</sup> See <http://www.tiversa.com/> (proclaiming itself as “[t]he world leader in P2P cyberintelligence”) (last visited Apr. 23, 2015).

<sup>10</sup> See (Proposed) RX-545 (Tiversa Incident Record Form); (Proposed) RX-546 (Tiversa Forensic Investigation Report for Ticket #CIG00081); CX0679, Ex. 5 (Dissenting Statement of Comm’r J. Thomas Rosch, FTC File No. 1023099 (June 21, 2012)).

In or about August, 2007, Tiversa began working with M. Eric Johnson of the Dartmouth College Tuck School of Business. Johnson had a \$24.3 million federal contract to study medical data breaches and inadvertent disclosures.<sup>11</sup> Johnson/Tiversa's goal was to show P2P health care data "hemorrhaging."<sup>12</sup>

Tiversa considered PHI a "treasure trove" and Tiversa CEO Robert Boback was eager to profit:<sup>13</sup> "Medical is a treasure trove of information... We've got tons of individual practitioners (most notably psychiatrists) who disclose (since they write up their findings)." Johnson Dep., RX-7 at 3 (E-mail from Chris Gormley, COO, Tiversa, to M. Eric Johnson (Apr. 29, 2008, 3:43 PM)).

Tiversa "searched" from January 4, 2008, to January 18, 2008.<sup>14</sup> On January 30, it told Johnson that the "initial read shows that we collected approximately 1,600 files across the 10

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<sup>11</sup> Eric Johnson Dep., RX-2 at 3 (Dep't of Homeland Sec. Grant Award Terms and Conditions for Dartmouth College).

<sup>12</sup> On August 13, 2007, Johnson told Tiversa that he hoped to target "Fortune top 10" hospitals. Gormley Dep., RX-4 at 1 (E-mail from M. Eric Johnson, Professor, Dartmouth College, to Gormley, COO, Tiversa (Aug. 13, 2007, 2:49 PM)). On November 19, 2007, Johnson and Tiversa discussed search terms such as "patient," "treatment," "health," and "hospital." See Johnson Dep., RX-5 at 1 (E-mail from Johnson to Gormley (Nov. 19, 2007)).

<sup>13</sup> RX-7 to Gormley Dep., Email from Robert Boback, CEO, Tiversa, to Gormley, COO, Tiversa, Griffin Schultz, Katy Everett, John P. Daunt, and William Ferguson (Apr. 29, 2008, 11:33 AM). See also Sarah Rubinstein, *Are Your Medical Records at Risk?*, Wall Street Journal (Apr. 29, 2008), available at <http://www.wsj.com/articles/SB120941048217350433>.

<sup>14</sup> See CX0382 at 8 (M. Eric Johnson, *Data Hemorrhages in the Health-Care Sector*, Fin. Cryptography & Data Sec. (forthcoming 2009)) ("With the help of Tiversa Inc., [Dartmouth] searched P2P networks...over a 2-week period (in January, 2008)..."); Gormley Dep., RX-4 (E-mail from Gormley to Johnson (Jan. 8, 2008, 11:13 AM)) ("I wanted to let you know that the hospital terms are in the system right now.").

hospitals”<sup>15</sup> and that it would run a “bot” to pull them.<sup>16</sup> On April 29, 2008, Johnson told Tiversa he was “working on the report right now,” but the results were not “intriguing.”<sup>17</sup> Johnson asked Tiversa to provide PHI from outside the study parameters to “spice up the report.”<sup>18</sup>

On April 18, 2008, Tiversa advised CIGNA that it had “detected a file ‘disclosed by what appears to be a potential provider of services for CIGNA.’ The Incident Record described a ‘single Portable Document Format (PDF)’ 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.’ The name of the file was ‘insuranceaging\_6.05.07l.pdf.’”<sup>19</sup> An August, 2008 analysis by Tiversa of the incident, requested by CIGNA, “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>20</sup> The forensic report “made clear that Tiversa had not downloaded the file from either additional source

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<sup>15</sup> Gormley Dep., RX-9 (E-mail from Gormley to Johnson (Jan. 30, 2008, 3:47 PM)).

<sup>16</sup> *Id.* A bot is an internal search program to pull files already captured and downloaded within Tiversa’s system from the Limewire/Gnutella protocol. Gormley Dep. at 126:18 – 127:13.

<sup>17</sup> Gormley Dep., RX-7 (E-mail from Johnson to Gormley (Apr. 29, 2008, 1:27 PM)).

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

<sup>19</sup> See RX-543 at 4 (Letter from Rep. Darrell Issa, Chairman, OGR, to Edith Ramirez, Chairwoman, Fed. Trade Comm’n (Dec. 1, 2014)) (footnotes omitted); (Proposed) RX-544 (Tiversa Incident Request Form, ID # CIG00081 (Apr. 18, 2008)). Pursuant to this Court’s Order on Resp’t’s Mots. to Admit Proffered Exs. RX-542 – RX-548, RX-543 is a public document.

<sup>20</sup> See RX-543 at 4 (Letter from Rep. Issa, Chairman, OGR, to Ramirez, Chairwoman, FTC (Dec. 1, 2014)) (footnotes omitted).

because of ‘network constraint and/or user behavior.’”<sup>21</sup> Thus, according to Tiversa, the 1718 File had only been downloaded from LabMD.<sup>22</sup>

On May 13, 2008, Tiversa contacted LabMD, advised that Tiversa had downloaded LabMD’s file, but refused to provide any additional information unless LabMD paid Tiversa for “remediation.”<sup>23</sup> Over the next two months, Tiversa sent six more sales-pitch emails to LabMD.<sup>24</sup> LabMD, however, declined Tiversa’s shakedown.<sup>25</sup>

On May 13, 2008, LabMD swept its computer system and discovered the unauthorized LimeWire download. The software was removed, and LabMD then performed a “systemic analysis inside every workstation and server within the company...[a]nd [the company] found it nowhere [else].”<sup>26</sup>

LabMD subsequently searched P2P networks and the internet but the 1718 File was nowhere to be found.<sup>27</sup>

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<sup>21</sup> *Id.* (footnote omitted).

<sup>22</sup> *Id.* (footnotes omitted); (Proposed) RX-546 (Tiversa Forensic Investigation Report for Ticket #CIT00081 (Aug. 12,2008)).

<sup>23</sup> Compl. ¶¶ 19-20, *Tiversa, Inc. v. LabMD, Inc.*, No. 13-10296, (W.D. Pa. filed Sept. 5, 2013); *LabMD, Inc. v. Tiversa, Inc.*, 509 Fed. Appx. 842, 843 (11th Cir. 2013).

<sup>24</sup> *LabMD, Inc.*, 509 Fed. Appx. at 843.

<sup>25</sup> CX0679, Ex. 5 (Dissenting Statement of Comm’r J. Thomas Rosch, FTC File No. 1023099 (June 21, 2012)); *see also* (Proposed) RX-547 (E-mail from Boback to Dan Kopchak and Molly Trunzo, Tiversa (Sept. 5, 2013, 3:20 PM)).

<sup>26</sup> Trial Tr. vol. 5 at 984:12 – 985:5 (Testimony of Michael J. Daugherty).

<sup>27</sup> John Boyle Dep. at 63:3 – 64:23. LabMD reported to the FTC, shortly after FTC informed LabMD that it had the 1718 File, that LabMD expended considerable resources trying to recover the 1718 File on P2P networks in order to ensure its removal from the Internet. In

On January 29, 2009, FTC attorney Carl Settlemeyer reached out to Tiversa and Boback, who would later be FTC's vehicle for CX-19, a single page of paper with four typed IP addresses that is the sole "proof" the 1718 File had been "found" on P2P networks.<sup>28</sup>

On February 22, 2009, Johnson published his "study" claiming, falsely, that Tiversa found the 1718 File during the January search.<sup>29</sup> Actually, the 1718 File was stolen after the fact and used by Johnson as additional "spice." The evidence is Tiversa downloaded the 1718 File from LabMD sometime between February and April 18, 2008. *See* (Proposed) RX-544 – 546 (motion to admit filed Dec. 23, 2014)<sup>30</sup>; CX0703, Robert J. Boback Dep. (Nov. 21, 2013), at 50-51, 60-64; 40; 73; 9; 141-42; 112-15; 50; RX-541, Robert J. Boback Trial Dep. (June 7, 2014), at 22, 29; 94; 67, 74, 80; 82; 61-62; 29; 81-82; Trial Tr. vol. 5 at 979-85 (Testimony of Michael J. Daugherty).

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May, 2010, LabMD retained Providyn, Inc. to conduct quarterly scans of LabMD's servers and network. CX0704, Boyle Dep. at 34-41 (Jan. 28, 2014).

<sup>28</sup> Robert J. Boback Dep., RX-5 (E-mail from Carl Settlemeyer, Att'y, Fed. Trade Comm'n, to Boback and Gornley (Jan. 26, 2009, 11:34 AM)), Nov. 12, 2013. CX0019 is the critical hinge of FTC's case against LabMD. [REDACTED]

<sup>29</sup> Johnson Dep., RX-3 at 10, 13-14 (Johnson, *Data Hemorrhages in the Health-Care Sector*, Fin. Cryptography & Data Sec. (forthcoming 2009)).

<sup>30</sup> Proffered exhibits RX-544 through RX-548 are treated as public documents in the instant Motion in accordance with this Court's Order on Resp't's Mots. to Admit Proffered Exs. RX-542 – RX-548. Neither Tiversa nor Complaint Counsel has moved for *in camera* treatment, the documents were relied upon in a public document (RX-543), and are widely available on the internet. *See* <http://www.scribd.com/doc/255830784/2014-12-01-Letter-From-Rep-Issa-to-Chairwoman-RamirezDec-1-House-Oversight-report-on-the-relationship-between-the-FTC-and-Tiversa#scribd>. Respondent may move again for admission of RX-544 through RX-548 at the appropriate time.

On February 3, 2009, FTC attorney Carl Settlemyer contacted Johnson, read the Dartmouth Report and then introduced Johnson to lead Complaint Counsel Alain Sheer.<sup>31</sup> Sheer and Johnson set up a time to meet on March 12, 2009.<sup>32</sup>

Tiversa and Boback collaborated with FTC, creating a sham corporation called The Privacy Institute to funnel PHI and personal identifying information (“PII”) to the government.<sup>33</sup> Tiversa handed over the 1718 File, and PHI taken from OpenDoor (an Elgin, Illinois AIDS clinic) to the FTC on Aug. 13, 2009.<sup>34</sup>

On January 2, 2010, FTC issued “Peer-to-Peer File Sharing: A Guide for Business.” Here, for the first time, FTC highlighted “the security problems that can result when organizations allow their employees – and others with access to their networks – to use P2P file sharing software.” This guide, again for the first time, noted the “measures network administrators or security professionals can use to address these problems.”<sup>35</sup> This “guide” does not explain why FTC changed course nor does it does not say that Section 5 demanded more

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<sup>31</sup> Johnson Dep., RX-8 at 1 (E-mail from Carl Settlemyer, Att’y, Fed. Trade Comm’n, to Johnson (Feb. 3, 2009, 4:02 PM)); *id.* at 5 (E-mail from Carl Settlemyer, Att’y, Fed. Trade Comm’n, to Johnson, copying Alain Sheer, Att’y, Fed. Trade Comm’n (Mar. 5, 2009, 1:03 PM)).

<sup>32</sup> *Id.* at 6 (E-mail from Alain Sheer, Att’y, Fed. Trade Comm’n, to Johnson (Mar. 9, 2009, 12:17 PM)).

<sup>33</sup> See Boback Dep. at 141–143, Nov. 21, 2013.

<sup>34</sup> Compl. ¶ 22, *Tiversa, Inc. v. LabMD, Inc.*, No. 13-10296, (W.D. Pa. filed Sept. 5, 2013).

<sup>35</sup> Fed. Trade Comm’n, *Peer-to-Peer File Sharing: A Guide For Business* at 1, 5-7 (2010), available at <https://www.ftc.gov/system/files/documents/plain-language/bus46-peer-peer-file-sharing-guide-business.pdf>.

from LabMD and other similarly-situated companies than the HHS regulations required for PHI.<sup>36</sup>

On January 19, 2010, FTC launched its inquisition of LabMD.<sup>37</sup>

On February 22, 2010, FTC said it had “notified almost 100 organizations that personal information, including sensitive data about customers and/or employees, has been shared from the organizations’ computer networks and is available on peer-to-peer (P2P) file-sharing networks to any users of those networks, who could use it to commit identity theft or fraud.” FTC advised it was “releasing new education materials that present the risks and recommend ways to manage them.” And, for the first time, FTC advised:

Companies should take a hard look at their systems to ensure that there are no unauthorized P2P file-sharing programs and that authorized programs are properly configured and secure... FTC enforces laws that require companies in various industries to take reasonable and appropriate security measures to protect sensitive personal information, including the Gramm-Leach-Bliley Act and Section 5 of the FTC Act. Failure to prevent such information from being shared to a P2P network may violate such laws.<sup>38</sup>

FTC thanked a number of federal agencies for their “cooperation.” However, FTC’s “probe” only regurgitated Tiversa’s “work.”

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<sup>36</sup> Expert Op. Decl. of Cliff Baker, *LabMD, Inc. v. Fed. Trade Comm’n*, No. 14-810 (N.D. Ga. filed Apr. 11, 2014) (received into evidence May 9, 2014); Prelim. Inj. Hr’g Tr. at 58-96, *LabMD, Inc. v. Fed. Trade Comm’n*, No. 14-810 (N.D. Ga. hr’g held May 7, 2014).

<sup>37</sup> See Letter from FTC Sec. Donald S. Clark to Stephen F. Fusco, Esq. (Aug. 28, 2013).

<sup>38</sup> Press Release, Fed. Trade Comm’n, Widespread Data Breaches Uncovered by FTC Probe: FTC Warns of Improper Release of Sensitive Consumer Data on P2P File-Sharing Networks, (Feb. 22, 2010), available at <https://www.ftc.gov/news-events/press-releases/2010/02/widespread-data-breaches-uncovered-ftc-probe>.

**B. Tiversa and FTC – A Symbiotic Relationship.***1. The institutional relationship between government and a crony business.*

Tiversa used FTC's data security "enforcement" activity to generate business.<sup>39</sup> The company's advisory board includes political insiders such as Wesley Clark and Howard Schmidt.<sup>40</sup> Commission Chairwoman, Edith Ramirez, ran the Obama campaign in California prior to her elevation to power.<sup>41</sup> And Commissioner Terrell McSweeney "has spent the bulk of her career in politics, working on the presidential campaigns of former Vice President Al Gore and General Wesley Clark, and serving as deputy assistant to President Barack Obama and domestic policy adviser for Vice President Joe Biden."<sup>42</sup>

Tiversa took advantage of these political contacts to pursue government contracts and even market its services to hostile nations.<sup>43</sup>

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<sup>39</sup> CX0679, Ex. 5 (Dissenting Statement of Comm'r J. Thomas Rosch, FTC File No. 1023099 (June 21, 2012)); Jaikumar Vijayan, *FTC seeks extensive information from firms being investigated for P2P breaches*, ComputerWorld (Feb. 15, 2010), <http://www.computerworld.com/article/2520117/data-privacy/ftc-seeks-extensive-information-from-firms-being-investigated-for-p2p-breaches.html>.

<sup>40</sup> See Tiversa, Inc., <http://www.tiversa.com/about/advisors.html> (last visited Apr. 22, 2015).

<sup>41</sup> See Katy Bachman, *Obama Names Edith Ramirez to Chair Federal Trade Commission – New Chair Has Close Political Ties With Obama*, AdWeek (Feb. 28, 2013), <http://www.adweek.com/news/advertising-branding/obama-names-edith-ramirez-chair-federal-trade-commission-147592>.

<sup>42</sup> See Melissa Lipman, *McSweeney Would Bring Political Finesse To FTC Role*, Law360 (June 25, 2013), <http://www.law360.com/articles/452544/mcsweeney-would-bring-political-finesse-to-ftc-role>.

<sup>43</sup> Tiversa has an Export Control Number issued by the State Department to export technology to at-risk terrorist countries, which indicates Tiversa may have an Iranian client. See Dep't of State, CJ Final Determination Listing, Export Control Number Listings at 28 (Jan. 9,

FTC used Tiversa to expand its authority.<sup>44</sup> At all times relevant, it appears actual consumers were irrelevant. Among other things, FTC's/Tiversa's close relationship explains why FTC never disclosed to LabMD, or this Court, that they had collaborated in creating the phony Privacy Institute as a PHI/PII conduit and why FTC did not use its "twenty-first century" law enforcement tools to verify Tiversa's claims or identify a single consumer "victim."<sup>45</sup>

At least one Commissioner recognized the FTC/Tiversa relationship was ill-fated very early on.

Tiversa is more than an ordinary witness, informant, or "whistle-blower." It is a commercial entity that has a financial interest in intentionally exposing and capturing sensitive files on computer networks....Indeed, in the instant matter, an argument has been raised that Tiversa used its robust, patented peer-to-peer monitoring technology to retrieve the 1,718 File, and then repeatedly solicited LabMD, offering investigative and remediation services regarding the breach, long before Commission staff contacted LabMD. In my view...the Commission should avoid even the appearance of bias or impropriety by not relying on such evidence or information in this investigation.

CX0679, Ex. 5 (Dissenting Statement of Comm'r J. Thomas Rosch, FTC File No. 1023099 (June 21, 2012)).

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2014), *available at* [http://test.pmddtc.state.gov/commodity\\_jurisdiction/documents/final\\_determinations.pdf](http://test.pmddtc.state.gov/commodity_jurisdiction/documents/final_determinations.pdf) (last visited Apr. 22, 2015).

<sup>44</sup> Boback Dep., at 141–143, Nov. 21, 2013; RX525, Daniel Kaufman Dep. (May 12, 2014), at 211:11-13; 215:11-21.

<sup>45</sup> Only during Boback's deposition did LabMD learn about the Privacy Institute and how FTC obtained the 1718 File. *See also* Resp't Mot. for Sanctions at pp. 5-8 (August 14, 2014). FTC's support for Tiversa's smear of Richard Wallace tells much about this alliance. *See* Tiversa Holding Corp.'s Notice of Information Pertinent to Richard Edward Wallace's Request for Immunity (Oct. 14, 2014).

If FTC had done basic prosecutorial due diligence,<sup>46</sup> then it would have discovered (and LabMD would have known from the outset) that Tiversa only supplied FTC with files from companies that refused to buy its services.<sup>47</sup> It would have learned (and LabMD would have known from the outset) that Tiversa only ever obtained the 1718 File from LabMD's computer in violation of Georgia and federal law. Instead, FTC colluded with Tiversa to conceal the 1718 File's origin.<sup>48</sup> Only on July 8, 2014, did FTC finally admit it had failed to investigate the 1718 File's origin by asking for additional discovery on "how, when and where Tiversa found the 1718 File on P2P networks."<sup>49</sup>

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<sup>46</sup> A United States District Court Judge publicly chastised the FTC for its careless work.

The Court: So you don't know where the documents came from, you don't know how these people got the possession of it, you don't know whether they originated from LabMD or some other place, but you are going to use that to show that, because [two individuals] committed identity theft, that certain individuals were damaged by documents, the source of which you don't even know?

[FTC]: Yes, Your Honor.

The Court: Holy cow.

Prelim. Inj. Hr'g Tr. at 80:24-81:07, *LabMD, Inc. v. Fed. Trade Comm'n*, No. 14-810 (N.D. Ga. hr'g held May 7, 2014).

<sup>47</sup> Letter from Chairman Issa, OGR, to Inspector General Kelly Tshibaka, Fed. Trade Comm'n, at 1-2 (June 17, 2014) ("Apparently, Tiversa provided information to the FTC about companies that refused to buy its services."), available at <http://oversight.house.gov/wp-content/uploads/2014/06/2014-06-17-DEI-to-Tshibaka-FTC-IG-LabMD-Tiversa.pdf>.

<sup>48</sup> See Letter from Chairman Issa, OGR, to Inspector General Kelly Tshibaka, FTC, at 1-2 (June 17, 2014).

<sup>49</sup> See Compl. Counsel's Mot. for Leave to Issue Subpoenas for Rebuttal Evidence at 4 (improperly and after the close of its case-in-chief, requesting information regarding "*how, when and where Tiversa found the 1718 File on P2P networks*") (emphasis added); see also Order Den. Compl. Counsel's Mot. for Leave to Issue Subpoenas for Rebuttal Evid. at 2 ("Complaint Counsel's assertion that further discovery into 'how, when, and where' Tiversa found the 1718 file on P2P networks...is questionable at best [since] Complaint Counsel elicited substantial evidence on this issue...at the trial deposition of Mr. Boback").

FTC's institutional crony relationship with Tiversa has apparently influenced Complaint Counsel's actions in this case.

For example, to protect Tiversa, FTC requested provisional *in camera* designation of probative but embarrassing Tiversa documents made public by OGR.<sup>50</sup>

FTC knew, or should have known, that in November, 2012, Tiversa falsely represented to the United States Court of Appeals for the Eleventh Circuit that it downloaded the 1718 File "without knowledge of the file's location" and that it did not "know where LabMD and its servers (if it even had servers) were located when it downloaded the 1,718 File."<sup>51</sup> However, it did not inform the Court of Tiversa's misrepresentation.

FTC knew Tiversa withheld responsive documents to its subpoena (and one from LabMD).<sup>52</sup> Nevertheless, Complaint Counsel has taken no action, refusing to join LabMD in seeking compliance while opposing LabMD's efforts to introduce into evidence the OGR documents Tiversa should have produced in November, 2013.<sup>53</sup>

## 2. *FTC's investigation and retaliation.*

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<sup>50</sup> See Resp't LabMD, Inc.'s Mot. to Admit RX-543 – RX-548 at 7.

<sup>51</sup> Br. of Appellee Tiversa, Inc. at 15, 29, *LabMD, Inc. v. Tiversa, Inc.*, No. 12-14504 (11th Cir. Nov. 16, 2012).

<sup>52</sup> RX-543 (Letter from Rep. Issa, Chairman, OGR (Dec. 1, 2014)).

<sup>53</sup> This Court took judicial notice of the fact that "Tiversa apparently did not fully provide requested documents subpoenaed in this matter." Order on Resp't's Mots. to Admit Proffered Exs. RX-542 – RX-548 at 3.

From the outset, LabMD warned FTC that Tiversa stole the 1718 File from LabMD's system, fabricated evidence and committed a cyber-crime.<sup>54</sup> FTC did not use either Consumer Sentinel or InternetLab to verify Tiversa's claims, though these vaunted tools were readily available. FTC instead stonewalled, staunchly defending Tiversa and Boback.<sup>55</sup>

After initially cooperating with FTC, in 2012, LabMD's CEO, Michael Daugherty, became frustrated at FTC's refusal to specify LabMD wrongdoing or to acknowledge its concerns about Tiversa. He began a public campaign to expose what he believed to be abusive bureaucratic overreach.<sup>56</sup>

In retaliation, FTC used legal process to destroy the company.

On July 19, 2013, Mr. Daugherty posted the trailer to his book, "The Devil Inside the Beltway," on his website. The trailer called the FTC's actions against LabMD an "abusive government shakedown" and explained that his book would "blow the whistle" about how "the Federal Trade Commission began overwhelming...[LabMD, a] small business, a cancer detection center, with their abusive beltway tactics." It criticized Alain Sheer.<sup>57</sup>

On July 22, 2013, Sheer told LabMD that staff had recommended enforcement proceedings against LabMD.<sup>58</sup>

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<sup>54</sup> See Initial Pretrial Conf. Tr. at 24:10-13.

<sup>55</sup> See, e.g., Resp't's Mot. for Sanctions at 3.

<sup>56</sup> See, e.g., <http://michaeljdaugherty.com> (last visited Apr. 23, 2015).

<sup>57</sup> Verified Compl. ¶38, *LabMD, Inc. v. Fed. Trade Comm'n*, No. 14-810 (N.D. Ga. filed Mar. 20, 2014).

<sup>58</sup> *Id.* ¶39. LabMD sought discovery here on its First Amendment retaliation claim and FTC objected. Complaint Counsel argued that "Mr. Daugherty's First Amendment claims are the subject of a separate lawsuit...[and] that materials generated and transmitted between

On August 28, 2013, the Commission issued a Complaint and Notice Order against LabMD.

3. *LabMD discovers the 1718 File's true origin.*

Exhaustive discovery and a Congressional investigation have demonstrated that FTC's inquisition and prosecution of LabMD are based on a crime, Tiversa's theft of the 1718 File, and that Complaint Counsel has defended a lie.

Boback was Complaint Counsel's lead witness. He testified Tiversa first found and downloaded the 1718 File from a San Diego, California IP address on February 5, 2008 at 3:49 pm while doing work for a "client."<sup>59</sup> He testified Tiversa also downloaded the 1718 File from three additional IP addresses using P2P.<sup>60</sup> In sum, he swore Tiversa downloaded the file from four separate locations<sup>61</sup> on four separate dates between February 5, 2008, and June 9, 2011.<sup>62</sup>

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Complaint Counsel and non-testifying Commission employees are not discoverable." This Court ruled for FTC, holding that evidence "expected to show whether or not the FTC violated...First Amendment rights by retaliating against LabMD are not relevant to the allegations of the Complaint, the proposed relief or the defenses of the respondent." However, in LabMD's federal court action, FTC argued the Administrative Procedure Act requires LabMD to exhaust the administrative process before seeking judicial review of its retaliation cause of action. Thus, the retaliation claim is functionally non-justiciable. *LabMD, Inc. v. Fed. Trade Comm'n*, 776 F.3d 1275, 1279-80 (11th Cir. 2015). Therefore, LabMD hereby renews its motion to conduct discovery on the retaliation claim. *See* Order Den. Resp't's. Mot. for R. 3.36 Subpoena.

<sup>59</sup> Boback Dep. at 24:17-25:2, Nov. 21, 2013 (IP address 68.107.85.250 was "the IP address that [Tiversa] downloaded the [1718] file from" and "if that IP address resolves to San Diego, California, then, yes, that is the original disclosure source"); *id.* at 25:9-13 ("Tiversa was providing services for a customer that the search criteria, that we were looking for, it came with those, with that search criteria"); *id.* at 38:9-14 ("68.107.85.250 is the IP address from which Tiversa downloaded CX 10, which is the 1,718 file"); *id.* at 53:8-25 (stating that "the first instance of us locating this [1718] file anywhere was at 68.107.85.250 on February 5, 2008, at 3:49 p.m."). Notably, LabMD was not a client of CIGNA.

<sup>60</sup> Boback Dep. at 43:5-7; 43:16-44:1, Nov. 21, 2013 (173.16.83.11 is "another example...[of] the IP address that we would have downloaded this [1718] file from"); *id.* at 49:9-11, 20-21 (1718 File was downloaded from IP address 201.194.118.82).

Through Boback, FTC introduced Exhibit CX-19,<sup>63</sup> a single sheet of paper with four typed IP addresses. CX19 was not on company letterhead or accompanied by any chain of custody or other verifying information. There was no metadata, additional business records, or even a simple screen shot proving origin.

Boback testified Richard Wallace created CX-19.<sup>64</sup> However, FTC did not depose Wallace. On January 30, 2013, LabMD subpoenaed Wallace and vigorously pursued a deposition before the close of discovery in March, 2014.<sup>65</sup> Tiversa fired Wallace on or about February 28, 2014, but Complaint Counsel and Tiversa's counsel, Jarrod D. Shaw, together played musical chairs until Tiversa publicly admitted on April 7, 2014, that Mr. Wallace was no longer with the company.<sup>66</sup>

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<sup>61</sup> Boback Dep. at 52:19-53:7, Nov. 21, 2013 (“I know that the four locations that we have found the file, although I don't attribute them directly to the IP address, the four locations were San Diego, Arizona, Costa Rico and London”).

<sup>62</sup> See Boback Dep. at 52:19 – 53:7, Nov. 21, 2013 (“I know that the four locations that we have found the file...were San Diego, Arizona, Costa Rico and London” and noting that “the Arizona IP address has now, because IP addresses get moved around the country over time, has now-- will now resolve to an Iowa IP address...[b]ut the person was in Arizona at the time”).

<sup>63</sup> Boback Dep. at 52:19-53:7, Nov. 21, 2013 (CX0019 “is a listing of the IP addresses and the times of downloads of the four instances that Tiversa has in our data store of the 1718 file”).

<sup>64</sup> RX-541, Boback Trial Dep. (June 7, 2014) at 83:21-22; 84:12-13; 21-22; 85:4-12.

<sup>65</sup> See Compl. Counsel's Mot. for Leave to Issue Subpoenas for Rebuttal Evidence, Ex. B (emails).

<sup>66</sup> *Id.*

On May 30, 2014, Wallace and Boback were both supposed to appear and testify at the administrative hearing.<sup>67</sup> On May 30, 2014, [REDACTED]

[REDACTED] Boback fled the FTC building.<sup>69</sup> On June 12, 2014, Mr. Wallace took the stand to assert his Fifth Amendment right against self-incrimination.<sup>70</sup>

The Court proposed calling Boback to appear and testify on June 12, 2014.<sup>71</sup> However, Tiversa's counsel falsely represented to the Court that Boback was leaving the country on a prepaid vacation and therefore could not appear to give testimony in person.<sup>72</sup> Therefore, the Court ordered Boback to testify by trial deposition, which he did on June 7, 2014.<sup>73</sup>

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<sup>67</sup> Trial Tr. vol. 7 at 1241-56.

<sup>68</sup> [REDACTED]

<sup>69</sup> *See id.* at 1245:22-25.

<sup>70</sup> Trial Tr. vol. 8, at 1301-02.

<sup>71</sup> Trial Tr., vol. 7, at 1251:6 – 1252:15 (May 30, 2014).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



Boback has adamantly maintained that Tiversa never downloaded the 1718 File from LabMD.<sup>78</sup> The truth, however, is that Tiversa only ever downloaded the 1718 File from LabMD in Atlanta and that it only downloaded the file once.

First, in his September 5, 2013, email, Boback said Tiversa downloaded the 1718 File from LabMD.<sup>79</sup> This contradicts his testimony claiming that the file was downloaded first in San Diego, then in Arizona, Costa Rica, and London but never Atlanta, Georgia. LabMD's IP address, listed in Boback's email, is not on CX 19 or CX957. Indeed, Boback specifically swore that the 1718 File had *not* been downloaded from Atlanta, Georgia.

Second, Tiversa's own records prove the 1718 File was downloaded only once from LabMD and never thereafter.<sup>80</sup> Tiversa told CIGNA that it downloaded the 1718 File on April 18, 2008 from IP Address 64.190.82.42 – LabMD's Atlanta work station. Tiversa then offered CIGNA the opportunity to sign up for four types of services to discover “the individual disclosing the information,” “what else...this individual is sharing or disclosing,” where the individual “is located in the world,” and whether “the files spread to other users of the network.”

In the Forensic Investigation Report for Ticket #CIG00081, Tiversa said “[f]or each file disclosure, Tiversa provides a disclosure ticket to CIGNA” and that “[e]ach ticket includes the

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<sup>78</sup> *E.g.*, Boback Dep. at 35:13-21, Nov. 21, 2013. Tiversa allegedly learned that the IP Address 64.190.82.42, resolving to Atlanta, Georgia, was the initial disclosure source after “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,” but “[w]e did not download the file from them.” *Id.* at 41:14-18; 42:14-18 (“I never downloaded the file from [64.190.82.42].”).

<sup>79</sup> (Proposed) RX-547 (E-mail from Boback to Dan Kopchak and Molly Trunzo, Tiversa (Sept. 5, 2013, 3:20 PM)) (“In 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 IP of the download was found to be in Georgia[.]”)

<sup>80</sup> *Id.*; *see also* (Proposed) RX-545 (Tiversa Incident Record Form).

name of the file(s) disclosed” and the “*IP on which the files were obtained*” (emphasis added).<sup>81</sup> To CIGNA, Tiversa said the disclosing IP Location for 1718 file was LabMD. Tiversa’s “File Proliferation Analysis” said that, as of August 12, 2008, Tiversa had “observed” the 1718 File elsewhere but it could not download the 1718 File from these IP addresses because “network constraints and/or user behavior *prevented Tiversa from downloading the files* from these additional sources.”<sup>82</sup> Indeed, there were only two additional “observations” of the LabMD file as of August 12, 2008. One was in Oakwood, Georgia and was “probably an IP shift of the original source” and the other was an IP address located in San Diego, California. However, this San Diego IP address was not even the same San Diego IP address identified by Boback or listed on CX19.<sup>83</sup> As OGR noted, “[o]ne of the two additional IP addresses is located in San Diego, California. It is different IP address, however, than the one from which Tiversa claims to have originally downloaded the file.”<sup>84</sup> Further, Tiversa did not observe that this San Diego IP address possessed the LabMD file until August 5, 2008. 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.”<sup>85</sup>

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<sup>81</sup> (Proposed) RX-546 (Tiversa Forensic Investigation Report for Ticket #CIG00081) (emphasis added).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 3, 5.

<sup>84</sup> RX-543 at 5 (Letter from Rep. Issa, Chairman, OGR, to Ramirez, Chairwoman, FTC (Dec. 1, 2014)) (emphasis added).

<sup>85</sup> *Compare* (Proposed) RX-545 at 3 (1718 File discovered April 18, 2008) *with* (Proposed) RX-546 at 3 (1718 File discovered “4/18/08” at LabMD, “8/1/08” in “Oakwood, GA”

**C. The Commission Is Tainted By the Chairwoman's Involvement in the OGR Investigation.**

On June 11, 2014, OGR's Chairman Darrell Issa sent the first of four letters to FTC's Chairwoman Ramirez concerning Tiversa,<sup>86</sup> advising FTC "the information provided to the FTC [by Tiversa] is incomplete and inaccurate."<sup>87</sup> FTC's top leadership responded by drafting a one paragraph letter dated June 13, 2014, ostensibly from FTC's Secretary Donald Clark, stating that "[b]ecause this matter relates to ongoing administrative litigation in *In the Matter of LabMD, Inc.*, Docket No. 9357, [therefore] I am responding on behalf of the agency."<sup>88</sup> This letter suggested that the Commissioners would be walled from OGR's investigation. However, at all times relevant, Chairwoman Ramirez was in total control and working to protect the agency.

To begin with, Ramirez's Chief of Staff ("COS") Heather Hipsley, and her Senior Legal Advisor Janis Kestenbaum, edited and substantively finalized this June 13, 2014 letter. *Id.*

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and "8/5/08" in "San Diego, CA" but "Tiversa analysts were only able to visually observe these "new sources" and promising CIGNA to "re-acquire sources and download any relevant files from them" and to "update this report as new information becomes available") *and* (Proposed) RX-548 at 3 (1718 File and eighteen other LabMD documents disclosed between "3/7/2007 and 2/25/2008"), and *id.* at 14 ("These 6 additional IP addresses were detected in possession of the 1718 [File] on various [but unspecified] dates . . ." but listing new disclosure dates and IP addresses, including a "2/5/2008" disclosure date in San Diego that was not listed on RX-545 or RX-546).

<sup>86</sup> See Exhibit I at 000092–000095 (selected documents from FTC-FOIA-2015-00109 Interim Production Feb. 19, 2015). Respondent will produce these documents back to FTC in a supplemental production.

<sup>87</sup> *Id.* at 000092.

<sup>88</sup> See *id.* at 000139 (emphasis added).

(“Don, here is the final with Edith's input . . . Please provide a copy back to our office after you sign and send ... Thanks! H.”).<sup>89</sup>

On June 17, 2014, OGR sent a letter to FTC Acting Inspector General Kelly Tshibaka (“AIG”) requesting a formal investigation into the relationship between FTC, its investigators and Complaint Counsel, and Tiversa.<sup>90</sup> OGR was also interested in the Privacy Institute:<sup>91</sup>

The possibility that inaccurate information played a role in the FTC's decision to initiate enforcement actions against LabMD is a serious matter...the alleged collaboration between the FTC and Tiversa...creates the appearance that the FTC aided a company whose business practices allegedly involve disseminating false data about the nature of data security breaches.<sup>92</sup>

FTC scrambled to respond and it is clear, based upon available information,<sup>93</sup> that Ramirez again directed the strategy.

At all times relevant, FTC’s responses to Congress were aimed at protecting its reputation, not LabMD’s due process rights or the integrity of this proceeding.

On June 18, 2014, the AIG informed Ramirez of the June 17 letter.<sup>94</sup>

On June 20, 2014, White briefed Hill staffer Shannon Taylor regarding FTC’s relationship with Tiversa. Taylor was Majority Counsel for the House Energy and Commerce Committee, and a staffer for Rep. Lee Terry (R-NE). Ramirez apparently met White before that

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<sup>89</sup> *Id.* at 000142-000149 (emphasis added).

<sup>90</sup> *See id.*, at 000117–120.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, at 000119.

<sup>93</sup> FTC has withheld in full at least 2,471 documents in response to FOIA requests to OCR, AIG, and DAEO by Cause of Action.

<sup>94</sup> *See id.* at 000127.

briefing to discuss LabMD and the IG's investigation.<sup>95</sup> Ramirez also was at least aware of a June 19 meeting regarding ethics issues and FTC staff in the LabMD matter.<sup>96</sup>

On Friday, July 18, 2014, Chairman Issa again wrote Ramirez:

Given what the Committee has learned so far, I have serious reservations about the FTC's reliance on Tiversa as a source of information used in FTC enforcement actions. I am also concerned that the FTC appears to have acted on information provided by Tiversa without verifying it in any meaningful way... Because Tiversa was benefiting commercially from the fact that the FTC was investigating the companies that Tiversa itself referred to the FTC, it is critical for the Committee to understand the relationship between the FTC and Tiversa, and whether Tiversa manipulated the FTC in order to enrich themselves.<sup>97</sup>

On July 21, 2014, the Commission was required to vote and approve the release to OGR of non-public material, including FTC's records of the LabMD inquisition. This surprised staff. *Id.* at 000100 ("My understanding is we are going to meet [OGR's] deadline. But I don't think any of us considered that we would need a vote.").<sup>98</sup>

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<sup>95</sup> *Id.* at 000125.

<sup>96</sup> *See id.* at 000124.

<sup>97</sup> *Id.* at 000082–84.

<sup>98</sup> *Id.*, at 000100. And here FTC's Operating Manual gives the game away:

*In certain situations (e.g., matters in ongoing adjudications), it may be inappropriate for the Commission itself to review particular responsive documents or information. The General Counsel's office should be contacted for guidance in these instances, and the memorandum to the Commission should advise the Commission of the existence of such materials.*

*See* Fed. Trade Comm'n., Operating Manual, Ch. 15: *Confidentiality and Access*, available at [https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch15confidentialityandaccess\\_0.pdf](https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch15confidentialityandaccess_0.pdf) (last visited Apr. 23, 2015).

On July 23, 2014, Senator Jay Rockefeller (D-WV) sent a letter to Chairman Issa berating him for interfering in the LabMD case.<sup>99</sup> FTC's emails suggest the Commission likely instigated and even helped write this letter.<sup>100</sup> First, OGR's investigation triggered a cascade of communications, calls and meetings between FTC staff and Hill political operatives starting in mid-June.<sup>101</sup> Second, the Rockefeller letter came the day before Chairman Issa's July 24 hearing,<sup>102</sup> where FTC was warned it would be "attacked."<sup>103</sup> A July 23 e-mail from Patrick Satalin, a staffer for Rep. Peter Welch, D-VT, to Aaron Burstein, Commissioner Brill's Attorney Advisor, clearly reveals a minority congressman on OGR tactically assisting FTC. *Id.* ("... The FTC is going to be getting attacked at the OGR Committee tomorrow (Peter sits on this Committee). If you have a few minutes, *would love to chat with you about this today to see if there is anything we could raise that would be helpful for you all.* Let me know.")<sup>104</sup> FTC's Hill

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<sup>99</sup> See Exhibit 2 (selected documents from FTC FOIA 2014 01217 (Aug. 25, 2014), at 00002-00004. Respondent will produce these documents back to FTC in a supplemental production.

<sup>100</sup> *Id.*, at 00009-00016.

<sup>101</sup> *Id.*, at 00012-00018, Taylor 18 June 2014 e-mail to Vandecar: "We definitely need to talk now."

<sup>102</sup> *E.g., The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury: Hearing Before the H. Comm. on Oversight & Gov't Reform*, (Jul. 24, 2014), available at <http://oversight.house.gov/hearing/federal-trade-commission-section-5-authority-prosecutor-judge-jury-2/> (last visited Apr. 23, 2015).

<sup>103</sup> See Ex. 2, at 00055.

<sup>104</sup> *Id.* (emphasis added). Brill, of course, had "voluntarily" recused herself because of speeches she gave in which she prejudged the outcome of FTC's Section 5 action against LabMD. See Statement of Commissioner Julie Brill (Dec. 24, 2013).

operatives in both chambers chimed in.<sup>105</sup> *See* Resp't's Mot. to Disqualify Chairwoman Edith Ramirez, Ex. 2 at 00039 ("Hey, Kim. I've been meaning to reach out to you on this. You guys have any thoughts you want to share with us, or just tell us generally what's happening in this case now that Government Reform is sniffing around Tiversa?").<sup>106</sup> Tellingly, Ellen Doneski (a close aide of Senator Rockefeller) sent her friend "Edith" (Ramirez) a copy of Rockefeller's letter early in the afternoon of July 23, before it was made public the next day.<sup>107</sup>

Finally, on December 1, 2014, OGR sent its fourth and final letter to Chairwoman Ramirez.<sup>108</sup> This letter reported that Tiversa withheld crucial documents from FTC and the attached documents, which should have been produced in 2013, confirmed Boback's perjury and Tiversa's obstruction of this proceeding. Yet Complaint Counsel and FTC have done nothing to protect the integrity of this case.

**D. The Commission Has Stacked The Deck.**

The undisputed facts show the likelihood or probability of Commission unfairness and the court should take official notice of same. *See* 16 C.F.R. § 3.43(f). On September 25, 2013, the Administrative Law Judge ("ALJ") advised LabMD's counsel that all pre-hearing dispositive motions "will be ruled on by the Commission, the same body that voted to issue the complaint in this case." Initial Pretrial Conference, at 7:12-14. On November 8, 2013, Commissioner Wright said FTC has a perfect 100 percent win rate against respondents where, as here, the Commission

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<sup>105</sup> *Id.*, at 00008–00011.

<sup>106</sup> *Id.*, at 00039.

<sup>107</sup> *Id.*, at 00001.

<sup>108</sup> *See* RX 543.

has voted to issue the Complaint. *See* Joshua D. Wright, Comm’r, Fed. Trade Comm., Recalibrating Section 5: A Response to the CPI Symposium, CPI Antitrust Symposium, at 4 (November 2013).<sup>109</sup>

On February 21, 2015, Commissioner Wright said:

Perhaps the most obvious evidence of abuse of process is the fact that over the past two decades, the Commission has almost exclusively ruled in favor of FTC staff. That is, when the ALJ agrees with FTC staff in their role as Complaint Counsel, the Commission affirms liability essentially without fail; when the administrative law judge dares to disagree with FTC staff, the Commission almost universally reverses and finds liability.”

Commissioner Wright also said that attempts to defend the FTC’s perfect win rate based on its expertise at choosing winning cases is a “facially implausible defense.” Remarks of Joshua D. Wright, Comm’r, Fed. Trade Comm., Global Antitrust Inst. Invitational Moot Court Competition (Washington, D.C. Feb. 21, 2015).<sup>110</sup>

This Court should also take judicial notice that the data shows that appeals courts reverse Commission decisions at four times the rate of federal district court judges in antitrust cases. Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, 1 J. ANTITRUST ENFORCEMENT 82, p. 15 (2013).

### **STANDARD OF REVIEW**

A first principle of Anglo-American jurisprudence is that the ends do not justify the means. *See Sorrells v. United States*, 287 U.S. 435, 459 (1932) (Roberts, J., concurring). Thus, due process requires a fair trial by a fair and impartial tribunal. *See Withrow v. Larkin*, 421 U.S.

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<sup>109</sup> Available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/recalibratingsection-5-response-cpi-symposium/1311section5.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/recalibratingsection-5-response-cpi-symposium/1311section5.pdf) (last visited Mar. 30, 2015).

<sup>110</sup> Available at [https://www.ftc.gov/system/files/documents/public\\_statements/626231/150221\\_judgingantitrust-1.pdf](https://www.ftc.gov/system/files/documents/public_statements/626231/150221_judgingantitrust-1.pdf) (last visited Mar. 30, 2015).

35, 47 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973). The Commission must maintain the appearance of impartiality, free from the taint of prejudice. *Pillsbury Co. v. Fed. Trade Comm'n*, 354 F.2d 952, 964 (5th Cir. 1966) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)); see also *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267-68 (1954); *Aera Energy LLC v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011) (“[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker.”); *United States v. Fensterwald*, 553 F.2d 231, 232 (D.C. Cir. 1977).

### ARGUMENT

“At times, a court ‘must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.’ This case is one of those times.” *Humane Soc’y of the United States v. Jewell*, No. 13-186, 2014 U.S. Dist. LEXIS 175846, at \*8 (D.D.C. Dec. 19, 2014) (citation omitted).

FTC has violated LabMD’s due process rights in a number of ways, each of which would alone render this action unlawful. However, even if this Court does not find that each individual infraction rises to the level required to dismiss the Complaint; together, the pattern of abuse, constant violations, and egregious FTC conduct has stripped LabMD of the “fair trial in a fair tribunal” to which it is entitled. *In re Murchison*, 349 U.S. at 136.

First, FTC’s reliance on Tiversa and the 1718 File, notwithstanding Boback’s evident perjury, is precisely the kind of prosecutorial misconduct that violates LabMD’s constitutional rights. *Mesarosh v. United States*, 352 U.S. 1, 9 (1956); *United States v. Basurto*, 497 F.2d 781, 784 (9th Cir. 1974); see *Napue v. Illinois*, 360 U.S. 264, 269 (1959). FTC has, at a minimum, the duty to strip Boback’s tainted testimony from the administrative record. *Communist Party of the United States v. Subversive Activities Control Bd.*, 351 U.S. 115, 125 (1956) (agency must

base findings on untainted evidence and must expunge perjured testimony from the record); *Applications of United Television Co.*, 59 F.C.C.2d 663, 665 (1976).

Second, the Commission's taint due to its response to OGR's investigation, especially in tandem with the statistical certainty that the Commission will find LabMD violated Section 5 no matter what this Court does, is enough to dismiss this case. *Gibson*, 411 U.S. at 578-79.

## I. FTC VIOLATED LABMD'S CONSTITUTIONAL RIGHTS.

### A. Government Misconduct.

FTC's blind reliance on Tiversa to commence an administrative inquisition was constitutionally infirm misconduct. While FTC has broad investigatory power, it is not unlimited. At a minimum, the agency is constrained by basic due process, *Withrow*, 421 U.S. at 47, *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-306 (1924), meaning that the Fourth Amendment applies. *See generally Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967) (protecting businesses subjected to regulatory searches); *See v. City of Seattle*, 387 U.S. 541 (1967); *OFCCP v. Bank of America*, 97-OFC-16, Admin. Review Bd.'s Decision and Order of Remand (Dep't of Labor Mar. 31, 2003) (protecting businesses from agency searches).

"The doctrine that the federal government should not be permitted to avail itself of its own wrongdoing is yet good law." *Falkowski v. Perry*, 464 F. Supp. 1016, 1021 (N.D. Ala. 1978); *Oliva-Ramos v. Att'y Gen. of the United States*, 694 F.3d 259 (3rd Cir. 2012) (the exclusionary rule is permitted in federal administrative proceedings if evidence is obtained as a result of an egregious constitutional violation").<sup>111</sup>

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<sup>111</sup> *See generally* Richard M. Re, *The Due Process Exclusionary Rule*, 127 Harv. L. Rev. 1885 (2014), available at [http://cdn.harvardlawreview.org/wp-content/uploads/2014/05/vol127\\_re.pdf](http://cdn.harvardlawreview.org/wp-content/uploads/2014/05/vol127_re.pdf) (exclusionary rule is truly a due process rule).

Tiversa obtained the 1718 File in violation of Georgia and federal cyber laws. *See* Ga. Code Ann. §§ 16-9-90 – 16-9-109 (2014); *see also* 18 U.S.C. § 1030 (2012). Evidence illegally obtained is properly excluded in administrative proceedings. *See O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality opinion); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 1982) (evidence obtained as a result of an unlawful search and seizure is properly excluded in an OSHA citation hearing); *United States v. Widow Brown's Inn of Plumsteadville, Inc.*, 1992 OCAHO LEXIS 3, 44, ALJ's Decision and Order (Dep't of Justice Exec. Office for Immigration Review Jan. 15, 1992).<sup>112</sup>

Here, Tiversa had a clear and direct economic interest in FTC action against the companies it hacked. CX0679, Ex. 5 (Dissenting Statement of Comm'r J. Thomas Rosch, FTC File No. 1023099 (June 21, 2012)).<sup>113</sup> FTC therefore had a heightened duty to employ its Consumer Guard and InternetLab and to take other reasonable measures to corroborate Tiversa's assertions that the 1718 File had been found outside of LabMD. *United States v. Brown*, 500 F.3d 48, 56 (1st Cir. 2007) (authorities must "act with due diligence to reduce the risk of a mendacious or misguided informant"); *United States v. Winchenbach*, 197 F.3d 548, 556 (1st Cir. 1999); *see Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (must have independent source for unlawfully obtained evidence). Instead, FTC failed to exercise even reasonable due diligence, waiting until the close of its case in chief to seek leave to investigate its origins. *See* Compl. Counsel Mot. for Leave to Issue Subpoenas for Rebuttal Evidence at 4, (requesting

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<sup>112</sup> *See also Danielson*, 3 N.T.S.B. 161, 181 (1977) (applying exclusionary principles in administrative adjudication to determine whether or not the evidence was properly before the board).

<sup>113</sup> *See also* Johnson Dep., RX-7 at 3 (E-mail from Gormley to Johnson (Apr. 29, 2008, 3:43 PM)).

information regarding “*how, when and where Tiversa found the 1718 File on P2P networks*”) (emphasis added).

The 1718 File was acquired illegally and improperly, and therefore all derivative evidence, including the day sheets, should be excluded and as a result the administrative case dismissed. See *Atlantic Richfield Co. v. Fed. Trade Comm'n*, 546 F.2d 646, 651 (5th Cir. 1977) (if the FTC acted “improperly or illegally” in obtaining evidence then respondent “should be entitled to have any evidence so obtained -- as well as its ‘fruits’ -- excluded from the proceeding or to obtain a reversal of any adverse judgment...”); *Knoll Associates v. Fed. Trade Comm'n*, 397 F.2d 530, 537 (7th Cir. 1968) (remanding case to FTC with instruction to reconsider evidence without documents and testimony given or produced by or through witness that stole materials from respondent).<sup>114</sup>

FTC’s defense of Boback’s perjury is also constitutionally infirm misconduct. *Giglio v. United States*, 405 U.S. 150, 153 (1972) (“[T]he presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’” (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935))); *Morris v. Ylist*, 447 F.3d 735, 744 (9th Cir. 2006) (suspected perjury requires an investigation and this “duty to act is not discharged by attempting to finesse the problem by pressing ahead without a diligent and good faith attempt to resolve it”).

---

<sup>114</sup> The Government’s pattern of rewarding Tiversa for information as well as FTC’s vigorous defense of Tiversa and Boback render Tiversa the FTC’s “agent.” *United States v. Johnson*, 196 F. Supp. 2d 795, 863 (N.D. Iowa 2002) (“implicit prearrangement between the government and an informant to gather information in return for a benefit establishes the informant’s agency”) (citing *United States v. York*, 933 F.2d 1343 (7th Cir. 1993)). Tiversa’s illegal conduct is fatal to FTC’s case on that basis alone since the FTC failed to present any evidence corroborating Boback’s testimony. *US v. Janis*, 428 US 433, 455; *In re Big Ridge, Inc.*, 36 FMSHRC 1677, 1739, 2014 FMSHRC LEXIS 465 (FMSHRC June 19, 2014) (Mine Safety and Health Review Commission excluded tainted evidence and found otherwise insufficient evidence to show violation of law).

Complaint Counsel here knew Boback lied no later than December 1, 2014, when OGR made public the documents Tiversa gave up to Congress but withheld in this proceeding, and likely much earlier. See [REDACTED]

[REDACTED]

[REDACTED] <sup>115</sup>

At that point, FTC should have taken appropriate steps to protect the integrity of this proceeding (and LabMD's rights). See *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974).

However, it failed to do so. At the very least, FTC is under an obligation to strike from the record all testimony which it knows to be inaccurate, including all evidence that the 1718 File was downloaded from multiple locations (besides LabMD's IP address) in 2008 or anytime thereafter. *Communist Party*, 351 U.S. at 125 (1956).<sup>116</sup>

**B. LabMD Was Denied A Fair Tribunal.**

LabMD is entitled to a fair tribunal. See *Gibson*, 411 U.S. at 564; *Pillsbury Co.*, 354 F.2d at 964. But this has been denied here.

First, this proceeding is tainted by the Commission's wrongful retaliation against LabMD for speaking out against government overreach. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178,

<sup>115</sup> See also [REDACTED]

<sup>116</sup> See, e.g., FNs 59-63, *infra*.

190-91, 190 n.22 (D.C. Cir. 2006) (official reprisal for constitutionally-protected speech violates the First Amendment); *see also White v. Baker*, 696 F. Supp. 2d 1289, 1312-13 (N.D. Ga. 2010).

Second, the Commission's response to OGR's investigation, and, particularly, Chairwoman Ramirez's active role in that response, alone, so taints this proceeding that this case should be dismissed. *Pillsbury Co.*, 354 F.2d at 964 (litigant's right to a fair trial is breached where agency officials in judicial function are subjected to powerful external influences). These facts, taken in tandem with the data demonstrating that the Commission is statistically certain to rule for Complaint Counsel no matter what this Court might find or conclude, and the fact that the FTC has already claimed *Chevron* deference for its Section 5 authority in its prior order, leads to the inapposite conclusion that the FTC Commission has prejudged the case and is no longer a fair and unbiased tribunal. *Accord Withrow*, 421 U.S. at 47; *Aera Energy LLC*, 642 F.3d at 221.

There is no reason that LabMD should be forced to continue this proceeding when its outcome is a statistical certainty. *See Cinderella Career & Finishing Schools, Inc. v. Fed. Trade Comm'n*, 425 F.2d 583, 591 (D.C. Cir. 1970); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("[N]o person [should] be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."); *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007); *Metropolitan Council of NAACP Branches v. Fed. Commc'ns Comm'n*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995). Simply put, no disinterested observer could ever conclude that the Commission has not already prejudged this case. *Dean Foods Co.*, No. 8674, 1966 FTC LEXIS 32, 332-335 (1966) (fair hearing denied where a disinterested observer would have reason to

believe that the Commission had in some measure adjudged the facts of a particular case in advance of hearing it).

Third, the Administrative Procedure Act forbids the type of *ex parte* contacts between the Commission and Congress that occurred in this case. *See* 5 U.S.C. §551, *et seq.*; *Home Box Office, Inc., v. Fed. Commc'ns Comm'n*, 567 F.2d 9, 17 (D.C. Cir. 1977); *see also United Steelworkers of Amer. v. Marshall*, 647 F.2d 1189, 1213 (D.C. Cir. 1980) (APA prohibits off-the-record communication between agency decision maker and any other person about a fact in issue). The only cure for such *ex parte* contact is full disclosure by the FTC of all *ex parte* communications and documents exchanged with Congress. *Aera Energy LLC*, 642 F.3d at 220-222. However, FTC refuses to produce these documents. As a result, this case should be dismissed.

### CONCLUSION

For the reasons stated above, LabMD respectfully requests that this Court grant its Motion to Dismiss for Lack of Due Process and dismiss the Complaint with prejudice.

Dated: April 24, 2015.

Respectfully submitted,

/s/ Erica L. Marshall  
Prashant K. Khetan, Esq.  
Patrick J. Massari, Esq.  
Erica L. Marshall, Esq.  
Cause of Action  
1919 Pennsylvania Ave., NW Suite 650  
Washington, DC 20006  
Phone: (202) 499-4232  
Facsimile: (202) 330-5842  
Email: prashant.khetan@causeofaction.org

/s/ Reed D. Rubinstein  
Reed D. Rubinstein, Esq.

PUBLIC

William A. Sherman, II, Esq.  
Dinsmore & Shohl, LLP  
801 Pennsylvania Ave., NW Suite 610  
Washington, DC 20004  
Phone: (202) 372-9100  
Facsimile: (202) 372-9141  
Email: reed.rubinstein@dinsmore.com

*Counsel for Respondent, LabMD, Inc.*

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

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

DOCKET NO. 9357

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.'S  
MOTION TO DISMISS**

Upon consideration of Respondent's Motion to Dismiss, and in consideration of the entire Record in this case,

IT IS HEREBY ORDERED that Respondent Counsel's Motion to Dismiss be and the same is hereby GRANTED; and

the Commission's Complaint shall be dismissed with prejudice.

SO ORDERED:

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

Date: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on April 24, 2015, I caused to be filed the foregoing document and an electronic copy with the Office of the Secretary:

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 hand-delivered 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, Esq.  
Megan Cox, Esq.  
Ryan Mehm, Esq.  
John Krebs, Esq.  
Jarad Brown, Esq.  
Division of Privacy and Identity Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Room CC-8232  
Washington, D.C. 20580

Dated: April 24, 2015

By: /s/ Patrick J. Massari

**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: April 24, 2015

By: /s/ Patrick J. Massari

# EXHIBIT 1

DARBELL E. ISSA, CALIFORNIA  
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LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED THIRTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM  
2157 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6143

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FACSIMILE (202) 225-3974  
MINORITY (202) 225-5051  
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VACANCY

July 18, 2014

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

Dear Madam Chairwoman:

The Committee on Oversight and Government Reform is investigating the activities of Tiversa, Inc., a company the Federal Trade Commission relied upon as a source of information in investigations and enforcement actions. The Committee has learned that the FTC received information on nearly 100 companies from Tiversa, and initiated investigations or enforcement actions against multiple companies after receiving the information. The Committee has received serious allegations against Tiversa related to the ways that the company collected and used that information. In the course of investigating those allegations, the Committee obtained documents and testimony that show the company's business practices cast doubt on the reliability of the information that Tiversa supplied to the FTC. Given what the Committee has learned so far, I have serious reservations about the FTC's reliance on Tiversa as a source of information used in FTC enforcement actions. I am also concerned that the FTC appears to have acted on information provided by Tiversa without verifying it in any meaningful way.

From the information the Committee has gathered the relationship between the FTC and Tiversa dates back to 2007. In July 2007, Tiversa and the FTC testified before the Oversight and Government Reform Committee about the dangers of peer-to-peer networks.<sup>1</sup> Following Tiversa's July 2007 testimony, the FTC had a number of conversations with Tiversa about the risks of inadvertent sharing on peer-to-peer networks.<sup>2</sup> According to documents obtained by the Committee, after at least two telephone conversations between FTC and Tiversa employees,

<sup>1</sup> H. Comm. on Oversight & Gov't Reform, *Hearing on Inadvertent File Sharing Over Peer-to-Peer Networks*, 110th Cong. (July 24, 2007) (H. Rept. 110-39).

<sup>2</sup> E-mail traffic indicates that representatives from the FTC and Tiversa held a conference call with an online meeting component on October 26. E-mail from [FTC Employee 1], Fed. Trade Comm'n, to Robert Boback, CEO, Tiversa, Inc. (Oct. 22, 2007 2:23 p.m.) ("We'll plan on speaking with you at 10:30 on Friday morning (10/26). I'll check on our ability to do the call with web access to be able to view a presentation." E-mail from Robert Boback, CEO, Tiversa, Inc., to [FTC Employee 1], Fed. Trade Comm'n (Oct. 22, 2007 3:25 p.m.) ("I have scheduled our demonstration for Friday at 10:30."). Another phone conversation appears to have occurred on December 19, 2007. E-mail from Robert Boback, CEO, Tiversa, Inc., to [FTC Employee 1], Fed. Trade Comm'n (Dec. 11, 2007 2:04 p.m.) ("2 pm on Wednesday (12/19) will work. Let's plan for that time.").

Robert Boback, Tiversa's CEO, sent information to the FTC in December 2007.<sup>3</sup> It is unclear what specific information Tiversa sent to the FTC at that time or how that information was used.

In 2009, Tiversa and FTC again testified before the Oversight and Government Reform Committee at another hearing on the risk of inadvertent sharing on peer-to-peer networks.<sup>4</sup> The Committee has learned that around the same time as this hearing, the FTC contacted Tiversa and asked for information about companies with large data breaches.<sup>5</sup> In order to receive the information, the FTC issued a civil investigative demand to the Privacy Institute, an entity Tiversa apparently created for the specific and sole purpose of providing information to the FTC. Mr. Boback explained the relationship between Tiversa and the Privacy Institute during a transcribed interview with the Committee. He testified that Tiversa lawyers set up the Privacy Institute "to provide some separation from Tiversa from getting a civil investigative demand at Tiversa, primarily. And, secondarily, it was going to be used as a nonprofit, potentially, but it never did manifest."<sup>6</sup>

Through the Privacy Institute, Tiversa produced a spreadsheet to the FTC that contained information on data breaches at a large number of companies.<sup>7</sup> Mr. Boback further testified that Tiversa provided information on "roughly 100 companies" to the FTC.<sup>8</sup>

In February 2010, the FTC announced that it notified "almost 100 organizations" that personal information had been shared from the organizations' computer networks and was available on peer-to-peer networks.<sup>9</sup> The FTC also announced that it opened non-public investigations concerning an undisclosed number of companies.<sup>10</sup> The timing of the Privacy Institute's production of negative information on "roughly 100 companies" to the FTC, and the FTC's subsequent announcement that it notified "almost 100 organizations" that they were under FTC scrutiny, creates the appearance that the FTC relied substantially on the information that Tiversa collected and provided.

That same month, Mr. Boback gave an interview to *Computerworld* about the FTC's announcement.<sup>11</sup> He stated, "We were happy to see that the FTC [has] finally started recognizing that P2P [peer-to-peer] is a main source for criminals to gain access to consumer's personally identifiable information for ID theft and fraud."<sup>12</sup> Mr. Boback also stated that 14 of the companies the FTC contacted had already reached out to Tiversa for assistance, and that 12

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<sup>3</sup> E-mail from Robert Boback, CEO, Tiversa, Inc., to [FTC Employee 1], Fed. Trade Comm'n (Dec. 19, 2007 3:08 p.m.) ("Per our discussion...see attached.").

<sup>4</sup> H. Comm. on Oversight & Gov't Reform, *Hearing on Inadvertent File Sharing Over Peer-to-Peer Networks: How it Endangers Citizens and Jeopardizes National Security*, 111th Cong. (July 29, 2009) (111-25).

<sup>5</sup> H. Comm. on Oversight & Gov't Reform, *Transcribed Interview of Robert Boback, CEO, Tiversa, Inc.*, at 169 (June 5, 2014) [hereinafter Boback Tr.].

<sup>6</sup> Boback Tr. at 42-43.

<sup>7</sup> Boback Tr. at 169.

<sup>8</sup> Boback Tr. at 171.

<sup>9</sup> Fed. Trade Comm'n, Press Release, *Widespread Data Breaches Uncovered by FTC Probe* (Feb. 22, 2010).

<sup>10</sup> *Id.*

<sup>11</sup> Jaikumar Vijayan, *FTC seeks extensive information from firms being investigated for P2P breaches*, COMPUTERWORLD, Feb. 25, 2010, [http://www.computerworld.com/s/article/9162560/FTC\\_seeks\\_extensive\\_information\\_from\\_firms\\_being\\_investigat\\_ed\\_for\\_P2P\\_breaches?taxonomyId=84&pageNumber=1](http://www.computerworld.com/s/article/9162560/FTC_seeks_extensive_information_from_firms_being_investigat_ed_for_P2P_breaches?taxonomyId=84&pageNumber=1).

<sup>12</sup> *Id.*

The Honorable Edith Ramirez

July 18, 2014

Page 3

of those companies received civil investigative demands.<sup>13</sup> Because Tiversa was benefiting commercially from the fact that the FTC was investigating the companies that Tiversa itself referred to the FTC, it is critical for the Committee to understand the relationship between the FTC and Tiversa, and whether Tiversa manipulated the FTC in order to enrich themselves.

In order to assist the Committee in its investigation, please provide the following documents as soon as possible, but by no later than 5:00 p.m. on July 21, 2014:

1. All civil investigative demand letters the FTC sent to the Privacy Institute and Tiversa, Inc.
2. All documents, including spreadsheets, produced by the Privacy Institute or Tiversa to the FTC in response to any civil investigative demand letters sent by the FTC.
3. All letters or other notices sent by the FTC sent to "almost 100 organizations" as discussed in a February 22, 2010, FTC press release.
4. All civil investigative demand letters the FTC sent as part of the investigations announced in the February 22, 2010, FTC press release.

The Committee on Oversight and Government Reform is the principal investigative committee of the U.S. House of Representatives. Pursuant to House Rule X, the Committee has authority to investigate "any matter" at "any time." An attachment to this letter provides additional information about responding to the Committee's request.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Tyler Grimm or Jennifer Barblan of the Committee staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,



Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

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



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

\* \* \*

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

A No.

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

A I did not. No.

\* \* \*

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

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

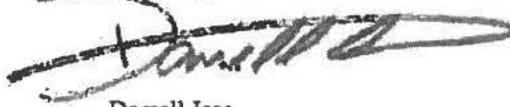
The Committee brings this matter to your attention because this information bears directly on the ongoing proceeding against LabMD, Inc. The Committee is currently considering next steps with regard to its own investigation, including the possibility of holding hearings, agreeing to hear certain testimony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

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

The Honorable Edith Ramirez  
June 11, 2014  
Page 3

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

Sincerely,

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

Darrell Issa  
Chairman

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

**Kelly, Andrea**

---

**From:** Mithal, Maneesha  
**Sent:** Sunday, July 20, 2014 5:58 PM  
**To:** Harrison, Lisa M.; DeMartino, Laura; Bumpus, Jeanne; White, Christian S.  
**Subject:** Re: Consent for non-public

Laura will send me the model when she gets a chance, and I'll take it from there.

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

**From:** Harrison, Lisa M.  
**Sent:** Sunday, July 20, 2014 05:54 PM  
**To:** DeMartino, Laura; Mithal, Maneesha; Bumpus, Jeanne; White, Christian S.  
**Subject:** Fw: Consent for non-public

(b)(5)

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

**From:** Bumpus, Jeanne  
**Sent:** Sunday, July 20, 2014 01:40 PM  
**To:** Harrison, Lisa M.; Rich, Jessica L.; Vandecar, Kim; Kaufman, Daniel; Mithal, Maneesha; Schoshinski, Robert; DeMartino, Laura; White, Christian S.; Liu, Josephine  
**Subject:** Re: Consent for non-public

(b)(5)

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

**From:** Harrison, Lisa M.  
**Sent:** Sunday, July 20, 2014 01:21 PM  
**To:** Rich, Jessica L.; Vandecar, Kim; Bumpus, Jeanne; Kaufman, Daniel; Mithal, Maneesha; Schoshinski, Robert; DeMartino, Laura; White, Christian S.; Liu, Josephine  
**Subject:** Re: Consent for non-public

(b)(5)

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

**From:** Rich, Jessica L.  
**Sent:** Sunday, July 20, 2014 01:14 PM  
**To:** Vandecar, Kim; Bumpus, Jeanne; Kaufman, Daniel; Mithal, Maneesha; Harrison, Lisa M.; Schlueter, Vanessa; Schoshinski, Robert; DeMartino, Laura  
**Subject:** Re: Consent for non-public

Yes

Jessica L. Rich, Director  
Bureau of Consumer Protection

From: Harrison, Lisa M.  
Sent: Saturday, July 19, 2014 12:09 PM  
To: Vandecar, Kim; Rich, Jessica L.; Mithal, Maneesha; DeMartino, Laura; Kaufman, Daniel; Clark, Donald S.; Schoshinski, Robert; Hipsley, Heather  
Cc: Bumpus, Jeanne; Schlueter, Vanessa; Liu, Josephine; White, Christian S.; Shonka, David C.  
Subject: Re: Letter from Chairman Issa

Is any of the material nonpublic?

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

From: Vandecar, Kim  
Sent: Saturday, July 19, 2014 12:07 PM  
To: Harrison, Lisa M.; Rich, Jessica L.; Mithal, Maneesha; DeMartino, Laura; Kaufman, Daniel; Clark, Donald S.; Schoshinski, Robert; Hipsley, Heather  
Cc: Bumpus, Jeanne; Schlueter, Vanessa; Liu, Josephine; White, Christian S.; Shonka, David C.  
Subject: Re: Letter from Chairman Issa

My understanding is we are going to meet the deadline. But I don't think any of us considered that we would need a vote.

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

From: Harrison, Lisa M.  
Sent: Saturday, July 19, 2014 12:04 PM  
To: Rich, Jessica L.; Vandecar, Kim; Mithal, Maneesha; DeMartino, Laura; Kaufman, Daniel; Clark, Donald S.; Schoshinski, Robert; Hipsley, Heather  
Cc: Bumpus, Jeanne; Schlueter, Vanessa; Liu, Josephine; White, Christian S.; Shonka, David C.  
Subject: Re: Letter from Chairman Issa

That said, Josephine and I can work with Laura D. and others on this (Vanessa is out until thursday). As you know, we will need commission approval to release any nonpublic material. Has a decision been made about the deadline?

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

From: Harrison, Lisa M.  
Sent: Saturday, July 19, 2014 10:25 AM  
To: Rich, Jessica L.; Vandecar, Kim; Mithal, Maneesha; DeMartino, Laura; Kaufman, Daniel; Clark, Donald S.; Schoshinski, Robert; Hipsley, Heather  
Cc: Bumpus, Jeanne; Schlueter, Vanessa; Liu, Josephine  
Subject: Re: Letter from Chairman Issa

(b)(5)

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

From: Rich, Jessica L.  
Sent: Saturday, July 19, 2014 10:05 AM  
To: Harrison, Lisa M.; Vandecar, Kim; Mithal, Maneesha; DeMartino, Laura; Kaufman, Daniel; Clark, Donald S.; Schoshinski, Robert; Hipsley, Heather  
Cc: Bumpus, Jeanne; Schlueter, Vanessa; Liu, Josephine  
Subject: Re: Letter from Chairman Issa

But we have Vanessa and Josephine, right?

Jessica L. Rich, Director  
Bureau of Consumer Protection

DARRELL E. ISSA, CALIFORNIA  
CHAIRMAN

JOHN L. MICA, FLORIDA  
MICHAEL R. TURNER, OHIO  
JOHN J. DUNCAN, JR., TENNESSEE  
PATRICK T. McHENRY, NORTH CAROLINA  
JIM JORDAN, OHIO  
JASON CHAFFETZ, UTAH  
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LAWRENCE J. BRADY  
STAFF DIRECTOR

ONE HUNDRED THIRTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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FACSIMILE (202) 225-3874  
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<http://oversight.house.gov>

ELIJAH E. CUMMINGS, MARYLAND  
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VACANCY

June 17, 2014

Ms. Kelly Tshibaka  
Acting Inspector General  
Federal Trade Commission  
Room CC-5206  
600 Pennsylvania Avenue, NW  
Washington, D.C. 20580

Dear Ms. Tshibaka:

The Committee on Oversight and Government Reform is investigating the activities of Tiversa, Inc., a company that provided information to Federal Trade Commission in an enforcement action against LabMD, Inc.<sup>1</sup> In 2008, Tiversa allegedly discovered a document containing the personal information of thousands of patients on a peer-to-peer network.<sup>2</sup> Tiversa contacted LabMD in May 2008, explaining that it believed it had identified a data breach at the company and offering “remediation” services through a professional services agreement.<sup>3</sup> LabMD did not accept Tiversa’s offer because LabMD believed it had contained and resolved the data breach. Tiversa, through an entity known as the Privacy Institute, later provided the FTC with a document it created that included information about LabMD, among other companies.<sup>4</sup> Apparently, Tiversa provided information to the FTC about companies that refused to buy its services. In the case of LabMD, after Tiversa provided questionable information to the FTC, the Commission sought an enforcement action against the company under its Section 5 authority related to deceptive and unfair trade practices.<sup>5</sup>

In addition to concerns about the merits of the enforcement action with respect to the FTC’s jurisdiction, the Committee has substantial concerns about the reliability of the information Tiversa provided to the FTC, the manner in which Tiversa provided the information, and the relationship between the FTC and Tiversa. For instance, according to testimony by

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

<sup>2</sup> Respondent LabMD, Inc.’s Answer and Defenses to Administrative Complaint, *In re* LabMD, Inc., No. 9357 (Fed. Trade Comm’n, Sept. 17, 2013), at 5.

<sup>3</sup> Respondent LabMD, Inc.’s Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings, *In re* LabMD, Inc., No. 9357 (Fed. Trade Comm’n, Nov. 12, 2013), at 5.

<sup>4</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>5</sup> See generally 15 U.S.C. § 45.

Tiversa CEO Robert Boback, the Committee has learned of allegations that Tiversa created the Privacy Institute in conjunction with the FTC specifically so that Tiversa could provide information regarding data breaches to the FTC in response to a civil investigative demand. The Committee has also learned that Tiversa, or the Privacy Institute, may have manipulated information to advance the FTC's investigation. If these allegations are true, such coordination between Tiversa and the FTC would call into account the LabMD enforcement action, and other FTC regulatory matters that relied on Tiversa supplied information.

Further, the Committee has received information from current and former Tiversa employees indicating a lack of truthfulness in testimony Tiversa provided to federal government entities. The Committee's investigation is ongoing, and competing claims exist about the culpability of those responsible for the dissemination of false information. It is now clear, however, that Tiversa provided incomplete and inaccurate information to the FTC. In a transcribed interview with Oversight and Government Reform Committee staff, Mr. Boback testified that he received "incomplete information with regard to my testimony of FTC and LabMD."<sup>6</sup> He stated that he now knows "[t]he original source of the disclosure was incomplete."<sup>7</sup> Mr. Boback testified:

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

A I had . . . [Tiversa Employee A] perform[] an analysis, again, remember, data store versus the peer to peer. So the information in the data store, he performed another analysis to say, what was the original source of the file from LabMD and what was the disclosure, a full analysis of it which then provided to me, which expanded upon what [Tiversa Employee B] had told me when I asked [Tiversa Employee B] prior to my testimony. And the only reason why I asked [Tiversa Employee B] in the first place was because [Tiversa Employee B] was the analyst on it at the time when it was found, so I asked the analyst who was most familiar with this. I didn't know [Tiversa Employee B] was going to provide me with less than accurate information.<sup>8</sup>

\* \* \*

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

A No.

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

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<sup>6</sup> Boback Tr. at 129.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 129-130.

A I did not. No.

\* \* \*

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

A Well, that's – yes. A Tiversa employee told me who the original source was ... just before I testified ... in the deposition [in the FTC LabMD case] in November of last year. And, subsequently, we have done a new search and found that the origin was different than what was provided to me ... in November.<sup>9</sup>

The possibility that inaccurate information played a role in the FTC's decision to initiate enforcement actions against LabMD is a serious matter. The FTC's enforcement actions have resulted in serious financial difficulties for the company.<sup>10</sup> Additionally, the alleged collaboration between the FTC and Tiversa, a company which has now admitted that the information it provided to federal government entities—including the FTC—may be inaccurate, creates the appearance that the FTC aided a company whose business practices allegedly involve disseminating false data about the nature of data security breaches. The Committee seeks to understand the motivations underlying the relationship between Tiversa and the FTC.

The Committee is currently considering next steps, including the possibility of holding hearings, agreeing to take certain testimony in executive session, and, based on information provided, to immunize certain future testimony pursuant to 18 U.S.C. § 6005. Concurrent with the Committee's investigative efforts, I request that you undertake a full review of the FTC's relationship with Tiversa.

Specifically, I ask that your office examine the following issues:

1. FTC procedures for receiving information that it uses to bring enforcement actions pursuant to its authority under Section 5, and whether FTC employees have improperly influenced how the agency receives information.
2. The role played by FTC employees, including, but not limited to, Alain Sheer and Ruth Yodaiken, in the Commission's receipt of information from Tiversa, Inc. through the Privacy Institute or any other entity, and whether the Privacy Institute or Tiversa received any benefit for this arrangement.
3. The reasons for the FTC's issuance of a civil investigative demand to the Privacy Institute instead of Tiversa, the custodian of the information.

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<sup>9</sup> *Id.* at 162-163.

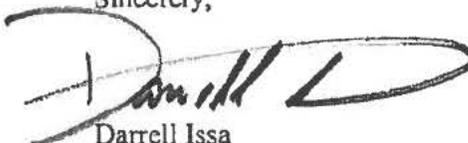
<sup>10</sup> Rachel Louise Ensign, *FTC Cyber Case Has Nearly Put Us Out of Business, Firm Says*, WALL ST. J., Jan. 28, 2014, <http://blogs.wsj.com/riskandcompliance/2014/01/28/ftc-cyber-case-has-nearly-put-us-out-of-business-firm-says/>.

Ms. Kelly Tshibaka  
June 17, 2014  
Page 4

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 about this request, please contact Tyler Grimm or Jennifer Barblan of the Committee staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,

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

Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

**Kelly, Andrea**

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**From:** Mithal, Maneesha  
**Sent:** Friday, June 20, 2014 8:54 AM  
**To:** White, Christian S.  
**Cc:** Sheer, Alain; VanDruff, Laura Riposo; Yodaiken, Ruth; Blodgett, Katrina Ane; Lincicum, David; Cohen, Kristin; Cox, Megan; Mehm, Ryan; Brown, Jarad; Lassack, Maggie  
**Subject:** names of people at meeting yesterday

Hi Chris – I'm cc'ing the people who attended the meeting yesterday, per your request. Please keep us posted. Thanks!

**Kelly, Andrea**

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**From:** Ramirez, Edith  
**Sent:** Friday, June 20, 2014 8:18 AM  
**To:** Nuechterlein, Jon; White, Christian S.  
**Subject:** RE: LabMD

See you then. Thanks.

---

**From:** Nuechterlein, Jon  
**Sent:** Friday, June 20, 2014 8:17 AM  
**To:** White, Christian S.; Ramirez, Edith  
**Subject:** Re: LabMD

I am.

---

**From:** White, Christian S.  
**Sent:** Friday, June 20, 2014 07:17 AM  
**To:** Ramirez, Edith; Nuechterlein, Jon  
**Subject:** Re: LabMD

10:00 would work if Jon is available.

---

**From:** Ramirez, Edith  
**Sent:** Friday, June 20, 2014 07:15 AM  
**To:** White, Christian S.; Nuechterlein, Jon  
**Subject:** RE: LabMD

Chris, I forgot about that. I can also meet at 10am or 3pm. Let me know what works. Thanks.

---

**From:** White, Christian S.  
**Sent:** Friday, June 20, 2014 7:08 AM  
**To:** Ramirez, Edith; Nuechterlein, Jon  
**Subject:** Re: LabMD

I'm supposed to go with Jeanne, Kim V, Maneesha, Daniel K for a public briefing of Cong. Terry's staff at 11. Could we meet before that? Or, they could certainly get along w/o me.

---

**From:** Ramirez, Edith  
**Sent:** Friday, June 20, 2014 06:54 AM  
**To:** Nuechterlein, Jon; White, Christian S.  
**Subject:** LabMD

Jon & Chris, are you available to meet with me at 11am today about this Hill matter? Please let me know. Thanks.

**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

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**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



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of the Secretary

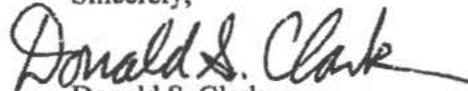
June 13, 2014

The Honorable Darrell Issa  
Chairman  
Committee on Oversight and Government Reform  
United States House of Representatives  
Washington, D.C. 20515-6143

Dear Chairman Issa:

Thank you for your letter to Chairwoman Ramirez dated June 11, 2014 regarding Tiversa, Inc. and information your Committee has obtained from that company. The Federal Trade Commission stands ready to respond to any Committee requests. Because this matter relates to ongoing administrative litigation in *In the Matter of LabMD, Inc.*, Docket No. 9357, I am responding on behalf of the agency. Please ask your staff to contact Jeanne Bumpus, the Director of our Office of Congressional Relations, at (202) 326-2195, if you or your staff have any additional questions.

Sincerely,

  
Donald S. Clark  
Secretary

cc: The Honorable Elijah E. Cummings  
Ranking Member  
Committee on Oversight and Government Reform  
United States House of Representatives

The Honorable Edith Ramirez  
June 11, 2014  
Page 3

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

Sincerely,

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

Darrell Issa  
Chairman

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

**Kelly, Andrea**

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**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

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**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**

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**From:** Hipsley, Heather  
**Sent:** Friday, June 13, 2014 2:05 PM  
**To:** Clark, Donald S.  
**Cc:** Vandecar, Kim; White, Christian S.  
**Subject:** Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx  
**Attachments:** Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

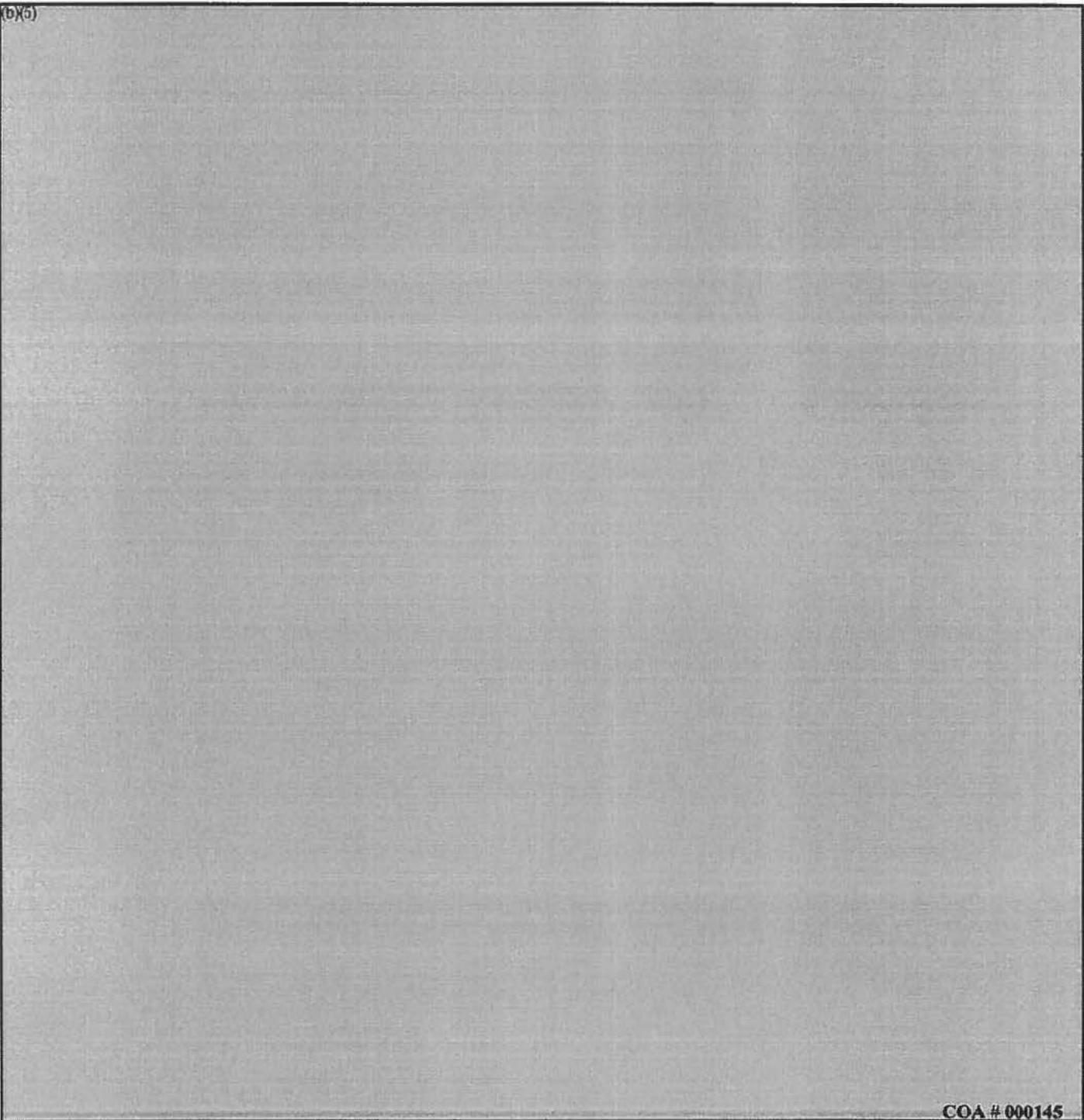
Don, here is the final with Edith's input. Please provide a copy back to our office after you sign and send. Thanks! H.

**Kelly, Andrea**

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**From:** Sheer, Alain  
**Sent:** Wednesday, November 05, 2014 3:07 PM  
**To:** White, Christian S.  
**Subject:** filed yesterday.  
**Attachments:** (b)(5)

(b)(5)



COA # 000145

FTC-FOIA-2015-00109

**Kelly, Andrea**

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**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**

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**From:** Vandecar, Kim  
**Sent:** Thursday, June 12, 2014 9:31 PM  
**To:** White, Christian S.; Hipsley, Heather; Clark, Donald S.  
**Cc:** Bumpus, Jeanne  
**Subject:** Re: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

I like that.

---

**From:** White, Christian S.  
**Sent:** Thursday, June 12, 2014 08:55 PM  
**To:** Hipsley, Heather; Clark, Donald S.; Vandecar, Kim  
**Cc:** Bumpus, Jeanne  
**Subject:** Re: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

(b)(5)

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**From:** Hipsley, Heather  
**Sent:** Thursday, June 12, 2014 08:52 PM  
**To:** Clark, Donald S.; Vandecar, Kim  
**Cc:** White, Christian S.; Bumpus, Jeanne  
**Subject:** Re: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

Let me read. I can fix. Thanks h

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**From:** Clark, Donald S.  
**Sent:** Thursday, June 12, 2014 08:18 PM  
**To:** Vandecar, Kim; Hipsley, Heather  
**Cc:** White, Christian S.; Bumpus, Jeanne  
**Subject:** Re: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

That's a good point; (b)(5)

Don

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**From:** Vandecar, Kim  
**Sent:** Thursday, June 12, 2014 07:14 PM  
**To:** Clark, Donald S.; Hipsley, Heather  
**Cc:** White, Christian S.; Bumpus, Jeanne  
**Subject:** Re: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

Thanks Don. (b)(5)

(b)(5)

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**From:** Clark, Donald S.  
**Sent:** Thursday, June 12, 2014 06:44 PM  
**To:** Vandecar, Kim; Hipsley, Heather  
**Cc:** White, Christian S.; Bumpus, Jeanne

**Subject:** RE: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

Kim, those are good points

(b)(5)

(b)(5)

Don

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**From:** Vandecar, Kim

**Sent:** Thursday, June 12, 2014 6:17 PM

**To:** Clark, Donald S.; Hipsley, Heather

**Cc:** White, Christian S.; Bumpus, Jeanne

**Subject:** RE: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

(b)(5)

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**From:** Clark, Donald S.

**Sent:** Thursday, June 12, 2014 6:02 PM

**To:** Hipsley, Heather

**Cc:** White, Christian S.; Vandecar, Kim; Bumpus, Jeanne

**Subject:** RE: Letter To Chairman Issa Acknowledging Receipt of Letter Re Tiversa.docx

Heather, I've now incorporated Chris's comments; please let us know if you or Edith would like any changes. Thanks!

Don

**Kelly, Andrea**

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**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

## EXHIBIT 2

**Kelly, Andrea**

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**From:** Ramirez, Edith  
**Sent:** Wednesday, July 23, 2014 1:53 PM  
**To:** Ellen Doneski  
**Subject:** RE: Rockefeller Letter to Issa Re: Improper Interference

Ellen, thank you for sending a copy of Chairman Rockefeller's letter. ~Edith

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**From:** Ellen Doneski  
**Sent:** Wednesday, July 23, 2014 1:34 PM  
**To:** Ramirez, Edith  
**Subject:** Rockefeller Letter to Issa Re: Improper Interference

Senator Rockefeller just sent this letter to Congressman Issa and we wanted to make sure you had a copy. Will call after mark up/hearing on cramming. Best, Ellen



timing and nature of your investigation are buttressed by the revelation that LabMD is being represented by a former member of your Committee staff. This raises the question of whether LabMD directly sought your help and intervention in the legal process rather than take the risk of losing on the merits at trial.

Another apparent purpose of your hearing is to express skepticism about the FTC's long-standing and well-established legal authority under Section 5 of the FTC Act to bring an action against companies like LabMD for negligent data-security practices. This skepticism is unfounded, and your public position was recently rejected by a federal judge in the FTC's data security case against Wyndham Corporation. Over the past 13 years, the Commission has initiated dozens of administrative adjudicatory proceedings and cases in federal court challenging practices that compromised the security of consumers' data and that resulted in improper disclosures of personal information collected from consumers.

Indeed, Congress has mandated that the FTC effectively use its authority to protect consumers from "unfair or deceptive acts or practices in or affecting interstate commerce" – the very issues at the heart of the LabMD case. The legislative history of the FTC Act confirms that Congress intended to delegate broad authority "to the [C]ommission to determine what practices were unfair," rather than "enumerating the particular practices to which [the term 'unfair'] was intended to apply... There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again." Against this backdrop, one must conclude that your upcoming hearing and current investigation are nothing more or less than an effort to weaken one of our nation's most important consumer-protection laws, a law that has protected generations of American consumers from scams and rip-offs.

Lastly, it is worth noting that due to Congress's repeated failure to pass strong data-security and breach notification legislation, the FTC stands as the primary federal entity protecting American consumers from harmful data breaches. Recent high-profile, large-scale data breaches -- most notably at Target -- have once again raised public awareness about the need for companies to adequately secure consumer information. Because Congress remains incapable of passing meaningful data-security legislation that provides American consumers with strong protections, we must continue to rely on the FTC and its organic authority under the FTC Act to bring enforcement actions against companies that break the law. Rather than continuing to pursue your current course of interference, I would urge you to instead work to pass meaningful data-security legislation. I would welcome your assistance.

As Chairman of the Senate Committee on Commerce, Science, and Transportation, I regard the FTC as the premier consumer-protection agency in the nation. The Commission consistently seeks to carry out its mission of protecting consumers and competition, and the agency and its employees serve as an important watchdog for corporate wrongdoing. If the Commission acted improperly or otherwise relied on faulty testimony or evidence in its case against LabMD, a judge would be the proper arbiter of such an allegation at trial, not Members

The Honorable Darrell E. Issa  
July 23, 2014  
Page 3 of 3

of Congress. I urge you to reconsider your actions and to allow for the American legal system and the rule of law – not political theater – to resolve this case.

Sincerely,

A handwritten signature in black ink, appearing to read "John D. Rockefeller IV", with a long horizontal flourish extending to the right.

John D. Rockefeller IV  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Member

**Kelly, Andrea**

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**From:** Bumpus, Jeanne  
**Sent:** Thursday, July 17, 2014 2:24 PM  
**To:** 'Ash, Michelle'; Berroya, Meghan  
**Subject:** RE: hearing

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

Thanks Michelle,

Hi Meghan, I would love to talk to you at your earliest convenience. My number is (202) 326-2946.

Jeanne

Jeanne Bumpus  
Director  
Office of Congressional Relations  
Federal Trade Commission  
326-2946

---

**From:** Ash, Michelle [<mailto:Michelle.Ash@mail.house.gov>]  
**Sent:** Thursday, July 17, 2014 2:21 PM  
**To:** Berroya, Meghan; Bumpus, Jeanne  
**Subject:** hearing

Meghan is with Oversight and Government Reform, Jeanne Bumpus is with FTC congressional. Meet each other. Cheers.

**Kelly, Andrea**

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**From:** Bumpus, Jeanne  
**Sent:** Monday, July 21, 2014 12:48 PM  
**To:** 'Nagle, Paul'  
**Subject:** RE: Hearing in OGR re: Section 5

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

Thanks Paul.

---

**From:** Nagle, Paul [<mailto:Paul.Nagle@mail.house.gov>]  
**Sent:** Monday, July 21, 2014 12:48 PM  
**To:** Bumpus, Jeanne  
**Subject:** RE: Hearing in OGR re: Section 5

Thanks for the heads up – that had caught my eye as well. We will monitor the hearing from afar for now.

---

**From:** Bumpus, Jeanne [<mailto:JBumpus@ftc.gov>]  
**Sent:** Monday, July 21, 2014 12:19 PM  
**To:** Nagle, Paul  
**Subject:** Hearing in OGR re: Section 5

Paul,

I wanted to make you are aware that the Oversight and Government Reform Committee has noticed a hearing for this Thursday morning entitled "The Federal Trade commission and Its Section 5 Authority: Prosecutor, Judge, and Jury." We expect they will discuss data security and the LabMD case. We hope to learn more about the hearing this afternoon. ...

Jeanne

**Kelly, Andrea**

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**From:** Bumpus, Jeanne  
**Sent:** Wednesday, July 23, 2014 2:16 PM  
**To:** Christian Fjeld; Vandecar, Kim  
**Subject:** RE: Letter

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

Thanks for sharing it.

---

**From:** Christian Fjeld  
**Sent:** Wednesday, July 23, 2014 1:42 PM  
**To:** Bumpus, Jeanne; Vandecar, Kim  
**Subject:** Letter

Jeanne and Kim – attached is a letter that Chairman Rockefeller sent to Chairman Issa with regard to his ongoing investigation and upcoming hearing on LabMD. Call me with any questions.

Christian.

Christian Tamotsu Fjeld  
Senior Counsel  
Senate Committee on Commerce, Science and Transportation  
428 Hart Office Building  
Washington, DC 20510  
p: (202) 224-1270 f: (202) 228-0327

## Kelly, Andrea

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**From:** Benway, Kathleen (Commerce) <Kathleen\_Benway@commerce.senate.gov>  
**Sent:** Monday, July 21, 2014 9:36 AM  
**To:** Vandecar, Kim; Bumpus, Jeanne; Simons, Claudia A.  
**Subject:** RE: The Federal Trade commission and Its Section 5 Authority: Prosecutor, Judge, and Jury | Committee on Oversight & Government Reform

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

I figured

---

**From:** Vandecar, Kim [<mailto:KVANDECAR@ftc.gov>]  
**Sent:** Monday, July 21, 2014 9:34 AM  
**To:** Benway, Kathleen (Commerce); Bumpus, Jeanne; Simons, Claudia A.  
**Subject:** RE: The Federal Trade commission and Its Section 5 Authority: Prosecutor, Judge, and Jury | Committee on Oversight & Government Reform

Thanks. We saw it yesterday.

---

**From:** Benway, Kathleen (Commerce) [[mailto:Kathleen\\_Benway@commerce.senate.gov](mailto:Kathleen_Benway@commerce.senate.gov)]  
**Sent:** Monday, July 21, 2014 9:33 AM  
**To:** Bumpus, Jeanne; Vandecar, Kim; Simons, Claudia A.  
**Subject:** FW: The Federal Trade commission and Its Section 5 Authority: Prosecutor, Judge, and Jury | Committee on Oversight & Government Reform

Link to the Issa hearing is up. No witnesses listed.

<http://oversight.house.gov/hearing/federal-trade-commission-section-5-authority-prosecutor-judge-jury-2/>

**Kelly, Andrea**

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**From:** Vandecar, Kim  
**Sent:** Wednesday, June 18, 2014 3:22 PM  
**To:** 'Taylor, Shannon'  
**Subject:** RE: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

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

I'll be in touch shortly.

---

**From:** Taylor, Shannon [mailto:shannon.taylor@mail.house.gov]  
**Sent:** Wednesday, June 18, 2014 3:12 PM  
**To:** Vandecar, Kim  
**Subject:** Fw: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

We definitely need to talk now. Let me know if Friday late morning would work. If not we'll find another time.

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**From:** Marrero, Alexa  
**Sent:** Wednesday, June 18, 2014 03:09 PM  
**To:** Nagle, Paul; Taylor, Shannon  
**Subject:** FW: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

IGYMI

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**From:** Watkins, Becca  
**Sent:** Wednesday, June 18, 2014 3:01 PM  
**Subject:** RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail



June 18th, 2014  
Contact: Becca Watkins, 202.225.0037

## **Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail**

WASHINGTON –House Oversight and Government Reform Committee Chairman Darrell Issa, R-Calif., sent a letter to Federal Trade Commission's (FTC) Acting Inspector General Kelly Tshibaka last night requesting that the IG's office

investigate the FTC's relationship with Tiversa, Inc. The Committee has substantial concerns about the reliability of the information Tiversa provided to the FTC and the relationship between the FTC and Tiversa.

In 2008, Tiversa allegedly discovered a document pertaining to LabMD, Inc. containing the personal information of thousands of patients on a peer-to-peer network. Tiversa contacted LabMD in May 2008, explaining that it believed it had identified a data breach at the company and offering "remediation" services through a professional services agreement. LabMD did not accept Tiversa's offer because LabMD believed it had contained and resolved the data breach. Tiversa, through an entity known as the Privacy Institute, later provided the FTC with a document it created that included information about LabMD, among other companies. Tiversa allegedly provided information to the FTC about companies that refused to buy its services. In the case of LabMD, after Tiversa provided information to the FTC, the Commission sought an enforcement action against the company under its Section 5 authority related to deceptive and unfair trade practices. New information has surfaced indicating that information Tiversa supplied to the FTC may have been inaccurate

"The possibility that inaccurate information played a role in the FTC's decision to initiate enforcement actions against LabMD is a serious matter," said Chairman Issa in today's letter. "The FTC's enforcement actions have resulted in serious financial difficulties for the company. Additionally, the alleged collaboration between the FTC and Tiversa, a company which has now admitted that the information it provided to federal government entities—including the FTC—may be inaccurate, creates the appearance that the FTC aided a company whose business practices allegedly involve disseminating false data about the nature of data security breaches."

The letter continues: "Further, the Committee has received information from current and former Tiversa employees indicating a lack of truthfulness in testimony Tiversa provided to federal government entities. The Committee's investigation is ongoing, and competing claims exist about the culpability of those responsible for the dissemination of false information. It is now clear, however, that Tiversa provided incomplete and inaccurate information to the FTC. "

Read the [letter](#) and embedded below.

June 16, 2014

Ms. Kelly Tshibaka  
Acting Inspector General  
Federal Trade Commission  
Room CC-5206  
600 Pennsylvania Avenue NW  
Washington, D.C. 20580

Dear Ms. Tshibaka:

The Committee on Oversight and Government Reform is investigating the activities of Tiversa, Inc., a company that provided information to Federal Trade Commission in an enforcement action against LabMD, Inc.<sup>[1]</sup> In 2008, Tiversa allegedly discovered a document containing the personal information of thousands of patients on a peer-to-peer network.<sup>[2]</sup> Tiversa contacted LabMD in May 2008, explaining that it believed it had identified a data breach at the company and offering "remediation" services through a professional services agreement.<sup>[3]</sup> LabMD did not accept Tiversa's offer because LabMD believed it had contained and resolved the data breach. Tiversa, through an entity

known as the Privacy Institute, later provided the FTC with a document it created that included information about LabMD, among other companies.<sup>[4]</sup> Apparently, Tiversa provided information to the FTC about companies that refused to buy its services. In the case of LabMD, after Tiversa provided questionable information to the FTC, the Commission sought an enforcement action against the company under its Section 5 authority related to deceptive and unfair trade practices.<sup>[5]</sup>

In addition to concerns about the merits of the enforcement action with respect to the FTC's jurisdiction, the Committee has substantial concerns about the reliability of the information Tiversa provided to the FTC, the manner in which Tiversa provided the information, and the relationship between the FTC and Tiversa. For instance, according to testimony by Tiversa CEO Robert Boback, the Committee has learned of allegations that Tiversa created the Privacy Institute in conjunction with the FTC specifically so that Tiversa could provide information regarding data breaches to the FTC in response to a civil investigative demand. The Committee has also learned that Tiversa, or the Privacy Institute, may have manipulated information to advance the FTC's investigation. If these allegations are true, such coordination between Tiversa and the FTC would call into account the LabMD enforcement action, and other FTC regulatory matters that relied on Tiversa supplied information.

Further, the Committee has received information from current and former Tiversa employees indicating a lack of truthfulness in testimony Tiversa provided to federal government entities. The Committee's investigation is ongoing, and competing claims exist about the culpability of those responsible for the dissemination of false information. It is now clear, however, that Tiversa provided incomplete and inaccurate information to the FTC. In a transcribed interview with Oversight and Government Reform Committee staff, Boback testified that he received "incomplete information with regard to my testimony of FTC and LabMD."<sup>[6]</sup> He stated that he now knows "[t]he original source of the disclosure was incomplete."<sup>[7]</sup> Mr. Boback testified:

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

A I had . . . [Tiversa Employee A] perform[] an analysis, again, remember, data store versus the peer to peer. So the information in the data store, he performed another analysis to say, what was the original source of the file from LabMD and what was the disclosure, a full analysis of it which then provided to me, which expanded upon what [Tiversa Employee B] had told me when I asked [Tiversa Employee B] prior to my testimony. And the only reason why I asked [Tiversa Employee B] in the first place was because [Tiversa Employee B] was the analyst on it at the time when it was found, so I asked the analyst who was most familiar with this. I didn't know [Tiversa Employee B] was going to provide me with less than accurate information.<sup>[8]</sup>

\* \* \*

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

A No.

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

A I did not. No.

\* \* \*

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

A Well, that's – yes. A Tiversa employee told me who the original source was ... just before I testified ... in the deposition [in the FTC LabMD case] in November of last year. And, subsequently, we have done a new search and found that the origin was different than what was provided to me . . . in November.<sup>[9]</sup>

The possibility that inaccurate information played a role in the FTC's decision to initiate enforcement actions against LabMD is a serious matter. The FTC's enforcement actions have resulted in serious financial difficulties for the company.<sup>[10]</sup> Additionally, the alleged collaboration between the FTC and Tiversa, a company which has now admitted that the information it provided to federal government entities—including the FTC—may be inaccurate, creates the appearance that the FTC aided a company whose business practices allegedly involve disseminating false data about the nature of data security breaches. The Committee seeks to understand the motivations underlying the relationship between Tiversa and the FTC.

The Committee is currently considering next steps, including the possibility of holding hearings, agreeing to take certain testimony in executive session, and, based on information provided, to immunize certain future testimony pursuant to 18 U.S.C. § 6005. Concurrent with the Committee's investigative efforts, I request that you undertake a full review of the FTC's relationship with Tiversa.

Specifically, I ask that your office examine the following issues:

1. FTC procedures for receiving information that it uses to bring enforcement actions pursuant to its authority under Section 5, and whether FTC employees have improperly influenced how the agency receives information.
2. The role played by FTC employees, including, but not limited to, Alain Sheer and Ruth Yodaiken, in the Commission's receipt of information from Tiversa, Inc. through the Privacy Institute or any other entity, and whether the Privacy Institute or Tiversa received any benefit for this arrangement.
3. The reasons for the FTC's issuance of a civil investigative demand to the Privacy Institute instead of Tiversa, the custodian of the information.

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 about this request, please contact Tyler Grimm or Jennifer Barblan of the Committee staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,

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Darrell Issa  
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

Becca Glover Watkins  
Communications Director

House Committee on Oversight and Government Reform  
Chairman Darrell Issa  
Rayburn 2157  
202.731.7234 - Blackberry  
202.225.0037 - Press  
202.225.5074 - Committee Main  
[becca.watkins@mail.house.gov](mailto:becca.watkins@mail.house.gov)  
<http://oversight.house.gov/>

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

<sup>[2]</sup> Respondent LabMD, Inc.'s Answer and Defenses to Administrative Complaint, *In re LabMD, Inc.*, No. 9357 (Fed. Trade Comm'n, Sept. 17, 2013), at 5.

<sup>[3]</sup> Respondent LabMD, Inc.'s Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings, *In re LabMD, Inc.*, No. 9357 (Fed. Trade Comm'n, Nov. 12, 2013), at 5.

<sup>[4]</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>[5]</sup> See generally 15 U.S.C. § 45.

<sup>[6]</sup> Boback Tr. at 129.

<sup>[7]</sup> *Id.*

<sup>[8]</sup> *Id.* at 129-130.

<sup>[9]</sup> *Id.* at 162-163.

<sup>[10]</sup> Rachel Louise Ensign, *FTC Cyber Case Has Nearly Put Us Out of Business, Firm Says*, WALL ST. J., Jan. 28, 2014, <http://blogs.wsj.com/riskandcompliance/2014/01/28/ftc-cyber-case-has-nearly-put-us-out-of-business-firm-says/>.

**Kelly, Andrea**

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**From:** Vandecar, Kim  
**Sent:** Wednesday, June 18, 2014 5:27 PM  
**To:** 'Taylor, Shannon'  
**Subject:** RE: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

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

Yes.

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**From:** Taylor, Shannon [mailto:shannon.taylor@mail.house.gov]  
**Sent:** Wednesday, June 18, 2014 5:25 PM  
**To:** Vandecar, Kim  
**Subject:** Re: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

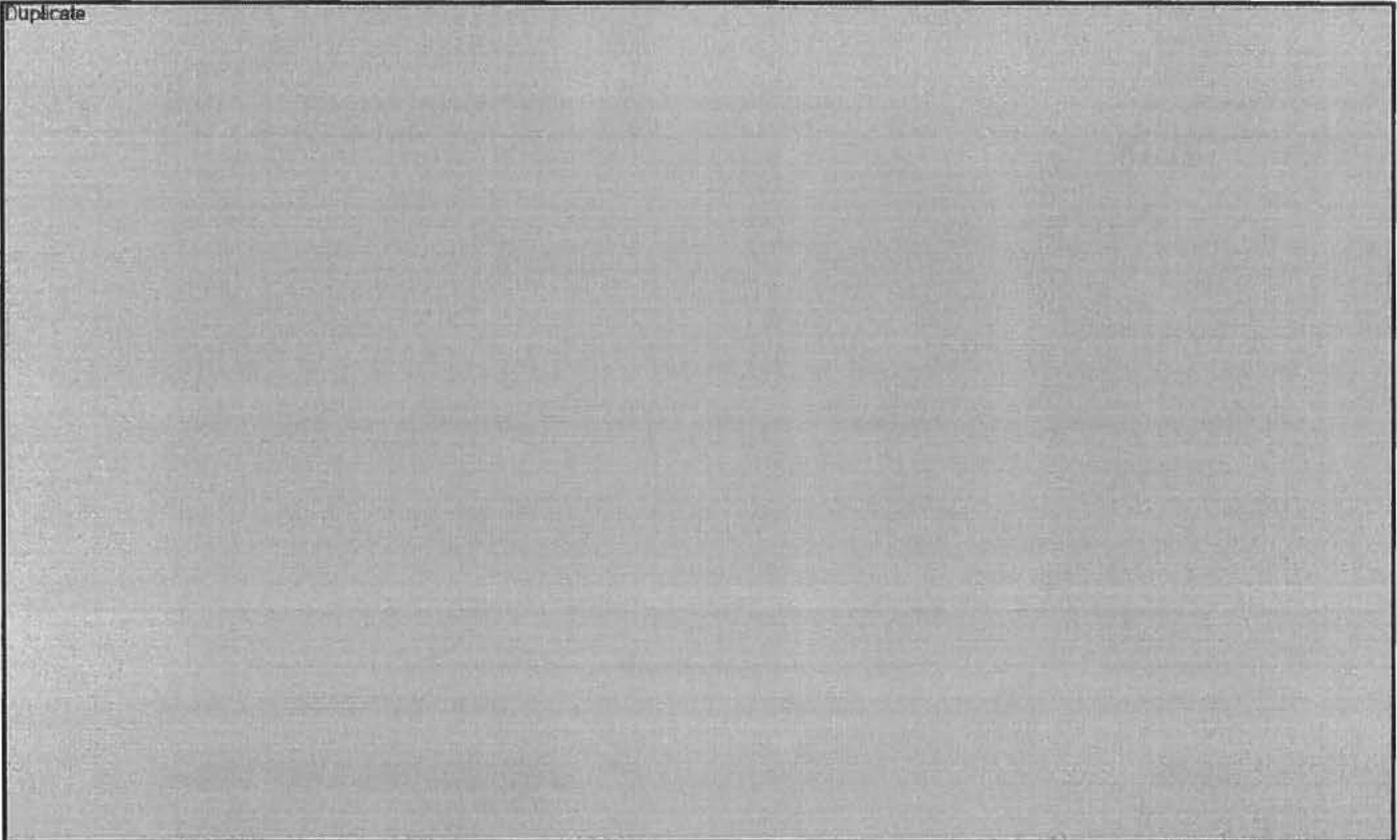
11am on Friday in H2-255?

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**From:** Vandecar, Kim [mailto:KVANDECAR@ftc.gov]  
**Sent:** Wednesday, June 18, 2014 04:10 PM  
**To:** Taylor, Shannon  
**Subject:** RE: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

It will. Tell us when and where. Daniel Kaufman, Deputy Director of BCP will come along with one of our General Counsels, Maneesha, Jeanne and myself.

Duplicate



**Kelly, Andrea**

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**From:** Taylor, Shannon <shannon.taylor@mail.house.gov>  
**Sent:** Wednesday, June 18, 2014 5:29 PM  
**To:** Vandecar, Kim  
**Subject:** Re: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

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

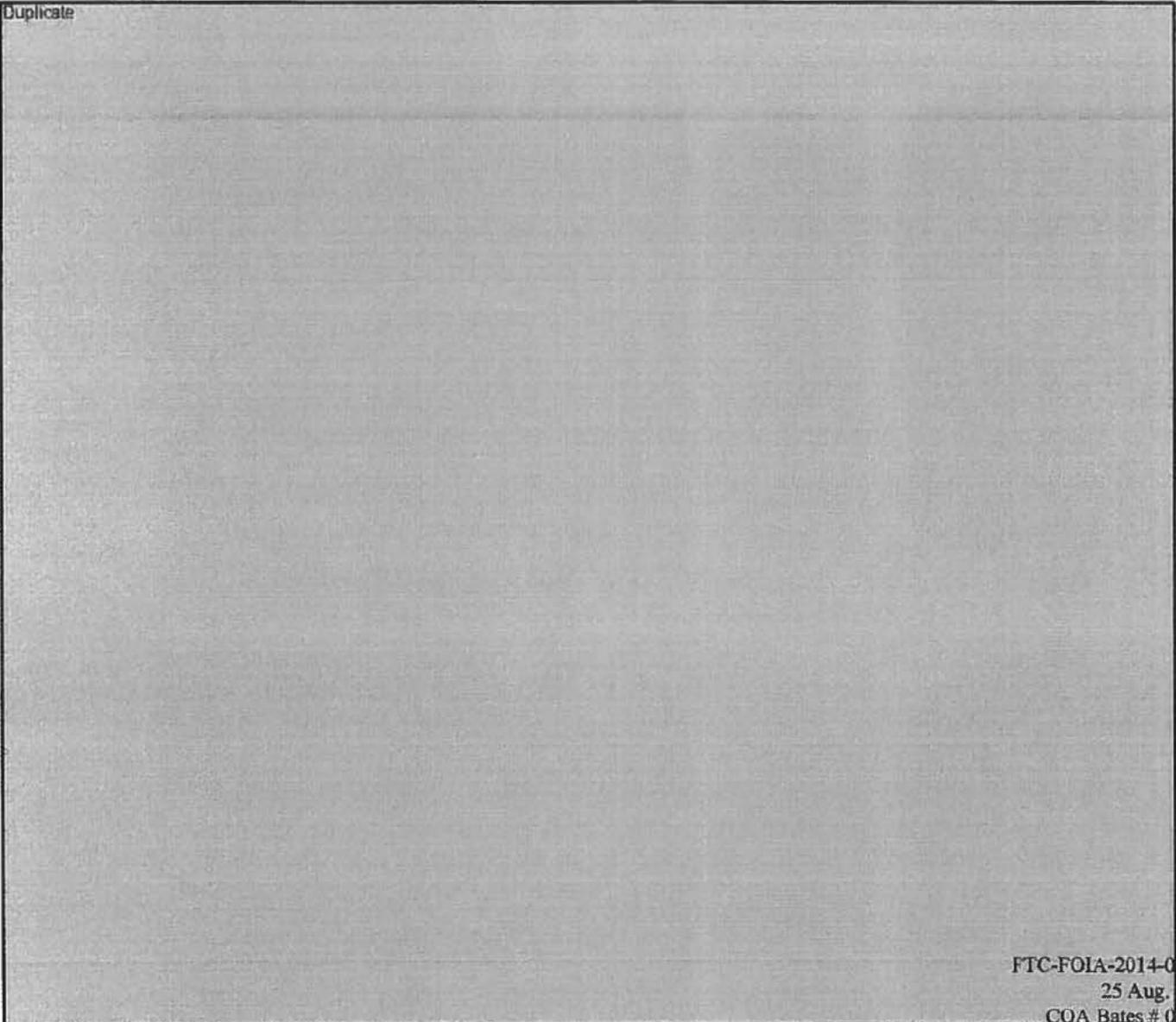
Second floor of ford btwn the elevator banks.

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**From:** Vandecar, Kim [mailto:KVANDECAR@ftc.gov]  
**Sent:** Wednesday, June 18, 2014 05:28 PM  
**To:** Taylor, Shannon  
**Subject:** RE: RELEASE: Issa to FTC Watchdog: Investigate Allegations of Corporate Blackmail

Where is that?

Duplicate



## Kelly, Andrea

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**From:** Taylor, Shannon <shannon.taylor@mail.house.gov>  
**Sent:** Wednesday, June 18, 2014 12:16 PM  
**To:** Vandecar, Kim  
**Subject:** LabMD/Tiversa/Government Reform

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

Hey, Kim.

I've been meaning to reach out to you on this. You guys have any thoughts you want to share with us, or just tell us generally what's happening in this case now that Government Reform is sniffing around Tiversa?

<http://blogs.wsj.com/riskandcompliance/2014/06/03/u-s-lawmakers-investigating-ftcs-use-of-firm-in-data-cases/>

<http://blogs.wsj.com/riskandcompliance/2014/06/12/house-committee-says-ftc-privacy-case-incomplete-and-inaccurate/>

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**Shannon Taylor**  
Counsel, Majority Staff  
Committee on Energy & Commerce  
U.S. House of Representatives  
2125 Rayburn HOB/316 Ford HOB  
Washington, DC 20515  
202.225.2927



**Kelly, Andrea**

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**From:** Satalin, Patrick <Patrick.Satalin@mail.house.gov>  
**Sent:** Wednesday, July 23, 2014 10:31 AM  
**To:** Burstein, Aaron  
**Subject:** Not an Agency Record

**Attachments:**

Hey Aaron,  
I hope you are doing well. The FTC is going to be getting attacked at the OGR Committee tomorrow (Peter sits on this Committee). If you have a few minutes, would love to chat with you about this today to see if there is anything we could raise that would be helpful for you all. Let me know. Thanks Aaron.

Patrick

Not an Agency Record.