

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



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

PUBLIC
Docket No. 9357

**COMPLAINT COUNSEL’S MOTION TO QUASH THE SUBPOENA SERVED ON
COMMISSION ATTORNEY CARL SETTLEMYER AND LIMIT THE
SUBPOENA SERVED ON COMMISSION ATTORNEY RUTH YODAIKEN**

Pursuant to Commission Rules 3.22, 3.31, and 3.34(c), 16 C.F.R. §§ 3.22, 3.31, 3.34(c), Complaint Counsel respectfully moves for an Order quashing the subpoena *ad testificandum* Respondent LabMD, Inc. (“LabMD”) served on Commission Attorney Carl Settlemyer, and moves for an Order limiting the subpoena *ad testificandum* served on Commission Attorney Ruth Yodaiken to testimony regarding the substance of her communications with the Sacramento Police Department.

The discovery Respondent seeks through these subpoenas is largely outside the scope of permissible discovery under the Commission’s Part III Rules. Moreover, much of this discovery is improper, as this Court has specifically ruled that discovery of the pre-Complaint investigation is not relevant to this administrative adjudication. Complaint Counsel conferred in good faith with Respondent in an effort to resolve the dispute, but was unable to reach an agreement. *See* Meet & Confer Statement (Exhibit A); Feb. 7, 2014 Letter from W. Sherman to L. VanDruff

(Exhibit B). Accordingly, this Court should quash the subpoena served on Settlemyer (Exhibit C) and limit the subpoena served on Yodaiken (Exhibit D).

BACKGROUND

Commission staff opened a Part II investigation into the adequacy of LabMD's information security practices in January 2010. On August 28, 2013, the Commission voted to approve an administrative Complaint alleging LabMD engaged in unfair practices in violation of Section 5 of the FTC Act by failing to take reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. Compl. ¶¶ 6-11, 17-21. One result of LabMD's failures is that a LabMD file containing the sensitive personal information of approximately 9,300 consumers was shared to a public peer-to-peer ("P2P") file sharing network without being detected by LabMD. *Id.* ¶¶ 10(g), 17-20.

In this litigation, Settlemyer was first identified at the November 2013 deposition of Robert Boback, the Chief Executive Officer of Tiversa Inc. ("Tiversa"). Boback testified that Commission staff met with Tiversa representatives twice in 2009. Respondent's counsel examined Boback using a letter dated June 25, 2008 from Settlemyer to Boback (Exhibit E), and an email exchange dated January 26, 2009 through March 4, 2009, between Boback and Settlemyer (Exhibit F).¹

Complaint Counsel's Initial Disclosures and Preliminary Witness List identify approximately 367 individuals and entities known to Complaint Counsel that are likely to have discoverable information relevant to the allegations in the Complaint, proposed relief, or Respondent's defenses. Complaint Counsel never identified Settlemyer as an individual with

¹ Complaint Counsel believes the communications used as exhibits were obtained by Respondent through a Freedom of Information Act request.

information relevant to allegations of the Complaint, proposed relief, or to the defenses of Respondent.

Yodaiken participated in the Commission's investigation of LabMD from January 2010 through July 2013. In February 2013, she represented the Commission at two investigational hearings in this matter, conducting the examination of LabMD President and Chief Executive Officer Michael J. Daugherty. Although she has not entered an appearance in this litigation, she participated personally and substantially in the pre-Complaint investigation, a topic on which this Court has denied discovery. Consistent with Complaint Counsel's obligations under the Rules and Orders of this Court, Complaint Counsel identified Yodaiken as an "individual[]" at the FTC who communicated with the Sacramento Police Department regarding the LabMD documents found at 5661 Wilkinson Street, Sacramento, California on October 5, 2012" in its Response to Respondent's First Set of Interrogatories. The parties conducted a deposition of Detective Karina Jestes of the Sacramento Police Department ("SPD") in December 2013, and she testified about the substance of her communications with Yodaiken and other Commission staff, in response to Respondent's counsel's questioning.

On January 2, 2014, Respondent served its Preliminary Witness List, naming Settlemyer as a witness, noting his testimony would include "his personal knowledge of meetings and communications between he, on behalf of the FTC, and individuals from Tiversa, and Dartmouth College" (Exhibit G at 5). Respondent did not name Yodaiken on its Preliminary Witness List.

Id. On January 30, 2014, Respondent served subpoenas on Settlemyer and Yodaiken (Exhibits C

and D).² Respondent's boundless subpoenas to Settlemyer and Yodaiken do not specify any topics, and Respondent has not committed to limiting the topics for testimony related to either subpoena (*see* Exhibits A and B). This motion will deal with each subpoena in turn.

ARGUMENT

I. SUBPOENA TO COMMISSION ATTORNEY SETTLEMYER

Under the Commission's Part III Rules and this Court's rulings, the subpoena to Settlemyer seeks wholly impermissible discovery, and this Court should quash it.

A. The subpoena to Commission Attorney Settlemyer should be quashed because it seeks information outside the scope of permissible discovery.

The subpoena Respondent served on Settlemyer does not seek information that is within the scope of discovery presumptively permitted under the Commission's rules, and thus should be quashed. Discovery is allowed "to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of [] respondent." Rule 3.31(c)(1), 16 C.F.R. § 3.31(c)(1). Settlemyer has no personal knowledge of the allegations of the Complaint, proposed relief, or facts relevant to any defenses of Respondent. Therefore the testimony sought does not "appear[] reasonably calculated to lead to the discovery of admissible evidence," and the subpoena should be quashed. *Id.*

The Commission's Part III Rules also include several limitations on the scope of discovery. Discovery of Complaint Counsel is limited in that "complaint counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter or prosecution of the case" and is not "required to search for materials generated and

² On December 24, 2013, Respondent served a similarly unbounded subpoena on Senior Complaint Counsel Alain Sheer, which Complaint Counsel moved to quash. On January 30, 2014, this Court quashed the subpoena.

transmitted . . . between complaint counsel and non-testifying Commission employees.” Rule 3.31(c)(2), 16 C.F.R. § 3.31(c)(2). These discovery limitations may be exceeded by a party only when authorized by the Administrative Law Judge (ALJ) upon a finding of good cause. *Id.*

Discovery is so limited because “the materials excluded by [Rule 3.31(c)(2)] . . . are frequently duplicative and almost always protected by the deliberative process or attorney-client privileges or as work product.” Rules of Practice, 74 Fed. Reg. 1804, 1812 (interim final rules Jan. 13, 2009). In “the rare event that material excluded . . . is not duplicative, privileged or work product, it should not be difficult for respondent to satisfy a good cause standard.” *Id.* Both specific limitations on the scope of discovery and the rulemaking history make plain that issuing a subpoena for broad discovery to a Commission employee under Rule 3.34 is not permitted in the normal course of discovery.

On its face, Respondent’s subpoena to Settlemyer does not give notice of the specific topics about which Respondent intends to depose him. Respondent has represented it is seeking discovery of communications Settlemyer may have had with the SPD, Dartmouth College, and Tiversa. As Complaint Counsel represented at the meet-and-confer, Settlemyer has not had any communications with the SPD. Any communications Settlemyer may have had with Dartmouth College were not collected or reviewed in the course of the investigation of this matter or prosecution of this case and therefore are outside the scope of ordinary discovery. Rule 3.31(c)(2). It is uncontroverted that representatives of Tiversa met with Commission staff twice in 2009, as Boback testified in his deposition. These discussions took place months before the Commission initiated its investigation of LabMD in January 2010. The 2009 meetings and any communications Settlemyer may have had with Tiversa are therefore presumptively outside the scope of discovery, as those communications were not collected or reviewed in the course of the

investigation of the matter or prosecution of this case. Rule 3.31(c)(2). Furthermore, if any materials regarding communications with these parties were transmitted between Complaint Counsel and Settlemyer, they are not discoverable absent a showing of good cause, as Settlemyer is a non-testifying Commission employee. *Id.*

Respondent has failed to make any showing to demonstrate the need for discovery of any communications Settlemyer may have had with the SPD, Tiversa, or Dartmouth College. Respondent's counsel has already deposed Detective Jestes of the SPD about her communications with Commission attorneys and staff. Moreover, Complaint Counsel has made plain that Settlemyer has had no communications with the SPD. Respondent's counsel has also already deposed Tiversa's designated witness about the communications he had with Settlemyer and will have the opportunity to depose a representative of Dartmouth College pursuant to its January 30, 2014 subpoena. Accordingly, Respondent has made no showing on which this Court could authorize discovery beyond the bounds of Rule 3.31(c)(2).

B. The subpoena to Commission Attorney Settlemyer should be quashed because it seeks discovery irrelevant to this administrative adjudication.

The Court should quash the subpoena served on Settlemyer because this Court has ruled that "information concerning the pre-Complaint investigation and the Commission's decision making in issuing the Complaint [] to challenge the bases for the Commission's commencement of this action" is "not relevant for the purposes of discovery in an administrative adjudication." Order on Compl. Counsel's Motion to Quash ("Quash Order") at 6. Furthermore, the Commission has held that once the Commission has settled questions of whether there is "reason to believe" a violation of law has occurred and that a proceeding to stop it would be in the public interest, and has issued a complaint, "the issue to be litigated is not the adequacy of the

Commission's pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred." *In re Exxon Corp.*, Docket No. 8934, 83 F.T.C. 1759, 1974 FTC LEXIS 226 at *2-3 (June 4, 1974).

Respondent seeks to depose Settlemyer without limit, and intends to specifically inquire about any communications he may have had with Tiversa and Dartmouth College over seven years, in an effort to litigate the adequacy of the Commission's pre-complaint process.

Testimony concerning any communications Settlemyer may have had with Tiversa or Dartmouth College is irrelevant to any issues pending in this administrative proceeding, is relevant only to the Commission's pre-Complaint process, and is therefore not permissible discovery. The adequacy of the Commission's pre-Complaint process is immaterial to this case under this Court's previous ruling in this matter. Quash Order at 6.

Additionally, the Court has noted that "[o]nce a complaint issues, 'only in the most extraordinary circumstances' will the Commission review its reason to believe and public interest determinations." *In re Boise Cascade Corp.*, Docket No. 9133, 97 F.T.C. 246, 1981 FTC LEXIS 71, at *3 n.3 (March 27, 1981) (citing *TRW Inc.*, 88 F.T.C. 544 (1976)). Respondent has made no showing of the "extraordinary circumstances" necessary for the Commission to review its reason to believe and public interest determination in this case, and thus to the extent that it seeks information regarding the Commission's "reason to believe," the subpoena seeks information irrelevant to this proceeding.

II. SUBPOENA TO COMMISSION ATTORNEY YODAIKEN

The subpoena served on Commission Attorney Yodaiken should be limited to the topic of the substance of her communications with the SPD, as all other information sought is impermissible discovery under Rule 3.31 and this Court's Order on Complaint Counsel's Motion to Quash Subpoena Served on Complaint Counsel.

A. The subpoena to Commission Attorney Yodaiken should be limited to the scope of permissible discovery under Rule 3.31.

Respondent's counsel has represented that its subpoena to Yodaiken was intended, *inter alia*, to relate to testimony concerning communications with Tiversa, Dartmouth College, and the SPD. During the meet-and-confer, Complaint Counsel represented Yodaiken did not have communications with Tiversa or Dartmouth College. If she had communicated with these entities, such communications would be irrelevant to the allegations of the Complaint, the proposed relief, and the defenses of Respondent, and outside the scope of presumptively permissible discovery. Such communications, would also be an improper topic for discovery under Commission Rules because they were not "collected or reviewed in the course of the investigation of the matter or prosecution of the case" Rule 3.31(c)(2). Finally, Respondent has made no showing on which this Court could authorize discovery on these topics.

To the extent that Respondent's counsel seeks the testimony of Yodaiken concerning the substance of communications she may have had with the SPD in the course of this investigation, Complaint Counsel is prepared to make her available on that narrow topic. Yodaiken is not trial counsel, and to the extent that the substance of her communications with SPD may relate to a cognizable defense or the relief sought, Complaint Counsel will permit her to testify.

To the extent that Respondent’s counsel seeks Yodaiken’s testimony as it relates to any other topic, such an examination would call for privileged information pursuant to the attorney-client privilege, the work product doctrine, and other applicable privileges and immunities. Therefore, the subpoena to Yodaiken should be limited “in order to preserve the privilege[s] . . . as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in light of reason and experience.” Rule 3.31(c)(4).

B. The subpoena to Commission Attorney Yodaiken should be limited, insofar as it seeks discovery irrelevant to this administrative adjudication.

“Information concerning the pre-Complaint investigation” is “not relevant for the purposes of discovery in an administrative adjudication.” Quash Order at 6. At this stage in the case, “the issue to be litigated is not the adequacy of the Commission’s pre-complaint information or the diligence of its study of the material in question but whether the alleged violation has in fact occurred.” *In re Exxon Corp.*, 1974 FTC LEXIS 226 at *2-3.

The subpoena to Yodaiken should be limited to the substance of her communications with the SPD because Respondent seeks to depose Yodaiken about topics irrelevant to discovery. Yodaiken worked substantively on the pre-Complaint investigation for three years. Because Complaint Counsel identified Yodaiken, who is not serving as trial counsel, as having communicated with the SPD in the course of this investigation, Complaint Counsel is amenable to making her available for deposition on the narrow topic of the substance of her communications in that regard. To the extent that Respondent seeks testimony about other topics—such as the pre-Complaint investigation or process or issues not pending in this case—

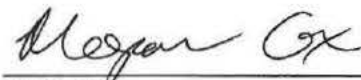
Complaint Counsel moves to limit the subpoena to exclude that testimony, which is irrelevant “for purposes of discovery in an administrative adjudication” such as this. Quash Order at 6.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion to Quash the Subpoena Served on Commission Attorney Settlemyer, and should grant the Motion to Limit the Subpoena Served on Commission Attorney Yodaiken.

Dated: February 10, 2014

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown
Federal Trade Commission
600 Pennsylvania Ave., NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2282 – Cox
Facsimile: (202) 326-3062
Electronic mail: mcox1@ftc.gov

Complaint Counsel

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

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

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S
MOTION TO QUASH SUBPOENA SERVED ON
COMMISSION ATTORNEY CARL SETTLEMYER AND
LIMIT SUBPOENA SERVED ON COMMISSION ATTORNEY RUTH YODAIKEN**

Upon consideration of Complaint Counsel’s Motion to Quash Respondent’s Subpoena Served on Commission Attorney Carl Settlemyer and Limit the Subpoena Served on Commission Attorney Ruth Yodaiken, it is hereby

ORDERED, that the subpoena *ad testificandum* served on Carl Settlemyer is QUASHED, and it is hereby

ORDERED, that the subpoena *ad testificandum* served on Ruth Yodaiken is LIMITED to testimony about the substance of Commission Attorney Yodaiken’s communications with the Sacramento Police Department.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2014, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

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

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

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

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

Michael Pepson
Lorinda Harris
Hallee Morgan
Robyn Burrows
Kent Huntington
Cause of Action
1919 Pennsylvania Avenue, NW, Suite 650
Washington, DC 20006
michael.pepson@causeofaction.org
lorinda.harris@causeofaction.org
hallee.morgan@causeofaction.org
robyn.burrows@causeofaction.org
kent.huntington@causeofaction.org


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

CERTIFICATE FOR ELECTRONIC FILING

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

February 10, 2014

By:



Laura Riposo VanDruff
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

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

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

**STATEMENT REGARDING MEET AND CONFER PURSUANT TO 16 C.F.R. § 3.22(g)
AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to F.T.C. Rule 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Quash the Subpoena Served on Commission Attorney Carl Settlemyer and Limit the Subpoena Served on Commission Attorney Ruth Yodaiken, Complaint Counsel met and conferred with counsel for Respondent, in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach an agreement.

Complaint Counsel Maggie Lassack, Jarad Brown, John Krebs, Megan Cox, and Ryan Mehm engaged in a meet-and-confer by phone with William Sherman and Sunni Harris, counsel for Respondent, on February 5, 2014 at approximately 11:30 a.m. regarding Respondent's subpoenas *ad testificandum* on Commission Attorneys Settlemyer and Yodaiken. Respondent's counsel orally identified the following topics for the depositions of Commission Attorneys Settlemyer and Yodaiken: (1) the Commission's investigation; (2) communications with Tiversa, Inc., the company that identified LabMD's file on a P2P network; (3) communications with Dartmouth College; and (4) communications with the Sacramento Police Department; and was

unwilling to limit the subpoenas to these topics. Complaint Counsel received a letter from Respondent on February 7, 2014, which was presented in support of Respondent's subpoenas (Exhibit B). In the letter, Respondent's counsel stated that it seeks the deposition testimony of Commission Attorneys Settlemyer and Yodaiken as their testimony relates to "pre-Complaint activities." Complaint Counsel Laura Riposo VanDruff, Maggie Lassack, Ryan Mehm, Jarad Brown, and Megan Cox engaged in another meet-and-confer by phone with William Sherman, Sunni Harris, and Lorinda Harris, counsel for Respondent, on February 7, 2014 at approximately 3:00 pm. During this teleconference, Complaint Counsel VanDruff asserted that Commission Attorney Yodaiken had not communicated with Tiversa, Inc. or Dartmouth College and Commission Attorney Settlemyer had not communicated with the Sacramento Police Department. Despite good faith efforts, Complaint Counsel has been unable to reach agreement with counsel for Respondent regarding Respondent's subpoenas *ad testificandum* served on Commission Attorneys Settlemyer and Yodaiken in this matter.

Dated: February 10, 2014

Respectfully submitted,



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm
John Krebs
Jarad Brown
Federal Trade Commission
600 Pennsylvania Ave., NW
Room NJ-8100
Washington, DC 20580
Telephone: (202) 326-2999 – VanDruff
Facsimile: (202) 326-3062
Electronic mail: lvandruff@ftc.gov

Complaint Counsel

Exhibit B



Legal Counsel.

DINSMORE & SHOHL LLP
801 Pennsylvania Ave., N.W. ^ Suite 610
Washington, D.C. 20004
www.dinsmore.com

William A. Sherman, II
(202) 372-9117 (direct) ^ (202) 372-9141 (fax)
william.sherman@dinsmore.com

February 7, 2014

Via Electronic Mail (mlsassack@ftc.gov)

Laura Riposo VanDuff
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW, Mail Stop NJ-8100
Washington, DC 20580

Re: Respondent's Subpoenas to FTC Personnel

Dear Ms. VanDuff:

Pursuant to our meet and confer which was held on Wednesday, February 5, 2014, I present this letter in support of respondent's subpoena of certain FTC personnel.

Respondent subpoenaed the testimony of Alain Sheer, Esq. which Complaint Counsel filed a Motion to Quash. The Administrative Law Judge granted Complaint Counsel's Motion to Quash in part and denied it in part. The relevant portions of the ALJ's decision as related to the current subpoenas of FTC personnel state that:

“Complaint Counsel does not contend that Respondent has issued any deposition subpoenas to Complaint Counsel other than that issued to Mr. Sheer. Moreover, as noted earlier, attorneys are not immune from being deposed. *Shelton*, 805 F.2d at 1327. Rather as is clear from *Shelton* and related authorities, the determination of whether a counsel deposition can proceed is a fact-based inquiry. Complaint Counsel's invitation to issue a “blanket” prohibition against future subpoenas directed to yet-to-be determined counsel is declined.”

Respondent seeks the deposition testimony of Carl Settlemyer and Ruth Yodaiken as their testimony relates to pre-complaint activities. Mr. Settlemyer and Ms. Yodaiken are attorneys; however, they are not counsel in this particular case. Based upon certain e-mails in our possession they have factual information relevant to this case.

It is clear from e-mails between the FTC and Tiversa and testimony from individuals at Tiversa that Settlemyer and Yodaiken were involved in planning and discussions which led to the service of a civil investigative demand upon a third party other than Tiversa in order to obtain documents which were in the possession of Tiversa. Why the FTC would agree to make special accommodations for Tiversa may lead to the discovery of other agreements between those two entities which may have impacted the use of LabMD's information in Tiversa's press release about its technology and in its testimony before Congress.

Similarly, Settlemyer and Yodaiken will have discoverable information relevant to the FTC's failure to promptly notify LabMD about documents confiscated by the Sacramento Police Department and whether the FTC notified consumers regarding the exposure of their protected health information as contained within the documents confiscated by the Sacramento Police Department. Should there be consumers, who now claim they were harmed by this information during the period when the FTC neither notified LabMD or the consumers this information is relevant to LabMD's defense regarding harm to these consumers.

Finally, the testimony of Mr. Wilmer who is identified as an individual who will give testimony at trial in this matter in the FTC's preliminary witness list is discoverable on its face.

Should you have any questions concerning the issues discussed herein, please do not hesitate to contact me.

Very truly yours,

Dinsmore & Shohl LLP



William A. Sherman, II

WAS:alm

Exhibit C

January 30, 2014

VIA HAND DELIVERY

Carl Settlemyer
Federal Trade Commission
600 Pennsylvania Avenue, N.W., NJ-8100
Washington, DC 20580

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

Dear Mr. Settlemyer:

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

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

I would be pleased to discuss the scheduling of your deposition at your earliest convenience. You may reach me at (202) 372-9100.

Sincerely,



William A. Sherman, II
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Phone: 202.372.9100
Fax: 202.372.9141
william.sherman@dinsmore.com

Enclosures:

- (1) Subpoena *Ad Testificandum*
- (2) Exhibit A: Protective Order Governing Discovery Material

cc (via email):

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm



SUBPOENA AD TESTIFICANDUM DEPOSITION

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

1. TO Carl Settlemyer Federal Trade Commission 600 Pennsylvania Avenue, N.W., N-8100 Washington, DC 20580	2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
-----------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------

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

3. PLACE OF DEPOSITION Dinsmore & Shohl LLP 801 Pennsylvania Avenue, N.W. Suite 610 Washington, DC 20004	4. YOUR APPEARANCE WILL BE BEFORE William A. Sherman II or other designated counsel 5. DATE AND TIME OF DEPOSITION February 18, 2014, at 9:00 a.m.
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6. SUBJECT OF PROCEEDING In the Matter of LabMD, Inc., Docket 9357

7. ADMINISTRATIVE LAW JUDGE Chief Judge D. Michael Chappell Federal Trade Commission Washington, D.C. 20580	8. COUNSEL AND PARTY ISSUING SUBPOENA William A. Sherman II, Respondent Counsel Dinsmore & Shohl LLP 801 Pennsylvania Avenue, N.W. Suite 610 Washington, DC 20004 (202) 372-9100
--------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

DATE SIGNED 1-30-14	SIGNATURE OF COUNSEL ISSUING SUBPOENA
------------------------	-------------------------------------------

GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

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

RETURN OF SERVICE

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

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

Federal Trade Commission
600 Pennsylvania Avenue, N.W., N) - 8100
Washington, DC 20580

on the person named herein on:

1-30-14
(Month, day, and year)

William H. Vermeil
(Name of person making service)

Resident Counsel
(Official title)

CERTIFICATE OF SERVICE

This is to certify that on January 30, 2014, I served via electronic delivery a copy of the foregoing document to:

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

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

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

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

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

January 30 2014

By: 
William A. Sherman, II

Exhibit A


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

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

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

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

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: August 29, 2013

ATTACHMENT A

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

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

1. As used in this Order, "confidential material" shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. "Sensitive personal information" shall refer to, but shall not be limited to, an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. "Document" shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. "Commission" shall refer to the Federal Trade Commission ("FTC"), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.

2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.

3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.

4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.

5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

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

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

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

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

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

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

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

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

Exhibit D

DINSMORE & SHOHL LLP
801 Pennsylvania Avenue, N.W. Suite 610
Washington, DC 20004
www.dinsmore.com
William A. Sherman, II
(202) 372-9117 (direct) ^ (202) 372-9141 (fax)
william.sherman@dinsmore.com

January 30, 2014

VIA HAND DELIVERY

Ruth Yodaiken
Federal Trade Commission
Division of Privacy and Identity Protection
600 Pennsylvania Avenue, N.W., NJ-8100
Washington, DC 20580

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

Dear Ms. Yodaiken:

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

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

I would be pleased to discuss the scheduling of your deposition at your earliest convenience. You may reach me at (202) 372-9100.

Sincerely,



William A. Sherman, II
Dinsmore & Shohl, LLP
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20004
Phone: 202.372.9100

Enclosures:

- (1) Subpoena *Ad Testificandum*
- (2) Exhibit A: Protective Order Governing Discovery Material

cc (via email):

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm



SUBPOENA AD TESTIFICANDUM DEPOSITION

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

1. TO
Ruth Yodaiken
Federal Trade Commission
Division of Privacy and Identity
Protection
600 Pennsylvania Avenue, NW, N.J. 8100
Washington, DC 20580

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

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

3. PLACE OF DEPOSITION
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004

4. YOUR APPEARANCE WILL BE BEFORE
William A. Sherman II or
other designated Counsel

5. DATE AND TIME OF DEPOSITION
February 18, 2014, at 9:00 a.m

6. SUBJECT OF PROCEEDING
In the Matter of LabMD, Inc., Docket 9357

7. ADMINISTRATIVE LAW JUDGE
Chief Judge D. Michael Chappell

Federal Trade Commission
Washington, D.C. 20580

8. COUNSEL AND PARTY ISSUING SUBPOENA
William A. Sherman II, Respondent Counsel
Dinsmore & Shohl LLP
801 Pennsylvania Avenue, N.W.
Suite 610
Washington, DC 20004
(202) 372-9100

DATE SIGNED
1-30-14

SIGNATURE OF COUNSEL ISSUING SUBPOENA
William A. Sherman II

GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

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

RETURN OF SERVICE

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

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

on the person named herein on:

1-30-14
(Month, day, and year)

William J. Stewart
(Name of person making service)

Respondent's Counsel
(Official title)

CERTIFICATE OF SERVICE

This is to certify that on January 30, 2014, I served via electronic delivery a copy of the foregoing document to:

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

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

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

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

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

January 30 2014

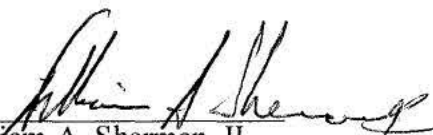
By: 
William A. Sherman, II

Exhibit A

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

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

DOCKET NO. 9357

PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

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

ORDERED:

DM Chappell
D. Michael Chappell
Chief Administrative Law Judge

Date: August 29, 2013

ATTACHMENT A

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

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

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

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

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

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

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

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

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

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

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

Exhibit E



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

RXZ

Bureau of Consumer Protection
Division of Advertising Practices

Carl H. Settlemyer, III
202 326 2019 (Direct)
202 326 3259 (Fax)
csettlemyer@ftc.gov

June 25, 2008

VIA EMAIL AND REGULAR MAIL

Robert Boback, Chief Executive Officer
Tiversa, Inc.
144 Emeryville Drive, Suite 300
Cranberry Township, PA 16066

Dear Mr. Boback:

This notifies you of an official request for information that the Federal Trade Commission has received from Chairman Waxman of the Committee on Oversight and Government Reform of the House of Representatives. The Committee has requested information concerning inadvertent file sharing over peer-to-peer ("P2P") networks. Certain information and materials that Tiversa submitted may be responsive to this request.

The Commission routinely receives official requests for confidential information from congressional committees and subcommittees. Neither the Freedom of Information Act, 5 U.S.C. § 552(d), nor the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(1)(A), authorize the Commission to withhold such information from congressional committees or subcommittees. The Commission, of course, requests that the responsive information and materials be kept confidential by the congressional committees and subcommittees.

If you have any questions about the Committee's inquiry or handling of information it has requested, please direct them to Committee staff contact, Roger Sherman, at (202) 225-5051. Questions about the Commission's response may be directed to me at (202) 326-2019.

Sincerely,

Carl H. Settlemyer

cc: Office of General Counsel

Exhibit E

Exhibit F

RX5

Kelly, Andrea

From: Robert Boback <rboback@tiversa.com>
Sent: Wednesday, March 04, 2009 5:26 PM
To: Settlemyer, Carl
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

The main office number will be fine. Its listed below.

Talk to you tomorrow.

Best,
Bob

Robert Boback
Chief Executive Officer

Tiversa, Inc.
The P2P Intelligence Experts
144 Emeryville Drive, Suite 300
Cranberry Township, Pennsylvania 16066
| 724-940-9030 Office | 724-940-9033 Fax

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov]
Sent: Wednesday, March 04, 2009 5:28 PM
To: Robert Boback
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

That's fine, Bob. Looking forward to it.

For now, we'll plan to call you from one of our conference rooms. We may, however, set up a call in number if it helps one of our folks participate in the call. We'll let you know. What number should we call?

Thanks.

Carl S.

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Wednesday, March 04, 2009 5:20 PM
To: Settlemyer, Carl
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

Carl,

Noon would work better on this end. I pushed a separate lunch meeting back to 12:45. Hopefully that will work on your end.

Best,

Bob

Robert Boback
Chief Executive Officer

Tiversa, Inc.
The P2P Intelligence Experts
144 Emeryville Drive, Suite 300
Cranberry Township, Pennsylvania 16066
| 724-940-9030 Office | 724-940-9033 Fax

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov]
Sent: Wednesday, March 04, 2009 3:46 PM
To: Robert Boback
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

Bob:

That would be great. 12:30 would be the best time for us, from a scheduling standpoint, but we could do the call any time in the noon-2pm window. I think a half hour would suffice. Please let us know what would work best for you.

Thanks.

Carl S.

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Wednesday, March 04, 2009 1:55 PM
To: Settlemyer, Carl
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

Carl,

I have time on tomorrow (3/5) for a call but I will be out of the office on Friday. Please let me know if you have some time tomorrow.

Best Regards,
Bob

Robert Boback
Chief Executive Officer

Tiversa, Inc.
The P2P Intelligence Experts
144 Emeryville Drive, Suite 300
Cranberry Township, Pennsylvania 16066
| 724-940-9030 Office | 724-940-9033 Fax

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov]
Sent: Monday, March 02, 2009 5:28 PM
To: Robert Boback

Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

Bob:

Do you any free time to talk on Friday morning? Most of us appear to be free on Thursday morning if that would work better for you. Any time after 9:30 or 10 would probably work fine for us. Obviously we'd also like to discuss (to the extent you are free to do so) the incident that broke over the weekend.

Thanks.

Carl S.

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Tuesday, February 24, 2009 12:24 PM
To: Settlemyer, Carl
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

Ok

Robert Boback
Chief Executive Officer

Tiversa, Inc.
The P2P Intelligence Experts
144 Emeryville Drive, Suite 300
Cranberry Township, Pennsylvania 16066
| 724-940-9030 Office | 724-940-9033 Fax

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov]
Sent: Tuesday, February 24, 2009 11:45 AM
To: Robert Boback
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

Bob:

No problem. We are sure you are quite busy. We are still interested in speaking with you. I'll check with my colleagues and see if any days later this week or early next week might be viable and get back to you ASAP.

Thanks.

Carl S.

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Tuesday, February 24, 2009 11:36 AM
To: Settlemyer, Carl
Cc: Ferguson, Stacey; Sheer, Alain; Quaresima, Richard A.
Subject: RE: P2P ID Theft Reseach - Conference Call?

Carl,

I hope this email finds you doing well. I apologize for the delay in my responding to this email. If you are still interested in a call, please let me know.

Best Regards,
Bob

Robert Boback
Chief Executive Officer

Tiversa, Inc.
The P2P Intelligence Experts
144 Emeryville Drive, Suite 300
Cranberry Township, Pennsylvania 16066
| 724-940-9030 Office | 724-940-9033 Fax

From: Settlemyer, Carl [mailto:csettlemyer@ftc.gov]
Sent: Monday, January 26, 2009 11:34 AM
To: Robert Boback; Chris Gormley
Cc: Ferguson, Stacey; Sheer, Alain; Quresima, Richard A.
Subject: P2P ID Theft Reseach - Conference Call?

Bob and Chris:

We hope you are well. We saw Tiversa's press release last week about some new research that you've done. We were hoping you might have some time to discuss that with us in a conference call next week. Other than Thursday afternoon, our calendars next week look relatively clear, so we could probably be available anytime that is convenient for you.

We look forward to speaking with you.

Regards,

Carl S.

Carl H. Settlemyer, Attorney
Federal Trade Commission
BCP-Division of Advertising Practices
600 Pennsylvania Ave., N.W., Room NJ-3212
Washington, DC 20580
Tel: 202-326-2019
csettlemyer@ftc.gov

Exhibit G

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

COMMISSIONERS: **Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Joshua D. Wright**

)	
In the Matter of)	DOCKET NO. 9357
)	
LabMD, Inc.,)	
a corporation.)	
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RESPONDENT’S PRELIMINARY WITNESS LIST

Pursuant to the Court’s Revised Scheduling Order, dated October 22, 2013, Respondent hereby provides its Preliminary Witness List to Complaint Counsel. This list identifies the fact witnesses who may testify for Respondent at the hearing in this action by deposition and/or investigational hearing transcript, declaration, or orally by live witness. It does not identify expert or rebuttal expert witnesses, whom Respondent will identify at a later date in compliance with the Scheduling Order and Revised Scheduling Order entered in this action.

The information disclosed herein is based upon information reasonably available to Respondent at present. Discovery is ongoing and likely will have an impact on Respondent’s final proposed witness list. Subject to the limitations in the Scheduling Order and Revised Scheduling Order entered in this action, Respondent reserves the right:

- A. To present testimony by deposition and/or investigational hearing transcript, declaration, or live orally, from any other person that Respondent or Complaint Counsel identifies as a potential witness in this action;

- B. For any individual listed below as being associated with a corporation, government agency, or other non-party entity, to substitute a witness designated by the associated non-party entity in response to any subpoena that has been or

may be issued by Complaint Counsel or Respondent to that non-party entity in this action;

C. To present testimony by deposition and/or investigational hearing transcript, declaration, or orally by live witness, from the custodian of records of any nonparty from which documents or records have been or will be obtained in this action, including, but not limited to, the non-parties listed below, to the extent necessary for the admission of documents or deposition or investigational hearing testimony into evidence in the event that a stipulation cannot be reached concerning the admissibility of such documents or testimony;

D. To present testimony by deposition and/or investigational hearing transcript, declaration, or live orally, from any witnesses to rebut the testimony of witnesses proffered by Complaint Counsel;

E. Not to present testimony by deposition and/or investigational hearing transcript, declaration, or live orally, from any of the witnesses listed below;

F. To limit to a relevant time frame as determined by the court, the testimony by deposition and/or investigational hearing transcript, declaration, or live orally, from any of the witnesses listed below;

G. To supplement this Preliminary Witness List and to expand the topics of testimony for each witness listed below if additional information becomes available through discovery or otherwise; and

H. To call as a witness each and every witness listed in Complaint Counsel's Preliminary Witness List.

Subject to these reservations of rights, Respondent's preliminary list of witnesses is as follows:

1. Alain Sheer, Attorney for the FTC's Division of Privacy and Identity Protection

We expect that Mr. Sheer will testify about the substance of his meetings with Tiversa Holding Corporation, Dartmouth College, Eric Johnson, etc. prior to and subsequent to the initiation of an investigation and filing of the Complaint against LabMD, Inc. ("LabMD"); facts related to a Civil Investigative Demand that resulted in the production of documents from Tiversa to FTC; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

2. Federal Trade Commission- designated witness(es) to be determined

We expect that one or more witnesses designated by the FTC will testify about the FTC's regulatory scheme regarding data security, any published FTC standards, guidelines or regulations and the initiation and evolution of the FTC standards, guidelines and regulations regarding data security and what these regulations and guideline required LabMD to have in place at all relevant times; whether the FTC enforces the Health

Insurance Portability and Accountability Act (“HIPAA”) or the Health Information Technology Act (“HITECH”); the FTC’s jurisdiction over data security breaches involving personal identifying information (“PII”) and/or personal health information (“PHI”); and facts relating to affirmative defenses asserted in the Answer.

3. U.S. Department of Health and Human Services (“HHS”) - designated witness(es) to be determined

We expect that the HHS will testify about the existence or non-existence of any evaluations by HHS of LabMD’s compliance with HIPAA, HITECH, and the regulations promulgated under HIPAA and HITECH.

4. Robert Boback, Chief Executive Officer of Tiversa Holding Corporation (“Tiversa”)

We expect that Mr. Boback will testify, as Tiversa’s corporate designee, about Tiversa’s understanding and use of peer-to-peer file sharing applications and networks; Tiversa’s communications with the FTC and Dartmouth; facts relating to the “P2P insurance aging file” referenced in Paragraph 17 of the Complaint; and other facts relating to the security incident alleged in Paragraphs 17-20 of the Complaint. We also expect that Mr. Boback will testify about facts relating to the documents produced in response to Complaint Counsel’s subpoena duces tecum to Tiversa Holding Corporation in this action and the admissibility of those documents into evidence in the hearing in this action. We also expect that Mr. Boback will testify about any Civil Investigative Demands which resulted in the production of documents from Tiversa to FTC.

5. Tuck School of Business at Dartmouth – designated witness to be determined

We expect that this witness will testify about contracts, cooperative agreements and grants associated with the study entitled “Data Hemorrhages in the Health-Care Sector”.

6. Eric Johnson, former Associate Dean of the Tuck School of Business at Dartmouth

We expect that Mr. Johnson will testify to the facts underlying his study entitled “Data Hemorrhages in the Health-Care Sector”; communications with the FTC, Tiversa, and/or Health and Human Services regarding LabMD, the 1718 file and his research in general; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

7. Allen Truett, former Chief Executive Officer of Automated PC Technologies, Inc.

We expect that Mr. Truett will testify about LabMD’s computer networks, including, but not limited to, remote access thereto; the products and/or services that he and his company, Automated PC Technologies, Inc., provided to LabMD, including but not limited to the security features of those products and/or services; the communications between LabMD and Mr. Truett or Automated PC Technologies, Inc.; the facts underlying and set forth in the affidavit that Mr. Truett executed on May 20, 2011, which LabMD submitted to Commission staff during the Part II investigation; and the facts relating to affirmative defenses asserted in the Answer.

8. Karina Jestes, Detective, Sacramento, CA Police Department

We expect that Detective Jestes will testify about facts relating to the security incident alleged in Paragraphs 10 and 21 of the Complaint; those consumers affected by the security incident alleged in Paragraphs 10 and 21 of the Complaint; facts relating to meetings and communications between her and the FTC; facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to the Custodian of Records of the Sacramento, CA Police Department in this action and the admissibility of those documents into evidence in the hearing in this action.

9. Robert Hyer, former LabMD IT Manager and former LabMD contractor

We expect that Mr. Hyer will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

10. Jeff Martin, LabMD IT employee and former LabMD contractor

We expect that Mr. Martin will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

11. Allison Simmons, former LabMD IT employee

We expect that Ms. Simmons will testify about her knowledge of LabMD's searches for the 1718 file on P2P networks; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

12. Chris Maire, former LabMD employee

We expect that Mr. Bureau will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

13. John Boyle, former LabMD employee

We expect that Mr. Boyle will testify about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the personal information to which he and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

14. Carl Settlemyer, FTC Counsel

We expect that Mr. Settlemyer's testimony will include his personal knowledge of meetings and communications between he, on behalf of the FTC, and individuals from Tiversa, and Dartmouth College.

15. Michael Daugherty, President CEO of LabMD, Inc.

We expect that Mr. Daugherty will testify about LabMD's computer networks; LabMD's security policies and practices, and employee training; LabMD employees; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

16. Lou Carmichael, former LabMD consultant

We expect that Ms. Carmichael will testify to LabMD's security policies and practices, compliance program, and employee training; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.

17. All witnesses listed in Complaint Counsel's Preliminary Witness List not listed herein.

We incorporate Complaint Counsel's Preliminary Witness List by reference as if fully set forth herein.

/s/ William Sherman

Reed D. Rubinstein, Esq.

William A. Sherman, II, Esq.

Dinsmore & Shohl, LLP

801 Pennsylvania Ave., NW Suite 610

Washington, DC 20004

Phone: (202) 372-9100

Fax: (202) 372-9141

Email: reed.rubinstein@dinsmore.com

Michael D. Pepson

Cause of Action

1919 Pennsylvania Ave., NW, Suite 650

Washington, D.C. 20006

Phone: (202) 499-4232

Fax: (202) 330-5842

Email: michael.pepson@causeofaction.org

Admitted only in Maryland.

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

Counsel for LabMD, Inc.

CERTIFICATE OF SERVICE

I certify that on January 2, 2014 I caused a copy of the foregoing Respondent's Preliminary Witness List to be served via electronic mail on:

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Complaint Counsel
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW Room NJ-8100
Washington, DC 20580
Tel: (202) 326-2999 (VanDruff) Facsimile: (202) 326-3062
Email: lvandruff@ftc.gov

By: /s/ William Sherman

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