

object to traveling to Washington D.C. for an entire day waiting to be called as a non-party witness.

Notably, well before receiving the Subpoena, Mr. Boback scheduled high level meetings with several clients in New York. These meetings are scheduled to begin on May 19, and will continue through May 22. Mr. Boback is then scheduled to travel back to Pittsburgh for internal meetings and company related business. Given his out of town meetings, it is critical that he return to Pittsburgh on May 23. The following week, Mr. Boback has more meetings scheduled in Pittsburgh with customers – again, on the calendar well before the Subpoena was issued – which are critical to the ongoing growth of Tiversa. *See Boback Aff.*, ¶ 3.

Accordingly, because Mr. Boback has a number of pre-existing travel plans on and around the time period during which LabMD has requested to solicit his second day of testimony, Mr. Boback has merely requested that he be permitted to provide his testimony via videoconference. *See id.*, ¶ 4. *See also* E-mail correspondence between Jarrod D. Shaw, Counsel for Mr. Boback, and William A. Sherman, II, Counsel for LabMD (attached as **Exhibit C**). Counsel for the Federal Trade Commission (“FTC”) has consented to Mr. Boback appearing via videoconference, and confirmed that the hearing room to be used for Mr. Boback’s testimony has videoconference capabilities. *See Exhibit C*.

LabMD’s refusal to allow Mr. Boback to appear by video is purely to harass a non-party witness. The FTC has agreed to allow Mr. Boback to appear via video conference. LabMD, however, has stated that it is “not willing to consent to Mr. Boback appearing by video.” *Id.* When counsel for Mr. Boback asked LabMD’s counsel to explain its reasoning for this position, LabMD’s counsel stated only “I want him there live,” despite admitting the fact that LabMD’s counsel’s office – in Pittsburgh – is fully equipped to allow videoconferencing,

and therefore Mr. Boback's video appearance would be free of cost for all parties. Based on this harassing position, the Subpoena should be quashed in its entirety because LabMD's stance is unduly burdensome, inefficient, and clearly aimed only at harassing Mr. Boback, with whom LabMD is involved in separate litigation in federal court. *See Tiversa Holding Corp. v. LabMD, Inc.*, 2014 WL 1584211 (W.D. Pa. Apr. 21, 2014) (denying LabMD's and Michael J. Daugherty's Motion to Dismiss the complaint filed against them by Mr. Boback and Tiversa Holding Corp. alleging, *inter alia*, defamation, and holding that Defendants' statements are capable of defamatory meaning.). Given the full day of testimony previously given, LabMD already has the testimony it needs for the hearing. In the alternative, the Subpoena should be limited such as to allow Mr. Boback's testimony to be taken via videoconference.

The law supports Mr. Boback's request. 16 C.F.R. § 3.31(c)(2)(i) states that a discovery vehicle is improper if it is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Mr. Boback has already provided an entire day's worth of testimony in this matter, under questioning from both LabMD and the FTC. *See Boback Aff.*, ¶ 2. Thus, requiring Mr. Boback to provide his testimony again will, undoubtedly, be both "cumulative" and "duplicative," but Mr. Boback is still willing to appear via video. However, requiring Mr. Boback to travel from Pittsburgh, Pennsylvania to Washington, DC to appear in person, as opposed to allowing him to appear via videoconference at no cost to any party in this matter, is unquestionably *less* convenient, *more* burdensome, and *more* expensive, and therefore improper under 16 C.F.R. § 3.31(c)(2)(i). *See also In the Matter of LabMD, Inc., a corporation, Respondent*, 2013 WL 6327986, at *7 (F.T.C. Nov. 22, 2013) (stating, in this matter, that in order to avoid an undue burden LabMD could "reduce its costs by appearing for the depositions telephonically"); *Reddick v. Dillard Store*

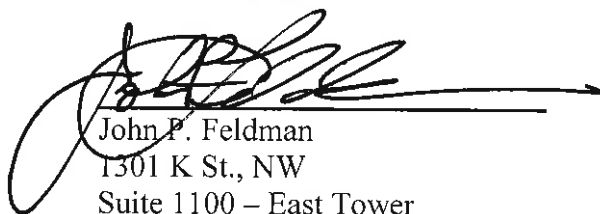
Services, Inc., 2010 WL 3025205 (S.D. Ill. Aug. 2, 2010) (quashing a subpoena requiring a witness to travel from Oregon to Illinois for trial because, *inter alia*, “requiring the doctor to travel from Oregon for trial—particularly when his deposition was videotaped—imposes undue burden and expense”). This conclusion is particularly unassailable here, where the only reasoning provided for requiring Mr. Boback to appear in-person is that LabMD’s counsel “want[s] him there live.” *See also* 16 C.F.R. § 3.43(d)(iii) (stating that an “Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses ... so as to ... [p]rotect witnesses from harassment ... ”); 16 C.F.R. § 3.31(d) (permitting an Administrative Law Judge to “protect a party or other person from annoyance ... ”).¹

Requiring Mr. Boback to appear in-person to give his testimony in this matter is less convenient for him, more burdensome for him, and more expensive for the parties. LabMD has provided absolutely no reasoning in support of its demand, making clear that it is simply trying to harass Mr. Boback, an adversary in another proceeding. As such, Mr. Boback’s Motion to Quash the Subpoena should be granted in its entirety, and he should not be required to testify in this matter. In the alternative, the Subpoena should be limited, and Mr. Boback should be allowed to provide his testimony in this matter via videoconference.

¹ As an alternative, LabMD’s counsel proposed that the testimony could be given live in Pittsburgh and that the FTC, LabMD and the Administrative Law Judge all travel to Pittsburgh to hear Mr. Boback’s testimony. This highlights the absurdity of LabMD’s position and its unwillingness to make the most reasonable accommodation.

Dated: May 12, 2014

REED SMITH LLP

A handwritten signature in black ink, appearing to read 'John P. Feldman', is written over a horizontal line. The signature is stylized and extends to the right of the line.

John P. Feldman
1301 K St., NW
Suite 1100 – East Tower
Washington, DC 20005
(202) 414-9200
(202) 414-9299 (fax)

Jarrold D. Shaw
Lucas Liben
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3100
(412) 288-3063 (Fax)

Attorneys for Robert Boback

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

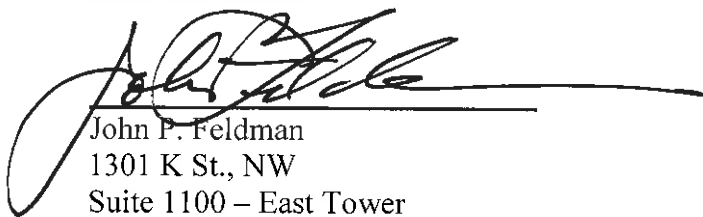
In the Matter of
LabMD, Inc.,
a corporation.

DOCKET NO. 9357

STATEMENT PURSUANT TO 16 C.F.R. § 3.22(g)

Counsel for the movant, Mr. Boback, hereby certifies that on May 9, 2014, counsel for Mr. Boback and counsel for LabMD, Inc. met via telephone in a good-faith effort to resolve by agreement the issues regarding Robert Boback's Emergency Motion to Quash or Limit Subpoena Ad Testificandum of LabMD, Inc. No resolution was reached.

REED SMITH LLP



John P. Feldman
1301 K St., NW
Suite 1100 – East Tower
Washington, DC 20005
(202) 414-9200
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Jarrold D. Shaw
Lucas Liben
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3100
(412) 288-3063 (Fax)

Attorneys for Robert Boback

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2014, I served and filed the original and twelve (12) copies of the foregoing document by hand delivery to:

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

I also certify that I caused two (2) copies of the foregoing document to be served by hand delivery 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 first-class mail a copy of the foregoing document to:

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

William A. Sherman II
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue, NW, Suite 610
Washington, DC 20001

Counsel for LabMD, Inc.

Dated: May 12, 2014

By: 
John P. Feldman

EXHIBIT A



SUBPOENA AD TESTIFICANDUM ADJUDICATIVE HEARING

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 Robert Boback Tiversa Holding Corporation 606 Liberty Avenue Pittsburgh, PA 15222	2. FROM <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to attend and give testimony at an adjudicative hearing, 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 ADJUDICATIVE HEARING FTC Courtroom Room 532 Federal Trade Commission Building 600 Pennsylvania Ave., NW Washington, DC 20580	4. YOUR APPEARANCE WILL BE BEFORE D. Michael Chappell, Chief Administrative Law Judge
	5. DATE AND TIME OF ADJUDICATIVE HEARING May 20, 2014 at 10:00 a.m.

6. SUBJECT OF PROCEEDING

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

7. ADMINISTRATIVE LAW JUDGE Chief Judge D. Michael Chappell <p style="text-align: center;">Federal Trade Commission Washington, D.C. 20580</p>	8. COUNSEL AND PARTY ISSUING SUBPOENA William A. Sherman II, Respondent Counsel Dinsmore & Shohl, LLP 801 Pennsylvania Avenue, NW Suite 810 Washington, DC 20004 202-372-9100
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DATE SIGNED May 1, 2014	SIGNATURE OF COUNSEL ISSUING SUBPOENA
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GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

EXHIBIT B

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
:
:

AFFIDAVIT OF ROBERT BOBACK

COMMONWEALTH OF PENNSYLVANIA)

COUNTY OF ALLEGHENY)

SS:

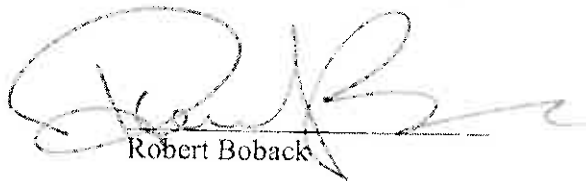
Robert Boback, being duly sworn, hereby deposes and says as follows:

1. I make this statement based upon my personal knowledge of the facts set forth within.
2. I have previously spent approximately one day's time providing deposition testimony to both LabMD, Inc. and the Federal Trade Commission in the above-referenced matter.
3. I am currently scheduled to be in New York for high level meetings with several clients on the following days: May 19th, 20th, 21st, and 22nd. Each of these meetings were scheduled prior to my receipt of the subpoena issued in this matter and they cannot be rescheduled as they are planned with several high level executives of Tiversa's largest business relationships. The week following these meetings in New York I have additional meetings in Pittsburgh with customers, which were also scheduled prior to any receipt of the subpoena issued in this matter. Given this schedule, it is critical that I return to and spend the day in Pittsburgh on May 23rd. As the Chief Executive Officer of Tiversa, Inc., I need to spend the time in Pittsburgh

meeting with my management team and coordinating business issues that result from my meetings.

4. Notwithstanding my schedule, I am available to provide testimony via videoconference in this matter on May 23, 2014.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.


Robert Boback

COMMONWEALTH OF PENNSYLVANIA)
)
COUNTY OF ALLEGHENY)

Sworn and signed before me, the undersigned officer, on this the 12th day of May, 2014.

IN WITNESS WHEREOF, I hereto set my hand and official seal.

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Dana Korbe, Notary Public
City of Pittsburgh, Allegheny County
My Commission Expires April 12, 2015
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES


Notary Public

EXHIBIT C

Lauritzen, Jessica B.

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, May 09, 2014 1:56 PM
To: Shaw, Jarrod D.
Cc: Rubinstein, Reed; Kent Huntington; Harris, Sunni; Pepson, Michael D.; VanDruff, Laura Riposo (lvandruff@ftc.gov)
Subject: RE: Letter to J. Shaw w/copy of subpoena

Jarrold,

We are not willing to consent to Mr. Boback appearing by video. I assume you will take whatever action you deem necessary.

William

Dinsmore

William A. Sherman, II
Partner

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Washington, DC 20004
T (202) 372-9117 • F (202) 372-9141
E william.sherman@dinsmore.com • dinsmore.com

From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Friday, May 09, 2014 9:42 AM
To: Sherman, William
Cc: Rubinstein, Reed; Kent Huntington; Harris, Sunni; Pepson, Michael D.; VanDruff, Laura Riposo (lvandruff@ftc.gov)
Subject: RE: Letter to J. Shaw w/copy of subpoena

William,

I wanted to revisit this issue. I have heard from the FTC and they consent to Mr. Boback appearing via video conferencing. In addition, the hearing room has the technology to allow for video conferencing.

Please let me know whether it is acceptable for Mr. Boback to participate by video. Given that Dinsmore has a Pittsburgh office, I would propose that Mr. Boback testify from there on May 23. Currently, May 20-22 is unavailable as Mr. Boback has previously scheduled meetings with clients and will be traveling out of state.

I understand there is a conference on May 15 before the judge. I think we should file a joint request to have Mr. Boback appear by videoconference before then so that it is teed up for the judge at the conference.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Tuesday, May 06, 2014 12:19 PM
To: Shaw, Jarrod D.
Cc: Rubinstein, Reed; Kent Huntington; Harris, Sunni; Pepson, Michael D.; VanDruff, Laura Riposo (lvandruff@ftc.gov)
Subject: RE: Letter to J. Shaw w/copy of subpoena

Jarrold,

I will take this under consideration and discuss it with my colleagues and the FTC and get back with you. Thank you for your response.

William

Dinsmore

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Partner

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From: Shaw, Jarrod D. [<mailto:JShaw@ReedSmith.com>]
Sent: Tuesday, May 06, 2014 12:10 PM
To: Sherman, William
Cc: Rubinstein, Reed; Kent Huntington; Harris, Sunni; Pepson, Michael D.; VanDruff, Laura Riposo (lvandruff@ftc.gov)
Subject: RE: Letter to J. Shaw w/copy of subpoena

William,

I have inquired with the FTC as to whether there are video capabilities in the hearing room. If so, I would request that both parties consent to Mr. Boback appearing by video. Given that he has already spent a day giving deposition testimony (which can be used at the hearing), Mr. Boback is now being further inconvenienced by the attached subpoena.

Please indicate whether his appearance by video is acceptable. Otherwise, we will be forced to seek redress from the Judge.

Jarrold

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Friday, May 02, 2014 12:23 PM
To: Shaw, Jarrod D.
Cc: Rubinstein, Reed; Kent Huntington; Harris, Sunni; Pepson, Michael D.
Subject: FW: Letter to J. Shaw w/copy of subpoena

Mr. Shaw,

Please find a courtesy copy of the subpoena to be served upon Mr. Boback. Call should you have any questions. Thank you

William

Dinsmore

William A. Sherman, II
Partner

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