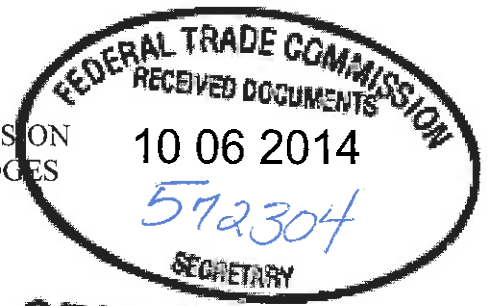


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



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

PUBLIC
Docket No. 9357

ORIGINAL

**COMPLAINT COUNSEL’S RESPONSE TO
RESPONDENT’S RULE 3.39 MOTION**

Although Complaint Counsel does not oppose the relief sought in Respondent’s Rule 3.39 Motion, it submits this Response to the Motion to identify clearly those assertions of fact and law made in the Motion with which Complaint Counsel disagrees. As a threshold matter, Complaint Counsel does not take a position regarding whether a grant of immunity would be in the public interest, 16 C.F.R. § 3.39(b)(1). However, Respondent’s Motion proffers testimony that [REDACTED] and it falsely represents that Mr. Wallace, a third-party witness, is a “government target.” Moreover, Respondent’s argument that the proffered testimony would require judgment for Respondent in the underlying matter is without legal authority. Complaint Counsel therefore respectfully requests that the Court include Complaint Counsel’s position regarding the [REDACTED] and the merits of Respondent’s arguments in any submission to the Attorney General.

Respondent proffers that it anticipates Mr. Wallace will testify that [REDACTED]
[REDACTED]

[REDACTED] If Respondent were to present such testimony during the evidentiary hearing, Complaint Counsel would present admissible evidence

to rebut it. In addition, Complaint Counsel would seek to establish Mr. Wallace's bias against Tiversa. Contrary to Respondent's assertions, *see* Resp't Mot. at 2 (accusing Complaint Counsel of "target[ing]" Mr. Wallace),¹ Complaint Counsel's efforts in this regard are appropriate and unremarkable: Complaint Counsel sought leave of Court to take additional discovery to refute Mr. Wallace's anticipated testimony and to demonstrate Mr. Wallace's bias, *see* Mot. for Leave (July 8, 2014), and Complaint Counsel obtained public records that corroborate Tiversa CEO Robert Boback's June 7, 2014 testimony regarding Mr. Wallace's bias. *See* Exs. E and F to Opp'n to Mot. for Sanctions (Aug. 25, 2014).

If the finder of fact were to credit the anticipated testimony Respondent proffers – specifically that [REDACTED]

[REDACTED] – Complaint Counsel would nonetheless satisfy its burden of demonstrating likely substantial consumer injury. Respondent's admissions establish that a 1,718-page LabMD document containing Social Security numbers, health information, and other sensitive personal information for more than 9,300 consumers ("1718 File") was available for sharing on a P2P network from a LabMD computer.² A document that is available for sharing on

¹ Contrary to Respondent's assertion that Mr. Wallace was Complaint Counsel's witness, *see* Mot. at 2, Complaint Counsel never identified Mr. Wallace as a witness from whom it intended to present testimony during the evidentiary hearing. It was Respondent, not Complaint Counsel, that noticed Mr. Wallace's deposition. *See* Resp't Subpoena *Ad Testificandum* to Rick Wallace (Jan. 30, 2014) (Ex. A). And it was Respondent, not Complaint Counsel, that included Mr. Wallace on its preliminary and final witness lists. *See* Resp't Supp'l Prelim. Witness List (Mar. 5, 2014) (Ex. B); Resp't Final Proposed Witness List (Apr. 9, 2014) (Ex. C).

² *See, e.g.*, JX0001, Facts 10, 11. More than 900 files on the LabMD computer, including the 1718 File, were available for sharing through LimeWire. *Id.* at Fact 11.

a P2P network may be freely accessed by other users of the network.³ Accordingly, the availability of the 1718 File and the sensitive personal information for more than 9,300 consumers that it contains resulted in likely substantial consumer injury. The Commission has held that “occurrences of actual data security breaches . . . are not necessary to substantiate that the firm’s data security activities cause or likely caused consumer injury” Order Den. Mot. to Dismiss (Jan. 16, 2014) at 19. The 1718 File’s presence on a P2P network is a cognizable injury because others had access to the 1718 File and the information it contained. Separate from the 1718 File, the evidentiary record contains significant evidence of LabMD’s failure to reasonably and appropriately protect consumers’ personal information on its computer networks. *See, e.g.*, Opp’n to Mot. for Sanctions (Aug. 25, 2014) at 8.

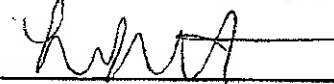
Rule 3.39 provides that upon an application by counsel other than Complaint Counsel for an order requiring a witness to testify and granting immunity, after making certain requisite factual findings, the Administrative Law Judge may request the Attorney General’s approval of such an order. 16 C.F.R. § 3.39(b)(2). If the Court determines that it should request approval by the Attorney General of an order requiring Mr. Wallace to testify and granting immunity, Complaint Counsel respectfully requests that Complaint Counsel’s position regarding the [REDACTED] and the merits of Respondent’s arguments be reflected in any such submission.

³ *See, e.g.*, Trial Tr. at 862-63 (Professor Clay Shields stating that the 1718 File was available for sharing and that “[a]ny one of the millions of other [Gnutella] clients that were running on the Gnutella network could have downloaded this file”); *id.* at 1198 (Adam Fisk stating that any user who located the 1718 file could download it on the LimeWire network); *id.* at 762 (Dean Johnson analogizing a computer on a P2P network to a box with the word “free” written on its side).

PUBLIC

Dated: October 6, 2014

Respectfully submitted,



Laura Riposo VanDruff
Federal Trade Commission
600 Pennsylvania Ave., NW
Room CC-8232
Washington, DC 20580
Telephone: (202) 326-2999 - VanDruff
Facsimile: (202) 326-3393
Electronic mail: Ivandruff@ftc.gov

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2014, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

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

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

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

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

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

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

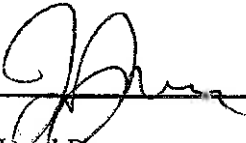
sunni.harris@dinsmore.com
Counsel for Respondent LabMD, Inc.

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.

October 6, 2014

By:



A handwritten signature in black ink, appearing to read 'Jarad Brown', is written over a solid horizontal line.

Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A



Legal Counsel.

DINSMORE & SHOHL LLP
801 Pennsylvania Avenue, N.W. ^ Suite 610
Washington, DC 20004
www.dinsmore.com

William A. Sherman, II
(202) 327-9117 (direct) ^ (202) 372-9141 (fax)
william.sherman@dinsmore.com

January 30, 2014

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Rick Wallace
Tiversa Holding Corporation
606 Liberty Ave.
Pittsburgh, PA 15222

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

Dear Mr. Wallace:

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 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 <i>Rick Wallace Tiversa Holding Corporation 606 Liberty Ave. Pittsburgh, PA 15222</i>	2. FROM <p style="text-align: center;">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
--	---

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

3. PLACE OF DEPOSITION <i>Dinsmore & Shohl LLP 301 Grant St. #2800 Pittsburgh, PA 15219 (412) 281-5000</i>	4. YOUR APPEARANCE WILL BE BEFORE <i>William A. Sherman II or other designated counsel</i>
5. DATE AND TIME OF DEPOSITION <i>February 18, 2014, at 9:00 a.m.</i>	

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

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

DATE SIGNED <i>1-30-14</i>	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.

certified 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 A. Stewart

(Name of person making service)

Respondent Counsel

(Official title)

CERTIFICATE OF SERVICE

This is to certify that on January 30th 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

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

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

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

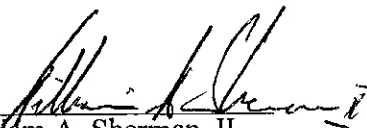
By: 
William A. Sherman, II

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:



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 B

**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.)	
)	

RESPONDENT’S SUPPLEMENTAL PRELIMINARY WITNESS LIST

Respondent supplements its Preliminary Witness List in light of additional information that has recently become available. Such additional information includes, but is not limited to, information relating to Tiversa Holding Corporation’s (“Tiversa”) use of its patented technology to locate LabMD Inc.’s (“LabMD”) 1718 file, and its participation and role in Dartmouth College’s (“Dartmouth”) research for the article by Eric Johnson, titled Data Hemorrhages in the Health-Care Sector. Respondent’s supplemental preliminary list of witnesses is as follows:

1. Rick Wallace, Tiversa Employee

We expect that Mr. Wallace will testify about Tiversa’s technology and its use with peer-to-peer file sharing applications and networks; Tiversa’s communications with the Federal Trade Commission (“FTC”) and Dartmouth College; facts relating to the “P2P insurance aging file” as referenced in Paragraph 17 of the Complaint; Mr. Wallace’s and Tiversa’s participation and role in Dartmouth’s research for the article by Eric Johnson, titled; “Data Hemorrhages in the Health-Care Sector.”

2. Chris Gormley, Tiversa Employee

We expect that Mr. Gormley will testify about Tiversa’s technology and its use with peer-to-peer file sharing applications and networks; Tiversa’s communications with the Federal Trade Commission (“FTC”) and Dartmouth College; facts relating to the “P2P insurance aging file” as referenced in Paragraph 17 of the Complaint; Mr. Gormley’s and Tiversa’s participation and role in Dartmouth’s research for the article by Eric Johnson, titled; “Data Hemorrhages in the Health-Care Sector.”

3. Susan McAndrew, or her designee, U.S. Department of Health and Human Services (“HHS”)

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

4. Rosalind Woodson, Former LabMD Employee

We expect that Rosalind Woodson will testify about her use of a P2P file sharing application on her work station computer and her knowledge of LabMD’s policies regarding such use, as well as her knowledge of the “1718 File.”

5. All witnesses listed in Complaint Counsel’s Preliminary Witness List and Supplemental Preliminary Witness List not listed herein.

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

/s/ William A. Sherman, II

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 hereby certify that on March 5, 2014, that I delivered via electronic mail a copy of the foregoing document to:

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

Dated: March 5, 2014

By: /s/ William A. Sherman, II
William A. Sherman, II

547159v3

Exhibit C

**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.)	
)	

RESPONDENT’S FINAL PROPOSED WITNESS LIST

Pursuant to the Court’s Revised Scheduling Order, dated October 22, 2013, Respondent hereby provides its Final Proposed 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.

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, affidavit, declaration, or orally by live witness, from the custodian of records of any party or non-party from whom documents or records have been obtained—specifically including, but not limited to, those parties and non-parties listed below—to the extent necessary to demonstrate the authenticity or admissibility of documents in the event a stipulation cannot be reached concerning the authentication or admissibility of such documents;

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

C. To amend this Final Proposed Witness List to be consistent with the Court's ruling on any pending motions, including any motions in limine filed in this matter;

D. To question the persons listed below about any topics that are the subjects of testimony by witnesses to be called 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 question any person listed below about any other topics that the person testified about at his or her deposition or investigational hearing, or about any matter that is discussed in any documents to which the person had access and which are designated as exhibits by either party or which have been produced since the person's deposition was taken;

G. To present testimony by deposition and/or investigational hearing transcript, affidavit, declaration, or orally by live witness, from any persons, regardless whether they are listed below, to rebut the testimony of witnesses proffered by Complaint Counsel;

H. 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; and

I. To supplement this Final Proposed Witness List as circumstances may warrant.

Subject to these reservations of rights, Complaint counsel's Final Proposed Witness list is as follows:

1. Daniel Kaufman, Bureau of Consumer Protection's Rule 3.33 Witness

We expect that Mr. Kaufman will testify live about the FTC's regulatory scheme regarding data security, any published or unpublished FTC standards, guidelines or regulations which the FTC requires Covered Entities like LabMD to meet regarding the security of Protected Health Information from 2005 to the present; the initiation and evolution of the FTC's standards, guidelines and regulations regarding data security and what these regulations and guidelines required Covered Entities like LabMD to have in place at all relevant times from 2005 to the present; the media by which the FTC alerted or informed Covered Entities like LabMD that these standards, guidelines and regulations existed.

- 2. Robert Boback, Chief Executive Officer of Tiversa Holding Corporation (“Tiversa”)**
We expect that Mr. Boback will testify live, as Tiversa’s corporate designee, about Tiversa’s technology and its use on peer-to-peer file sharing protocols and networks; Tiversa’s communications with the FTC, Eric Johnson 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 the organization that produced Tiversa’s document to the FTC 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.
- 3. Eric Johnson, former Associate Dean of the Tuck School of Business at Dartmouth**
We expect that Mr. Johnson will testify live 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 methodology in general and specifically in relation to locating and downloading the 1718; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; and facts relating to affirmative defenses asserted in the Answer.
- 4. Allen Truett, former Chief Executive Officer of Automated PC Technologies, Inc.**
We expect that Mr. Truett will testify live 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.
- 5. Karina Jestes, Detective, Sacramento, CA Police Department**
We expect that Detective Jestes will testify by designation 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.
- 6. Robert Hyer, former LabMD IT Manager and former LabMD contractor**
We expect that Mr. Hyer will testify live about LabMD’s computer networks, including, but not limited to, hard ware and soft ware, remote access thereto; LabMD’s security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; and facts relating to affirmative defenses asserted in the Answer.

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

We expect that Mr. Martin will testify by designation about LabMD's computer networks, including, but not limited to, hard ware and soft ware, remote access thereto; LabMD's security policies and practices, and employee training; the protected health 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.

8. Allison Simmons, former LabMD IT employee

We expect that Ms. Simmons will testify by designation 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.

9. Chris Maire, former LabMD employee

We expect that Mr. Maire will testify by designation about LabMD's computer networks, including, but not limited to, hard ware and soft ware, remote access thereto; LabMD's security policies and practices, and employee training; the protected health 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. John Boyle, former LabMD employee

We expect that Mr. Boyle will testify live about LabMD's computer networks, including, but not limited to, remote access thereto; hard ware and soft ware, LabMD's security policies and practices, and employee training; the protected health 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. Michael Daugherty, President CEO of LabMD, Inc.

We expect that Mr. Daugherty will testify live 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.

12. Lou Carmichael, former LabMD consultant

We expect that Ms. Carmichael will testify by designation about LabMD's security policies and practices, hard ware and soft ware, 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.

13. Rick Wallace, former Tiversa Employee

We expect that Mr. Wallace will testify live about Tiversa's technology and its use with peer-to-peer file sharing applications and networks; Tiversa's communications with the Federal Trade Commission ("FTC") and Dartmouth College; facts relating to the "P2P insurance aging file" as referenced in Paragraph 17 of the Complaint; Mr. Wallace's and Tiversa's participation and role in Dartmouth's research for the article by Eric Johnson, titled; "Data Hemorrhages in the Health-Care Sector."

14. Chris Gormley, Tiversa Employee

We expect that Mr. Gormley will testify by designation about Tiversa's technology and its use with peer-to-peer file sharing applications and networks; Tiversa's communications with the Federal Trade Commission ("FTC") and Dartmouth College; facts relating to the "P2P insurance aging file" as referenced in Paragraph 17 of the Complaint; Mr. Gormley's and Tiversa's participation and role in Dartmouth's research for the article by Eric Johnson, titled; "Data Hemorrhages in the Health-Care Sector."

15. Rosalind Woodson, Former LabMD Employee

We expect that Rosalind Woodson will testify live about her use of a P2P file sharing application on her work station computer and her knowledge of LabMD's policies regarding such use, as well as her knowledge of the "1718 File."

16. David Lapidés, Detective Sandy Springs, GA Police Department

We expect that Detective Lapidés will testify by designation about his communications with LabMD and the Bureau of Consumer Protection and documents provided to him relating to the security incident alleged in Paragraph 21 of the Complaint; or any other matters as to which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. Detective Lapidés will also testify about facts relating to documents that were produced in response to Complaint Counsel's subpoena *duces tecum* to the Sandy Springs, GA Police Department in this action, and the admissibility of those documents into evidence in the hearing in this action.

17. Curt Kaloustian, former LabMD IT employee

We expect that Mr. Kaloustian will testify live about his knowledge of LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT-related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; Respondent's affirmative defenses, or the proposed relief.

18. Kim Gardner, former LabMD Executive Assistant

We expect that Ms. Gardner will testify by designation about LabMD's security policies and practices, and employee training; the protected health information to which she had access; information relating to the wind down of LabMD's business operations and the corresponding relocation of LabMD's business premises; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint

Counsel about which she has knowledge; or any other matters as to which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

19. Peter Sandrev, Broadvox employee, Cypress Communications, LLC ("Cypress") designee

We expect that Mr. Sandrev will testify by designation about LabMD's computer networks, including, but not limited to the products and/or services that Cypress provided to LabMD, including but not limited to any security features of those products and/or services; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which Cypress has knowledge; or any other matters as to which Cypress has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. He will also testify about facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to Cypress in this action, and the admissibility of those documents into evidence in the hearing in this action.

20. Eric Knox, former LabMD sales employee

We expect that Mr. Knox will testify by designation about LabMD's computer networks, including, but not limited to remote access thereto; LabMD's security policies and practices, and sales employee training; the protected health information to which he and other LabMD sales employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

21. Kevin Wilmer, Investigator, Federal Trade Commission, Bureau of Consumer Protection, Division of Privacy and Identity Protection

We expect that Mr. Wilmer will testify by designation about the process used to identify the individuals listed in Appendix A (designated as "CONFIDENTIAL") to Complaint Counsel's Initial Disclosures as "Individuals Associated with 9-Digit Numbers Listed in the Day Sheets Referenced in Paragraph 21 of the Complaint Whose Names Are Not Listed in Those Day Sheets," which has been produced at FTC-010907, as well any other issues addressed in his deposition.

22. Lawrence Hudson, former LabMD sales employee

We expect that Ms. Hudson will testify by designation about LabMD's computer networks, including, but not limited to remote access thereto; LabMD's security policies and practices, and sales employee training; the protected health information to which she and other LabMD sales employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel as to which she has knowledge; or any other matters as to which she has

knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

23. Letonya Randolph, Midtown Urology, PC ("Midtown Urology") employee, Midtown Urology designee

We expect that Ms. Randolph will testify by designation about Midtown Urology's relationship and communications with LabMD; computer hardware and software provided to Midtown Urology by LabMD, and the maintenance thereof; the transmission of protected health information between Midtown Urology and LabMD, if any; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which Midtown Urology has knowledge; or any other matters about which Midtown Urology has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. She will also testify about facts relating to the documents produced in response to Complaint Counsel's subpoena *duces tecum* to Midtown Urology in this action, and the admissibility of those documents into evidence in the hearing in this action.

24. Nicotra Harris, former LabMD finance or billing employee

We expect that Ms. Harris will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD billing employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

25. Jeremy Dooley, former LabMD Communications Coordinator and IT employee

We expect that Mr. Dooley will testify by designation about LabMD's computer networks, including, but not limited to, hard ware and soft ware; remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

26. Jerry Maxey, Southeast Urology Network ("S.U.N.") employee, S.U.N. designee

We expect that Mr. Maxey will testify by designation about S.U.N.'s relationship and communications with LabMD; computer hardware and software provided to S.U.N. by LabMD, and the maintenance thereof; the transmission of protected health information between S.U.N. and LabMD; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which S.U.N. has knowledge; or any other matters about which S.U.N. has knowledge that are relevant to

the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief. He will also testify about facts relating to the documents produced in response to Complaint Counsel's subpoena duces tecum to S.U.N. in this action, and the admissibility of those documents into evidence in the hearing in this action.

27. Jennifer Parr, former LabMD IT employee

We expect that Ms. Parr will testify by designation about LabMD's computer networks, including, but not limited to, hardware and software; remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; LabMD's IT related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

28. Karalyn Garrett, former LabMD finance or billing employee

We expect that Ms. Garrett will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

29. Patricia Gilbreth, former LabMD finance or billing employee

We expect that Ms. Gilbreth will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

30. Patrick Howard, former LabMD IT employee

We expect that Mr. Howard will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT-related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he

has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

31. Sandra Brown, former LabMD finance or billing employee

We expect that Ms. Brown will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which she and other LabMD employees had access; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in her deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which she has knowledge; or any other matters about which she has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

32. Brandon Bradley, former LabMD IT employee

We expect that Mr. Bradley will testify by designation about LabMD's computer networks, including, but not limited to, remote access thereto; LabMD's security policies and practices, and employee training; the protected health information to which he and other LabMD employees had access; LabMD's IT-related expenditures; facts relating to the security incidents alleged in Paragraphs 17-21 of the Complaint; any other issues addressed in his deposition; any documents introduced into evidence by Respondent or Complaint Counsel about which he has knowledge; or any other matters about which he has knowledge that are relevant to the allegations of the Complaint, Respondent's affirmative defenses, or the proposed relief.

33. Erick Garcia

We expect that Mr. Garcia will testify by designation about facts relating to the security incident alleged in Paragraph 21 of the Complaint.

34. Adam Fisk

We expect Adam Fisk to testify live and give an expert opinion about the technology behind the program known as LimeWire; the operation of peer to peer networks; the adequacy of LabMD's network security hardware, software policies practices and procedures; and to offer rebuttal testimony with regard to Complaint Counsel's expert Rachel Hill's opinion.

s/ William A. Sherman, II
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Counsel for LabMD, Inc.

CERTIFICATE OF SERVICE

I certify that on April, 9 2014 I caused a copy of the foregoing Respondent's Final Proposed Witness List to be served via courier on:

Alain Sheer, Esq.
Laura Riposo VanDruff, Esq.
Megan Cox, Esq.
Margaret Lassack, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
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Mail Stop NJ-8122
Washington, D.C. 20580

Dated: April 9, 2014

By: /s/ William A. Sherman, II
William A. Sherman, II

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