

ORIGINAL

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 OPPOSITION TO RESPONDENT’S
MOTION FOR LEAVE TO RE-DEPOSE DETECTIVE KARINA JESTES**

The Court should deny the Motion of Respondent, LabMD, Inc. (“LabMD”) for leave to re-depose Detective Karina Jestes. Respondent seeks a second deposition on the very topics upon which it deposed Detective Jestes on December 17, 2013. In support of its Motion for this extraordinary relief, Respondent cites “recently discovered documents” that—it claims—were unavailable at Detective Jestes’s deposition, and suggests—inaccurately—that the unavailability of those documents was due to a late production of documents to Complaint Counsel by the Sacramento Police Department (“SPD”). In reality, however, Respondent’s delay in serving discovery on the SPD was the sole cause of it having not obtained the documents prior to Detective Jestes’s deposition. Furthermore, contrary to Respondent’s assertions, Detective Jestes provided substantive testimony regarding the very topics upon which Respondent seeks to re-depose her. The Court should not reward Respondent’s failure to engage in timely discovery with a second bite at the apple. Doing so would disrupt the Court’s prehearing schedule and prejudice Complaint Counsel in meeting its obligations under the Court’s Scheduling Order, as

the deposition would occur after the March 5, 2014 close of discovery. Accordingly, the Court should deny Respondent's Motion for Leave to Re-depose Detective Jestes.

BACKGROUND

On August 28, 2013, the Commission filed an Administrative Complaint alleging that 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. Among other things, the Complaint alleges that "[i]n October 2012, the Sacramento, California Police Department found more than 35 [LabMD] Day Sheets and a small number of copied checks in the possession of individuals who pleaded no contest to state charges of identity theft." *Id.* ¶ 21. In its September 24 Initial Disclosures, Complaint Counsel identified Detective Karina Jestes of the SPD as a witness who is likely to have discoverable information related to the allegations of the Complaint, the proposed relief, or the defenses of Respondent.

On October 24, 2013, Complaint Counsel issued a subpoena *ad testificandum* to Detective Jestes. Also on October 24, Complaint Counsel issued a subpoena *duces tecum* to the Custodian of Records of the SPD, requesting documents related to LabMD and two individuals who pleaded no contest to identity theft. Subpoena *Duces Tecum* to Custodian of Records of the SPD, attached as Exhibit A, at 13 (Oct. 24, 2013). In three productions, on November 18, 21, and December 6, the SPD produced documents responsive to Complaint Counsel's subpoena. Complaint Counsel timely provided the productions to Respondent on November 18, 25, and December 9, respectively.

Detective Jestes's deposition was scheduled to proceed on the agreed-upon date of December 17, 2013.¹ Six days before the deposition, LabMD served a subpoena *duces tecum* on the Custodian of Records for the SPD. *See* Resp't's Subpoena *Duces Tecum* to Custodian of Records for SPD, attached as Exhibit C (Dec. 11, 2013). The subpoena requests, among other things, "[a]ll documents reflecting communications between you and the Federal Trade Commission." *Id.* at 15. The time, date, and address of the Place of Production were the same time, date, and address as the deposition of Detective Jestes. *Id.* at 4.² No production was made at the deposition, which took place as scheduled on December 17. At the deposition, counsel for LabMD questioned Detective Jestes extensively about her communications with Commission staff. *See, e.g.,* Respondent's Motion for Leave to Re-depose Detective Karina Jestes ("Resp't's Motion"), Ex. A at 60-72. Counsel for LabMD also introduced LabMD's Subpoena *Duces Tecum* and asked Detective Jestes whether she had received a copy, to which she answered no. *See id.* Ex. A at 51.

On December 24, 2013, two months after Complaint Counsel served discovery on the SPD and seven days after Detective Jestes's deposition, LabMD served written discovery on Complaint Counsel, asking Complaint Counsel to "[i]dentify all communications between the

¹ Complaint Counsel informed counsel for LabMD that Detective Jestes was available for deposition on December 17, 2013, and requested that counsel confirm whether they agreed to that date. Letter from VanDruff to Sherman regarding Jestes and Boyle Deps., attached as Exhibit B (Nov. 14, 2013). The letter gave counsel until November 18 to respond, at which point Complaint Counsel would understand Respondent to have agreed. Counsel for Respondent did not reply, and on November 25, Complaint Counsel reissued the subpoena for December 17.

² LabMD improperly demanded production at the address, time, and place of the deposition without Complaint Counsel's agreement. *See id.*; Sept. 25, 2013 Scheduling Order at 6-7, Add'l Prov. 14 (production at time of deposition permissible only if agreed to by all parties involved).

FTC and the Sacramento Police Department regarding the LabMD documents found” at the home of individuals who pleaded no contest to charges of identity theft, and to identify all individuals at the FTC who communicated with the SPD regarding those LabMD documents. *See Resp’t LabMD, Inc.’s First Set of Interrogs.*, attached as Exhibit D, at 10 (Interrogs. 8, 9). LabMD also requested Complaint Counsel produce “[a]ll communications and all documents relating to communications between FTC and the Sacramento Police Department from October 5, 2012 to the present.” *See Resp’t LabMD, Inc.’s First Set of Reqs. for Produc. of Docs.*, attached as Exhibit E, at 12 (Req. 15). Complaint Counsel served its response to the Interrogatories on January 24, 2014, and produced documents responsive to this request for production on February 19. Complaint Counsel has today produced a log of responsive documents that have been withheld on the basis of an applicable privilege or immunity.

On December 31, 2013, the SPD made a production to Complaint Counsel of communications between the SPD and Commission staff. Complaint Counsel timely reproduced the documents to counsel for LabMD on January 3, 2014. On January 30, LabMD produced documents to Complaint Counsel that LabMD received on an unspecified date from the SPD pursuant to its subpoena *duces tecum*. Complaint Counsel and counsel for LabMD regard the SPD’s production to LabMD to be identical to the SPD’s December 31 production to Complaint Counsel, and both productions appear to be responsive to LabMD’s, not Complaint Counsel’s, subpoena.³

³ *See* Email from Sherman to VanDruff regarding Sacramento Production, attached as Exhibit F (Jan. 29, 2014). A close review reveals that the productions are identical in all but three respects: a single email in the SPD production was not included in LabMD’s production (FTC-SAC-001108); a letter to consumers produced twice by the SPD was only produced once by LabMD

ARGUMENT

Depositions in this proceeding are “limited to a single, seven-hour day, unless agreed to by the parties or ordered by the Administrative Law Judge.” Scheduling Order at 6, Add’l Prov. 12. The Court has the power to limit discovery that is “unreasonably cumulative or duplicative,” or where “[t]he party seeking discovery had ample opportunity by discovery in the action to obtain the information sought” Rule 3.31(c)(2)(i)-(ii), 16 C.F.R. § 3.31(c)(2)(i)-(ii). The Court should not grant leave for LabMD to take a second deposition of Detective Jestes because it would be duplicative of the same topics covered in the first deposition, Detective Jestes had sufficient recollection of those topics, and LabMD had myriad opportunities to obtain the “recently disclosed documents” before proceeding with the December 17, 2013 deposition. Allowing the deposition at this late stage would disrupt the Court’s prehearing litigation schedule and prejudice Complaint Counsel in meeting its obligations under the Scheduling Order, including as they relate to expert reports, which are due to be served on March 18, 2014.

I. RE-DEPOSING DETECTIVE JESTES IS UNREASONABLY DUPLICATIVE

Respondent should not be permitted to re-depose Detective Jestes because it deposed her on precisely the same topics extensively—at the first deposition, and she recalled the subjects about which she was asked. *See, e.g.,* Resp’t’s Motion Ex. A at 60-72. Moreover, refreshing the memory of a witness is not a valid justification for retaking her deposition. *See Bonnie & Co.*

(FTC-SAC-001109 – 10, FTC-SAC-001116 – 17, and LABMD-SAC-000004 – 05, respectively); and the SPD’s production to Complaint Counsel included a declaration that records were kept in the regular course of business (LABMD-SAC-001093), referencing a forensic computer examination disc provided to Complaint Counsel at the deposition of Detective Jestes. Complaint Counsel understands the declaration was meant to accompany that disc, and was transmitted with the December 31 production for convenience.

Fashions, Inc. v. Bankers Trust Co., 945 F. Supp. 693, 733 (S.D.N.Y. 1996) (holding that refreshing memory of non-party witness is an insufficient justification, as “plaintiffs intend simply to re-hash old testimony”).⁴ As Respondent concedes in its Motion, counsel for LabMD covered every topic at the December 17, 2013 deposition on which Respondent seeks to re-depose Detective Jestes. *See* Resp’t’s Motion at 3-4. A second deposition would be unreasonably duplicative of the first, and therefore the Court should not grant leave.

Respondent argues that Detective Jestes did not recall facts during her deposition that are important to its defense. But Respondent drastically mischaracterizes Detective Jestes’s testimony in attempting to support its argument. On the contrary, her recollection was good, even in the instances to which Respondent cites:

- Respondent asserts that Detective Jestes was unable to remember “whether the FTC had instructed her to keep documents from LabMD.” Resp’t’s Motion at 3. Rather, she testified in no uncertain terms that she was not so instructed.⁵ Her only lack of recollection was whether Commission attorney Ruth Yodaiken was on the line. *See id.* Ex. A at 65.

⁴ Courts have generally only permitted second depositions on subjects that could not have been covered in the first. *See, e.g., Collins v. Int’l Dairy Queen*, 189 F.R.D. 496, 498 (M.D. Ga. 1999) (re-deposition permitted on new allegations in amended complaint); *Flintkote Co. v. Gen. Accident Assurance Co. of Can.*, 692 F. Supp. 2d 1194, 1199 (N.D. Cal. 2010) (re-depositions permitted where new documents produced were indecipherable on their own and contradicted previous statements made by party, and witnesses instructed not to answer on same topic at first deposition); *Christy v. Pa. Tpk. Comm’n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (re-deposition permitted for newly added defendants, only on topics not covered in first deposition).

⁵ *Id.* Ex. A at 60 (“Q: Did anyone at the FTC communicate with you and instruct you not to return the documents to LabMD? A: I don’t think so, no. . . . Q: So you made the determination not to return LabMD’s documents to LabMD based on the FTC’s investigation of LabMD? A: Yes.”); *id.* Ex. A at 65.

- Respondent asserts that Detective Jestes was unable to remember “whether [the FTC] instructed her not [to] communicate with LabMD.” *Id.* at 3. But she testified clearly that she did not think anyone had.⁶
- Respondent asserts that Detective Jestes was unable to remember “whether there was any discussion regarding the basis for the search warrant which resulted in finding the Day Sheets.” *Id.* at 3. However, Detective Jestes was testifying regarding a different search warrant: a warrant to forensically examine computers seized from the house where LabMD’s day sheets were also found, not “the search warrant which resulted in finding the Day Sheets.” *See id.* Ex. A at 94-96.
- Respondent asserts that Detective Jestes was unable to remember “the discussion about who was responsible for sending letters to the patients of LabMD’s customers as a result of finding the Day Sheets.” *Id.* at 3. In fact, it was her testimony from earlier in the deposition that she could not recall. *Id.* Ex. A at 110. She was unequivocal about her understanding of who was sending notice letters. *Id.*

As its transcript citations demonstrate, Respondent seeks to re-depose Detective Jestes not to refresh her lack of recollection, but because it does not like the answers it received.

II. LABMD HAD AMPLE OPPORTUNITY TO ACQUIRE THE DOCUMENTS PRIOR TO THE DEPOSITION

To the extent that Respondent was prejudiced by not having the “recently discovered documents”—which it was not—any prejudice was a result of its own delay in serving discovery. LabMD failed to take advantage of multiple opportunities to discover the “recently disclosed documents” prior to deposing Detective Jestes. LabMD was informed of Detective Jestes by Complaint Counsel’s Initial Disclosures, and it had over three months from the issuance of the Complaint to subpoena communications with the Commission from the SPD, or to request such communications from Complaint Counsel, prior to the deposition.⁷ LabMD also

⁶ *Id.* Ex. A at 75-76 (“Q: Okay. Did the FTC – anyone at the FTC ever communicate with you to not communicate with LabMD? A: I don’t think so.”).

⁷ Respondent’s assertion that the “recently discovered documents” are the result of Complaint Counsel’s subpoena to the SPD is incorrect: the documents are responses to LabMD’s

had an opportunity to request that Complaint Counsel schedule Detective Jestes's deposition later to allow LabMD to serve discovery. *See* note 1, *supra*. LabMD and its counsel are responsible for failing to prepare for the deposition, and their failure to have done so is not justification for disrupting the Court's prehearing litigation schedule, burdening Complaint Counsel, and allowing LabMD to rehash covered ground.

III. REOPENING DISCOVERY FOR A SECOND DEPOSITION PREJUDICES COMPLAINT COUNSEL

A second deposition of Detective Jestes at this late stage will prejudice Complaint Counsel due to the imminent March 5, 2014 close of discovery and March 18 deadline for expert reports. Respondent waited until the February 19 to file its motion to re-depose Detective Jestes, despite possessing the "recently disclosed documents" since January 3. At this late stage, a second deposition would occur after the March 5 close of discovery. *See* Oct. 22, 2013 Revised Scheduling Order at 1. Depending on when the Court issues its ruling on Respondent's Motion, the deposition may not be able to proceed before March 18, the deadline for Complaint Counsel to provide expert witness reports. *See id.*⁸ Because of the prejudice to Complaint Counsel's case, the disruption to the Court's schedule, and the ample opportunity Respondent had to depose

December 11, 2013 Subpoena *Duces Tecum* to the SPD. *See* note 2 and accompanying text, *supra*. The production by the SPD to which Respondent's Motion relates consists entirely of communications with Commission staff, directly responsive to LabMD's subpoena, which requests all communications with the Commission. *See* Ex. C at 15.

⁸ Regardless of the Court's timing, Complaint Counsel's expert witnesses will not have a meaningful opportunity to review the transcript of Detective Jestes's testimony before finalizing their reports. Complaint Counsel would be precluded from addressing any new information in rebuttal reports. Rule 3.31A(a), 16 C.F.R. § 3.31A(a).

Detective Jestes on these very topics, the Court should not grant Respondent leave to re-depose Detective Jestes at this stage of the proceedings.

CONCLUSION

For the foregoing reasons, the Court should deny Respondent's motion and deny leave for Respondent to re-depose Detective Jestes.

Dated: March 3, 2014

Respectfully submitted,



Alan Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
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Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 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:

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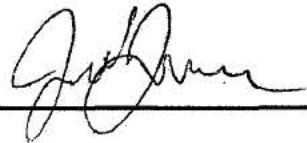
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Counsel for Respondent LabMD, Inc.

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.

March 3, 2014

By:



Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

October 24, 2013

VIA PROCESS SERVER

Custodian of Records
Office of the Court Liaison
Sacramento Police Department
901 G Street
Sacramento, CA 95814

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

To Whom It May Concern:

The Commission recently initiated an adjudicative proceeding against LabMD, Inc. The Commission's Rules of Practice state that "[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary [of the Commission], commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things. . . ." 16 C.F.R. § 3.34(b). This letter is to notify you that Complaint Counsel has issued a subpoena *duces tecum* for certain of Sacramento Police Department's documents. The subpoena and its schedule and exhibits are enclosed.

On August 29, 2013, the Federal Trade Commission's 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.

Any documents you produce to the Commission that are confidential must include the notice "CONFIDENTIAL – FTC Docket No. 9357," in accordance with paragraph 6 of the Protective Order. If you produce confidential documents in electronic format, such as on a CD or other media, you may place the "CONFIDENTIAL – FTC Docket No. 9357" designation on the CD.

I would be pleased to discuss any issues regarding production of documents at your earliest convenience. You may reach me at (202) 326-2282.

Sincerely,

A handwritten signature in black ink that reads "Megan Cox". The signature is written in a cursive, flowing style.

Megan Cox

Enclosure (1)

cc: Michael Pepson (*via email*)
Reed Rubinstein (*via email*)



SUBPOENA DUCES TECUM

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

<p>1. TO</p> <p>Custodian of Records of the Sacramento Police Dept. Office of the Court Liaison 901 G Street Sacramento, CA 95814</p>	<p>2. FROM</p> <p>UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

<p>3. PLACE OF PRODUCTION</p> <p>Matthew Smith Federal Trade Commission 601 New Jersey Avenue, N.W. Room NJ-8100 Washington, D.C. 20001</p>	<p>4. MATERIAL WILL BE PRODUCED TO</p> <p>Matthew Smith</p> <hr/> <p>5. DATE AND TIME OF PRODUCTION</p> <p>November 21, 2013</p>
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6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc., Docket 9357

7. MATERIAL TO BE PRODUCED

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

<p>8. ADMINISTRATIVE LAW JUDGE</p> <p>Chief Judge D. Michael Chappell</p> <p>Federal Trade Commission Washington, D.C. 20580</p>	<p>9. COUNSEL AND PARTY ISSUING SUBPOENA</p> <p>Megan Cox, Complaint Counsel Federal Trade Commission 601 New Jersey Ave, N.W., Room NJ-8100 Washington, DC 20001 (202) 326-2282</p>
--	--

<p>DATE SIGNED</p> <p>October 24, 2013</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
--	--

GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

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

RETURN OF SERVICE

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

in person.

by registered mail.

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

Custodian of Records of the Sacramento Police Dept.
Office of the Court Liaison

901 G Street

Sacramento, CA 95814

by pro cur Aveser
on the person named herein on:

October 25, 2013

(Month, day, and year)

Matthew Smith

(Name of person making service)

Paralegal

(Official title)

location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book or label. "**Document**" shall also include electronically stored information ("ESI"). ESI means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.

6. The terms "**each**," "**any**," and "**all**" shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope.
7. "**Includes**" or "**including**" means "including, but not limited to," so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
8. "**LabMD**" means LabMD, Inc., the named defendant in the above-captioned matter, and its directors, officers, employees and agents.
9. "**Or**" as well as "**and**" shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
10. The term "**Person**" means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.
11. "**Personal Information**" means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a "cookie" or processor serial number.
12. The terms "**Relate**" or "**Relating to**" mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing,

analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.

13. **“Subpoena”** means the Subpoena to Custodian of Records, Sacramento Police Department, including this Schedule and Exhibits, and including the Definitions, Instructions, and Specifications.
14. **“You”** or **“Your”** means the Sacramento Police Department, including Karina Jestes.
15. The use of the singular includes the plural, and the plural includes the singular.
16. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by a document request shall be limited to the period from **June 5, 2007 to present**.
2. **Petitions to Limit or Quash:** Pursuant to Commission Rule of Practice § 3.34(c), any motion to limit or quash this subpoena must be filed within ten days of service thereof.
3. **Protective Order:** On August 29, 2013, the Court entered a Protective Order governing discovery material in this matter. A copy of the protective order is enclosed as Exhibit A, with instructions on the handling of confidential information.
4. **Document Identification:** Documents that may be responsive to more than one specification of this Subpoena need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. If any documents responsive to this Subpoena have been previously supplied to the Commission, you may comply with this Subpoena by identifying the document(s) previously provided and the date of submission. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.
5. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this Subpoena. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided, however, that submission of a copy shall constitute a waiver of any claim as to

the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to Commission staff upon request. Copies of materials shall be produced in color if necessary to interpret them or render them intelligible.

6. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact the Commission counsel named above before sending those materials to discuss ways to protect such information during production. For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number in combination with one or more of the following: date of birth, Social Security number, driver's license number or other state identification number, or a foreign country equivalent, passport number, financial account number, credit card number, or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. **Scope of Search:** These requests relate to documents that are in your possession or under your actual or constructive custody or control, including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, or other agents or consultants, whether or not such documents were received from or disseminated to any other person or entity.
8. **Claims of Privilege:** Pursuant to the Federal Trade Commission's Rule of Practice 3.38A, 16 C.F.R. § 3.38A, if any documents are withheld from production based on a claim of privilege or any similar claim, you shall provide, not later than the date set for production of materials, a schedule that describes the nature of the documents, communications, or tangible things not produced or disclosed in a manner that will enable Complaint Counsel to assess the claim of privilege. The schedule shall state individually for each item withheld: (a) the document control number(s); (b) the full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form); (c) a description of the material withheld (for example, a letter, memorandum, or email), including any attachments; (d) the date the material was created; (e) the date the material was sent to each recipient (if different from the date the material was created); (f) the email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent; (g) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors; (h) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material; (i) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material; (j) the factual basis supporting the claim that the material is protected (for

example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and (k) any other pertinent information necessary to support the assertion of protected status by operation of law. If only part of a responsive document is privileged, all non-privileged portions of the document must be produced.

9. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish the admissibility of documents produced in response to this subpoena. You are asked to execute this Certification and provide it with your response.
10. **Continuing Nature of Requests:** This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by you prior to the close of discovery, which is March 5, 2014.
11. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this Subpoena. We may require the submission of additional documents at a later time. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this litigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise.
12. **Electronic Submission of Documents:** The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, you must confirm with Commission counsel named above that the proposed formats and media types will be acceptable to the Commission. The FTC requests Concordance load-ready electronic productions, including DAT and OPT load files.
 - (1) **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to the FTC as follows:
 - (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links,

directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;

- (b) All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (“OCR”) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (“TIFF”) or as color JPEG images (where color is necessary to interpret the contents); and
 - (c) Each electronic file should be assigned a unique document identifier (“DocID”) or Bates reference.
- (2) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:
- (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (3) For each document electronically submitted to the FTC, you should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) **For electronic mail:** begin Bates or unique document identification number (“DocID”), end Bates or DocID, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DocID of the attachments (“AttachIDs”) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) **For email attachments:** begin Bates or DocID, end Bates or DocID, parent email ID (Bates or DocID), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;

- (c) **For loose electronic documents** (as retrieved directly from network file stores, hard drives, etc.): begin Bates or DocID, end Bates or DocID, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file; and
 - (d) **For imaged hard-copy documents:** begin Bates or DocID, end Bates or DocID, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.
- (4) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact the Commission counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to this Subpoena.
- (5) Submit electronic productions as follows:
- (a) With passwords or other document-level encryption removed or otherwise provided to the FTC;
 - (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible, media;
 - (c) All electronic media shall be scanned for and free of viruses;
 - (d) Data encryption tools may be employed to protect privileged or other personal or private information. The FTC accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by the FTC; and
 - (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

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

- (6) All electronic files and images shall be accompanied by a production transmittal letter, which includes:
- (a) A summary of the number of records and all underlying

images, emails, and associated attachments, native files, and databases in the production; and

- (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that the Commission counsel named above determines prior to submission that the machine-readable form would be in a format that allows the agency to use the computer files). The Commission counsel named above will provide a sample index upon request.

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

13. **Documents No Longer In Existence:** If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of a document retention policy but you have reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
14. **Incomplete Records:** If you are unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by you to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for you to make an estimate, provide an explanation.
15. **Questions:** Any questions you have relating to the scope or meaning of anything in this request or suggestions for possible modifications thereto should be directed to Laura VanDruff, at (202) 326-2999, or Megan Cox, at (202) 326-2282. Documents responsive to the request shall be addressed to the attention of Matthew Smith, Federal Trade Commission, 601 New Jersey Avenue, N.W., Washington, D.C. 20001, and delivered between 8:30 a.m. and 5:00 p.m. on any business day to the Federal Trade Commission.


SPECIFICATIONS

Demand is hereby made for the following documents:

1. All documents related to the investigation of Erick Garcia or Josie Martinez Maldonado.
2. All communications between you and LabMD.
3. All documents related to LabMD.
4. All records of communications you received from individuals who contacted you related to LabMD.

October 24, 2013

By:



Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

Complaint Counsel
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Room NJ-8100
Washington, D.C. 20580
Telephone: (202) 326-2282 (Cox)
Facsimile: (202) 326-3062
Electronic mail: mcox1@ftc.gov

CERTIFICATE OF SERVICE

This is to certify that on October 24, 2013, I served *via* electronic mail delivery a copy of the foregoing document to:

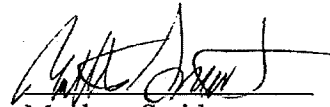
Michael D. Pepson
Regulatory Counsel
Cause of Action
1919 Pennsylvania Avenue, NW, Suite 650
Washington, D.C. 20006
michael.pepson@causeofaction.org

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

Counsel for Respondent LabMD, Inc.

October 24, 2013

By:



Matthew Smith
Federal Trade Commission
Bureau of Consumer Protection

Exhibit B



United States of America
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

Bureau of Consumer Protection
Division of Privacy and Identity Protection

November 14, 2013

VIA EMAIL

William A. Sherman, II
Dinsmore & Shohl LLP
801 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20004

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

Dear Mr. Sherman:

Karina Jestes and John Boyle, third parties to whom Complaint Counsel issued subpoenas on October 24, 2013, have agreed to make themselves available for deposition. Detective Jestes is available on December 17, 2013 in Sacramento, California. Mr. Boyle is available on January 28, 2014 in Denver, Colorado.

Your client, LabMD, Inc., is seeking relief from Complaint Counsel's discovery of certain third parties. Until such relief is granted, however, and so that we may meet our obligations under Judge Chappell's Revised Scheduling Order, we intend to proceed to schedule third parties' depositions.

Pursuant to our obligations under the Commission's Rules of Practice and Paragraph 13 of the Additional Provisions to the Administrative Law Judge's Scheduling Order, by this letter we are seeking to consult with counsel for LabMD regarding scheduling Detective Jestes's deposition for December 17, 2013 and Mr. Boyle's deposition for January 28, 2014. Please confirm your availability for these dates by 5:00 PM on Monday, November 18, 2013. If we do not hear differently from you by then and Judge Chappell does not quash the subpoenas directed to Detective Jestes and Mr. Boyle, we will understand counsel for LabMD, Inc. to have agreed to proceed with Detective Jestes's deposition on December 17, 2013 and Mr. Boyle's deposition on January 28, 2014.

William A. Sherman, II
November 14, 2013
Page 2

For your reference, below is a list of the depositions the parties have scheduled by agreement. We have included Detective Jestes and Mr. Boyle's proposed deposition dates on this list. We will supplement this list as we identify dates for the remaining depositions.

Deponent	Date
Tiversa Holding Corporation	November 21, 2013, 9:00 AM
Jeremy Dooley	December 2, 2013, 9:00 AM
Robert Hyer	December 13, 2013, 9:00 AM
Karina Jestes	December 17, 2013, 9:00 AM
Karalyn Garrett	January 25, 2014, 9:00 AM
John Boyle	January 28, 2014, 9:00 AM

Sincerely,


Laura Riposo VanDruff

cc: Reed D. Rubinstein (*via email*)
Michael Pepson (*via email*)

Exhibit C



December 11, 2013

DELIVERED BY HAND

Custodian of Records
Office of the Court Liaison
Sacramento Police Department
901 G Street
Sacramento, CA 95814

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

Dear Sir or Madam:

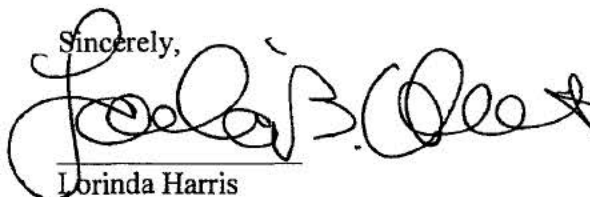
This letter is to notify you that counsel for LabMD, Inc. ("LabMD"), has issued a *subpoena duces tecum* for the Custodian of Records of the Sacramento Police Department, which is enclosed. The Federal Trade Commission's Rules of Practice state that "[c]ounsel for a party may sign and issue a subpoena, on a form provided by the Secretary [of the Federal Trade Commission], commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things...." 16 C.F.R § 3.34(b). Accordingly, LabMD's counsel has issued a subpoena *duces tecum* for certain of Sacramento Police Department's documents. The subpoena schedule and exhibits are enclosed.

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.

Any documents you produce to the Commission that are confidential must include the notice "CONFIDENTIAL – FTC Docket No. 9357," in accordance with paragraph 6 of the Protective Order. If you produce confidential documents in electronic format, such as on a CD, thumb drive, or other media, you may place the "CONFIDENTIAL – FTC Docket No. 9357" designation on the CD, thumb drive, or other media.

I would be pleased to discuss any questions you may have regarding production of documents. You may reach me at (202) 400-2723.

Sincerely,

A handwritten signature in black ink, appearing to read "Lorinda Harris", with a star symbol at the end of the signature.

Lorinda Harris
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Phone: 202.400.2723
Fax: 202.330.5842
lorinda.harris@causeofaction.org

Enclosures:

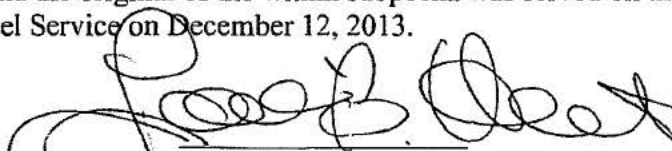
- (1) Subpoena *Duces Tecum*
- (2) LabMD's Counsel's Schedule For Production of Documents Pursuant to Subpoena
- (3) Exhibit A: Protective Order Governing Discovery Material
- (4) Exhibit B: Certification of Records of Regularly-Conducted Activity
- (5) Exhibit C: BCP Production Guide

cc (via email):

Alain Sheer
Laura Riposo VanDruff
Megan Cox
Margaret Lassack
Ryan Mehm

Certificate of Service

I hereby certify that a true and correct copy of the within subpoena (including all supporting documents) was personally served on the Custodian of Records of the Sacramento Police Department on December 11, 2013, and the original of the within subpoena was served on the Custodian of Records via United Parcel Service on December 12, 2013.



Lorinda Harris
Senior Counsel



SUBPOENA DUCES TECUM

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

1. TO
Custodian of Records of the Sacramento Police Dept.
Office of the Court Liaison
901 G Street
Sacramento, CA 95814

2. FROM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

This subpoena requires you to produce and permit inspection and copying of designated books, documents (as defined in Rule 3.34(b)), or tangible things, at the date and time specified in Item 5, and at the request of Counsel listed in Item 9, in the proceeding described in Item 6.

3. PLACE OF PRODUCTION
5770 Freeway Boulevard
~~901 G Street~~
Sacramento, CA ~~95814~~ 95822

4. MATERIAL WILL BE PRODUCED TO
Lorinda B. Harris

5. DATE AND TIME OF PRODUCTION
9:00 a.m., December 17, 2013

6. SUBJECT OF PROCEEDING

In the Matter of LabMD, Inc., Docket 9357

7. MATERIAL TO BE PRODUCED

See attached Schedule and Exhibits, Including Protective Order Governing Discovery Material

8. ADMINISTRATIVE LAW JUDGE

Chief Judge D. Michael Chappell

Federal Trade Commission
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Lorinda B. Harris
Cause of Action
1919 Pennsylvania Ave, NW, Suite 650
Washington, DC 20006
(202) 400-2723
Counsel for Respondent LabMD, Inc.

DATE SIGNED

December 11, 2013

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 9, and upon all other parties prescribed by the Rules of Practice.

TRAVEL EXPENSES

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

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

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

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of)
)
)

LabMD, Inc.,)
a corporation.)
)
)
)
)

DOCKET NO. 9357

**RESPONDENT LABMD, INC.'S SCHEDULE FOR
PRODUCTION OF DOCUMENTS PURSUANT TO SUBPOENA TO
CUSTODIAN OF RECORDS OF SACRAMENTO POLICE DEPARTMENT**

PLEASE TAKE NOTICE, pursuant to LabMD's counsel's attached Subpoena Duces Tecum issued December 11, 2013, under Rules 3.34 of the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.34, that LabMD's counsel requests that the following material be produced to Lorinda Harris, Cause of Action, at 9:00 am at the Sacramento Police Department 5770 Freeport Boulevard, Sacramento, CA 95822.

DEFINITIONS

1. **"All documents"** means each document within your possession, custody, or control, as defined below, that can be located, discovered or obtained by reasonable, diligent efforts, including without limitation all documents possessed by: (a) you, including documents stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or which you have a legal right to bring within your possession by demand.

2. **"All communications"** means each communication, as defined below, that is a document that can be located, discovered, or obtained by reasonable, diligent efforts, including without limitation all communications possessed by: (a) you, including communications stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or that you have a legal right to bring within your possession by demand.

3. The term “**communication**” includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
4. “**Complaint**” means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.
5. The term “**containing**” means containing, describing, or interpreting in whole or in part.
6. “**Document**” means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book or label. “**Document**” shall also include electronically stored information (“**ESI**”). **ESI** means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.
7. The term “**documents sufficient to show**” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
8. The terms “**each**,” “**any**,” and “**all**” shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope

9. **"Includes"** or **"including"** means "including, but not limited to," so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
10. **"LabMD"** means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
11. **"Federal Trade Commission"** means the Federal Trade Commission, and its directors, officers, and employees.
12. **"Or"** as well as **"and"** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
13. The term **"person"** means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.
14. **"Personal information"** means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a "cookie" or processor serial number.
15. Documents that are in the your **"possession, custody, or control"** include, but are not limited to, documents that are in the Commission's constructive possession, custody, or control, as well as documents that are in the possession, custody, or control of Commission's attorney (if not privileged or work product). This means that the documents do not need to be owned, written, or recorded by the Sacramento Police Department to fall within this definition, which should be construed liberally.
16. The terms **"relate"** or **"relating to"** or **"referring or relating to"** mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
17. **"Subpoena"** means the Subpoena to the Custodian of Records of the Sacramento Police Department, including this Schedule and Exhibits, and including the Definitions, Instructions, and Specifications.

18. "You" or "your" means Sacramento Police Department, including the Custodian of Records of the Sacramento Police Department.
19. The use of the singular includes the plural, and the plural includes the singular.
20. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
21. Words in the masculine, feminine, or neuter form shall include each of the other genders.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by a document request shall be limited to the period from June 5, 2007 to present.
2. **Petitions to Limit or Quash:** Pursuant to Commission Rule of Practice § 3.34(c), any motion to limit or quash this subpoena must be filed within ten (10) days of service thereof.
3. **Protective Order:** On August 29, 2013, the Court entered a Protective Order governing discovery material in this matter. A copy of the protective order is enclosed as Exhibit A, with instructions on the handling of confidential information.
4. **Document Identification:** Documents that may be responsive to more than one specification of this Subpoena need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In addition, number by page (or file, for those documents produced in native electronic format) all documents in your submission, preferably with a unique Bates identifier, and indicate the total number of documents in your submission.
5. **Production of Copies:** Unless otherwise stated, legible photocopies (or electronically rendered images or digital copies of native electronic files) may be submitted in lieu of original documents, provided that the originals are retained in their state at the time of receipt of this Subpoena. Further, copies of originals may be submitted in lieu of originals only if they are true, correct, and complete copies of the original documents; provided,

however, that submission of a copy shall constitute a waiver of any claim as to the authenticity of the copy should it be necessary to introduce such copy into evidence in any Commission proceeding or court of law; and provided further that you shall retain the original documents and produce them to LabMD or its counsel upon request. Copies of materials shall be produced in color if necessary to interpret them or render them intelligible.

6. **Sensitive Personally Identifiable Information:** If any material called for by these requests contains sensitive personally identifiable information or sensitive health information of any individual, please contact LabMD's counsel named above before sending those materials to discuss ways to protect such information during production. For purposes of these requests, sensitive personally identifiable information includes: an individual's Social Security number alone; or an individual's name or address or phone number *in combination with* one or more of the following: date of birth, Social Security number, driver's license number or other state identification number, or a foreign country equivalent, passport number, financial account number, credit card number, or debit card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.
7. **Scope of Search:** These requests relate to documents that are in your possession or under your actual or constructive custody or control, including, but not limited to, documents and information in the possession, custody, or control of your attorneys, accountants, directors, officers, employees, or other agents or consultants, whether or not such documents were received from or disseminated to any other person or entity.
8. **Claims of Privilege:** Pursuant to the Federal Trade Commission's Rule of Practice 3.38(a), 16 C.F.R. § 3.38(a), if any documents are withheld from production based on a claim of privilege or any similar claim, you shall provide, not later than the date set for production of materials, a schedule that describes the nature of the documents, communications, or tangible things not produced or disclosed in a manner that will enable LabMD's counsel to assess the claim of privilege. The schedule shall state individually for each item withheld: (a) the document control number(s); (b) the full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form); (c) a description of the material withheld (for example, a letter, memorandum, or email), including any attachments; (d) the date the material was created; (e) the date the material was sent to each recipient (if different from the date the material was created); (f) the email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent; (g) the

names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors; (h) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material; (i) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material; G) the factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and (k) any other pertinent information necessary to support the assertion of protected status by operation of law. If only part of a responsive document is privileged, all non-privileged portions of the document must be produced.

9. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish the admissibility of documents produced in response to this subpoena. You are asked to execute this Certification and provide it with your response.
10. **Continuing Nature of Requests:** This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by you prior to the close of discovery, which is currently scheduled for March 5, 2014.
11. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this Subpoena. We may require the submission of additional documents at a later time. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this litigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise.

Electronic Submission of Documents: The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, you must confirm with LabMD counsel named above that the proposed formats and media types will be acceptable to LabMD. LabMD requests Concordance load-ready electronic productions, including DAT and OPT load files.

12. **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to LabMD as follows:

- (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;

All ESI other than those documents described in (l)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition ("OCR") and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format ("TIFF") or as color JPEG images (where color is necessary to interpret the contents); and

- (b) Each electronic file should be assigned a unique document identifier ("DocID") or Bates reference.

(1) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:

- (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and
- (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and

- (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (2) For each document electronically submitted to LabMD, you should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) For electronic mail: begin Bates or unique document identification number (“DociD”), end Bates or DociD, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DociD of the attachments (“AttachiDs”) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) For email attachments: begin Bates or DociD, end Bates or DociD, parent email ID (Bates or DociD), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.): begin Bates or DociD, end Bates or DociD, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file; and
 - (d) For imaged hard-copy documents: begin Bates or DociD, end Bates or DociD, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.
- (3) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact LabMD’s counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to this Subpoena.
- (4) Submit electronic productions as follows:

- (a) With passwords or other document-level encryption removed or otherwise provided to LabMD;
- (b) As uncompressed electronic volumes on size-appropriate, Windows-compatible media;
- (c) All electronic media shall be scanned for and free of viruses;
- (d) Data encryption tools may be employed to protect privileged or other personal or private information. LabMD accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by LabMD; and
- (e) Please mark the exterior of all packages containing electronic media sent through the U.S. Postal Service or other delivery services as follows:

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

- (5) All electronic files and images shall be accompanied by a production transmittal letter, which includes:
 - (a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and
 - (b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that LabMD's counsel named above determines prior to submission that the machine-readable form would be in a format that allows LabMD to use the computer files). We have included a Bureau of Consumer Protection Production Guide as Exhibit C. This guide provides detailed directions on how to fully comply with this instruction.

13. Documents No Longer In Existence: If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of a document retention policy but you have reason to believe have been

in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.

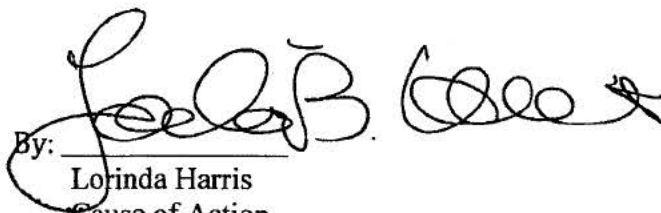
14. **Incomplete Records:** If you are unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by you to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for you to make an estimate, provide an explanation.
15. **Questions:** Any questions you have relating to the scope or meaning of anything in this request or suggestions for possible modifications thereto should be directed to Lorinda Harris, at 202.499.4232.
16. Documents responsive to the request shall be addressed to the attention of Lorinda Harris, Cause of Action, and delivered to her at 9:00 am on November 17, 2013, at the Sacramento Police Department 5770 Freeport Boulevard, Sacramento, CA 95822.

SPECIFICATIONS

Demand is hereby made for the following documents:

1. All documents reflecting communications between you and the Federal Trade Commission.
2. All documents relating to your identity theft investigation protocol, policies and procedures.
3. All documents relating to your personal theft investigation protocol, policies and procedures.

December 11, 2013

By: 

Lorinda Harris
Cause of Action
Suite 650
1919 Pennsylvania Ave, NW
Washington, D.C. 20006
Telephone: 202.400.2723
Fax: 202.330.5842
Email: lorinda.harris@causeofaction.org

CERTIFICATE OF SERVICE

This is to certify that on December 11, 2013, I served via email 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

December 11, 2013

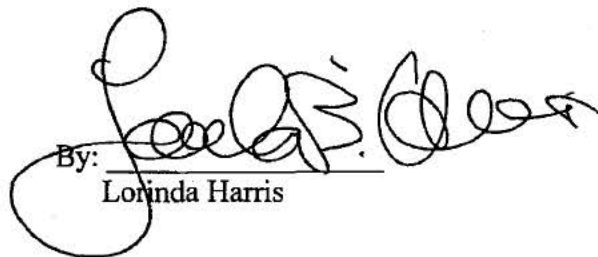
By: 
Lorinda Harris

Exhibit A

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

CERTIFICATION OF RECORDS OF REGULARLY CONDUCTED ACTIVITY
Pursuant to 28 U.S.C. § 1746

1. I, _____, have personal knowledge of the facts set forth below and am competent to testify as follows:
2. I have authority to certify the authenticity of the records produced by the Sacramento Police Department and attached hereto.
3. The documents produced and attached hereto by the Sacramento Police Department are originals or true copies of records of regularly conducted activity that:
 - a. were made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
 - b. were kept in the course of the regularly conducted activity of the Sacramento Police Department; and
 - c. were made by the regularly conducted activity as a regular practice of the Sacramento Police Department.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2013.

Signature

Exhibit C

BCP PRODUCTION GUIDE

Bureau of Consumer Protection Production Guide

An eDiscovery Resource

This guide explains what the Bureau of Consumer Protection (BCP) at the Federal Trade Commission (Commission) generally requires in response to a Civil Investigative Demand (CID) or a subpoena. The suggested formats are based on BCP's experience with many different submissions; follow them to organize your submission and minimize the chance of incompatibility with BCP's processes and systems.

This resource is intended as guidance and does not supersede instructions in any CID or subpoena. Please contact the Commission counsel identified in CID or subpoena to discuss any specific issues you may have with collecting, formatting, or submitting documents.

1. Getting Started: Protocols for All Submissions

Before processing documents in response to a formal request, please note: The following protocols apply to ALL formats submitted to BCP. BCP has additional requirements pertaining to metadata, format, etc., for certain types of documents. See section 2 of these instructions (entitled "Preparing Collections") for details.

a. Concordance Version and Load Files

BCP uses LexisNexis® Concordance® 2008 v 10.05. With the production, you must submit:

- an Opticon image load file (OPT) containing a line for every image file in the production, and
- a Concordance delimited data load file (DAT) containing a line for every document in the production, with Bates references, metadata fields, and native file links where applicable.

b. Virus Scanning

All electronic documents and production media shall be scanned and free of viruses prior to shipping to BCP. BCP will request replacement for any infected media, **which may affect the timing of your compliance with BCP's request.**

c. Extracted Text / OCR

Submit text:

- as document-level text files,
- named for the beginning Bates number, and
- organized into a folder separate from images.

BCP cannot accept Unicode text files and will request replacement files if received.

d. Deduplication

You must have the approval of Commission counsel to globally de-dupe or to apply email threading. You do not need prior approval of Commission counsel to deduplicate within a custodian's document set.

e. Labeling & Numbering Files

For image file names, bates numbers and document identification numbers (Doc IDs), use a consistent number of numerals to prevent issues with image display, using leading zeros where necessary. Do not use a space to separate the prefix from numbers.

Acceptable formats (as long as you are consistent)

- ABC-FTC0000001
- ABCFTC0000001

Unacceptable format

- ABC 0000001

f. Recommended Delimiters

BCP strongly recommends using these delimiters in delimited data load files:

Description	Symbol	ASCII Character
Field Separator	□	20
Quote Character	␣	254
Multi Entry delimiter	Ⓢ	174
<Return> Value in data	~	126

g. Image Files

BCP only accepts image files that are:

- 300 DPI
- single-page Group IV TIFF files
- or color JPEG image files where color is necessary to interpret content

h. Date & Time Format

Submit date and time data in separate fields so Concordance can load it.

2. Preparing Collections

a. Preparing Scanned Documents

Submit TIFF (or color JPEG) images with OCR text

Metadata & Other Information Requirements

Include the following metadata fields and information in the delimited data load file. Alongside each piece of information, BCP recommends a corresponding field name for the delimited data load file.

<u>Document Info / Metadata</u>	<u>Description</u>	<u>Concordance Field Name</u>
Beginning Bates number	The beginning bates number for the document	BEGBATES
Ending Bates number	The ending bates number for the document	ENDBATES
Page Count	The total number of pages in the document	PGCOUNT
Custodian	Mailbox where the email resided	CUSTODIAN

b. Preparing Email & Attachments

Email: Submit TIFF images with extracted text of email

Attachments:

- Submit Microsoft Excel and PowerPoint files in native format with extracted text and metadata.
- Submit Microsoft Access files and other multimedia files in native format with *metadata only*.
- Submit other files and attachments as images with extracted text and metadata.

Metadata & Other Information Requirements

- Preserve the parent/child relationship in email by including a reference to all attachments.
- Produce attachments as separate documents and number them consecutively to the parent email.
- Include the following metadata fields and information in the delimited data load file. Alongside each piece of information, BCP recommends a corresponding field name for the delimited data load file.

Metadata for Emails

<u>Document Info / Metadata</u>	<u>Description</u>	<u>Concordance Field Name</u>
Beginning Bates number	The beginning bates number for the document	BEGBATES
Ending Bates number	The ending bates number for the document	ENDBATES
Page Count	The total number of pages in the document	PGCOUNT

Custodian	Mailbox where the email resided	CUSTODIAN
To	Recipient(s) of the email	RECIPIENT
From	The person who authored the email	FROM
CC	Person(s) copied on the email	CC
BCC	Person(s) blind copied on the email	BCC
Date Sent	Date the email was sent	DATESENT
Time Sent	Time the email was sent	TIMESENT
Subject	Subject line of email	SUBJECT
Date Received	Date the email was received	DATERCVD
Time Received	Time the email was received	TIMERCVD
Child records (attachments)	The beginning bates number(s) of attachments delimited by comma	ATTACHMENTID
Location or "Path"	Location of email in personal folders/Deleted Items/Sent Items	FILEPATH
Message ID	MS Outlook Message ID or similar number in other message systems	MESSAGEID

Metadata for Attachments

<u>Document Info / Metadata</u>	<u>Description</u>	<u>Concordance Field Name</u>
Beginning Bates number	The beginning bates number for the document	BEGBATES
Ending Bates number	The ending bates number for the document	ENDBATES
Page Count	The total number of pages in the document	PGCOUNT
Custodian	The name of the original custodian of the file	CUSTODIAN
Parent Record	Beginning bates number of parent email	PARENTID
Creation Date	The date attachment was saved at the location on the electronic media for the first time	CREATEDATE
Creation Time	The time the attachment was saved at the location on the electronic media for the first time	CREATETIME
Modified Date	The date/time the attachment was last changed, and then saved	MODDATE
Modified Time	The time the attachment was last changed, and then saved	MODTIME
Last Accessed Date	The time the attachment was last opened, scanned, or even "touched" by a user or software activity	LASTACCDATE
Last Accessed Time	The time the attachment was last opened, scanned, or even "touched" by a user or software activity	LASTACCTIME

Size	The amount of space the file takes up on the electronic media. Usually recorded in kilobytes, however may be reported in single bytes	FILESIZE
File Name	The name of the attachment including the extension denoting the application in which the file was created	FILENAME
Native link	Relative path of submitted native files such as Excel spreadsheets	NATIVELINK
Hash	The SHA (Secure Hash Algorithm) or MD5 (Message Digest) hash for the original native file if available	HASH

c. Preparing Native Files

- a. Submit Microsoft Access, Excel, and PowerPoint files in native format with extracted text and metadata.
- b. Submit other files and attachments as images with extracted text and metadata.

Metadata & Other Information Requirements

Include the following metadata fields and information in the delimited data load file. Alongside each piece of information, BCP recommends a corresponding field name for the delimited data load file.

Metadata and other information requirements for native files

Document Info / Metadata	Description	Concordance Field Name
Beginning Bates number	The beginning bates number for the document	BEGBATES
Ending Bates number	The ending bates number for the document	ENDBATES
Page Count	The total number of pages in the document	PGCOUNT
Custodian	The name of the original custodian of the file	CUSTODIAN
Creation Date	The date attachment was saved at the location on the electronic media for the first time	CREATEDATE
Creation Time	The time the attachment was saved at the location on the electronic media for the first time	CREATETIME
Modified Date	The date/time the attachment was last changed, and then saved	MODDATE
Modified Time	The time the attachment was last changed, and then saved	MODTIME
Last Accessed Date	The time the attachment was last opened, scanned, or even "touched" by a user or software activity	LASTACCDATE
Last Accessed Time	The time the attachment was last opened, scanned, or even "touched" by a user or software activity	LASTACCTIME
Size	The amount of space the file takes up on the electronic media. Usually recorded in kilobytes	FILESIZE

File Name	The name of the file including the extension denoting the application in which the file was created	FILENAME
Native link	Relative path of submitted native files	NATIVELINK
Hash	The SHA (Secure Hash Algorithm) or MD5 Hash for the original native file if available	HASH

3. Submitting Your Production

Once you've prepared documents according to this guide, follow these instructions to submit them to BCP.

a. Media BCP Accepts

Submit any of the following:

- For Productions under 10 gigabytes:
 - CD-R CD-ROM optical disks formatted to ISO 9660 specifications
 - DVD-ROM optical disks for Windows-compatible personal computers
 - USB 2.0 flash drives
- For Productions over 10 gigabytes
 - IDE, EIDE and SATA hard disk drives, formatted in Windows-compatible, uncompressed data in a USB 2.0 external enclosure
 - USB 2.0 flash drives

b. Submit a Production Transmittal Letter

For any format, accompany the submission with a letter that includes all of the following:

- volume name,
- Bates ranges and custodians,
- total number of records,
- total number of images or files,
- list of fields in the order in which they are listed in the data files,
- date and time format, and
- confirmation that the number of files on the volume match the load files.

Exhibit D

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

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

**RESPONDENT LABMD, INC.'S FIRST SET OF
INTERROGATORIES TO COMPLAINT COUNSEL
(NUMBERS 1-22)**

Pursuant to the Federal Trade Commission's Rules of Practice, 3.35, 16 C.F.R. § 3.35, and the Court's Scheduling Order dated September 25, 2013, LabMD requests that Complaint Counsel respond to the following interrogatories within thirty (30) days and furnish the requested information to the undersigned counsel for Respondent at the offices of Dinsmore & Shohl, LLP 801 Pennsylvania Avenue, N.W., Suite 610, Washington, D.C. 20004.

DEFINITIONS

1. **"All communications"** means each communication, as defined below, that is a document that can be located, discovered, or obtained by reasonable, diligent efforts, including without limitation all communications possessed by: (a) you, including communications stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or that you have a legal right to bring within your possession by demand.
2. The term **"communication"** includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
3. **"Complaint"** means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.
4. The term **"containing"** means containing, describing, or interpreting in whole or in part.

5. **“Document”** or **“All documents”** means each document within your possession, custody, or control, as defined below, that can be located, discovered or obtained by reasonable, diligent efforts, including without limitation all documents possessed by: (a) you, including documents stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or which you have a legal right to bring within your possession by demand.
6. The term **“documents sufficient to show”** means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.
7. The terms **“each,” “any,”** and **“all”** shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope
8. The term **“Identify”** as the term is used herein shall have the following meaning:
 - A. When identifying a person, give such person's:
 - (1) full name;
 - (2) last known business address and last known residence address;
 - (3) present or last known business affiliation, and position and business affiliation at the time in question.
 - B. When identifying a document:
 - (1) state the author thereof, if any and all parties thereto and, if the case, the name of the persons who signed the documents;
 - (2) state its title, number, code or other identifying data;
 - (3) state the number of pages, if the document contains more than one page;
 - (4) identify any attachments or supplemental items incorporated with the document;

- (5) state the date on which the document was prepared, or, if not known, the approximate date;
 - (6) state the date appearing on the document;
 - (7) state the transaction, act or occurrence to which each document relates and the substance of each document;
 - (8) state the general description of the document;
 - (9) if the document was, but no longer is, in your possession or subject to your control, state what disposition was made of it;
 - (10) state the name of the recipients of the original and every copy known to you;
 - (11) state the subject matter of the document;
 - (12) should you deem any document requested to be identified herein to be privileged, you are requested to list, for each such document, the following information:
 - (a) type of document (e.g., letter, notebook, etc.);
 - (b) the date of the document;
 - (c) identification of the author;
 - (d) identification of the signatory or signatories of the document, if any;
 - (e) the location of the addresses of the document, if any;
 - (f) identification of all persons shown as receiving or otherwise known to have received a copy of the document;
 - (g) the present whereabouts of the document and the name and address of the custodian thereof;
 - (h) a statement of the grounds on which the claim of privilege rests.
- C. When identifying a written or oral communication:

- (1) identify the person who made the communication and the person to whom the communication was directed;
- (2) give the date, time and place of the communication;
- (3) give the contents of the communication in as verbatim a form as possible;
- (4) identify any other persons present when the communication was made.

D. When identifying a publication:

- (1) state the full title of the publication;
- (2) state the name and address of the author;
- (3) state the date of publication;
- (4) state the name of the resource in which the publication is printed;
- (5) state the name and address of the publisher, if any;
- (6) state the volume and page numbers of all relevant references, if any.

9. **"Includes"** or **"including"** means "including, but not limited to," so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
10. **"LabMD"** means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
11. **"Federal Trade Commission"** or **"FTC"** means the Federal Trade Commission, and its directors, officers, and employees.
12. **"Dartmouth College"** means Dartmouth College, its divisions, programs, projects, affiliates, contractors, and its directors, officers, and employees.
13. **"Or"** as well as **"and"** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.

14. The term “**person**” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.
15. “**Personal information**” means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (G) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a “cookie” or processor serial number.
16. Documents that are in your “**possession, custody, or control**” include, but are not limited to, documents that are in your constructive possession, custody, or control, as well as documents that are in the possession, custody, or control of your attorney (if not privileged or work product). This means that the documents do not need to be owned, written, or recorded by you to fall within this definition, which should be construed liberally.
17. The terms “**relate**” or “**relating to**” or “**referring or relating to**” mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.
18. “**Sacramento Police Department**” means the Sacramento Police Department and its officials, employees, and agents.
19. “**Tiversa**” means Tiversa Holding Corporation, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, Board members, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
20. “**You**” or “**your**” means Federal Trade Commission.
21. “**1,718 File**” means the 1,718 page file Tiversa Holding Corporation (“Tiversa”) found on a peer-to-peer network and identified as having been created and stored on a LabMD computer
22. The use of the singular includes the plural, and the plural includes the singular.
23. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

24. Words in the masculine, feminine, or neuter form shall include each of the other genders.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by an Interrogatory shall be limited to the period from **January 1, 2005 to present**.
2. **Interrogatory Responses:** Provide a separate and complete sworn response for each Interrogatory and subpart. Preceding each response, the Interrogatory shall be set forth in full.
3. **Available Information:** These Interrogatories seek answers based on information or knowledge in your possession, custody, or control, including information reasonably available to you and your agents, attorneys or representatives.
4. **Referencing Documents in Interrogatory Responses:** To the extent that an Interrogatory may be answered by referencing a document, it is permissible to attach the document as an exhibit to the answer and refer to the document in the answer. If any such document contains more than one page, you must refer to the page and section where the relevant reference(s) can be found. 16 C.F.R. § 3.35(c).
5. **Interpreting Interrogatories:** If, in answering any of the Interrogatories, you claim any ambiguity in either the Interrogatory or any applicable definition or instruction, identify in your response the language you consider to ambiguous and state the interpretation you are using in responding.
6. **Incomplete Responses:** State if you are unable to answer any of the Interrogatories fully and completely and after exercising due diligence to secure the information necessary to make full and complete responses. Specify the reason(s) for your inability to answer any portion or aspect of such Interrogatory. For each Interrogatory that cannot be answered in full, describe the efforts made to locate information needed for such answer.
7. **Objections:** All objections to any Interrogatory must be raised in your initial response or will be waived. If you object to any Interrogatory or a part of any Interrogatory, state with specificity the precise grounds upon which you rely so that the Administrative Law Judge or other administrative or judicial entity may determine the legal sufficiency of your objection, and provide the most responsive information you are willing to provide without an order compelling response(s).
8. **Claims of Privilege:** If you object to any Interrogatory or any portion of any Interrogatory on the ground that it requests information that is privileged or immune from production based on any similar claim, provide, not later than the date set for responses, a

schedule that describes the nature of the applicable privilege(s) or similar claim(s), including all information required by 16 C.F.R. § 3.38A, in a manner that will enable Complaint Counsel to assess the claim(s).

9. **Continuing Nature of Requests:** These Interrogatories are continuing and require prompt amendment of any prior response if you learn, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. 16 C.F.R. § 3.31(e).
10. **Failure to Respond:** You are hereby advised that Complaint Counsel will move to preclude you from presenting evidence regarding responsive matters you fail to set forth in your answers to these Interrogatories.
11. **Questions:** Any questions you have relating to the scope or meaning of anything in these Interrogatories or suggestions for possible modifications thereto should be directed to William Sherman at (202) 372-9117. Documents produced in conjunction with Interrogatory responses shall be addressed to the attention of William Sherman, Dinsmore & Shohl, LLP, 801 Pennsylvania Avenue N.W., Suite 610, Washington, D.C. 20004, and delivered between 8:30 a.m. and 5:00 p.m. on any business day to that address.

INTERROGATORIES

LabMD hereby requests that the FTC respond to the following interrogatories:

1. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 10 of the Complaint that Respondent “failed to provide reasonable and appropriate security for personal information and its computer networks.”

RESPONSE:

2. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 11 of the Complaint that “Respondent could have corrected its security failures at relatively low cost using readily available security measures.”

RESPONSE:

3. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 12 of the Complaint that “[c]onsumers have no way of independently knowing about respondent’s security failures and could not reasonably avoid possible harms of such failures.”

RESPONSE:

4. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 16 of the Complaint that “since 2005, security professionals and others (including the Commission) have warned that P2P applications present a risk that users will inadvertently share files on P2P networks.”

RESPONSE:

5. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegations in Paragraph 21 of the Complaint that “[a] number of the SSNs in the Day Sheets are being, or have been, used by people with different names, which may indicate that the SSNs have been used by identity thieves”;

RESPONSE:

6. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegations in Paragraph 22 of the Complaint that “respondent’s failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information”: (1) “caused, or is likely to cause, substantial injury to consumers. . .”, and (2) “was, and is, an unfair act or practice.”

RESPONSE:

7. Please set forth with specificity all facts and evidence, including identification of witnesses and documents, that you contend supports your allegation in Paragraph 23 of the Complaint that “the acts and practices of respondent as alleged in this Complaint constitute unfair acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).”

RESPONSE:

8. Identify all communications between the FTC and the Sacramento Police Department regarding the LabMD documents found at 5661 Wilkinson Street, Sacramento, California on October 5, 2012.

RESPONSE:

9. Identify all individuals 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.

RESPONSE:

10. Identify all communications between the FTC and Dartmouth College.

RESPONSE:

11. Identify all communications between the FTC and Tiversa.

RESPONSE:

12. Identify all communications between the FTC and M. Eric Johnson.

RESPONSE:

13. Identify all individuals who participated in and, or worked with M. Eric Johnson and Tiversa gathering, compiling, analyzing and writing the article/study known as “Data Hemorrhages In The Health Care Sector.”

RESPONSE:

14. Identify companies (other than LabMD) whose documents or files Tiversa downloaded from Peer to Peer Networks which contained Personal Identifying Information (“PII”) and/or Protected Health Information (“PHI”) that was provided to FTC.

RESPONSE:

15. If any company listed in your response to Interrogatory 14 was not investigated by the FTC, or a complaint has not been filed against them, please explain why the FTC has not done so.

RESPONSE:

16. Identify the number of consumers harmed as a result of the PII and PHI identified in your response to interrogatory 14, and state the nature of the harm.

RESPONSE:

17. Identify the consumers harmed as a result of respondent's alleged failure to employ reasonable and appropriate measures to prevent unauthorized access to personal information, and state the nature of the harm.

RESPONSE:

18. Identify all companies you have investigated and/or filed complaints against since 2005 for alleged data security failures.

RESPONSE:

19. Identify all publications and documents relating to the data security standards, regulations and guidelines the FTC seeks to enforce against LabMD.

RESPONSE:

20. Identify any and all changes in the data security standards, regulations and guidelines the FTC uses to enforce section 5 of the FTC Act.

RESPONSE:

21. Identify all data security standards, regulations and guidelines the FTC will use to determine whether LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

22. Identify the time frame in which the FTC claims that LabMD's data security practices were not reasonable and appropriate.

RESPONSE:

December 24, 2013

By: 

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
Counsel for Respondent LabMD

2621490v2

CERTIFICATE OF SERVICE

This is to certify that on December 24 2013, I served via email 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

December 24, 2013

By: 
William A. Sherman, II

Exhibit E

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

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

**RESPONDENT LABMD, INC.'S FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS
COMPLAINT COUNSEL
(NUMBERS 1-17)**

Pursuant to the Federal Trade Commission's Rules of Practice, 3.37, 16 C.F.R. § 3.37, and the Court's Scheduling Order dated October 22, 2013, LabMD requests that Complaint Counsel produce the documents and material identified below for inspection and copying within thirty (30) days at the offices of Dinsmore & Shohl, LLP 801 Pennsylvania Avenue, N.W., Suite 610, Washington, D.C. 20004.

DEFINITIONS

1. **"All documents"** means each document within your possession, custody, or control, as defined below, that can be located, discovered or obtained by reasonable, diligent efforts, including without limitation all documents possessed by: (a) you, including documents stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such documents by request or which you have a legal right to bring within your possession by demand.

2. **"All communications"** means each communication, as defined below, that is a document that can be located, discovered, or obtained by reasonable, diligent efforts, including without limitation all communications possessed by: (a) you, including communications stored in any personal electronic mail account, electronic device, or any other location under your control, or the control of your officers, employees, agents, or contractors; (b) your counsel; or (c) any other person or entity from which you can obtain such

documents by request or that you have a legal right to bring within your possession by demand.

3. The term “**communication**” includes, but is not limited to, any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
4. “**Complaint**” means the Complaint issued by the Federal Trade Commission in the above-captioned matter on August 28, 2013.
5. The term “**containing**” means containing, describing, or interpreting in whole or in part.
6. “**Dartmouth College**” means Dartmouth College, its divisions, programs, projects, affiliates, contractors, and its directors, officers, and employees.
7. “**Document**” means the complete original and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any written, typed, printed, transcribed, filmed, punched, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated or made, including, but not limited to, any advertisement, book, pamphlet, periodical, contract, correspondence, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, journal, agenda, minute, code book or label. “**Document**” shall also include electronically stored information (“**ESI**”). **ESI** means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise), regardless of origin or location, of any electronically created or stored information, including, but not limited to, electronic mail, instant messaging, videoconferencing, and other electronic correspondence (whether active, archived, or in a deleted items folder), word processing files, spreadsheets, databases, and sound recordings, whether stored on cards, magnetic or electronic tapes, disks, computer files, computer or other drives, thumb or flash drives, cell phones, Blackberry, PDA, or other storage media, and such technical assistance or instructions as will enable conversion of such ESI into a reasonably usable form.
8. The term “**documents sufficient to show**” means both documents that are necessary and documents that are sufficient to provide the specified information. If summaries, compilations, lists, or synopses are available that provide the information being requested, these may be provided in lieu of the underlying documents.

9. The terms **“each,” “any,”** and **“all”** shall be construed to have the broadest meaning whenever necessary to bring within the scope of any document request all documents that might otherwise be construed to be outside its scope
10. **“Federal Trade Commission”** or **“FTC”** means the Federal Trade Commission, and its directors, officers, and employees.
11. **“Includes”** or **“including”** means **“including, but not limited to,”** so as to avoid excluding any information that might otherwise be construed to be within the scope of any document request.
12. **“LabMD”** means LabMD, Inc., the named respondent in the above-captioned matter, and its directors, officers, and employees.
13. **“Or”** as well as **“and”** shall be construed both conjunctively and disjunctively, as necessary, in order to bring within the scope of any document request all documents that otherwise might be construed to be outside the scope.
14. The term **“person”** means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or other legal entity.
15. **“Personal information”** means individually identifiable information from or about an individual consumer including, but not limited to: (a) first and last name; (b) telephone number; (c) a home or other physical address, including street name and name of city or town; (d) date of birth; (e) Social Security number; (f) medical record number; (g) bank routing, account, and check numbers; (h) credit or debit card information, such as account number; (i) laboratory test result, medical test code, or diagnosis, or clinical history; (j) health insurance company name and policy number; or (k) a persistent identifier, such as a customer number held in a **“cookie”** or processor serial number.
16. Documents that are in your **“possession, custody, or control”** include, but are not limited to, documents that are in your constructive possession, custody, or control, as well as documents that are in the possession, custody, or control of your attorney (if not privileged or work product). This means that the documents do not need to be owned, written, or recorded by you to fall within this definition, which should be construed liberally.
17. The terms **“relate”** or **“relating to”** or **“referring or relating to”** mean discussing, constituting, commenting, containing, concerning, embodying, summarizing, reflecting, explaining, describing, analyzing, identifying, stating, referring to, dealing with, or in any way pertaining to, in whole or in part.

18. **"Sacramento Police Department"** means the Sacramento Police Department and its officials, employees, and agents.
19. **"Tiversa"** means Tiversa Holding Corporation, its wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, Board members, officers, employees, agents, consultants, attorneys, and other persons working for or on behalf of the foregoing.
20. **"You"** or **"your"** means Federal Trade Commission.
21. **"1,718 File"** means the 1,718 page file Tiversa Holding Corporation ("Tiversa") found on a peer-to-peer network and identified as having been created and stored on a LabMD computer
22. The use of the singular includes the plural, and the plural includes the singular.
23. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.
24. Words in the masculine, feminine, or neuter form shall include each of the other genders.

INSTRUCTIONS

1. **Applicable Time Period:** Unless otherwise specified, the time period covered by a document request shall be limited to the period from January 1, 2005 to present.
2. **Objections:** Pursuant to Commission Rule of Practice § 3.37(b), any objection and reason therefore must be filed within thirty (30) days of service thereof.
3. **Protective Order:** On August 29, 2013, the Court entered a Protective Order governing discovery material in this matter. A copy of the protective order is enclosed as Exhibit A, with instructions on the handling of confidential information.
4. **Document Identification:** Documents that may be responsive to more than one specification of this Request for Production of Documents need not be submitted more than once; however, your response should indicate, for each document submitted, each specification to which the document is responsive. Documents should be produced in the order in which they appear in your files or as electronically stored and without being manipulated or otherwise rearranged; if documents are removed from their original folders, binders, covers, containers, or electronic source in order to be produced, then the documents shall be identified in a manner so as to clearly specify the folder, binder, cover, container, or electronic media or file paths from which such documents came. In

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

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

communications, or tangible things not produced or disclosed in a manner that will enable LabMD's counsel to assess the claim of privilege. The schedule shall state individually for each item withheld: (a) the document control number(s); (b) the full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form); (c) a description of the material withheld (for example, a letter, memorandum, or email), including any attachments; (d) the date the material was created; (e) the date the material was sent to each recipient (if different from the date the material was created); (f) the email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent; (g) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all authors; (h) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material; (i) the names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material; (j) the factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and (k) any other pertinent information necessary to support the assertion of protected status by operation of law. If only part of a responsive document is privileged, all non-privileged portions of the document must be produced.

9. **Certification of Records of Regularly Conducted Activity:** Attached as Exhibit B is a Certification of Records of Regularly Conducted Activity, which may reduce the need to subpoena you to testify at future proceedings in order to establish the admissibility of documents produced in response to this Request for Production of Documents. You are asked to execute this Certification and provide it with your response.
10. **Continuing Nature of Requests:** This request for documents shall be deemed continuing in nature so as to require production of all documents responsive to any specification included in this request produced or obtained by you prior to the close of discovery, which is currently scheduled for March 5, 2014.
11. **Document Retention:** You shall retain all documentary materials used in the preparation of responses to the specifications of this Request for Production of Documents. We may require the submission of additional documents at a later time. Accordingly, you should suspend any routine procedures for document destruction and take other measures to prevent the destruction of documents that are in any way relevant to this litigation during its pendency, irrespective of whether you believe such documents are protected from discovery by privilege or otherwise.

Electronic Submission of Documents: The following guidelines refer to the production of any Electronically Stored Information (“ESI”) or digitally imaged hard copy documents. Before submitting any electronic production, you must confirm with LabMD counsel named above that the proposed formats and media types will be acceptable to LabMD. LabMD requests Concordance load-ready electronic productions, including DAT and OPT load files.

12. **Electronically Stored Information:** Documents created, utilized, or maintained in electronic format in the ordinary course of business should be delivered to LabMD as follows:

- (a) Spreadsheet and presentation programs, including but not limited to Microsoft Access, SQL, and other databases, as well as Microsoft Excel and PowerPoint files, must be produced in native format with extracted text and metadata. Data compilations in Excel spreadsheets, or in delimited text formats, must contain all underlying data un-redacted with all underlying formulas and algorithms intact. All database productions (including structured data document systems) must include a database schema that defines the tables, fields, relationships, views, indexes, packages, procedures, functions, queues, triggers, types, sequences, materialized views, synonyms, database links, directories, Java, XML schemas, and other elements, including the use of any report writers and custom user data interfaces;

All ESI other than those documents described in (1)(a) above must be provided in native electronic format with extracted text or Optical Character Recognition (“OCR”) and all related metadata, and with corresponding image renderings as converted to Group IV, 300 DPI, single-page Tagged Image File Format (“TIFF”) or as color JPEG images (where color is necessary to interpret the contents); and

- (b) Each electronic file should be assigned a unique document identifier (“DocID”) or Bates reference.

(1) **Hard Copy Documents:** Documents stored in hard copy in the ordinary course of business should be submitted in an electronic format when at all possible. These documents should be true, correct, and complete copies of the original documents as converted to TIFF (or color JPEG) images with corresponding document-level OCR text. Such a production is subject to the following requirements:

- (a) Each page shall be endorsed with a document identification number (which can be a Bates number or a document control number); and
 - (b) Logical document determination should be clearly rendered in the accompanying load file and should correspond to that of the original document; and
 - (c) Documents shall be produced in color where necessary to interpret them or render them intelligible.
- (2) For each document electronically submitted to LabMD, you should include the following metadata fields in a standard ASCII delimited Concordance DAT file:
- (a) For electronic mail: begin Bates or unique document identification number (“DociD”), end Bates or DociD, mail folder path (location of email in personal folders, subfolders, deleted or sent items), custodian, from, to, cc, bcc, subject, date and time sent, date and time received, and complete attachment identification, including the Bates or DociD of the attachments (“AttachiDs”) delimited by a semicolon, MD5 or SHA Hash value, and link to native file;
 - (b) For email attachments: begin Bates or DociD, end Bates or DociD, parent email ID (Bates or DociD), page count, custodian, source location/file path, file name, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file;
 - (c) For loose electronic documents (as retrieved directly from network file stores, hard drives, etc.): begin Bates or DociD, end Bates or DociD, page count, custodian, source media, file path, filename, file extension, file size, author, date and time created, date and time modified, date and time printed, MD5 or SHA Hash value, and link to native file; and
 - (d) For imaged hard-copy documents: begin Bates or DociD, end Bates or DociD, page count, source, and custodian; and where applicable, file folder name, binder name, attachment range, or other such references, as necessary to understand the context of the document as maintained in the ordinary course of business.

(3) If you intend to utilize any de-duplication or email threading software or services when collecting or reviewing information that is stored in your computer systems or electronic storage media, or if your computer systems contain or utilize such software, you must contact LabMD's counsel named above to determine whether and in what manner you may use such software or services when producing materials in response to this Request for Production of Documents.

(4) Submit electronic productions as follows:

(a) With passwords or other document-level encryption removed or otherwise provided to LabMD;

(b) As uncompressed electronic volumes on size-appropriate, Windows-compatible media;

(c) All electronic media shall be scanned for and free of viruses;

(d) Data encryption tools may be employed to protect privileged or other personal or private information. LabMD accepts TrueCrypt, PGP, and SecureZip encrypted media. The passwords should be provided in advance of delivery, under separate cover. Alternate means of encryption should be discussed and approved by LabMD; and

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

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

(5) All electronic files and images shall be accompanied by a production transmittal letter, which includes:

(a) A summary of the number of records and all underlying images, emails, and associated attachments, native files, and databases in the production; and

(b) An index that identifies the corresponding consecutive document identification number(s) used to identify each person's documents and, if submitted in paper form, the box number containing such documents. If the index exists as a computer file(s), provide the index both as a printed hard copy and in machine-readable form (provided that LabMD's counsel

named above determines prior to submission that the machine-readable form would be in a format that allows LabMD to use the computer files). We have included a Bureau of Consumer Protection Production Guide as Exhibit C. This guide provides detailed directions on how to fully comply with this instruction.

13. **Documents No Longer In Existence:** If documents responsive to a particular specification no longer exist for reasons other than the ordinary course of business or the implementation of your document retention policy but you have reason to believe have been in existence, state the circumstances under which they were lost or destroyed, describe the documents to the fullest extent possible, state the specification(s) to which they are responsive, and identify Persons having knowledge of the content of such documents.
14. **Incomplete Records:** If you are unable to answer any question fully, supply such information as is available. Explain why such answer is incomplete, the efforts made by you to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation "est." If there is no reasonable way for you to make an estimate, provide an explanation.
15. **Questions:** Any questions you have relating to the scope or meaning of anything in this request or suggestions for possible modifications thereto should be directed to William A. Sherman, II at 202.372.9100.
16. Documents responsive to the request shall be addressed to the attention of William A. Sherman, II, Dinsmore & Shohl LLP, 801 Pennsylvania Ave., NW, Suite 610, Washington, DC 20004, and delivered between 8:30 a.m. and 5:00 p.m. on any business day.

REQUESTS

Please produce the following:

1. All documents referring or relating to the 1,718 File.
2. All communications between Dartmouth College and FTC.
3. All communications between M. Eric Johnson and FTC.
4. All communications between Tiversa and FTC.
5. All communications between FTC and any third person not employed by FTC referring or relating to LabMD or the 1,718 File.
6. All communications between FTC and any federal Government agency, including the U.S. Department of Homeland Security, concerning LabMD generally and/or the 1,718 File specifically.
7. All communications between FTC employees referring or relating to LabMD or the 1,718 File that is not protected as attorney work product, including communications between the FTC and the FTC's Office of Public Affairs (including communications between the FTC and the Office of Public Affairs's current and former employees).
8. All documents sufficient to show what data-security standards are currently used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act.
9. All documents sufficient to show what changes occurred in the data-security standards used by FTC to enforce the law under Section 5 of the Federal Trade Commission Act from 2005 to the present and the dates on which these standards changed.
10. All documents sufficient to show the standards or criteria the FTC used in the past and is currently using to determine whether an entity's data-security practices violate Section 5 of the Federal Trade Commission Act from 2005 to the present.
11. All documents provided to the FTC pursuant to any Civil Investigation Demand regarding its investigation of LabMD.
12. All documents identifying LabMD and other companies whose documents or files Tiversa downloaded from Peer to Peer Networks which contained Personal Identifying Information and or Protected Health Information that were provided to FTC.
13. All documents identifying consumers that were harmed, or that are substantially likely to be harmed, as result of the claims alleged against LabMD in the Complaint.

14. All documents that are utilized by FTC to determine whether to pursue an investigation or complaint against an entity or individual, including but not limited to evaluation standards and scoring systems.
15. All communications and all documents relating to communications between FTC and the Sacramento Police Department from October 5, 2012 to the present.
16. All communications—including letters—between FTC and the Persons identified in the documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.
17. All documents relating to communications between the Bureau of Competition and the Persons identified in documents discovered by the Sacramento Police Department at 5661 Wilkinson Street, Sacramento, CA, on October 5, 2012; Bates-Labeled by the FTC in the present matter as FTC-SAC-000233 through 000272, FTC-SAC-000273 through 000282, and FTC-SAC-000001 through 000044.

December 24, 2013

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

CERTIFICATE OF SERVICE

This is to certify that on December 24 2013, I served via email 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

December 24, 2013

By: 
William A. Sherman, II

Exhibit F

VanDruff, Laura Riposo

From: Sherman, William <william.sherman@dinsmore.com>
Sent: Wednesday, January 29, 2014 3:06 PM
To: VanDruff, Laura Riposo
Cc: Neal, Chuck; Harris, Sunni; Lorinda Harris
Subject: RE: FTC Docket No. 9357 -- Complaint Counsel's First Production of Documents

Laura,

We recently received documents from the Sacramento Police department pursuant to a subpoena we served upon them. We are in the process of bates stamping those documents now and while we believe they are an exact duplicate of the documents they produced to you please provide us with an Accellion link so that we may provide the documents to you. Thank you.

William

William A. Sherman, II
Partner

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

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

From: VanDruff, Laura Riposo [<mailto:lvandruff@ftc.gov>]
Sent: Tuesday, January 28, 2014 11:20 AM
To: Sherman, William; Neal, Chuck
Subject: RE: FTC Docket No. 9357 -- Complaint Counsel's First Production of Documents

Thank you for your message, William.

The encryption key for Complaint Counsel's first production of documents, which was delivered to your office yesterday, is dMG#8f23>Lx .

Best regards,

Laura Riposo VanDruff

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

From: Sherman, William [<mailto:william.sherman@dinsmore.com>]
Sent: Tuesday, January 28, 2014 11:16 AM
To: VanDruff, Laura Riposo; Neal, Chuck
Subject: Re: FTC Docket No. 9357 -- Complaint Counsel's First Production of Documents

Laura

Please send the encryption key referenced in your letter. Thank you William Sent from my iPhone

> On Jan 27, 2014, at 1:35 PM, "VanDruff, Laura Riposo" <lvandruff@ftc.gov> wrote:

>

> Good afternoon, William.

>

> Attached is a letter that relates to Complaint Counsel's first production of documents.

>

> I understand that the second page of this letter was omitted inadvertently from the package that is being couriered to your office. Nonetheless, Ms. Harris and Ms. Burrows are copied on this email.

>

> Best regards,

>

> Laura

>

>

> -----

> Laura Riposo VanDruff

> Federal Trade Commission

> Division of Privacy and Identity Protection

> 600 Pennsylvania Avenue, N.W., NJ-8100 Washington, DC 20580

> 202.326.2999 (direct)

> 202.326.3062 (facsimile)

> lvandruff@ftc.gov<<mailto:lvandruff@ftc.gov>>

>

> <2014.01.27 VanDruff Letter to Sherman Enclosing First Production of

> Documents.pdf>

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