

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



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

PUBLIC
Docket No. 9337

ORIGINAL

**RESPONDENT LABMD, INC.'s OPPOSITION TO ROBERT BOBACK'S
EMERGENCY MOTION TO QUASH OR LIMIT SUBPOENA AD TESTIFICANDUM**

The subpoena *ad testificandum* served upon Robert Boback by Respondent LabMD, Inc. (LabMD) to appear as a fact witness in the administrative trial in the above-captioned matter was properly issued and served under 16 C.F.R. § 3.34(a) and should not be quashed. As established below, Mr. Boback's testimony is directly relevant to matters that are in dispute. Because Mr. Boback's testimony is relevant to the proceedings, and he has not met his heavy burden of establishing that compliance with the subpoena will impose the sort of unreasonable and substantial degree of burden, inconvenience, and cost on him that would justify relief, the Court should deny Mr. Boback's Motion and order him to appear at trial.¹

In light of the May 20, 2014, hearing date and the straightforward yet time-sensitive nature of the issues presented by Mr. Boback's "Emergency" motion, LabMD respectfully requests that the Court issue a ruling on this motion upon an expedited basis.

BACKGROUND

Mr. Boback is the CEO of Tiversa, the company that obtained LabMD's 1,718 file without LabMD's knowledge or permission using Tiversa's patented technology. Tiversa then

¹ Based upon the Court's ruling at the final pretrial hearing, should the Court deny the motion to Quash, Mr. Boback will not be required to testify before May 27, 2014.

provided it to its research partner Dartmouth College and Professor Eric Johnson. *See* Respondent LabMD Inc.'s Pre-Trial Brief at 3-5 & n.4. Then-Commissioner Thomas Rosch cautioned that, to "avoid even the appearance of bias or impropriety," the FTC should not rely in any way on the 1,718 file that Tiversa obtained. *See id.* at 5 n.4.

Mr. Boback was deposed by both LabMD and Complaint Counsel on November 21, 2014; his deposition was literally the first to be taken after the FTC issued its complaint. At that time, Tiversa had yet to produce to LabMD documents responsive to LabMD's subpoena *duces tecum*. Exhibit 1 (Boback Deposition Transcript) at 163:13-15 ("Tiversa has not [yet] produced documents in response to the subpoena *duces tecum* issued by LabMD...."). Likewise, LabMD had yet to depose former Tiversa employee Chris Gormley. Exhibit 2 (Transcript of March 31, 2014, deposition of Chris Gormley). LabMD also neither received documents from then-Dartmouth Professor Eric Johnson—a Tiversa collaborator—nor had an opportunity to depose Professor Johnson. After Mr. Boback was deposed, extensive additional discovery, including multiple other depositions has been undertaken.

Mr. Boback's deposition testimony is critical to LabMD's defense and, indeed, Complaint Counsel's case, as demonstrated by Complaint Counsel's pretrial brief and expert reports, all of which rely heavily on his testimony. *See, e.g.*, Exhibit 3 (excerpt from Kam report); Exhibit 4 (excerpt from Hill report citing Boback's deposition for proposition that LabMD's 1,718 file was found in four places, *i.e.*, California, Arizona, Costa Rica, and the United Kingdom); Complaint Counsel's Pretrial Brief at 11 & n.48, 12 & n.51, 45 & n.130, 46 & nn.131-135, 49 & nn.137-48; Exhibit 2 to Complaint Counsel's Pretrial Brief at 10, ¶ 28 (Complaint Counsel's description of Mr. Boback's role in this case). In fact, Mr. Boback could be described as the key witness.

Mr. Boback acknowledges that he was served with LabMD's subpoena, attached hereto as Exhibit 5, on May 2, 2014, which provided him with "roughly 20-days" to plan his schedule accordingly. Robert Boback's Emergency Motion to Quash or Limit Subpoena Ad Testificandum of LabMD, Inc. (the "Boback Motion").² Yet, Mr. Boback waited until May 12, 2014 to file an "Emergency Motion" in an attempt to avoid travelling from Pittsburgh, Pennsylvania to Washington, D.C. to testify at an evidentiary hearing for about one day at no cost.

As Mr. Boback readily acknowledges in his moving papers, Mr. Boback is available and willing to testify via video conference on May 23. Boback Motion at 1-2 & Ex. B (Affidavit of Robert Boback) ("[I] am available to provide testimony via video conference in this matter on May 23, 2014."), but he argues that requiring him to either take a one-hour flight, or make a several-hour drive, from Pittsburgh to Washington, D.C., to testify in-person before this Court is "harassment." See Boback Motion at 2-3. Notwithstanding his contentions that, under the Commission Rules, LabMD is obligated to reimburse Mr. Boback for the reasonable costs of his travel and attendance, so testifying "live" would cost him nothing. In support of his argument, Mr. Boback's affidavit states that he has "high level meetings" in New York between May 19-22 and unspecified meetings with customers in Pittsburgh the following week. Boback Aff. ¶ 3. Mr. Boback does not provide the dates or times of those meetings, nor does he explain why the meetings cannot be rescheduled. See *id.* Finally, Mr. Boback alleges that he "need[s] to spend time in Pittsburgh meeting with [[his] management team and coordinating business issues that

² The Commission Rules contemplate circumstances where a subpoena for testimony can be issued and enforced on *less* than 10 days' notice. See 16 C.F.R. § 3.34(c) ("Any motion by the subject of a subpoena to limit or quash the subpoena shall be filed *within the earlier* of 10 days after service thereof *or the time for compliance therewith.*" (emphasis added)).

result from [his] meetings,” *id.*, without elaborating when or why.³ For these reasons, however, Mr. Boback argues that LabMD’s subpoena should be quashed.

LabMD has always been willing to accommodate Mr. Boback’s schedule and has no objection to Mr. Boback appearing before the Court the week of May 27-30 or the week after that, if necessary.

ARGUMENT

I. Mr. Boback Cannot Meet His Burden of Showing the Subpoena Is Unreasonable.

Mr. Boback’s testimony is relevant and material to LabMD’s case, and his motion to quash fails to show that LabMD’s subpoena is unreasonable or otherwise improper. A party seeking to quash a subpoena bears the heavy burden to show the request is unreasonable. *In re OSF Healthcare Sys.*, 2012 FTC LEXIS 31, *3-4 (F.T.C. Feb. 14, 2012). That burden “‘is not easily met where . . . [the] inquiry is pursuant to a lawful purpose and the request[] . . . is relevant to that purpose.’” *Id.* at *4 (citation omitted). Further, “[e]ven where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse [complying with a subpoena] that appears generally relevant to the issues in the proceeding.” *In re Polypore Int’l, Inc.*, 2009 FTC LEXIS 41, at *9-10 (Jan. 15, 2009) (citing *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976)).

Here, Mr. Boback cannot demonstrate that compliance with LabMD’s subpoena will impose a material degree of burden, inconvenience, and cost, let alone a substantial burden.⁴ *Cf.*

³ Whether Complaint Counsel consents to Mr. Boback’s preference for testifying via videoconference is irrelevant to LabMD’s right to examine Mr. Boback in the presence of the trier of fact, who can then observe Mr. Boback’s demeanor and credibility and assess the veracity of his testimony in that light.

id. Mr. Boback has not shown that travelling from Pittsburgh to Washington, D.C., for one day at no cost imposes the type of severe hardship that would warrant relief and thus he cannot meet the heavy burden of establishing that his subpoena should be quashed.

Conversely, Mr. Boback's testimony is not only "generally relevant to the issues in the proceeding," *see id.*, but is highly relevant to this proceeding. Specifically, Mr. Boback has unique firsthand personal knowledge of the facts underlying how LabMD's 1,718 file came into the possession of Tiversa, Inc., Professor Johnson, and the FTC, as well as the extent to which the 1,718 file was "available" on Limewire, which, *inter alia*, is highly relevant to the question of whether LabMD's PHI data-security practices "caused or were likely to cause substantial injury to consumers" as required by 15 U.S.C. § 45(n). Here, both LabMD and Complaint Counsel must recognize the importance of Mr. Boback's testimony to these proceedings.

II. The Law Does Not Support Mr. Boback's Request.

Notwithstanding the above, the Boback Motion cites 16 C.F.R. § 3.31(c)(2)(i) in support of Mr. Boback's "Request." Boback Motion at 3. That Rule, "General Discovery Provisions," is irrelevant to LabMD's right to examine witnesses at trial in the presence of the Court.⁵ Even if it was not, as noted above: (1) Mr. Boback's testimony is neither cumulative nor duplicative nor obtainable from a more convenient source (or any source, for that matter); (2) LabMD had only a few hours at the outset of discovery to question Mr. Boback; and (3) the "burden" of travelling from Pittsburgh to Washington, D.C., for one day does not outweigh the benefit of in-person

⁴ In fact, under the Commission's Rules, Mr. Boback will not incur *any* costs in connection with this matter, as LabMD is required to reimburse him for the costs of attendance and travel.

⁵ Commission Rule 3.41(c), 16 C.F.R. § 3.41(c), provides that LabMD "shall have the right to . . . cross-examin[e] [witnesses], present[] evidence, . . . and all other rights essential to a fair hearing." *See also* Fed. R. Civ. P. 43(a) (providing the right to take witness testimony in open court).

testimony from a critical fact witness, where Mr. Boback will be reimbursed the reasonable costs of his attendance and travel.⁶

Although Mr. Boback's motion to quash suggests that he should not have to testify "live" because he already has been deposed, Boback Mot. at 3, the Commission's Rules and case law are clear that witnesses may need to testify more than just once.⁷ *See, e.g.*, Rule 3.33(b), 16 C.F.R. § 3.33(b). Rule 3.34 does not qualify LabMD's right to subpoena witnesses to testify at the evidentiary hearing. Rather, Commission Rule 3.34(a), 16 C.F.R. § 3.34(a), provides that "[c]ounsel for a party may sign and issue a subpoena . . . requiring a person to . . . attend and give testimony at an adjudicative hearing."⁸

Discovery depositions are meant to serve as a discovery tool to better understand a witness's involvement in and knowledge of the case and to disclose other evidence which may be discoverable. They are not meant to serve as a substitute for live trial testimony.⁹

First, on November 21, 2014, Mr. Boback was literally the first person to be deposed during the Part 3 adjudicative phase. Here, given the extensive discovery that has followed Mr. Boback's testimony, LabMD fully expects to examine Mr. Boback regarding matters that have only come to light *after* his deposition, which LabMD could not examine him about then.

⁶ Particularly given that Mr. Boback's deposition was not videotaped, an unpublished district court order applying the Federal Rules of Civil Procedure distinguishes facts and emphasizes that witness's "deposition was videotaped" is facially irrelevant. *See* Boback Motion at 4.

⁷ In fact, under Commission Rules, it is permissible to depose a witness twice in the same matter. *See In re Polypore Int'l*, 2008 FTC LEXIS 155, *9-10 (F.T.C. Nov. 14, 2008).

⁸ Rule 3.34 governs subpoenas issued for both discovery depositions and adjudicative hearings.

⁹ Further, Additional Provision 12 of the Court's Scheduling Order generally limits each deposition to a "single, seven-hour day."

Second, the law supports LabMD's reasoning for wanting "him there live."¹⁰ Cf. Boback Motion at 4. Unless Mr. Boback is required to testify at the evidentiary hearing, this Court will have *no* opportunity to observe Mr. Boback's demeanor and make a fully informed determination as to his credibility as a witness and the veracity of his testimony. See *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1070-71 (11th Cir. 2005) ("The Supreme Court has noted the importance of an examiner's determination of credibility," emphasizing importance of "experienced examiner who has observed the witnesses" to fact-finding process.); see also *Rodriguez del Carmen v. Gonzales*, 441 F.3d 41, 43 (1st Cir. 2006) ("Matters of witness credibility and demeanor are peculiarly for the factfinder."). Because factfinders such as this Court "ma[k]e credibility findings based upon . . . [the Court's] observations of the witnesses' demeanor and the testimony given at trial," *Schering-Plough*, 402 F.3d at 1070, deposition transcripts simply cannot substitute for "live" testimony.

Accordingly, we respectfully request that the Court order Mr. Boback to appear before the trier of fact, as envisioned by the Court's Rules.

III. LabMD Is Flexible And Willing To Accommodate Mr. Boback's Schedule.

In his motion, Mr. Boback argues that his schedule does not permit him to testify. See Johnson Mot. to Quash ¶¶ 5-9. Even though it has no duty to do so, LabMD has, and is making, every effort to accommodate Mr. Boback's schedule. In LabMD's May 2, 2014, letter accompanying the subpoena, LabMD informed Mr. Boback that "the date and time on the Subpoena are placeholders" and LabMD is "available to coordinate . . . the actual date and time

¹⁰ Mr. Boback's claim that LabMD's alternate proposal "highlights the absurdity of LabMD's position," Boback Motion at 4 n.1, is belied by Commission Rule 3.41(b)(1), which specifically allows the ALJ to "order hearings at more than one place." 16 C.F.R. § 3.41(b)(1).

[Mr. Boback] will be needed.” Exhibit 1. LabMD does not object to Mr. Boback appearing before the Court on the date most convenient with his schedule.

CONCLUSION

For the foregoing reasons, LabMD respectfully requests that the Court deny Mr. Boback’s motion to quash the subpoena *ad testificandum*. In the alternative, LabMD respectfully requests that the Court either order that the hearing be held in Pittsburgh on May 23, 2014, pursuant to 16 C.F.R. § 3.41(b)(1) to allow Mr. Boback to testify in-person before the Court there.

/s/ William A. Sherman, II
William A. Sherman, II, Esq.
Reed D. Rubinstein, Esq.
Sunni R. Harris, Esq.
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Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

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

I further certify that I delivered via electronic mail and first-class mail a copy of the foregoing document to:

John P. Feldman
Reed Smith LLP
1301 K St., NW
Suite 1100—East Tower
Washington, DC 20005

Jarrod D. Shaw
Lucas Liben
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222

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

CERTIFICATE OF ELECTRONIC FILING

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

Dated: May 15, 2014

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

EXHIBIT 1

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of:

Lab MD, Inc., a corporation, Docket No. 9357
Respondent.

Thursday, November 21, 2013

REED SMITH, LLP
225 Fifth Avenue
Suite 1200
Pittsburgh, PA 15222

The above-entitled matter came on for deposition,
pursuant to notice at 9:09 a.m.

- - - -

C O N F I D E N T I A L
Pursuant to Protective Order

- - - -

1 certainly we'll provide copies of them to you. But if
2 that was the basis of your objection, I just wanted to
3 inform you that we did not receive any documents
4 pursuant to the subpoena duces tecum.

5 MR. SHEER: We obviously did not know that.
6 And the goal is not to surprise us or you about the
7 documents that are going to be presented. And even
8 though we knew about some of those documents, still, it
9 is presented for both sides to have a chance to think
10 about them before we are confronted with them. And that
11 is the point that I will make.

12 MR. SHAW: And I'll just notes, because it
13 seems to be appropriate at the time that Tiversa has not
14 produced documents in response to the subpoena duces
15 tecum issued by Lab MD, as you mentioned, because of the
16 short time frame with the response deadline of, I
17 believe, November 19th, which fails to both comply with
18 the standing order requiring three days before
19 production, which you just noted. But the parties did
20 agree that Tiversa would produce documents within a
21 reasonable period of time subsequent to the deposition,
22 although, objects to any effort on the part of Lab MD or
23 the FTC to bring back Tiversa to testify.

24 MR. SHERMAN: Just one point of correction.
25 The subpoena duces tecum taken served on November 14th

EXHIBIT 2

Transcript of the Testimony of **Christopher Gormley**

Date: March 31, 2014

Case: In The Matter of: LabMD, INC., a corporation



ORIGINAL

Ace-Federal Reporters, Inc.
Phone: 202-347-3700
Fax: 202-737-3638
Email: info@acefederal.com
Internet: www.acefederal.com

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

In the Matter of:

DOCKET NO. 9357

Lab MD, Inc, a Corporation,

- - - -

DEPOSITION OF: CHRISTOPHER GORMLEY

- - - -

DATE: March 31, 2014

Monday, 9:30 a.m.

LOCATION: DINSMORE & SHOHL

2800 One Oxford Centre

301 Grant Street

Pittsburgh, PA 15219

TAKEN BY: LabMD, Inc.

REPORTED BY: G. Donavich, RPR, CRR

Notary Public

Ref. No. 34281

EXHIBIT 3

REPORT OF RICK KAM, CIPP/US

IN THE MATTER OF LABMD

FTC COMPLAINT #1023099, DOCKET #9357

MARCH 18, 2014

FTC Documents for Analysis

I have based my analysis on my experience as outlined in Section I of this report, a literature review (see Appendix B), and the documents that I received and reviewed from the FTC, which are listed here.

Documents related to the P2P Disclosure

- **P2P Insurance Aging file (insuranceaging_6.05.071.pdf):** This is the 1,718-page file Tiversa discovered on a peer-to-peer (P2P) network that contained consumer data from the LabMD Insurance Aging Report with roughly 9,300 records. The data elements included in this file are:
 - o First and last names, and middle initials
 - o Dates of birth
 - o Nine-digit Social Security numbers (SSNs)
 - o Health insurance provider numbers, names, addresses, and phone numbers
 - o Current Procedural Terminology (CPT) Codes: Uniform set of codes defined by the American Medical Association to describe medical, surgical, and diagnostic services.
 - o Billing dates and amounts

- **Transcript of the deposition of Robert Boback, CEO of Tiversa, dated November 21, 2013, with supporting exhibits.**

- **Transcript of the deposition of Alison Simmons, former LabMD IT employee, dated February 5, 2014, with supporting exhibits.**

- **Transcript of the deposition of Eric Johnson, Dean of the Owen Graduate School of Management at Vanderbilt University, dated February 18, 2014, with supporting exhibits.**

- **Transcript of the deposition of Michael Daugherty, President and CEO of LabMD, dated March 4, 2014.**

Documents related to the Sacramento Disclosure

- **Day Sheets from LabMD (Sacramento LabMD-Documents.pdf):** These are documents the Sacramento Police Department found on October 5, 2012, during an arrest of two individuals who pleaded “no contest” to identity theft charges. The Day Sheets contain approximately 600 records with first and last names, and middle initials; nine-digit Social Security numbers; and billing dates and amounts.

Summary of LabMD Analysis

In my opinion, LabMD's failure to provide reasonable and appropriate security for sensitive personal information, including medical information, is likely to cause substantial injury to consumers and puts them at significant risk of identity crimes. The following is a summary of my analysis of likely risks of harm from identity theft and medical identity theft to the approximately 10,000 consumers affected by the P2P and Sacramento disclosures. Apart from these two incidents, I also believe that LabMD's failure to provide reasonable and appropriate security for the more than 750,000 consumers' personal information maintained on its computer networks creates a risk of unauthorized disclosure of this information. These unauthorized disclosures and the failure to provide reasonable and appropriate security are likely to cause substantial harm to these consumers.

P2P Disclosure

- Approximately 9,300 consumers from the May 2008 unauthorized disclosure are at significant risk of harm from identity crimes.
- LabMD did not notify the 9,300 consumers whose personal information was contained in the 1,718-page P2P Insurance Aging file that Tiversa discovered on February 5, 2008. Robert Boback indicated in his testimony on November 21, 2013, that this file was found on peer-to-peer networks. He indicated that at four of the IP addresses on which Tiversa found the 1,718-page P2P Insurance Aging file, Tiversa also found unrelated sensitive consumer information that could be used to commit identity theft, including passwords, tax returns, account numbers, and Social Security numbers.
- These 9,300 consumers have had no opportunity to mitigate the risk of harm because LabMD, which has known about the unauthorized disclosure of their personal information since May 2008, has not notified them of this disclosure. Even if LabMD had provided notice, consumers would still remain at risk of harm from identity crimes since this unauthorized disclosure included Social Security numbers and health insurance numbers, which can be used to commit identity crimes over an extended period of time.
- There is a significant risk of reputational damage for 3,000 or more consumers from the unauthorized disclosure of sensitive medical information, specifically diagnostic codes indicating tests for prostate cancer, herpes, hepatitis, HIV, and testosterone levels.

1. The nature and extent of the sensitive personal information involved, including the types of identifiers and the likelihood of re-identification. In other words, could the disclosed consumer data elements be used to facilitate identity theft, identity fraud, and medical identity theft? Was sensitive personal data part of the unauthorized disclosure (e.g., name, medical records, health insurance number, diagnostic codes)?
2. The unauthorized person who used the protected health information or to whom the disclosure was made. For instance, was this an employee disclosing the information to another employee, which poses a low risk, versus to an unauthorized individual not associated with that entity, be it another consumer, business, identity thief, etc.?
3. Whether the sensitive personal information was actually acquired or viewed. An example: Was the information stored on a secure encrypted device such as a laptop or storage drive, or were they paper health records left on a public bus and viewed by others?
4. The extent to which the risk to the protected health information has been mitigated. For instance: Were copies of sensitive information destroyed during its recovery from unauthorized parties, or is the data still available for others to misuse?

Analysis of the P2P Disclosure (9,300 records)

According to the materials supplied by the FTC, Tiversa alerted LabMD of the unauthorized disclosure of the P2P Insurance Aging file that contained 9,300 consumer records in May 2008. The compromised data included:

- First and last names, and middle initials
- Dates of birth
- Nine-digit Social Security numbers
- Health insurance provider numbers, names, addresses, and phone numbers
- Current Procedural Terminology (CPT) diagnostic codes
- Billing dates and amounts

I analyzed these data elements looking at the first risk factor, specifically the nature and extent of the information disclosed. Approximately 9,300 consumers' sensitive data was found in a LabMD document available on a P2P network on February 5, 2008, in clear text, according to Robert Boback's testimony. The disclosure of names with corresponding Social Security numbers, health insurance provider numbers, and CPT diagnostic codes pose a greater risk of various identity crimes.

EXHIBIT 4

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

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

EXPERT REPORT OF RAQUEL HILL, PH.D.

41. Record evidence shows that in 2005 or 2006, LimeWire, a peer-to-peer (P2P) file-sharing program, was installed on a computer on LabMD's network. The computer was used by the Billing Manager.

42. At a high level, the software is called peer-to-peer because users use it to search for and retrieve files directly from the computers of others using the software instead of retrieving files from a central server. To do this, the software allows users to designate or place files they will share in a folder (Sharing Folder). Using the software, a user can search the Sharing Folders of other users for files of interest. P2P programs have been widely available since 1999, and have been, and are, used by millions of users to share music, video, and other types of files.

43. Record evidence, including a screenshot of the Sharing Folder on the Billing Manager's computer taken in May 2008, shows that hundreds of files were in the Sharing Folder on the Billing Manager's computer.⁴ Among these files was an insurance aging file (called the 1,718 File) that contained Personal Information about more than 9,300 people.⁵ Copies of the 1,718 File were found on computers in California, Arizona, Costa Rica, and the United Kingdom.⁶

44. The risk of inadvertently sharing files with sensitive information using P2P software and the difficulty of undoing sharing are well known. After a file has been shared, the copy is out of the control of the original source and can be shared again from its new location to any number of other computers running the software. Searching for the file might not find all of the copies

⁴ See FTC-LABMD-3755 (CX0152).

⁵ See FTC-LABMD-3755 (CX0152); Tiversa-FTC_Response-000001 through Tiversa-FTC_Response-001719 (CX0008)

⁶ See Robert Boback, November 21, 2013 Deposition Transcript, pp. 50-53; TIVERSA-FTC_RESPONSE-000001 through TIVERSA-FTC_RESPONSE-006876 (CX0008-CX0011); TIVERSA-FTC_RESPONSE-006882 (CX0019).

EXHIBIT 5



Legal Counsel.

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

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

May 2, 2014

VIA ELECTRONIC MAIL AND U.S. MAIL
(JShaw@ReedSmith.com)

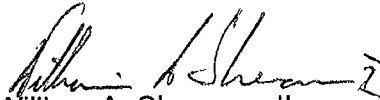
Mr. Jarrod Shaw
Reed Smith LLP
Reed Smith Centre
225 5th Avenue
Pittsburgh, PA 15222-2716

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

Dear Jarrod:

Please find enclosed a courtesy copy of the Subpoena for Robert Boback to appear at the hearing in the above-captioned matter. Please note that the date and time on the Subpoena are placeholders. I am available to coordinate with you the actual date and time your client will be needed. The Subpoena will be served at Tiversa unless you agree to accept service on behalf of your client. Please advise.

Very truly yours,


William A. Sherman, II

WAS/jb
Enclosure

cc: Counsel for FTC

2971755v1



**SUBPOENA AD TESTIFICANDUM
ADJUDICATIVE HEARING**

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

<p>1. TO</p> <p>Robert Boback Tiversa Holding Corporation 606 Liberty Avenue Pittsburgh, PA 15222</p>	<p>2. FROM</p> <p align="center">UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION</p>
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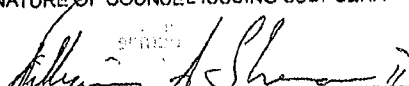
This subpoena requires you to attend and give testimony at an adjudicative hearing, at the date and time specified in Item 5, and at the request of Counsel listed in Item 8, in the proceeding described in Item 6.

<p>3. PLACE OF ADJUDICATIVE HEARING</p> <p>FTC Courtroom Room 532 Federal Trade Commission Building 600 Pennsylvania Ave., NW Washington, DC 20580</p>	<p>4. YOUR APPEARANCE WILL BE BEFORE</p> <p>D. Michael Chappell, Chief Administrative Law Judge</p> <hr/> <p>5. DATE AND TIME OF ADJUDICATIVE HEARING</p> <p>May 20, 2014 at 10:00 a.m.</p>
--	---

6. SUBJECT OF PROCEEDING

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

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

<p>DATE SIGNED</p> <p>May 1, 2014</p>	<p>SIGNATURE OF COUNSEL ISSUING SUBPOENA</p> 
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GENERAL INSTRUCTIONS

APPEARANCE

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

MOTION TO LIMIT OR QUASH

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

TRAVEL EXPENSES

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

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

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