

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



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

**PUBLIC**  
Docket No. 9357

**ORIGINAL**

**COMPLAINT COUNSEL’S MOTION TO COMPEL RESPONSES  
TO COMPLAINT COUNSEL’S SUBPOENA *DUCES TECUM*  
TO RICHARD EDWARD WALLACE  
AND TO POSTPONE RESUMPTION OF THE EVIDENTIARY HEARING**

Complaint Counsel will be prejudiced if it is required to cross-examine Richard Edward Wallace before it receives and reviews the potentially voluminous documents responsive to the subpoena this Court authorized. The bulk of the potentially responsive documents have been maintained by Mr. Wallace’s former counsel and therefore, are within his possession, custody or control. However, because Mr. Wallace’s current counsel has not received them from his former counsel, they have neither been reviewed nor produced. Complaint Counsel met and conferred in good faith with counsel for Mr. Wallace and counsel for Respondent on this Motion, but has been unable to reach an agreement. *See* Meet & Confer Statement (attached as Exhibit A). Accordingly, pursuant to Rules 3.22 and 3.38(a) of the Commission’s Rules of Practice, Complaint Counsel respectfully moves the Court for an Order requiring Mr. Wallace to respond fully to the Subpoena and postponing the resumption of the evidentiary hearing until at least two weeks from the date Complaint Counsel receives the full response.

## **BACKGROUND**

In response to Complaint Counsel's December 30, 2014 subpoena *duces tecum* ("Subpoena"), which this Court's December 8, 2014 Order authorized, Mr. Wallace has produced approximately 97 pages of documents. This modest production represents responsive documents from Mr. Wallace's Gmail. *See* Feb 2, 2015 Letter from L. VanDruff to M. Buchanan and J. Schell (attached as Exhibit B). Missing from Mr. Wallace's production, however, are potentially responsive documents from the terabytes of data that Mr. Wallace provided to his former counsel and to the House of Representatives' Committee on Oversight and Government Reform ("Oversight Committee"). *Id.* Only on January 30, 2015 did Mr. Wallace's counsel receive assurances from his former counsel that his file, which includes voluminous potentially responsive documents, would be supplied for attorney review and production. *Id.* Because of the volume of potentially responsive documents that must be reviewed after they are received, Mr. Wallace's counsel cannot estimate the time necessary for him to complete his production in response to the Subpoena.<sup>1</sup> *Id.*

Prior to filing this Motion, Complaint Counsel worked diligently to prepare for a meaningful cross-examination of Mr. Wallace. Following the Department of Justice's approval of the immunity request for Mr. Wallace, Complaint Counsel immediately began seeking to determine whether Mr. Wallace was represented by counsel in this matter, and if so, by whom. *See* Dec. 8, 2014 Letter from L. VanDruff to C. Callaway (attached as Exhibit C).

On November 21, 2014, Complaint Counsel filed a motion requesting leave to issue subpoenas to Mr. Wallace in order to prepare for an effective cross-examination of Mr. Wallace. On December 8, 2014, the Court granted Complaint Counsel leave to issue a subpoena *duces*

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<sup>1</sup> Counsel for Mr. Wallace stated that staff for the Oversight Committee had indicated that at this time they would not provide Mr. Wallace with a copy of the documents he had submitted to the Committee. *Id.*

*tecum* to Mr. Wallace for documents related to LabMD, the 1718 File, the IP Address List introduced at trial as CX 19, and Mr. Wallace's employment with Tiversa; and a subpoena *ad testificandum* for a two-hour deposition to occur immediately following the conclusion of Mr. Wallace's direct examination. Order on Compl. Counsel's Mot. for Leave to Issue Subpoenas to Richard Wallace (Dec. 8, 2014) at 4-5 ("Order"). The Court concluded that these documents and the deposition would be needed to allow Complaint Counsel to conduct a "meaningful cross-examination" of Mr. Wallace, which would serve "the public interest and the search for truth." Order at 4. The Court's Order specified that Complaint Counsel could issue the subpoenas "[n]o earlier than the date upon which an order is issued, after a request for such order under Rule 3.39(b)(2) and the Order of October 9, 2014, *supra*, requiring Mr. Wallace to testify under a grant of immunity." Order at 4.

On December 12, 2014, Respondent filed a motion for an order requiring Mr. Wallace to testify in person under a grant of immunity pursuant to Commission Rule 3.39(b)(2). On December 15, 2014, Complaint Counsel filed a response to Respondent's motion, stating that it did not oppose the Court ordering Mr. Wallace to testify pursuant to Rule 3.39, but requesting that "the evidentiary hearing not resume until Complaint Counsel receives and has reviewed the written discovery [from Mr. Wallace] ordered by the Court." Compl. Counsel's Response to Resp't Renewed Mot. for Order Requiring Richard Edward Wallace to Test. Under Grant of Immunity (Dec. 15, 2014) at 1. On December 29, 2014, the Court issued an Order requiring Mr. Wallace to appear and testify at the evidentiary hearing under a grant of immunity and ordering that the evidentiary hearing resume on March 3, 2015, in order to allow Complaint Counsel time to receive and review the discovery permitted by the Court's December 8, 2014 Order.

Upon issuance of the Court's December 29, 2014 Order, Complaint Counsel immediately issued the permitted subpoenas. *See* Subpoenas *Duces Tecum* and *Ad Testificandum* to Richard Wallace (Dec. 30, 2014) (attached as Exhibit D). Complaint Counsel effected personal service of the subpoenas, dated December 30, 2014, on Mr. Wallace on January 2, 2015. *See* Affidavit of Process Server (attached as Exhibit E). The subpoena *duces tecum* required that Mr. Wallace produce the responsive documents by January 21, 2015. *See* Ex. D. At this time, Complaint Counsel again tried to determine whether Mr. Wallace was represented by counsel in this matter, and if so, by whom. *See* Jan. 5, 2015 Letter from L. VanDruff to M. Buchanan (attached as Exhibit F).

On January 16, 2015, counsel for Mr. Wallace contacted Complaint Counsel, stating that they were finalizing their retention by Mr. Wallace, and requesting an extension until February 11, 2015 for Mr. Wallace to respond to the Subpoena. *See* Email from J. Schell to J. Brown (attached as Exhibit G). Later that day, in a telephone conference with Complaint Counsel, Mr. Wallace's counsel represented that they needed additional time to collect and review potentially responsive documents. Mr. Wallace's counsel further stated that they were working to obtain potentially responsive documents that Mr. Wallace had provided to the Oversight Committee and his former counsel. Complaint Counsel agreed to grant an extension until January 30, 2015 to allow Mr. Wallace and his counsel additional time to gather and review any potentially responsive documents. *See* Jan. 20, 2015 Letter from L. VanDruff to M. Buchanan and J. Schell (attached as Exhibit H). On the afternoon of January 30, 2015, Mr. Wallace's former counsel agreed to transmit his file, which includes copies of potentially responsive documents, to his current counsel. *See* Ex. B. Because of the volume of potentially responsive documents that



must be reviewed, Mr. Wallace's current counsel cannot estimate the time required to complete Mr. Wallace's production. *See id.*

To date, despite Complaint Counsel's efforts and Mr. Wallace's cooperation, Complaint Counsel has received only a partial response to the Subpoena. Moreover, Complaint Counsel has no assurances that the remaining documents will be produced sufficiently in advance of the evidentiary hearing to permit Complaint Counsel to conduct a "meaningful cross-examination."

### **ARGUMENT**

The Court's December 8, 2014 Order determined that the document specifications in the Subpoena are necessary for "meaningful cross-examination" of Mr. Wallace. Order at 4. Any responsive documents Mr. Wallace provided to third parties, including his former counsel, are within the scope of the Subpoena and within Mr. Wallace's control. In addition, Mr. Wallace cannot meet the heavy burden of showing that the document specifications in the Subpoena are unreasonable. Therefore, the Court should compel Mr. Wallace to fully respond to the Subpoena and postpone the resumption of the evidentiary hearing until at least two weeks from the date Complaint Counsel receives the full response.

#### **I. DOCUMENTS RESPONSIVE TO THE SUBPOENA ARE RELEVANT AND NECESSARY TO ALLOW COMPLAINT COUNSEL TO CONDUCT A MEANINGFUL CROSS-EXAMINATION OF MR. WALLACE**

The Court has already determined that Mr. Wallace's responses to the Subpoena are relevant. Order at 4-5; *see* Rule 3.31(c)(1). The Court held that these documents are necessary to allow Complaint Counsel to conduct a "meaningful cross-examination" of Mr. Wallace, which will serve "the public interest and the search for truth." Order at 4. Accordingly, Mr. Wallace should be compelled to produce all responsive documents.

## **II. RESPONSIVE DOCUMENTS THAT MR. WALLACE PROVIDED TO THIRD PARTIES ARE WITHIN HIS CONTROL**

Mr. Wallace's counsel has represented that Mr. Wallace's former counsel also has possession of the voluminous documents he submitted to the Oversight Committee. These documents are within Mr. Wallace's control, and he is required to produce those documents that are responsive to the Subpoena. *See Nippon Steel & Sumitomo Metal Corp. v. POSCO*, 2014 U.S. Dist. LEXIS 94781, at \*19 (D.N.J. June 27, 2014) (“[T]he clear rule is that documents in the possession of a party's current or former counsel are deemed to be within that party's possession, custody and control.”) (internal quotation and citation omitted). Thus, the Court should compel Mr. Wallace to provide all responsive documents to the Subpoena, including those he provided to his former counsel.<sup>2</sup>

## **III. THE SUBPOENA IS NOT UNREASONABLE**

To the extent that Mr. Wallace argues that the response time for the Subpoena does not allow enough time to search for and review any potentially responsive documents, he cannot meet the burden of showing that Subpoena is unreasonable. “The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.” *In re OSF Healthcare Sys.*, 2012 FTC LEXIS 31, at \*4 (Feb. 14, 2012) (internal citations omitted). The fact that Mr. Wallace is not a party to this proceeding does not change the burden that he faces in showing that the Subpoena is unreasonable. *See In re Flowers*

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<sup>2</sup> Because counsel for Mr. Wallace has represented that Mr. Wallace's former counsel should have a copy of the documents that were submitted to the Oversight Committee, and documents within his former counsel's possession are clearly within Mr. Wallace's possession, custody, or control, there is no need to seek to compel Mr. Wallace to retrieve documents from the Oversight Committee. Complaint Counsel notes that if Mr. Wallace's former counsel does not have a copy of those documents, the documents held by the Oversight Committee may remain within Mr. Wallace's control. *See generally Krishanthi v. Rajaratnam*, 2011 U.S. Dist. LEXIS 119879, at \*9 (D.N.J. Oct. 17, 2011) (affirming that documents owned by defendant but seized by the Government were still within the defendant's control) (unpublished opinion).

*Indus., Inc.*, 1982 FTC LEXIS 96, at \*15 (Mar. 19, 1982) (“[A] recipient of a subpoena *duces tecum* issued in an FTC adjudicative proceeding who resists compliance therewith bears a heavy burden. That burden is no less because the subpoena is directed at a non-party.”).

Prior to issuing the Subpoena, Complaint Counsel made numerous attempts to determine whether Mr. Wallace was represented by counsel in this matter to begin an early dialogue regarding compliance with its forthcoming subpoena. *See, e.g.*, Exs. C & F. Consistent with the Court’s December 8, 2014 Order, Complaint Counsel issued and served the Subpoena immediately after the Court’s December 29, 2014 Order. Complaint Counsel also agreed to grant Mr. Wallace an extension of time to respond. To the extent that Mr. Wallace’s delay in obtaining counsel has constrained his ability to comply in a timely manner, it would be unjust to allow that delay to prejudice Complaint Counsel by depriving Complaint Counsel of the opportunity to conduct a meaningful cross-examination. Therefore, Mr. Wallace should be compelled to produce all responsive documents.

#### **IV. THE EVIDENTIARY HEARING SHOULD NOT RESUME UNTIL AFTER MR. WALLACE COMPLIES WITH THE SUBPOENA**

As the Court held, Mr. Wallace’s production of documents responsive to the Subpoena is necessary for a “meaningful cross-examination” of Mr. Wallace, and therefore in service of “the public interest and the search for truth.” Order at 4. In order to facilitate a meaningful cross-examination, however, Mr. Wallace must produce responsive documents reasonably in advance of the evidentiary hearing’s resumption to allow Complaint Counsel a full opportunity to review the documents produced. Therefore, the Court should order that the evidentiary hearing resume no earlier than two weeks after Mr. Wallace produces all responsive, non-privileged documents.

**CONCLUSION**

For the foregoing reasons, the Court should grant Complaint Counsel's Motion to Compel and To Postpone Resumption of the Evidentiary Hearing.

Dated: February 2, 2015

Respectfully submitted,



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Laura Riposo VanDruff  
Federal Trade Commission  
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Room CC-8232  
Washington, DC 20580  
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*Complaint Counsel*

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

\_\_\_\_\_) )  
In the Matter of ) )  
 ) )  
LabMD, Inc., ) Docket No. 9357  
a corporation, ) )  
Respondent. ) )  
 ) )  
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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S  
MOTION TO COMPEL RESPONSES TO COMPLAINT COUNSEL’S  
SUBPOENA *DUCES TECUM* TO RICHARD EDWARD WALLACE  
AND TO POSTPONE RESUMPTION OF THE EVIDENTIARY HEARING**

Upon consideration of Complaint Counsel’s Motion to Compel Responses to Complaint Counsel’s Subpoena *Duces Tecum* to Richard Edward Wallace and to Postpone Resumption of the Evidentiary Hearing:

IT IS HEREBY ORDERED that Complaint Counsel’s Motion is GRANTED.

IT IS FURTHER ORDERED that Richard Edward Wallace shall produce (1) all documents responsive to Document Specifications 1-3 of Complaint Counsel’s subpoena *duces tecum*, and, (2) if any documents are withheld from production based on a claim of privilege or any similar claim, a schedule describing 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.

IT IS FURTHER ORDERED that the evidentiary hearing in this matter shall resume two weeks after Mr. Wallace provides to Complaint Counsel all documents responsive to Document Specifications 1-3 of Complaint Counsel’s subpoena *duces tecum*.

ORDERED:

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D. Michael Chappell  
Chief Administrative Law Judge

Date:

## CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2015, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

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

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

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

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

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Daniel Epstein  
Patrick Massari  
Prashant K. Khetan  
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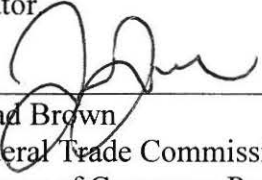
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*Counsel for Respondent Lab MD, Inc.*

Mary Beth Buchanan  
Jacquelyn N. Schell  
Bryan Cave LLP  
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jacquelyn.schell@bryancave.com  
*Counsel for Richard Edward Wallace*

### **CERTIFICATE FOR ELECTRONIC FILING**

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

February 2, 2015

By:   
Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection



# Exhibit A

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

|                  |   |                 |
|------------------|---|-----------------|
| In the Matter of | ) |                 |
|                  | ) | <b>PUBLIC</b>   |
|                  | ) |                 |
| LabMD, Inc.,     | ) | Docket No. 9357 |
| a corporation,   | ) |                 |
| Respondent.      | ) |                 |
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**STATEMENT REGARDING MEET AND CONFER PURSUANT TO  
RULE 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Compel Responses to Complaint Counsel’s Subpoena Duces Tecum to Richard Edward Wallace and to Postpone Resumption of the Evidentiary Hearing, Complaint Counsel conferred with counsel for Richard Wallace and counsel for Respondent in a good faith effort to resolve by agreement the issues raised by the motion.

Complaint Counsel Laura Riposo VanDruff and Jarad Brown, as well as attorney Amanda Koulousias of the Federal Trade Commission, conferred by teleconference with counsel for Mr. Wallace Mary Beth Buchanan and Jacquelyn Schell on Friday, January 30, 2015 at 3:30 PM in an effort to reach agreement on the subject of this motion. Complaint Counsel Ms. VanDruff and Mr. Brown continued their teleconference with Ms. Buchanan and Ms. Schell on January 30, 2015 at 5:30 PM. Counsel for Mr. Wallace stated that they would not be able to produce the balance of responsive documents by the extended deadline granted by Complaint Counsel, and could not provide a date by which they could complete production of all responsive

documents. Despite good faith efforts, Complaint Counsel and counsel for Mr. Wallace have been unable to reach agreement on the subject of the motion.

In addition, Complaint Counsel Ms. VanDruff and Mr. Brown, as well as Ms. Koulousias, conferred by teleconference with counsel for Respondent William Sherman on January 30, 2015 at 4:00 PM. Counsel for Respondent stated that it would not agree to withdraw Mr. Wallace as a witness, and thus the parties have been unable to reach agreement on the subject of the motion.

Dated: February 2, 2015

Respectfully submitted,



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Laura Riposo VanDruff  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
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Telephone: (202) 326-2999–VanDruff  
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*Complaint Counsel*

# Exhibit B



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

February 2, 2015

**VIA EMAIL**

Mary Beth Buchanan  
Jacquelyn N. Schell  
Bryan Cave LLP  
1290 Avenue of the Americas  
New York, NY 10104-3300

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

Dear Ms. Buchanan and Ms. Schell:

This letter memorializes our January 28, January 29, and January 30, 2015 telephone conversations. We appreciate your diligent efforts on behalf of Mr. Wallace to comply with Complaint Counsel's subpoena *duces tecum* ("Subpoena").

On the afternoon of Friday, January 30, 2015, you produced approximately 97 pages of responsive documents collected from his Gmail account. As we discussed, you intend to reproduce these materials in accordance with Paragraph 6 of the Protective Order. We will work with counsel for Respondent to substitute the revised production for the forthcoming production and meet our obligations under Paragraph 14 of the Additional Provisions of the Scheduling Order.

You advised us that the balance of Mr. Wallace's production would follow your receipt and review of the information Mr. Wallace provided to his former counsel and to the House of Representatives' Committee on Oversight and Government Reform ("Oversight Committee"). You indicated that it is your understanding that your client provided terabytes of data on a hard drive and possibly other materials to his former counsel at Quinn Emanuel Urquhart & Sullivan, LLP. You stated that documents responsive to the Subpoena are likely to be included in the materials Mr. Wallace provided to Quinn Emanuel, and which Quinn Emanuel provided to the Oversight Committee. You indicated that Quinn Emanuel turned over its files related to Mr. Wallace, which included copies of these potentially responsive documents, to the attorneys who next represented Mr. Wallace at Katten Muchen Rosenman LLP. You represented that on the afternoon of Friday, January 30, 2015, Claudia Callaway at Katten agreed to transfer Mr. Wallace's files to your firm.

Mary Beth Buchanan  
Jacquelyn N. Schell  
February 2, 2015  
Page 2

We understand that the Oversight Committee will not agree to return Mr. Wallace's files to your firm at this time. However, it is our understanding that you intend to review the materials that are forthcoming from Katten and produce responsive documents without undue delay. Nonetheless, because of the volume of potentially responsive documents that must be reviewed after they are received, we understand that you cannot estimate the time required to complete Mr. Wallace's production.

We look forward to continuing to work with you on these issues. As always, please do not hesitate to call me at (202) 326-2999 if you would like to discuss this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "LRiposo", written in a cursive style.

Laura Riposo VanDruff

cc: Jarad Brown

# Exhibit C



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

December 8, 2014

**VIA EMAIL**

Claudia Callaway  
Katten Muchin Rosenman, LLP  
2900 K Street NW  
North Tower, Suite 200  
Washington, DC 20007

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

Dear Ms. Callaway:

I understand from Lauren Dickie's July 17, 2014 email to counsel for the parties in the above-captioned proceeding that you serve as counsel for Richard Wallace. On November 19, 2014 at 9:52AM, I called your office to confirm that you continue to represent Mr. Wallace. To date, you have not returned my voicemail message. If you do not represent Mr. Wallace, please advise me who is representing Mr. Wallace in this proceeding. If you do not have knowledge of who is representing Mr. Wallace at present, please advise me immediately so that we may contact Mr. Wallace directly.

Earlier this afternoon, Chief Administrative Law Judge D. Michael Chappell issued the attached opinion, which permits Complaint Counsel to issue a document subpoena to Mr. Wallace. We expect that Mr. Wallace is preserving all of the documents responsive to our forthcoming subpoena because of the investigation by the House Committee on Oversight and Government Reform and the civil lawsuit pending against Mr. Wallace in the Allegheny County Court of Common Pleas. Nonetheless, Mr. Wallace must take all reasonable measures to prevent the destruction of documents that may be in any way responsive to Complaint Counsel's forthcoming subpoena, irrespective of whether Mr. Wallace or his counsel believes that such documents may be protected from discovery. Failure to retain records, documents, or materials that may be relevant to this matter may result in civil or criminal liability. 15 U.S.C. § 50.

Sincerely,

A handwritten signature in black ink, appearing to read "Laura Riposo VanDruff".

Laura Riposo VanDruff

Attachment (1)



Claudia Callaway  
December 8, 2014  
Page 2

cc: Glen Donath (*via email*)  
William A. Sherman, II (*via email*)  
Reed D. Rubinstein (*via email*)  
Prashant Khetan (*via email*)

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

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

**ORDER ON COMPLAINT COUNSEL’S MOTION FOR LEAVE  
TO ISSUE SUBPOENAS TO RICHARD WALLACE**

**I.**

On November 21, 2014, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion for Leave to Issue Subpoenas to Richard Wallace (“Motion”). Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed an opposition to the Motion on December 2, 2014, and filed a revised Opposition on December 5, 2014 (“Opposition”). As set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

**II.**

Under the Revised Scheduling Order in this case, the deadline for the completion of fact discovery was March 5, 2014. Trial commenced on May 20, 2014. Complaint Counsel rested its case on May 23, 2014. Mr. Wallace is a fact witness that was subpoenaed by Respondent to testify at the hearing on this matter, but whose testimony was delayed by efforts to obtain immunity for Mr. Wallace’s testimony. On November 14, 2014, the Attorney General approved the request by the Administrative Law Judge for authority to issue an order requiring Mr. Wallace’s testimony and granting immunity. Respondent has yet to file a motion seeking such order requiring Mr. Wallace to testify, pursuant to FTC Rule 3.39 (b)(1). *See* Order Granting in Part and Denying in Part Motion for Order Requiring Testimony Under Grant of Immunity Pursuant to Commission Rule 3.39, October 9, 2014; *see also* Opposition at 2 n.2 (stating that Respondent is prepared to move for order under Rule 3.39).

Complaint Counsel seeks to depose Mr. Wallace in advance of his anticipated testimony, and also to obtain document discovery from Mr. Wallace as follows:

1. All Documents related to Tiversa.
2. All Documents related to LabMD, Inc. and/or the 1718 File.
3. All Documents related to the IP Address List.
4. For the period from February 28, 2014 through the present, all Documents related to Communications, including proffered testimony, with any third party

- related to the Federal Trade Commission, including the Federal Trade Commission's employees or agents, or Tiversa, including its employees or agents.
5. All Documents, including personnel files, that relate to your duties, formal or informal performance evaluations, disciplinary records, and promotion, demotion, or termination from Tiversa.
  6. All Documents related to the sale or offer of sale of your stock in Tiversa.

Complaint Counsel states that it is "requesting this discovery to facilitate the cross-examination of Mr. Wallace, not to develop its rebuttal case." Motion at 4 n.3.<sup>1</sup> Complaint Counsel contends that the discovery is necessary to enable Complaint Counsel to prepare a meaningful cross-examination of Mr. Wallace, which is in the interest of justice. In addition, Complaint Counsel asserts, permitting discovery in advance of Mr. Wallace's testimony is not premature because it is for the purpose of facilitating cross-examination and will enable Complaint Counsel to cross-examine Mr. Wallace immediately upon conclusion of his direct testimony, which will prevent requiring Mr. Wallace to return for another court appearance.

Complaint Counsel argues that good cause exists to reopen discovery for the purpose of obtaining discovery from Mr. Wallace because, according to Complaint Counsel, it "could not reasonably have anticipated the need to depose Mr. Wallace before the March 5, 2014 close of discovery or the start of the evidentiary hearing in this matter." Motion at 6. Complaint Counsel asserts that it had no notice of, could not have foreseen, and did not in fact learn of, the substance of Mr. Wallace's anticipated testimony until Respondent's counsel made a proffer of that testimony during the evidentiary hearing on June 12, 2014. Complaint Counsel further asserts that, given that proceedings in this matter have already been delayed to facilitate obtaining Mr. Wallace's testimony, Respondent will not be prejudiced by a brief additional delay for limited discovery from Mr. Wallace.

Respondent argues that Complaint Counsel has long known of Mr. Wallace's importance to this case and the nature of his expected testimony, stating that: Complaint Counsel identified Mr. Wallace in its Initial Disclosures in this case; at the deposition of Tiversa, Tiversa's designee and president Mr. Robert Boback identified Mr. Wallace in November 2013 as the Tiversa employee that allegedly found the insurance aging file at issue in this case (the "1718 file") on peer-to-peer networks, and created the document purporting to evidence the peer-to-peer networks at which the 1718 file was allegedly found (CX 19); Respondent identified Mr. Wallace on its Final Proposed Witness list in advance of the trial; and Complaint Counsel has long been aware that Respondent claims that Tiversa took the 1718 file from a LabMD workstation. Notwithstanding the foregoing, Respondent argues, Complaint Counsel declined the opportunity to depose Mr. Wallace during the discovery period, and also confirmed at trial that it would not seek to obtain Mr. Wallace's deposition in advance of his testimony.

Respondent also argues that Complaint Counsel is seeking anticipatory rebuttal discovery, which effort was previously denied by Order dated July 23, 2014. Finally, Respondent contends that some of the requested discovery, including details regarding Mr.

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<sup>1</sup> Complaint Counsel's Motion for Leave to Issue Subpoenas for the purpose of obtaining rebuttal evidence for Mr. Wallace's anticipated testimony was denied as premature by Order dated July 23, 2014.

Wallace's February 28, 2014 termination by Tiversa, and regarding Mr. Wallace's subsequent sale of Tiversa stock in April and May 2014 are not relevant.

### III.

FTC Rule 3.21(c)(2) states in pertinent part: "The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing. . . . In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner." 16 C.F.R. § 3.21(c)(2).

Having considered all the arguments and contentions of the parties, and based on the record presented, Complaint Counsel erred in failing to take Mr. Wallace's deposition during the discovery period. Complaint Counsel does not deny that Mr. Wallace was closely involved with the discovery of the 1718 file or the creation of CX 19, but asserts that it had no reason to believe that Mr. Wallace would say anything contrary to the testimony of Mr. Boback. However, a deposition would have enabled Complaint Counsel to test its assumptions about Mr. Wallace's testimony.

Complaint Counsel also erred in failing to seek leave to take Mr. Wallace's deposition (or take any other discovery from Mr. Wallace), after the close of discovery, even after Respondent on April 9, 2014 designated Mr. Wallace as a defense witness for trial. Respondent's designation stated:

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

Respondent's Final Proposed Witness List at 4-5.

Indeed, Complaint Counsel expressly declined to seek a deposition of Mr. Wallace in advance of his testimony, notwithstanding the foregoing summary of testimony. During preliminary proceedings at trial on May 22, 2014, Respondent advised it would call approximately 9 witnesses, at which time the following exchange occurred:

JUDGE CHAPPELL: Have all of these witnesses been deposed?

MR. SHERMAN: All except for maybe one.

MS. VANDRUFF: . . . I'm concerned about Mr. Sherman's representation that one

witness may not have been deposed because I'm not aware of a witness on their witness list who has not been deposed.

MR. SHERMAN: Rick Wallace is on our witness list and he was not deposed.

MS. VANDRUFF: And I didn't -- okay. That is true, Your Honor.

JUDGE CHAPPELL: So that's not a concern.

MS. VANDRUFF: To the extent --

JUDGE CHAPPELL: That was your choice not to depose him. He was on the list.

MS. VANDRUFF: Your Honor, we're not concerned about the fact that he hasn't been deposed, that's correct.

Trial Tr., at 438-439.

Complaint Counsel contends that it had no notice that Mr. Wallace's testimony would include assertions of misconduct by Complaint Counsel and the fabrication of evidence until June 12, 2014, when Respondent made a proffer of Mr. Wallace's testimony in court. However, Respondent's summary of Mr. Wallace's anticipated testimony included "Tiversa's communications with the Federal Trade Commission ("FTC") . . . [and] facts relating to the 'P2P insurance aging file.'" Complaint Counsel's failure to know the specifics of Mr. Wallace's testimony until June 12, 2014, is a function of having decided not to seek Mr. Wallace's deposition.

The failure to take discovery from Mr. Wallace earlier was a strategic error. However, the public interest and the search for truth are served by facilitating meaningful cross-examination. In addition, Respondent has not demonstrated that it would be prejudiced by allowing limited discovery to facilitate cross-examination. Nonetheless, Complaint Counsel has not demonstrated that the entirety of its requested discovery is relevant to an effective cross-examination, including the request for documents relating to Mr. Wallace's sale of Tiversa stock in the months after his termination, and the requested discovery is narrowed, as addressed below.

#### IV.


For all the foregoing reasons, Complaint Counsel's Motion is GRANTED IN PART. No earlier than the date upon which an order is issued, after a request for such order under Rule 3.39(b)(2) and the Order of October 9, 2014, *supra*, requiring Mr. Wallace to testify under a grant of immunity, Complaint Counsel may issue a subpoena to Mr. Wallace for documents limited to the following:

1. All Documents related to LabMD, Inc. and/or the 1718 File.

2. All Documents related the IP Address List introduced at trial as CX 19.
3. All Documents, including personnel files, that relate to your duties, formal or informal performance evaluations, disciplinary records, and promotion, demotion, or termination from Tiversa.

In addition, no earlier than the date upon which an order is issued under Rule 3.39(b)(2) requiring Mr. Wallace to testify under a grant of immunity, Complaint Counsel may subpoena Mr. Wallace for a deposition. Because Complaint Counsel has asserted that the late-requested deposition is needed “to facilitate the cross-examination of Mr. Wallace,” the deposition shall take place on the day of Mr. Wallace’s appearance in this matter to testify, during a recess that will take place immediately upon completion of Mr. Wallace’s direct testimony. The deposition shall not exceed 2 hours without further order. Except as set forth herein, Complaint Counsel’s Motion is DENIED.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: December 8, 2014

# Exhibit D



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

December 30, 2014

**VIA PROCESS SERVER AND FEDERAL EXPRESS**

Richard Edward Wallace  
Redacted SPI

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

Dear Mr. Wallace:

This letter is to notify you that Complaint Counsel has issued a subpoena *duces tecum* for certain documents relating to the Commission's adjudicative proceeding against LabMD. The Chief Administrative Law Judge overseeing this matter authorized Complaint Counsel to issue this subpoena pursuant to Orders issued on December 8, 2014 and December 29, 2014. The subpoena, its schedule, and its 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 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.

This letter also is to notify you that Complaint Counsel has issued a subpoena for your deposition, which is enclosed. The Chief Administrative Law Judge has ordered that your deposition will take place on the day you appear to testify in this matter, immediately after completion of your direct testimony. Please note that your deposition will be recorded by videotape.



I would be pleased to discuss any issues regarding production of documents or your deposition at your earliest convenience. You may reach me at (202) 326-2927.

Sincerely

A handwritten signature in black ink, appearing to read 'Jarad Brown', written in a cursive style.

Jarad Brown

Enclosures (2)

cc: Prashant Khetan (*via email*)  
William Sherman (*via email*)  
Reed Rubinstein (*via email*)  
Hallee K. Morgan (*via email*)  
Kent Huntington (*via email*)  
Sunni Harris (*via email*)  
Daniel Epstein (*via email*)  
Patrick Massari (*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)

1. TO

Richard Edward Wallace  
Redacted SPI

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

Matthew Smith  
Federal Trade Commission  
600 Pennsylvania Ave, NW  
Mail Stop CC-8232  
Washington, DC 20580

4. MATERIAL WILL BE PRODUCED TO

Matthew Smith

5. DATE AND TIME OF PRODUCTION

January 21, 2015 5:00 PM

6. SUBJECT OF PROCEEDING

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

7. MATERIAL TO BE PRODUCED

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

8. ADMINISTRATIVE LAW JUDGE

D. Michael Chappell  
Chief Administrative Law Judge

Federal Trade Commission  
Washington, D.C. 20580

9. COUNSEL AND PARTY ISSUING SUBPOENA

Jarad Brown, Complaint Counsel  
Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, DC 20580  
(202) 326-2927

DATE SIGNED

Dec 30, 2014

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 1995.

**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:*

Richard Edward Wallace  
Redacted SPI

BY PROCESS SERVER

*on the person named herein on:*

\_\_\_\_\_  
(Month, day, and year)

Kenneth Noble

\_\_\_\_\_  
(Name of person making service)

\_\_\_\_\_  
(Official title)

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

|                      |   |                 |
|----------------------|---|-----------------|
| In the Matter of     | ) |                 |
|                      | ) |                 |
| <b>LabMD, Inc.,</b>  | ) | DOCKET NO. 9357 |
| <b>a corporation</b> | ) |                 |
|                      | ) |                 |
|                      | ) |                 |

**COMPLAINT COUNSEL’S SCHEDULE FOR  
PRODUCTION OF DOCUMENTS PURSUANT TO SUBPOENA TO  
RICHARD WALLACE**

Pursuant to Complaint Counsel’s attached Subpoena Duces Tecum issued December 30, 2014, under Commission Rule of Practice § 3.34(b), Complaint Counsel requests that the following material be produced to the Federal Trade Commission, 600 Pennsylvania Ave NW, Mailstop CC-8232, Washington, DC 20580.

**DEFINITIONS**

1. “**All documents**” means each document, 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. 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. “**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.

4. 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.
5. “**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.
6. “**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.
7. The terms “**Relate**” or “**Related 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.
8. “**Subpoena**” means the Subpoena to Richard Wallace, including this Schedule and Exhibits, and including the Definitions, Instructions, and Specifications.
9. “**Tiversa**” means Tiversa Holding Corporation or Tiversa, Inc., wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all directors, officers, employees, agents, consultants, and other persons working for or on behalf of the foregoing.
10. “**Third Party**” means any natural person, corporate entity, partnership, association, joint venture, or governmental entity other than You.
11. “**You**” or “**Your**” means Richard Wallace.
12. “**1718 File**” means the 1,718 page file, bearing the filename “insuranceaging\_6.05.071.pdf,” which Tiversa found on a peer-to-peer network.



13. **“IP Address List”** means the document produced to the Federal Trade Commission listing four IP addresses where the 1718 file was found on a peer-to-peer network, marked by Tiversa as TIVERSA-FTC\_RESPONSE-006882.
14. The use of the singular includes the plural, and the plural includes the singular.
15. The use of a verb in any tense shall be construed as the use of the verb in all other tenses.

### INSTRUCTIONS

1. **Transmission of Sensitive Personally Identifiable Information:** Because material called for by this request may contain sensitive personally identifiable information or sensitive health information, materials responsive to this request shall be submitted by Accellion file transfer or another encrypted method of transmission.
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. **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.
5. **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.
6. **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.

7. **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.
8. **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.
9. **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.**

- 10. **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.
- 11. **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.
- 12. **Questions:** Any questions you have relating to the scope or meaning of anything in this request, or questions regarding the encrypted transmission of electronically stored information should be directed to Laura Riposo VanDruff, at (202) 326-2999. Documents responsive to the request shall be addressed to the attention of Matthew

Smith, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Mail Stop CC-8232, Washington, D.C. 20580, 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 LabMD, Inc. and/or the 1718 File.
2. All Documents related to the IP Address List introduced at trial as CX0019.
3. All Documents, including personnel files, that relate to your duties, formal or informal performance evaluations, disciplinary records, and promotion, demotion, or termination from Tiversa.

Dated: December 30, 2014

Respectfully submitted,



---

Jarad Brown

Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room CC-8232  
Washington, DC 20580  
Telephone: (202) 326-2927 - Brown  
Facsimile: (202) 326-3062  
Electronic mail: [jbrown4@ftc.gov](mailto:jbrown4@ftc.gov)

*Complaint Counsel*

**CERTIFICATE OF SERVICE**

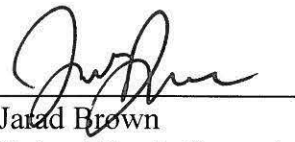
This is to certify that on December 30, 2014, I served *via* electronic mail delivery a copy of the foregoing document to:

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

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

December 30, 2014

By:



Jarad Brown  
Federal Trade Commission  
Bureau of Consumer Protection

# Exhibit A

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

\_\_\_\_\_  
In the Matter of )  
 )  
 )

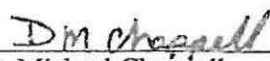
LabMD, Inc., )  
a corporation, )  
Respondent. )  
\_\_\_\_\_ )

DOCKET NO. 9357

**PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

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

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: August 29, 2013

## ATTACHMENT A

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

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

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



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

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

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

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

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

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

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

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

# Exhibit B

**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 Richard Wallace and attached hereto.
3. The documents produced and attached hereto by Richard Wallace 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 Richard Wallace;  
and
  - c) Were made by the regularly conducted activity as a regular practice of Richard Wallace.

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

Executed on \_\_\_\_\_, 2014.

\_\_\_\_\_  
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.





# SUBPOENA AD TESTIFICANDUM DEPOSITION

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

1. TO

Richard Edward Wallace  
Redacted SPI

2. FROM

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION

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

3. PLACE OF DEPOSITION

Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, DC 20580

4. YOUR APPEARANCE WILL BE BEFORE

Laura Riposo VanDruff or other designated counsel

5. DATE AND TIME OF DEPOSITION

March 3, 2015 10:00 AM

6. SUBJECT OF PROCEEDING

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

7. ADMINISTRATIVE LAW JUDGE

Chief Administrative Law Judge

Federal Trade Commission  
Washington, D.C. 20580

8. COUNSEL AND PARTY ISSUING SUBPOENA

Jarad Brown  
Federal Trade Commission  
600 Pennsylvania Ave, NW  
Washington, DC 20580  
(202) 326-2927

DATE SIGNED

12/30/2014

SIGNATURE OF COUNSEL ISSUING SUBPOENA

## GENERAL INSTRUCTIONS

### APPEARANCE

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

### MOTION TO LIMIT OR QUASH

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

### TRAVEL EXPENSES

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

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

This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1995.

**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:*

Richard Edward Wallace

Redacted SPI

**BY PROCESS SERVER**

*on the person named herein on:*

\_\_\_\_\_  
(Month, day, and year)

Kenneth Noble

\_\_\_\_\_  
(Name of person making service)

\_\_\_\_\_  
(Official title)

**CERTIFICATE OF SERVICE**

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

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

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

December 30, 2014

By:



Jared Brown  
Federal Trade Commission  
Bureau of Consumer Protection

# Exhibit E



# Affidavit of Process Server

United States of America, Federal Trade Commission, Washington DC 20580

(NAME OF COURT)

FTC United States of America Federal Trade Commission, Washington DC 20580

vs In the Matter of LabMD

FTC Docket no. 9357

PLAINTIFF/PETITIONER

DEFENDANT/RESPONDENT

CASE NUMBER

I Kenneth A. Noble, being first duly sworn, depose and say: that I am over the age of 18 years and not a party to this action, and that within the boundaries of the state where service was effected, I was authorized by law to perform said service.

Service: I served Richard Edward Wallace  
NAME OF PERSON / ENTITY BEING SERVED

with (list documents) Cover ltr dated 12/30/2014, subpoena duces tecum, and subpoena ad testificandum

by leaving with \_\_\_\_\_ At \_\_\_\_\_

Residence Redacted SPI  
NAME RELATIONSHIP  
ADDRESS CITY / STATE

Business \_\_\_\_\_  
ADDRESS CITY / STATE

On 1/2/15 AT 10:48 a.m.  
DATE TIME

Inquired if subject was a member of the U.S. Military and was informed they are not.

Thereafter copies of the documents were mailed by prepaid, first class mail on \_\_\_\_\_  
DATE

from \_\_\_\_\_  
CITY STATE ZIP

### Manner of Service:

- Personal:** By personally delivering copies to the person being served.
- Substituted at Residence:** By leaving copies at the dwelling house or usual place of abode of the person being served with a member of the household over the age of \_\_\_\_\_ and explaining the general nature of the papers.
- Substituted at Business:** By leaving, during office hours, copies at the office of the person/entity being served with the person apparently in charge thereof.
- Posting:** By posting copies in a conspicuous manner to the front door of the person/entity being served.

**Non-Service:** After due search, careful inquiry and diligent attempts at the address(es) listed above, I have been unable to effect process upon the person/entity being served because of the following reason(s):

- Unknown at Address
- Moved, Left no Forwarding
- Service Cancelled by Litigant
- Unable to Serve in Timely Fashion
- Address Does Not Exist
- Other \_\_\_\_\_

**Service Attempts:** Service was attempted on: (1) \_\_\_\_\_ (2) \_\_\_\_\_  
DATE TIME DATE TIME

(3) \_\_\_\_\_ (4) \_\_\_\_\_ (5) \_\_\_\_\_  
DATE TIME DATE TIME DATE TIME

Description: Age 50 Sex M Race C Height 70" Weight 170 Hair Blk Beard N Glasses N

PENNSYLVANIA ALLEGHENY COUNTY  
SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of JANUARY, 2015, by KENNETH A. NOBLE.  
Proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

[Signature]  
SIGNATURE OF PROCESS SERVER

NOTARIAL SEAL  
Jennifer Strozier-Notary Public  
Monroeville Bldg., Allegheny County  
MY COMMISSION EXPIRES FEB. 04, 2015

[Signature]  
SIGNATURE OF NOTARY PUBLIC

NOTARY PUBLIC for the state of PENNSYLVANIA



# Exhibit F



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

January 5, 2015

**VIA EMAIL**

Mary Beth Buchanan  
Bryan Cave LLP  
1290 Avenue of the Americas  
New York, NY 10104-3300

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

Dear Ms. Buchanan:

This letter follows our January 2, 2015 telephone conversation regarding Richard Wallace, which took place at approximately 5:25PM.

I understand from our discussion that you represented Mr. Wallace for the limited purpose of negotiating an extension in a separate matter pending in the Allegheny County Court of Common Pleas. I further understand that on the afternoon of January 2, 2015, subsequent to Mr. Wallace's telephone call to my colleague, Jarad Brown, Mr. Wallace asked that you represent him in the above-captioned proceeding.

During our conversation, you explained that your law firm is gathering information as it considers whether to represent Mr. Wallace in the matter before the Federal Trade Commission. As we discussed, I would be grateful if you would please keep me apprised of whether Bryan Cave agrees to represent Mr. Wallace before the Commission. In the interim, I have attached a copy of Chief Administrative Law Judge D. Michael Chappell's December 8, 2014 Order, which permits Complaint Counsel to issue certain subpoenas to Mr. Wallace. We effected service of our subpoenas on January 2, 2015.

Sincerely,

A handwritten signature in blue ink, appearing to read "Laura Riposo VanDruff".

Laura Riposo VanDruff

Attachment (1)

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

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

**ORDER ON COMPLAINT COUNSEL’S MOTION FOR LEAVE  
TO ISSUE SUBPOENAS TO RICHARD WALLACE**

**I.**

On November 21, 2014, Federal Trade Commission (“FTC”) Complaint Counsel filed a Motion for Leave to Issue Subpoenas to Richard Wallace (“Motion”). Respondent LabMD, Inc. (“Respondent” or “LabMD”) filed an opposition to the Motion on December 2, 2014, and filed a revised Opposition on December 5, 2014 (“Opposition”). As set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

**II.**

Under the Revised Scheduling Order in this case, the deadline for the completion of fact discovery was March 5, 2014. Trial commenced on May 20, 2014. Complaint Counsel rested its case on May 23, 2014. Mr. Wallace is a fact witness that was subpoenaed by Respondent to testify at the hearing on this matter, but whose testimony was delayed by efforts to obtain immunity for Mr. Wallace’s testimony. On November 14, 2014, the Attorney General approved the request by the Administrative Law Judge for authority to issue an order requiring Mr. Wallace’s testimony and granting immunity. Respondent has yet to file a motion seeking such order requiring Mr. Wallace to testify, pursuant to FTC Rule 3.39 (b)(1). *See* Order Granting in Part and Denying in Part Motion for Order Requiring Testimony Under Grant of Immunity Pursuant to Commission Rule 3.39, October 9, 2014; *see also* Opposition at 2 n.2 (stating that Respondent is prepared to move for order under Rule 3.39).

Complaint Counsel seeks to depose Mr. Wallace in advance of his anticipated testimony, and also to obtain document discovery from Mr. Wallace as follows:

1. All Documents related to Tiversa.
2. All Documents related to LabMD, Inc. and/or the 1718 File.
3. All Documents related to the IP Address List.
4. For the period from February 28, 2014 through the present, all Documents related to Communications, including proffered testimony, with any third party

- related to the Federal Trade Commission, including the Federal Trade Commission's employees or agents, or Tiversa, including its employees or agents.
5. All Documents, including personnel files, that relate to your duties, formal or informal performance evaluations, disciplinary records, and promotion, demotion, or termination from Tiversa.
  6. All Documents related to the sale or offer of sale of your stock in Tiversa.

Complaint Counsel states that it is "requesting this discovery to facilitate the cross-examination of Mr. Wallace, not to develop its rebuttal case." Motion at 4 n.3.<sup>1</sup> Complaint Counsel contends that the discovery is necessary to enable Complaint Counsel to prepare a meaningful cross-examination of Mr. Wallace, which is in the interest of justice. In addition, Complaint Counsel asserts, permitting discovery in advance of Mr. Wallace's testimony is not premature because it is for the purpose of facilitating cross-examination and will enable Complaint Counsel to cross-examine Mr. Wallace immediately upon conclusion of his direct testimony, which will prevent requiring Mr. Wallace to return for another court appearance.

Complaint Counsel argues that good cause exists to reopen discovery for the purpose of obtaining discovery from Mr. Wallace because, according to Complaint Counsel, it "could not reasonably have anticipated the need to depose Mr. Wallace before the March 5, 2014 close of discovery or the start of the evidentiary hearing in this matter." Motion at 6. Complaint Counsel asserts that it had no notice of, could not have foreseen, and did not in fact learn of, the substance of Mr. Wallace's anticipated testimony until Respondent's counsel made a proffer of that testimony during the evidentiary hearing on June 12, 2014. Complaint Counsel further asserts that, given that proceedings in this matter have already been delayed to facilitate obtaining Mr. Wallace's testimony, Respondent will not be prejudiced by a brief additional delay for limited discovery from Mr. Wallace.

Respondent argues that Complaint Counsel has long known of Mr. Wallace's importance to this case and the nature of his expected testimony, stating that: Complaint Counsel identified Mr. Wallace in its Initial Disclosures in this case; at the deposition of Tiversa, Tiversa's designee and president Mr. Robert Boback identified Mr. Wallace in November 2013 as the Tiversa employee that allegedly found the insurance aging file at issue in this case (the "1718 file") on peer-to-peer networks, and created the document purporting to evidence the peer-to-peer networks at which the 1718 file was allegedly found (CX 19); Respondent identified Mr. Wallace on its Final Proposed Witness list in advance of the trial; and Complaint Counsel has long been aware that Respondent claims that Tiversa took the 1718 file from a LabMD workstation. Notwithstanding the foregoing, Respondent argues, Complaint Counsel declined the opportunity to depose Mr. Wallace during the discovery period, and also confirmed at trial that it would not seek to obtain Mr. Wallace's deposition in advance of his testimony.

Respondent also argues that Complaint Counsel is seeking anticipatory rebuttal discovery, which effort was previously denied by Order dated July 23, 2014. Finally, Respondent contends that some of the requested discovery, including details regarding Mr.

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<sup>1</sup> Complaint Counsel's Motion for Leave to Issue Subpoenas for the purpose of obtaining rebuttal evidence for Mr. Wallace's anticipated testimony was denied as premature by Order dated July 23, 2014.



Wallace's February 28, 2014 termination by Tiversa, and regarding Mr. Wallace's subsequent sale of Tiversa stock in April and May 2014 are not relevant.

### III.

FTC Rule 3.21(c)(2) states in pertinent part: "The Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in this scheduling order other than the date of the evidentiary hearing. . . . In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner." 16 C.F.R. § 3.21(c)(2).

Having considered all the arguments and contentions of the parties, and based on the record presented, Complaint Counsel erred in failing to take Mr. Wallace's deposition during the discovery period. Complaint Counsel does not deny that Mr. Wallace was closely involved with the discovery of the 1718 file or the creation of CX 19, but asserts that it had no reason to believe that Mr. Wallace would say anything contrary to the testimony of Mr. Boback. However, a deposition would have enabled Complaint Counsel to test its assumptions about Mr. Wallace's testimony.

Complaint Counsel also erred in failing to seek leave to take Mr. Wallace's deposition (or take any other discovery from Mr. Wallace), after the close of discovery, even after Respondent on April 9, 2014 designated Mr. Wallace as a defense witness for trial. Respondent's designation stated:

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

Respondent's Final Proposed Witness List at 4-5.

Indeed, Complaint Counsel expressly declined to seek a deposition of Mr. Wallace in advance of his testimony, notwithstanding the foregoing summary of testimony. During preliminary proceedings at trial on May 22, 2014, Respondent advised it would call approximately 9 witnesses, at which time the following exchange occurred:

JUDGE CHAPPELL: Have all of these witnesses been deposed?

MR. SHERMAN: All except for maybe one.

MS. VANDRUFF: . . . I'm concerned about Mr. Sherman's representation that one

witness may not have been deposed because I'm not aware of a witness on their witness list who has not been deposed.

MR. SHERMAN: Rick Wallace is on our witness list and he was not deposed.

MS. VANDRUFF: And I didn't -- okay. That is true, Your Honor.

JUDGE CHAPPELL: So that's not a concern.

MS. VANDRUFF: To the extent --

JUDGE CHAPPELL: That was your choice not to depose him. He was on the list.

MS. VANDRUFF: Your Honor, we're not concerned about the fact that he hasn't been deposed, that's correct.

Trial Tr., at 438-439.

Complaint Counsel contends that it had no notice that Mr. Wallace's testimony would include assertions of misconduct by Complaint Counsel and the fabrication of evidence until June 12, 2014, when Respondent made a proffer of Mr. Wallace's testimony in court. However, Respondent's summary of Mr. Wallace's anticipated testimony included "Tiversa's communications with the Federal Trade Commission ("FTC") . . . [and] facts relating to the 'P2P insurance aging file.'" Complaint Counsel's failure to know the specifics of Mr. Wallace's testimony until June 12, 2014, is a function of having decided not to seek Mr. Wallace's deposition.

The failure to take discovery from Mr. Wallace earlier was a strategic error. However, the public interest and the search for truth are served by facilitating meaningful cross-examination. In addition, Respondent has not demonstrated that it would be prejudiced by allowing limited discovery to facilitate cross-examination. Nonetheless, Complaint Counsel has not demonstrated that the entirety of its requested discovery is relevant to an effective cross-examination, including the request for documents relating to Mr. Wallace's sale of Tiversa stock in the months after his termination, and the requested discovery is narrowed, as addressed below.

#### IV.


For all the foregoing reasons, Complaint Counsel's Motion is GRANTED IN PART. No earlier than the date upon which an order is issued, after a request for such order under Rule 3.39(b)(2) and the Order of October 9, 2014, *supra*, requiring Mr. Wallace to testify under a grant of immunity, Complaint Counsel may issue a subpoena to Mr. Wallace for documents limited to the following:

1. All Documents related to LabMD, Inc. and/or the 1718 File.

2. All Documents related the IP Address List introduced at trial as CX 19.
3. All Documents, including personnel files, that relate to your duties, formal or informal performance evaluations, disciplinary records, and promotion, demotion, or termination from Tiversa.

In addition, no earlier than the date upon which an order is issued under Rule 3.39(b)(2) requiring Mr. Wallace to testify under a grant of immunity, Complaint Counsel may subpoena Mr. Wallace for a deposition. Because Complaint Counsel has asserted that the late-requested deposition is needed "to facilitate the cross-examination of Mr. Wallace," the deposition shall take place on the day of Mr. Wallace's appearance in this matter to testify, during a recess that will take place immediately upon completion of Mr. Wallace's direct testimony. The deposition shall not exceed 2 hours without further order. Except as set forth herein, Complaint Counsel's Motion is DENIED.

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: December 8, 2014



# Exhibit G

## Brown, Jarad

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**From:** Schell, Jacquelyn N. <jacquelyn.schell@bryancave.com>  
**Sent:** Friday, January 16, 2015 4:47 PM  
**To:** Brown, Jarad  
**Cc:** Buchanan, Mary Beth  
**Subject:** In re: LabMD, Inc., Docket no. 9357

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Jarad,

Following up on my voicemail, Mary Beth Buchanan and I represent Richard Wallace, who received two FTC subpoenas in the above matter.

Regarding the Subpoena Duces Tecum, would you be willing to extend the current response date (Jan. 21) until February 11? We are, just today, finalizing our representation of Mr. Wallace and still trying to determine what, if any, documents are in his possession. Additional time would be extremely helpful on our end and hopefully still provide documents to you and your team well in advance of his appearance date.

I'm happy to provide more detail by phone, if you would like. I'll be in the office for a few more hours this evening.

Thank you,  
Jacquelyn

**Jacquelyn N. Schell**

Attorney | Bryan Cave LLP | 1290 Avenue of the Americas | New York, NY 10104  
(p) 212-541-1242 | (f) 212-261-9842

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This electronic message is from a law firm. It may contain confidential or privileged information. If you received this transmission in error, please reply to the sender to advise of the error and delete this transmission and any attachments.  
bc1lp2015

# Exhibit H



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Consumer Protection  
Division of Privacy and Identity Protection

January 20, 2015

**VIA EMAIL**

Mary Beth Buchanan  
Jacquelyn N. Schell  
Bryan Cave LLP  
1290 Avenue of the Americas  
New York, NY 10104-3300

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

Dear Ms. Buchanan and Ms. Schell:

This letter follows our January 16, 2015 telephone conversation regarding your client's compliance with Complaint Counsel's subpoena *duces tecum*.

We understand that you are requesting an extension to February 11, 2015 to comply with the December 30, 2014 subpoena *duces tecum* issued to your client, Richard Wallace. Complaint Counsel issued our subpoena *duces tecum* immediately following Chief Administrative Law Judge D. Michael Chappell's December 29, 2014 Order requiring your client to appear on March 3, 2015, when the evidentiary hearing in the above-captioned proceeding is scheduled to resume.

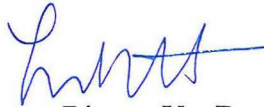
You represented that you require additional time to collect and review potentially responsive documents in your client's possession. In addition, you explained that you are working to obtain the potentially responsive documents that your client provided to the House of Representatives' Committee on Oversight and Government Reform. Finally, we understand that your client may have provided potentially responsive documents to his former counsel.

As you know from our discussion and from Judge Chappell's December 8, 2014 Order, which I forwarded to you on January 5, 2015, our need to prepare for your client's March 3, 2015 appearance constrains our ability to provide the requested extension. Absent relief from the Court, we are able to extend the deadline for Mr. Wallace to comply with Complaint Counsel's subpoena *duces tecum* only to Friday, January 30, 2015. In the interim, we would appreciate you keeping us apprised of your efforts to collect and review documents responsive to the December 30, 2014 subpoena that the Administrative Law Judge authorized Complaint Counsel to issue.

Mary Beth Buchanan  
Jacquelyn N. Schell  
January 20, 2015  
Page 2

Please do not hesitate to call me at (202) 326-2999 if you would like to discuss this or any other matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Laura Riposo VanDruff', with a long horizontal flourish extending to the right.

Laura Riposo VanDruff

cc: Jarad Brown