

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

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

RESPONDENT’S MOTION FOR SANCTIONS

Pursuant to Commission Rule 16 C.F.R. § 3.42(c) (2014), and in response to Complaint Counsel’s Motion for Leave to Issue Subpoenas for Rebuttal Evidence (July 8, 2014) (“Complaint Counsel’s Motion”), Respondent LabMD, Inc. (“LabMD”) hereby moves for sanctions against the Federal Trade Commission (“FTC”), including dismissal of this case with prejudice and an award of LabMD’s reasonable attorneys’ fees and costs.

This Court rejected Complaint Counsel’s first effort to remediate Tiversa, Inc.’s (“Tiversa”) false testimony. Tr. at 1228-30 (June 12, 2014); *see also* Respondent LabMD, Inc.’s Opposition to Motion for Leave to Issue Subpoenas for Rebuttal Evidence, at 4 (July 18, 2014) (“Respondent’s Opposition”). This Court also rejected Complaint Counsel’s second attempt, made after the government had rested, during a stay, in the face of requested FTC Inspector General review and in the midst of an unprecedented Congressional investigation of both FTC and Tiversa. *See* Order Denying Complaint Counsel’s Motion for Leave to Issue Subpoenas for Rebuttal Evidence (July 23, 2014) (“Order”); *see generally* Resp’t’s Opp’n.¹ Complaint

¹ OGR recently advised FTC that its investigation reveals “doubt on the reliability of the information that Tiversa supplied to the FTC.” Letter from Darrell Issa, Chairman, OGR, to Hon. Edith Ramirez, Chairwoman, FTC, at 1 (July 18, 2014) (Ex. 1). Requesting additional information about the relationship between Tiversa and FTC, OGR expressed “concern[] that the FTC appears to have acted on information provided by Tiversa without verifying it in any

Counsel's requested "rebuttal" discovery was apparently aimed to impeach Richard Wallace, the Tiversa employee who "found" the 1718 File, created CX-19, and appears on the FTC's witness list but who has yet to testify, and to rehabilitate Tiversa CEO Robert Boback, who has testified inconsistently in this case. *See, e.g.*, RX-542 (proposed exhibit) (Letter from Rep. Darrell Issa, Chairman, U.S. House of Representatives, Comm. on Oversight & Gov't Reform ("OGR"), to FTC (June 11, 2014)). This Court denied that request, noting that that there was no "good cause to reopen discovery, at this late stage of proceedings." Order at 2. Undeterred, last week in an end-around ploy to circumvent the Court's Order, Complaint Counsel made a third attempt to remediate the prior false testimony by submitting "supplemental" initial disclosures, almost a year after the "preliminary" initial disclosures were submitted, after discovery closed, and even after Complaint Counsel rested its case. Letter from Maggie Lassack, Complaint Counsel, FTC, to William A. Sherman, Counsel for Respondent (July 28, 2014); *see Harriman v. Hancock Cnty.*, 627 F.3d 22, 28 (1st Cir. 2010) (affirming the district court's decision to preclude affidavits based on supplemental initial disclosures when the "justification for the late disclosure [was] nonexistent").

Additionally, Complaint Counsel's Motion demonstrates why the government should be sanctioned here. Complaint Counsel's demand for "rebuttal evidence" supports LabMD's argument in its Motion to Admit RX-542 (June 16, 2014) that this case is based on a crime (the theft of the 1718 File from a LabMD workstation in Atlanta, Georgia in violation of state

meaningful way." *Id.* Relying almost exclusively on the uncorroborated information supplied by Tiversa, the government claimed that it needed "rebuttal" discovery to "prove" the origin and chain of custody of the seminal 1718 File. This is a further reflection of FTC's culture of arrogance and yet another demonstration that institutional controls are lacking. *Accord, e.g., LabMD v. FTC*, No. 1:14-cv-810, Hr'g Tr. at 77, 80-81 (N.D. Ga. May 9, 2014) (Court exclaiming "holy cow" in response to FTC's failure to prove chain of custody with respect to Day Sheets, and "Boy, that's a sad comment on your agency" in response to FTC's failure to interview the people who had the Day Sheets); Order at 2 n.1.

computer law, O.C.G.A. §§ 16-9-93(a)-(c)), and a lie (Boback's testimony that the 1718 File was "found" at various IP addresses specified in CX-19). It also demonstrates that FTC never independently verified the origin of or chain of custody for the 1718 File, the seminal basis for FTC's investigation and prosecution of this case. *See* Complaint Counsel's Mot. at 4.

A shoddy pre-complaint investigation does not necessarily undermine the integrity of the adjudicative process in such a way that sanctions should always follow, though the law authorizes punishing agencies for such conduct. *See* 28 U.S.C. § 2412(d)(1)(A) (2012) (awarding fees and expenses to a prevailing party when the government's position was not substantially justified); *see also United States v. Estridge*, 797 F.2d 1454, 1457-60 (8th Cir. 1986) (affirming lower court's award of attorneys' fees for agency's lack of diligent investigation and error in giving "unwarranted credence to obviously biased witnesses"); *First Interstate Bank v. Purewell Inv.*, No. 94-15821, 1996 U.S. App. LEXIS 2234, at *10-11 (9th Cir. Jan. 26, 1996) (awarding fees because the agency failed to conduct even a "minimal investigation"). And FTC's investigation of LabMD was certainly shoddy.² Tr. at 371-72 (May 21, 2014); *LabMD v. FTC*, No. 1:14-cv-810, Hr'g Tr. at 77 (N.D. Ga. May 9, 2014) (admonishing FTC for failing to interview key witnesses). But sanctions are called for here

² FTC had a clear and well-established obligation to investigate LabMD's claim that the 1718 File had been stolen. For example, in ruling against the IRS, the D.C. Circuit said:

First, Baker complained about disadvantageous treatment in comparison to *identically* situated taxpayers, persons working at the same place for the same employer and required to live, as he was, in housing provided near the workplace by, and for the benefit of, the employer. Second, Baker's allegations suggest that the officials handling his case had turned a totally deaf ear to his *pro se* pleas that he had been singled out to run an obstacle course for no apparent reason. Not even a minimal effort was made, we must assume at this stage, to determine, before Baker engaged counsel, whether the merits of his case were any different from the merits of his co-workers' cases, and whether the IRS officers in Cleveland were acting in accord with the Commissioner's position as it had evolved by the fall of 1983.

See Baker v. Commissioner, 787 F.2d 637, 644 (D.C. Cir. 1986) (citation omitted).

because FTC's secretive relationship with Tiversa and the Privacy Institute, and its failure to do anything to authenticate or have a chain of custody for the 1718 File before commencing this case, are unduly and dangerously corrosive to the most fundamental principles of administrative process integrity. *See* Ex. 1 at 1, 3 (expressing OGR's "serious reservations about the FTC's reliance on Tiversa as a source" because "Tiversa was benefiting commercially from the fact that the FTC was investigating the companies that Tiversa itself referred to the FTC," thus opening up the possibility that "Tiversa manipulated the FTC in order to enrich themselves"); 16 C.F.R. § 3.42(c) (stating that the administrative law judge "shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order"); *cf. In re ECM BioFilms, Inc.*, No. 9358, 2014 FTC LEXIS 63, at *13-14 (F.T.C. Mar. 21, 2014) (sanctioning complaint counsel for violating discovery obligation).

LabMD has stated for years, which Complaint Counsel's Motion now confirms, that FTC never questioned or confirmed how Tiversa obtained the 1718 File.³ The only document produced by the government "proving" that the 1718 File was found somewhere other than a LabMD workstation is CX-19, a one-page document containing nothing but four typed IP

³ Complaint Counsel characterized its "rebuttal discovery" as a response to an "unanticipated, eleventh-hour attack on the information provided by Tiversa during discovery." *See* Complaint Counsel's Mot. at 7 n.6. This characterization is contrary to the record. From the start of this case, LabMD has argued that Tiversa stole the 1718 File directly from a LabMD workstation in violation of Georgia law. *See* O.C.G.A. §§ 16-9-93(a)-(c). Yet FTC never checked to see if this was true as it was required to do, for if LabMD was correct, then FTC could not rely on the 1718 File or any derivative evidence to investigate or sue LabMD. *See Atlantic Richfield Co. v. FTC*, 546 F.2d 646, 651 (5th Cir. 1977) ("If the FTC act[ed] improperly or illegally in obtaining evidence for the adjudicative proceeding ... [Respondent] should be entitled to have any evidence so obtained – as well as its 'fruits' – excluded from the proceeding or to obtain a reversal of any adverse judgment founded upon improperly admitted 'tainted' evidence."); *Knoll Associates, Inc. v. FTC*, 397 F.2d 530, 537 (7th Cir. 1968) (remanding case to FTC with instruction to reconsider evidence without documents and testimony given or produced by or through witness who stole materials from respondent); *see also Rochin v. California*, 342 U.S. 165, 172-74 (1952).

addresses created by Richard Wallace sometime in or about October, 2013 – *after* FTC already issued its administrative complaint. Mr. Wallace, though listed on FTC’s own witness list, is now a government target because his testimony may contradict Tiversa’s story.⁴

For his part, Tiversa CEO Boback (FTC’s key fact witness) has given conflicting testimony regarding the most critical issues surrounding the 1718 File, including how CX-19 was prepared, whether Tiversa searched for File 1718’s hash, whether Tiversa downloaded files to find the 1718 File, whether Tiversa searched P2P networks or its own system to find the 1718 File, whether Tiversa spoke with FTC specifically about LabMD, whether the 1718 File escaped via a thumb drive, and whether Tiversa found the 1718 File at four IP addresses.⁵

Given that FTC’s case flowed from the 1718 File, given that theft of the 1718 File from a LabMD workstation was a crime, and given that Tiversa’s financial interest in government enforcement action was open and obvious, it was vital (even self-evident) that FTC have independently corroborated the 1718 File’s origin before it began its nearly five-year assault on LabMD. Yet, Complaint Counsel admits that it never did so. This means, among other things, that FTC never had any basis for claiming that the alleged “availability” of the 1718 File suggested improper data security practices.⁶

⁴ Ostensibly to protect privacy, Complaint Counsel raises issues relating to Mr. Wallace’s personal medical and employment information (presumably obtained from his former employer Tiversa), simply because Mr. Wallace might testify as to the true origin of the 1718 File (something Complaint Counsel never checked) and to facts that might cast Tiversa and Complaint Counsel in an unfavorable light. *See* Complaint Counsel’s Mot. at 7-8 & Ex. E at 5. In other words, to protect Tiversa, Complaint Counsel cynically smeared Mr. Wallace. The irony of the government’s conduct is biting.

⁵ *Compare*, respectively, CX-703 (excerpts of Deposition Testimony of Robert Boback dated Nov. 21, 2013) at 50-51, 60-64; 40; 73; 9; 141-42; 112-15; 50, *with* RX-541 (excerpts of Deposition Testimony of Robert Boback dated June 7, 2014) at 22, 29; 94; 67, 74, 80; 82; 61-62; 29; 81-82.

⁶ Indeed, FTC’s actions throughout this litigation have demonstrated a lack of concern for factual accuracy and more interest in protecting Tiversa’s credibility. *See* Tr. at 1276-78 (June 12,

FTC repeatedly has refused to reveal the full extent of its collaboration with Tiversa. It seems, however, that the relationship was and remains quite close. *See* Ex. 1 at 3. For example, during Complaint Counsel’s opening statement, Alain Sheer had the following colloquy with the Court:

JUDGE CHAPPELL: Is [Tiversa] a non-government-affiliated entity?

MR. SHEER: It is.

JUDGE CHAPPELL: Not funded by taxpayer money in any way?

MR. SHEER: It is not.

Tr. at 16-17 (May 20, 2014). However, a simple internet search reveals that Tiversa does indeed receive taxpayer money. *See* usaspending.gov (enter “Tiversa” in the search field). Chairman Issa said during a July 24, 2014 OGR hearing that the “CIA ... paid Tiversa at one point.” *The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge and Jury*, YOUTUBE (July 24, 2014), <https://www.youtube.com/watch?v=EljpToLay7w#t=9271>. Boback testified that Tiversa received a contract with the Transportation Security Administration and acted as a sub-contractor on a classified contract. RX-541 at 14-15; RX-541 at 64. Boback further testified that Tiversa received funds from the Federal Bureau of Investigation as an informant on child pornography cases, in the hope that it “would lead to a larger contract.”⁷ RX-541 at 64-65, 107.

The evidence shows FTC worked with Tiversa to maximize opacity. Boback testified that Tiversa created the Privacy Institute while working with FTC to transfer information,

2014) (admonishing FTC’s lack of candor for failing to inform the Court of relevant, highly probative evidence); Complaint Counsel’s Mot. at 4 (seeking evidence to protect Tiversa by establishing Mr. Wallace’s alleged bias against his former employer).

⁷ The FBI has also contracted with Tiversa to spy on Swedish servers downloading information on P2P networks. Alexa O’Brien, *2011-01-20 Bloomberg Discloses FBI Contractor Admits to Spying on Swedish*, WLCentral (Jan. 20, 2011), <http://wlcentral.org/node/1002>. Once again, Tiversa has made dubious claims based on its searches by asserting that certain Swedish computers were involved in Wikileaks. *Id.*

including the 1718 File, to FTC. *See* CX-703 at 142-43; RX-526 at 16-17 (FTC’s Amended Response to RFA No. 20); Ex. 1 (describing the Privacy Institute as “an entity Tiversa created for the specific and sole purpose of providing information to the FTC”). While FTC and Complaint Counsel were aware of, if not directly complicit in, this highly irregular and improper arrangement, LabMD did not learn the truth until November, 2013, during Mr. Boback’s deposition. *See* CX-703 at 142-43. According to Boback, the Privacy Institute (based in his uncle’s home), CX-541 at 43, was constructed to protect Tiversa’s commercial interest by “creat[ing] distance” and “funnel[ing]” the CID to a third party. CX-703 at 142-43.

Also, at all times relevant, Complaint Counsel and FTC knew that Tiversa had a financial interest in an enforcement action against LabMD. As Mr. Boback said, many companies facing FTC enforcement actions have become Tiversa clients, proving that FTC actions are very lucrative for that company. *See* Jaikumar Vijayan, *FTC Seeks Extensive Information from Firms Being Investigated for P2P Breaches*, ComputerWorld (Feb. 25, 2010), available at http://www.computerworld.com/s/article/9162560/FTC_seeks_extensive_information_from_firms_being_investigated_for_P2P_breaches. In fact, FTC announced in 2010 that it notified “almost 100 organizations” that their personal information was available on peer-to-peer networks. Ex. 1 at 2 (citing Press Release, Widespread Data Breaches Uncovered by FTC Probe (Feb. 22, 2010)). “The timing of the Privacy Institute’s production of negative information on ‘roughly 100 companies’ to the FTC, and the FTC’s subsequent announcement that it notified ‘almost 100 organizations’ that they were under FTC scrutiny, creates the appearance that the FTC relied substantially on the information that Tiversa collected and provided.” *Id.* Tiversa’s

financial self-interest in an action against LabMD should have led FTC, and the lawyers investigating the case, to take extra care.⁸

On January 10, 2012, LabMD challenged FTC's civil investigative demand to the company. LabMD's Petition to Limit or Quash the Civil Investigative Demand, FTC File No. 1023099 (Jan. 10, 2012). LabMD argued that Tiversa illegally downloaded the 1718 File with the support of federally-funded researchers at Dartmouth College. *Id.* at 2-4. At that time, LabMD did not know about the Privacy Institute or that FTC had failed to authenticate or establish even the most modest of chain of custody for the 1718 File.

But LabMD did know Tiversa had tried to shake down LabMD for a \$40,000 "remediation" contract before Tiversa turned over the 1718 File to Complaint Counsel. *Tr.* at 986-89 (May 27, 2014). For former Commissioner Rosch, this was enough. He questioned Tiversa's credibility, describing Tiversa as "more than an ordinary witness, informant, or 'whistle-blower'" because it has a "financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its services to help organizations protect against similar infiltrations." Dissenting Statement of Commissioner J. Thomas Rosch, Petitions of LabMD, Inc. and Michael J. Daugherty to Limit or Quash the Civil Investigative Demands, FTC File No. 1023099 (June 21, 2012). Commissioner Rosch therefore recommended that the Commission not rely on evidence obtained from Tiversa, including the 1718 File, to "avoid even the appearance of bias or impropriety." *Id.*

⁸ FTC has produced no documents confirming that the 1718 File was "found" outside LabMD addresses other than CX-19, which, as noted *supra*, was created in or about October, 2013. RX-541 at 22-23. However, one can only assume that FTC asked and Tiversa told FTC where the 1718 File had been "found" at some point between 2009 and Mr. Boback's deposition in November, 2013, and that FTC took Tiversa at its word. After all, if FTC believed or understood that Tiversa had stolen the 1718 File, then surely it would have turned the weight of its enforcement authorities against Tiversa and not against Tiversa's victim, LabMD. For FTC to do otherwise would mean that it actively sanctioned and rewarded criminal conduct in this case.

LabMD cannot know what FTC told the Commission in reply to the motions to quash. *See* 16 C.F.R. § 2.10(a)(4) (permitting staff to submit a reply *ex parte*). However, the Commission’s decision, including Rosch’s dissent, show no indication that FTC disclosed its failure to authenticate Tiversa’s story or to establish a chain of custody for the 1718 File. Nor does it appear the Commission knew that FTC had colluded with Tiversa to funnel the 1718 File through the Privacy Institute to protect Tiversa’s financial interests.

FTC, its officials and lawyers, had a heightened duty to act fairly and ethically in this case and to disclose these things.⁹ *See* 5 C.F.R. § 2635.101(b)(5), (8), (14); 16 C.F.R. § 5.1 (cross-referencing executive branch-wide standards of conduct). Courts expect that federal lawyers with prosecutorial powers will treat targets of government investigations fairly by providing a “more candid picture of the facts and the legal principles governing the case.” *See, e.g.,* James E. Moliterno, *The Federal Government Lawyer’s Duty to Breach Confidentiality*, 14 Temp. Pol. & Civ. Rts. L. Rev. 633, 639 (2006). This heightened duty required first FTC and later Complaint Counsel to conduct a detailed and diligent investigation of Tiversa and the 1718 File before proceeding against LabMD.¹⁰ *See* 16 C.F.R. § 2.4 (stating that FTC’s investigational policy mandates the “just . . . resolution of investigations”). In any event, the facts show that Commissioner Rosch’s concerns regarding bias and impropriety were well-founded.

⁹ “A government lawyer ‘is the representative not of an ordinary party to a controversy,’ the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, ‘but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.’” *Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47-48 (D.C. Cir. 1992) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, “a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission.” *Id.* at 48.

¹⁰ Failure to conduct a well-reasoned investigation is grounds for a court to remand to the agency *sua sponte*. *See Igonia v. Califano*, 568 F.2d 1383, 1387 (D.C. Cir. 1977) (finding judicial review impossible because the agency did not conduct a diligent investigation supported by corroborating evidence).

Similar concerns are at the heart of OGR's investigation of FTC's relationship with Tiversa, which is apparently only one part of a much broader inquiry.¹¹ According to Chairman Issa, with respect to FTC and this case, it was not for OGR to "second guess" the Section 5 authority that Congress had given FTC. However, OGR was well within its bounds to ensure that FTC puts parties on notice of its expectations and holds the proper parties accountable: "We need to find out if they [FTC] are targeting the culprit or victim, and what information the agency is considering to be a reliable basis...[for] inquiries into the activities of American companies." See Allison Grande, *LabMD Says FTC, Witness Conspired in Data Security Suit*, Law360 (July 24, 2014, 6:37 PM ET), <http://www.law360.com/articles/560525/labmd-says-ftc-witness-conspired-in-data-security-suit> (reporting testimony from both LabMD and an AIDS clinic of Tiversa's shake-down followed by FTC action); *The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 113th Cong (July 24, 2014) (statement of David Roesler, Executive Director, Open Door Clinic of Greater Elgin), available at <http://oversight.house.gov/wp-content/uploads/2014/07/Roesler-OpenDoor-Statement-7-24-FTC1.pdf>.

This Court must protect the integrity of Commission proceedings: "An administrative law judge [ALJ] has both the authority and the duty to control an adjudicative proceeding so as to ensure a fair and impartial hearing." See, e.g., *In re Intel Corp.*, No. 9288, 1999 FTC LEXIS 215, at *4 (F.T.C. Jan. 8, 1999) (citing 16 C.F.R. § 3.42(c), which grants the ALJ "all powers

¹¹ Among other things, OGR is evaluating whether to take a vote on granting immunity to Richard Wallace. Despite the pendency of that process, Complaint Counsel recently filed a motion seeking to require Respondent's Counsel to file a Rule 3.39 request for an order requiring Richard Wallace to testify and granting immunity. Compl. Counsel's Mot. for Order Requiring Resp't's Counsel to File a Rule 3.39 Request or Resuming the Evidentiary Hr'g (Aug. 5, 2014). Complaint Counsel therefore refuses to wait a matter of weeks for Congress to return from recess and complete its evaluation of this same issue, even though Complaint Counsel previously was content to sit on an inadequate investigation for over three years.

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necessary to” conduct a “fair” hearing). Thus, for example, the ALJ has the power to order relief “necessary to prevent complaint counsel from using extrajudicial discovery to obtain an unfair and impermissible advantage, or, at least, to prevent ‘a basis for a respondent to fear that those powers are being abused.’” *See id.* at *5.

Here, Complaint Counsel’s attempt to re-open discovery after its case was closed to create a chain of custody that it should have had in 2009; FTC’s opaque relationship with Tiversa; FTC’s apparent failure to disclose all of the facts to the Commission (much less LabMD) about its Tiversa relationship, the origin of and lack of chain of custody for the 1718 File, and the Privacy Institute; and its general course of conduct give LabMD ample reason to fear that FTC has abused its very considerable prosecutorial power and discretion. As United States District Court Judge Duffy put it, “[I]t is a sad comment on [the FTC]” and “almost ... unconscionable” that the agency would bring an enforcement action here. *LabMD v. FTC*, No. 1:14-cv-810, Hr’g Tr. at 77 (N.D. Ga. May 9, 2014).

For these reasons, Respondent respectfully requests that the Court sanction FTC by dismissing this case with prejudice and awarding Respondent reasonable attorneys’ fees and costs.

Dated: August 14, 2014

Respectfully submitted,



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/s/ Reed D. Rubinstein

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

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**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.'S
MOTION FOR SANCTIONS**

Having considered Respondent LabMD, Inc.'s Motion for Sanctions and all supporting and opposition papers, and good cause appearing, it is hereby ORDERED that:

- (1) Respondent's Motion is GRANTED;
- (2) This case is dismissed with prejudice; and
- (3) Respondent is entitled to attorneys' fees and costs in an amount to be determined following briefing by the parties.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2014, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

Alain Sheer, Esq.
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Margaret Lassack
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CERTIFICATE OF ELECTRONIC FILING

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

Dated: August 14, 2014

By: /s/ Robyn N. Burrows

EXHIBIT

1

JOHN L. MICA, FLORIDA
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VACANCY

LAWRENCE J. BRADY
STAFF DIRECTOR

July 18, 2014

The Honorable Edith Ramirez
Chairwoman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Madam Chairwoman:

The Committee on Oversight and Government Reform is investigating the activities of Tiversa, Inc., a company the Federal Trade Commission relied upon as a source of information in investigations and enforcement actions. The Committee has learned that the FTC received information on nearly 100 companies from Tiversa, and initiated investigations or enforcement actions against multiple companies after receiving the information. The Committee has received serious allegations against Tiversa related to the ways that the company collected and used that information. In the course of investigating those allegations, the Committee obtained documents and testimony that show the company's business practices cast doubt on the reliability of the information that Tiversa supplied to the FTC. Given what the Committee has learned so far, I have serious reservations about the FTC's reliance on Tiversa as a source of information used in FTC enforcement actions. I am also concerned that the FTC appears to have acted on information provided by Tiversa without verifying it in any meaningful way.

From the information the Committee has gathered the relationship between the FTC and Tiversa dates back to 2007. In July 2007, Tiversa and the FTC testified before the Oversight and Government Reform Committee about the dangers of peer-to-peer networks.¹ Following Tiversa's July 2007 testimony, the FTC had a number of conversations with Tiversa about the risks of inadvertent sharing on peer-to-peer networks.² According to documents obtained by the Committee, after at least two telephone conversations between FTC and Tiversa employees,

¹ H. Comm. on Oversight & Gov't Reform, *Hearing on Inadvertent File Sharing Over Peer-to-Peer Networks*, 110th Cong. (July 24, 2007) (H. Rept. 110-39).

² E-mail traffic indicates that representatives from the FTC and Tiversa held a conference call with an online meeting component on October 26. E-mail from [FTC Employee 1], Fed. Trade Comm'n, to Robert Boback, CEO, Tiversa, Inc. (Oct. 22, 2007 2:23 p.m.) ("We'll plan on speaking with you at 10:30 on Friday morning (10/26). I'll check on our ability to do the call with web access to be able to view a presentation." E-mail from Robert Boback, CEO, Tiversa, Inc., to [FTC Employee 1], Fed. Trade Comm'n (Oct. 22, 2007 3:25 p.m.) ("I have scheduled our demonstration for Friday at 10:30."). Another phone conversation appears to have occurred on December 19, 2007. E-mail from Robert Boback, CEO, Tiversa, Inc., to [FTC Employee 1], Fed. Trade Comm'n (Dec. 11, 2007 2:04 p.m.) ("2 pm on Wednesday (12/19) will work. Let's plan for that time.").

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Robert Boback, Tiversa's CEO, sent information to the FTC in December 2007.³ It is unclear what specific information Tiversa sent to the FTC at that time or how that information was used.

In 2009, Tiversa and FTC again testified before the Oversight and Government Reform Committee at another hearing on the risk of inadvertent sharing on peer-to-peer networks.⁴ The Committee has learned that around the same time as this hearing, the FTC contacted Tiversa and asked for information about companies with large data breaches.⁵ In order to receive the information, the FTC issued a civil investigative demand to the Privacy Institute, an entity Tiversa apparently created for the specific and sole purpose of providing information to the FTC. Mr. Boback explained the relationship between Tiversa and the Privacy Institute during a transcribed interview with the Committee. He testified that Tiversa lawyers set up the Privacy Institute "to provide some separation from Tiversa from getting a civil investigative demand at Tiversa, primarily. And, secondarily, it was going to be used as a nonprofit, potentially, but it never did manifest."⁶

Through the Privacy Institute, Tiversa produced a spreadsheet to the FTC that contained information on data breaches at a large number of companies.⁷ Mr. Boback further testified that Tiversa provided information on "roughly 100 companies" to the FTC.⁸

In February 2010, the FTC announced that it notified "almost 100 organizations" that personal information had been shared from the organizations' computer networks and was available on peer-to-peer networks.⁹ The FTC also announced that it opened non-public investigations concerning an undisclosed number of companies.¹⁰ The timing of the Privacy Institute's production of negative information on "roughly 100 companies" to the FTC, and the FTC's subsequent announcement that it notified "almost 100 organizations" that they were under FTC scrutiny, creates the appearance that the FTC relied substantially on the information that Tiversa collected and provided.

That same month, Mr. Boback gave an interview to *Computerworld* about the FTC's announcement.¹¹ He stated, "We were happy to see that the FTC [has] finally started recognizing that P2P [peer-to-peer] is a main source for criminals to gain access to consumer's personally identifiable information for ID theft and fraud."¹² Mr. Boback also stated that 14 of the companies the FTC contacted had already reached out to Tiversa for assistance, and that 12

³ E-mail from Robert Boback, CEO, Tiversa, Inc., to [FTC Employee 1], Fed. Trade Comm'n (Dec. 19, 2007 3:08 p.m.) ("Per our discussion...see attached.").

⁴ H. Comm. on Oversight & Gov't Reform, *Hearing on Inadvertent File Sharing Over Peer-to-Peer Networks: How it Endangers Citizens and Jeopardizes National Security*, 111th Cong. (July 29, 2009) (111-25).

⁵ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Robert Boback, CEO, Tiversa, Inc., at 169 (June 5, 2014) [hereinafter Boback Tr.].

⁶ Boback Tr. at 42-43.

⁷ Boback Tr. at 169.

⁸ Boback Tr. at 171.

⁹ Fed. Trade Comm'n, Press Release, *Widespread Data Breaches Uncovered by FTC Probe* (Feb. 22, 2010).

¹⁰ *Id.*

¹¹ Jaikumar Vijayan, *FTC seeks extensive information from firms being investigated for P2P breaches*, COMPUTERWORLD, Feb. 25, 2010, http://www.computerworld.com/s/article/9162560/FTC_seeks_extensive_information_from_firms_being_investigated_for_P2P_breaches?taxonomyId=84&pageNumber=1.

¹² *Id.*

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of those companies received civil investigative demands.¹³ Because Tiversa was benefiting commercially from the fact that the FTC was investigating the companies that Tiversa itself referred to the FTC, it is critical for the Committee to understand the relationship between the FTC and Tiversa, and whether Tiversa manipulated the FTC in order to enrich themselves.

In order to assist the Committee in its investigation, please provide the following documents as soon as possible, but by no later than 5:00 p.m. on July 21, 2014:

1. All civil investigative demand letters the FTC sent to the Privacy Institute and Tiversa, Inc.
2. All documents, including spreadsheets, produced by the Privacy Institute or Tiversa to the FTC in response to any civil investigative demand letters sent by the FTC.
3. All letters or other notices sent by the FTC sent to “almost 100 organizations” as discussed in a February 22, 2010, FTC press release.
4. All civil investigative demand letters the FTC sent as part of the investigations announced in the February 22, 2010, FTC press release.

The Committee on Oversight and Government Reform is the principal investigative committee of the U.S. House of Representatives. Pursuant to House Rule X, the Committee has authority to investigate “any matter” at “any time.” An attachment to this letter provides additional information about responding to the Committee’s request.

When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Tyler Grimm or Jennifer Barblan of the Committee staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,



Darrell Issa
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

¹³ *Id.*

DARRELL E. ISSA, CALIFORNIA
CHAIRMAN

ELIJAH E. CUMMINGS, MARYLAND
RANKING MINORITY MEMBER

ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

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Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTHOUR, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,

CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been

located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Schedule Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms “and” and “or” shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms “person” or “persons” mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.