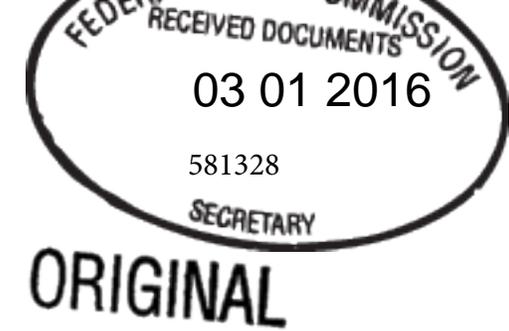


In the matter of LabMD, Inc.
FTC No.9357



RESPONDENT'S SLIDES RE: ORAL
ARGUMENT BEFORE THE COMMISSION
MARCH 8, 2016

Commissioner J. Thomas Rosch

“In my view, however, as a matter of prosecutorial discretion under the unique circumstances posed by this investigation, the CIDs should be limited.

Accordingly, without reaching the merits of petitioners’ legal claims, I do not agree that staff should further inquire – either by document request, interrogatory, or investigational hearing – about the 1,718 File.”

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 (cont.)

“Specifically, I am concerned that Tiversa is more than an ordinary witness, informant, or ‘whistle-blower.’ It is a commercial entity that 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 (cont.)

“Indeed, in the instant matter, an argument has been raised that Tiversa used its robust, patented peer-to-peer monitoring technology to retrieve the 1,718 File, and then repeatedly solicited LabMD, offering investigative and remediation services regarding the breach, long before Commission staff contacted LabMD.”

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

Oversight and Government Reform Committee (OGR)

“Tiversa, a Pittsburgh-based company that sells peer-to-peer monitoring services, provided information on LabMD and nearly 100 other companies to the FTC.

This information formed the basis for multiple enforcement actions and dozens of warning letters sent by the FTC. In August 2013, Mike Daugherty, LabMD’s CEO, expressed concern to the Committee about both the relationship between the FTC and Tiversa, Inc., and the veracity of the information provided by Tiversa.

In April of the following year, the Committee became aware of a former Tiversa employee with allegations of substantial misconduct related to Tiversa’s dealings with the federal government.”

See OGR Report at 5 – released May 2015

OGR Findings (cont.)

Information provided by Tiversa to the FTC through a shell organization known as the Privacy Institute was only nominally verified but was nonetheless relied on by the FTC for enforcement actions.

See OGR Report/Key Findings at 4

STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113th Cong., Tiversa, Inc.: White Knight Or High-Tech Protection Racket?, 1-99 (Jan. 2, 2015) (PREPARED FOR CHAIRMAN DARRELL E. ISSA) (RX644) (“OGR’s Protection Racket Report Regarding FTC & Tiversa”), at 4, available at <http://michaeljdaugherty.com/2015/05/19/congressional-report-ftc-tiversa-misrepresented/> (last accessed March 1, 2016)

OGR (cont.)

“Boback and Tiversa provided intentionally false information to the United States government on more than one occasion. This is a crime.”

See OGR Report/I. Introduction at 5

OGR (cont.)

“During the course of this investigation, the Committee conducted ten day-long transcribed interviews and reviewed over 50,000 pages of documents. Documents and testimony obtained by the Committee in the course of its investigation displayed a troubling pattern with respect to Tiversa’s business practices.”

See OGR Report/I. Introduction at 5 (emphasis added)

OGR (cont.)

“Tiversa routinely provided falsified information to federal government agencies. Instead of acting as the ‘white knight’ the company purports to be, Tiversa often acted unethically and sometimes unlawfully after downloading documents unintentionally exposed on peer-to-peer networks.”

See OGR Report/I. Introduction at 5

OGR (cont.)

The FTC failed to question Tiversa’s creation of a dubious shell organization, the Privacy Institute, to funnel information to the FTC.

“Regardless of the reasons that Boback created the Privacy Institute, it is not in dispute that Tiversa used the Privacy Institute to send information to the FTC. The FTC did not question Tiversa’s use of the Privacy Institute, and did not know that the Privacy Institute was set up solely to respond to the FTC’s request for information.”

See OGR Report at 61 (notes omitted)

OGR (cont.)

The FTC failed to question Tiversa's creation of a dubious shell organization, the Privacy Institute, to funnel information to the FTC.

FTC officials clearly knew that the information was, in fact, coming from Tiversa, despite the use of the Privacy Institute. The FTC admitted that the use of Tiversa's information was unusual relative to standard agency operating procedures for enforcement measures.”

See OGR Report at 61 (notes omitted)

OGR (cont.)

FTC did not properly verify the information received from Tiversa.

“Ultimately, outside of some minimal work verifying IP addresses and looking at metadata, the FTC relied entirely on the list of companies and documents Tiversa provided.”

See OGR Report at 61-62 (note omitted)

OGR (cont.)

FTC did not properly verify the information received from Tiversa.

“Of the 88 companies Tiversa submitted to the FTC, the agency sent warning letters to 63 companies, and opened investigations into 9 companies. The FTC also issued a press release on the letters and received considerable media exposure for its new work related to data security. According to the FTC, this was the only time it obtained information from Tiversa.”

See OGR Report at 61-62 (note omitted)

FTC Denial of advance notice to Tiversa

“The FTC categorically denied to the Committee that it gave Tiversa notice that it would be using the information in letters to companies. Documents the Committee obtained during the course of this investigation suggest otherwise.”

“The FTC further explained that it only needs ‘reason to believe’ that a company is failing to adhere to appropriate data security standards before sending a warning letter or issuing a complaint. The agency was comfortable with the extent of the ‘self-verifying’ steps it took before sending warning letters and opening investigations into nearly 100 companies.”

See OGR Report at 62 (emphasis added)

OGR (cont.)

“Tiversa manipulated advanced, non-public, knowledge of FTC regulatory actions for profit.”

“Tiversa had advanced knowledge that the FTC intended to pursue regulatory actions against many of the companies it turned over to the Privacy Institute in response to the CID.”

See OGR Report at 62 (emphasis original)

OGR (cont.)

Triversa had advance notice of non-public information.

“FTC officials maintained to the Committee that no one at the FTC provided advance information of the January 2010 regulatory actions to Tiversa.”

See OGR Report at 62 (note omitted)

OGR (cont.)

Tiversa used non-public knowledge of pending FTC actions with LifeLock.

“Armed with non-public knowledge of these impending actions, Tiversa maneuvered to position itself to profit from the FTC’s actions.”

See OGR Report at 62 (note and E-mail from Robert Boback to LifeLock executives Mike Prusinski, Todd Davis, and Clarissa Cerda (Oct. 26, 2009 7:37 a.m.) omitted)

OGR (cont.)

Tiversa used advance non-public information with LifeLock.

“In the fall of 2009, Boback began working with LifeLock, a major partner of Tiversa and Tiversa’s largest source of income, to send letters to the companies that would be contacted by the FTC—the very companies that Tiversa turned over to the FTC. In October 2009, Boback e-mailed senior LifeLock executives about the impending FTC investigations”

See OGR Report at 62 (note and E-mail from Robert Boback to LifeLock executives Mike Prusinski, Todd Davis, and Clarissa Cerda (Oct. 26, 2009 7:37 a.m.) omitted)

OGR (cont.)

“Boback further explained that the Washington Post planned to ‘shame’ companies into addressing the problem, and that the upcoming FTC investigations presented a unique opportunity for LifeLock and Tiversa to profit.”

“Boback’s scheme to profit from the FTC investigations took shape in the coming weeks. In early October 2009, Boback advised LifeLock that ‘the FTC letters did not go out yet so the companies will not know what you are talking about yet.’ He further advised that LifeLock should ‘be solo’ and ‘suggest Tiversa if asked by the company.’”

See OGR Report at 63 (notes omitted)

OGR (cont.)

Advance non- public information with Tiversa

See OGR Report at
63



From: Robert Boback [rboback@tiversa.com]
Sent: Monday, October 26, 2009 7:37 AM
To: Mike Prusinski; Todd Davis; Clarissa Cerda
Subject: RE: 60 minutes

As soon as I get the OK from the FBI, we will be off an running. We have some huge rings that we are tracking right now but I can't discuss as they are open investigations. We hired a new guy that came from the Secret Service to help us address these crimes.

Also, there was a breach in House Ethics via P2P that the Washington Post will be writing a story about this week or next. Should be interesting...

And...the FTC is preparing the federal cases against 100 or so companies that have breached consumers information via P2P. This is a huge increase for them since they have only prosecuted 25 cases since 2001. The Washington Post is already planning on writing a big expose on that and they plan to name companies in an effort to shame them into properly addressing this for the individuals exposed.....ie buy LL. :-). There are about 600-700K individuals on those lists, therefore if we time things right, LL can have a huge upswing in members AND LL will have pricing power over the companies that leaked the information. Since LL is still the only company that can offer P2P remediation, you will be the only choice for the solution. :-)

I saw the settlement of the Experian suit.....they must have seen that Todd on the stand and Clarissa on a cross examination would not be beneficial to their long term viability.....

Best,
Bob

Robert Boback
Chief Executive Officer

Tiversa, Inc.
The P2P Intelligence Experts
144 Emeryville Drive, Suite 300
Cranberry Township, Pennsylvania 16066
| 724-940-9030 Office | 724-940-9033 Fax

OGR (cont.)

Advance non-public information with Tiversa

See OGR Report at 65



From: Gary Woods
Sent: Tuesday, November 03, 2009 2:25 PM
To: Austin Colcord; Chris Miller
Cc: Anthony Hesano; Eric Warbasse; Steve McGrady
Subject: FW: LifeLock Breach Services - intro letter

Austin & Chris

I re-wrote the letter and believe it is on target – and generic enough that Legal is not going to have any issue. I spoke with Eric & Austin about it and now I just need Chris to have Legal approve the verbiage.

Key points:

- No FTC reference
- No Tiversa reference
- No P2P reference

This is solely to make these accounts aware of LifeLock so when they fully realize the need to respond to a data breach – they think of LifeLock first and have our contact information to reach out and partner with us. I'm sure based on discussions with Bob that Tiversa will also be involved with these accounts and will reinforce their need to provide a LL solution in their breach compliance letter to affected individuals.

Thanks for your help,

Gary

OGR (cont.)

“On February 22, 2010, the FTC announced that it notified ‘almost 100 organizations’ about data breaches that occurred on peer-to-peer file sharing networks, and opened non-public investigations into several other companies.”

See OGR Report at 65 (notes omitted)



FTC Press Release

The Federal Trade Commission has notified almost 100 organizations that personal information, including sensitive data about customers and/or employees, has been shared from the organizations' computer networks and is available on peer-to-peer (P2P) file-sharing networks to any users of those networks, who could use it to commit identity theft or fraud. The agency also has opened non-public investigations of other companies whose customer or employee information has been exposed on P2P networks.

<https://www.ftc.gov/news-events/press-releases/2010/02/widespread-data-breaches-uncovered-ftc-probe>

Widespread Data Breaches Uncovered by FTC Probe
FTC Warns of Improper Release of Sensitive Consumer Data on P2P File-Sharing Networks
FOR RELEASE, February 22, 2010

OGR (cont.)

Boback sent the link to executives at LifeLock

From: Robert Boback
To: Gary Woods; Todd Davis; Mike Prusinski
Sent: Mon Feb 22 09:30:18 2010
Subject: FTC press release

Guys,

See OGR Report at 65

Check out this link.....then ask yourself who knows what's going on?!?!?!?! :-)

<http://www.ftc.gov/opa/2010/02/p2palert.shtm>

Best,
Bob

Robert Boback
Chief Executive Officer

1

OGR (cont.)

“Lifelock responded, ‘Once again you guys are at the top of the food chain. Any problem with us pushing this with media and using you?’ Boback promptly replied, ‘No problem.’”

“In an interview with Computerworld days after the FTC press release, Boback stated, ‘We were happy to see that the FTC [has] finally started recognizing that P2P is a main source for criminals to gain access to consumer’s personally identifiable information for ID theft and fraud.’ Boback further stated that complying with the FTC’s request for information could be ‘extensive and cumbersome,’ and that 14 of the companies the FTC contacted had already contacted Tiversa for help. |

The Computerworld article does not mention that Tiversa acted as the primary source for the FTC’s enforcement actions announced in February 2010.”

See OGR Report at 66 (notes omitted) (emphasis added)

OGR (cont.)

“Sheer further testified that he was unaware of Tiversa seeking to profit off of the information provided to the FTC until shown documents produced to the Committee and that the scheme with Lifelock was concerning.”

“Troublingly, despite Tiversa’s close relationship with Lifelock, a company that was itself the subject of an FTC investigation, *Sheer stated that he was unaware of the relationship between Lifelock and Tiversa before being informed of it by Committee staff in a transcribed interview.*”

See OGR Report at 66-67 (emphasis added)



OGR (cont.)

“The FTC used Tiversa as the source of convenient information used to initiate enforcement actions, and Tiversa used the FTC to in further pursuing the company’s coercive business practices.”

“Boback could not have known the details of the FTC’s investigations—including the timing of the letters, which constituted pre-decisional information about pending non-public government actions —without some sort of inside knowledge about the FTC’s enforcement plans.

While the Committee’s investigation has not yet identified the source of the Tiversa’s information about the FTC actions, it is clear that Tiversa and the FTC had a mutually beneficial relationship.”

See OGR Report at 67 (emphasis added)

OGR (cont.)

“The discrepancies in the accounts of Tiversa’s downloading of the LabMD file and the information provided to the FTC call into question the FTC’s processes for relying on third-party sources and integrity of its actions against LabMD.”

“All of this information not only calls into question Tiversa’s technological capabilities, but also Tiversa’s claim that it never downloaded the LabMD file from a Georgia IP address – a critical fact in the case against LabMD.

As described above, Tiversa’s Eagle Vision software purportedly downloads a document every time it hits on a search term. . . . To the Committee’s knowledge, Tiversa has not explained in this investigation or other legal proceedings why the software did not download the file from the Georgia IP address.

Boback has testified that the LabMD file was available on the peer-to-peer network. Either the software does not download a relevant file each time it spreads to a new IP address, which fundamentally calls into question Tiversa’s capabilities, or Tiversa did download the LabMD file from the Georgia IP address, a key point in the FTC proceeding.” *See* OGR Report at 70-71

OGR (cont.)

“Evidence produced to the Committee shows that the FTC notified Tiversa of its investigatory schedule, so that Tiversa knew when the Commission would issue complaint letters and act accordingly.”

“The reason for forging the IP addresses, according to the whistleblower, was to assist the FTC in showing that P2P networks were responsible for data breaches that resulted in likely harm, not just the exposure of the information from the source computer which could have been easily remedied.”

See OGR Report at 71 (emphasis added) 

FTC Testimony before House Oversight Committee

Inadvertent File Sharing Over Peer-to-Peer Networks: Hearing Before the H. Comm. on Oversight and Gov't Reform, 110th Cong. (July 24, 2007) (statement of Mary Engle, Assoc. Dir. for Advertising Practices. Federal Trade Comm'n) at 3, 8.

On July 24, 2007, FTC told Congress: “P2P file-sharing ... is a ‘neutral’ technology”

There was “little empirical evidence” regarding relative P2P risks “compared to the risks from other Internet-related activities”

OGR Findings (cont.)

According to the testimony of a whistleblower and documents obtained in this investigation, Tiversa appears to have provided intentionally false information to this Committee and numerous other federal departments and agencies.

Tiversa has further used and overstated its relationships with Congress and federal agencies to advance its unethical business model.

The Committee's findings should give pause to any government entities which have relied or are planning to rely on information provided by Tiversa.

See OGR Report/I. Introduction at 6

STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113th Cong., *Tiversa, Inc.: White Knight Or High-Tech Protection Racket?*, 1-99 (Jan. 2, 2015) (PREPARED FOR CHAIRMAN DARRELL E. ISSA) (RX644) (“OGR’s Protection Racket Report Regarding FTC & Tiversa”), at 6, available at <http://michaeljdaugherty.com/2015/05/19/congressional-report-ftc-tiversa-misrepresented/> (last accessed March 1, 2016)

OGR Findings (cont.)

Given these numerous instances in which Tiversa failed to fully provide information to the Committee and the FTC, the Committee strongly believes that Tiversa may be withholding additional relevant documents.

Tiversa's failure to produce numerous relevant documents to this Committee and the FTC, at a minimum, demonstrates a lack of good faith. At worst, Tiversa intentionally withheld documents and other information in the face of multiple subpoenas.

Either way, Tiversa's actions call into question the credibility of the company and its CEO, Robert Boback, as a source of information for the FTC.

See OGR Report/III. Tiversa's Lack of Cooperation with this Investigation at 8

STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113th Cong., Tiversa, Inc.: White Knight Or High-Tech Protection Racket?, 1-99 (Jan. 2, 2015) (PREPARED FOR CHAIRMAN DARRELL E. ISSA) (RX644) ("OGR's Protection Racket Report Regarding FTC & Tiversa"), at 8, available at <http://michaeljdaugherty.com/2015/05/19/congressional-report-ftc-tiversa-misrepresented/> (last accessed March 1, 2016)

The FTC misrepresented the extent of its relationship with Tiversa to the Committee.

The FTC told the Committee that it had limited contact with Tiversa. Representatives from the Division of Privacy and Identity Protection of the Bureau of Consumer Protection told the Committee that the FTC first contacted Tiversa around the time of the July 2009 hearing.

FTC officials stated they found Tiversa to be a credible source of information, in large part, because of Boback's previous testimony before the House Oversight Committee.

See OGR report/V. Tiversa's Relationship with the Federal Trade Commission/B. The FTC misrepresented the extent of its relationship with Tiversa to the Committee at 56 (notes omitted)

FTC misrepresented (cont.)

According to the FTC, after Tiversa sent the information responsive to the CID through the Privacy Institute, all subsequent contacts with Tiversa took the form of clarifying questions about the information provided by Tiversa. Alain Sheer and Kristen Cohen made these calls.¹⁷¹

As described above, FTC officials also recalled a meeting at Tiversa's offices in 2009, although they could not remember the details.¹⁷² FTC officials did not recall any other meetings with Tiversa. Sheer in particular did not recall meeting with Tiversa in Washington, D.C.

See OGR report/V. Tiversa's Relationship with the Federal Trade Commission/B. The FTC misrepresented the extent of its relationship with Tiversa to the Committee at 56 (notes omitted)

FTC misrepresented (cont.)

Tiversa's phone records are also telling of the company's relationship with the FTC. They indicate that Tiversa employees placed two phone calls to FTC attorney Laura Vandruff in June 2008, and that in the four months leading up to the July 2009 Oversight Committee hearing, Tiversa employees called Alain Sheer at his FTC office on 21 occasions.

Documents show that Boback was one of the FTC's main contacts at Tiversa prior to July 2009.

See OGR report/V. Tiversa's Relationship with the Federal Trade Commission/B. The FTC misrepresented the extent of its relationship with Tiversa to the Committee at 57 (note omitted)

FTC misrepresented (cont.)

Regular phone calls between Tiversa and the FTC took place between August 2009, when Tiversa provided information to the FTC, and January 19, 2010, when the FTC sent letters to nearly all of the companies Tiversa turned over to the FTC.

During these months, Tiversa employees called Alain Sheer 34 times.¹⁸² The FTC represented to the Committee that only a handful of phone calls ever took place. Tiversa also represented to the Committee that the relationship between Tiversa and the FTC was nominal, and produced few documents indicating any ongoing contract with the FTC after July 2009, let alone this many interactions. The phone records stand in stark contrast to this assessment.

See OGR report/V. Tiversa's Relationship with the Federal Trade Commission/B. The FTC misrepresented the extent of its relationship with Tiversa to the Committee at 57-58 (note omitted)

Notice of Electronic Service

I hereby certify that on March 01, 2016, I filed an electronic copy of the foregoing RESPONDENT'S SLIDES RE: ORAL ARGUMENT BEFORE THE COMMISSION, with:

D. Michael Chappell
Chief Administrative Law Judge
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Washington, DC, 20580

Donald Clark
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I hereby certify that on March 01, 2016, I served via E-Service an electronic copy of the foregoing RESPONDENT'S SLIDES RE: ORAL ARGUMENT BEFORE THE COMMISSION, upon:

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