

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



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

ORIGINAL

**RESPONDENT LABMD, INC.’S UNOPPOSED MOTION TO REFER
TIVERSA, INC., TIVERSA HOLDING CORP., AND ROBERT BOBACK
FOR INVESTIGATION REGARDING POTENTIAL CRIMINAL VIOLATIONS OF 42
U.S.C. § 1320D-6(a), 18 U.S.C. §§ 371, 1001, 1030, 1505, AND 1519**

Respondent, LabMD, Inc. (“LabMD”), pursuant to 16 CFR § 3.42(c), moves to refer Tiversa, Inc. and Tiversa Holding Corp. (collectively “Tiversa”), and Tiversa CEO Robert Boback (“Boback”), to the United States Department of Justice for an investigation of potential perjury and criminal violations of 42 U.S.C. § 1320D-6(a) (knowingly obtaining or disclosing individually identifiable health information maintained by a covered entity without authorization and for commercial gain), 18 U.S.C. §§ 371 (conspiracy), 1001 (false statements/perjury), 1030 (computer crimes), 1505 (obstruction), and/or 1519 (falsification of records) in and as a result of their conduct with respect to this proceeding.

Complaint Counsel has advised that it will not join Respondent’s Motion but that it **does not oppose** the relief sought by LabMD herein.

Undisputed Facts

1. On May 15, 2015, Congressman Darrell E. Issa released a Staff Report from the House Oversight and Government Reform Committee (“OGR”) entitled, “Tiversa, Inc.: White Knight or High-Tech Protection Racket?” that was prepared on January 2, 2015 (the “OGR Report”). See Exhibit 1, 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). The OGR Report supports the need for a robust investigation by an impartial entity. *See infra* ¶¶ 5-8, 10-17; *see also* Ex. 1 at 39-42, 61-72.

2. Tiversa, in the ordinary course of its business, willfully and knowingly stole the 1718 File containing individually identifiable health information from LabMD for purposes of commercial gain and in violation of Georgia and federal law. *See* Exhibit 2, Richard E. Wallace Tr., at 1367-1396, 1399-1403, 1409-11 (May 5, 2015) (Vol. IX) (PUBLIC); *see also* Off. Code of Ga. Ann. § 16-9-93 (2010) (Georgia Computer Crimes Statute); 42 U.S.C. § 1320D-6(a); 18 U.S.C. § 1030. At all times relevant, LabMD was a “covered entity.” *See* 45 CFR § 160.103.

3. Boback approved and ratified the theft. *See* Ex. 2 at 1372-1380.

4. Tiversa routinely manufactured false evidence of “spread” or proliferation to generate business and it did so in this case. *Id.* at 1380; *id.* at 1361-1391.

5. Tiversa and/or Boback directed Richard Wallace to manufacture false evidence for this case, including CX19, which was introduced by Complaint Counsel to “prove” that the 1718 File proliferated across peer-to-peer networks and had been found outside of LabMD’s Atlanta, Georgia workstation. *Id.* at 1361-1411.

6. Tiversa routinely manufactured false reports to its clients to generate business and it did so in this case. *Id.* at 1390-91; *see also* CX19; Exhibit 3 (Letter from Chairman Darrell Issa, House Oversight and Government Reform Committee, to FTC Chairwoman Edith Ramirez, at 1-8 (Dec. 1, 2014) (RX543).

7. Tiversa included LabMD on a list of companies it submitted to the Federal Trade Commission (“FTC”) because LabMD refused to pay Tiversa. Ex. 2 at 1365-66.

8. To obstruct and prejudice judicial proceedings in the Eleventh Circuit, Tiversa falsely represented to that Court that it downloaded the 1718 File “without knowledge of the file’s

location” and that it did not “know where LabMD and its servers (if it even had servers) were located when it downloaded” the 1718 File. *See* Brief of Appellee Tiversa, Inc., *LabMD, Inc. v. Tiversa, Inc., et al.*, No. 12-14504, at 15, 29 (11th Cir. Nov. 16, 2012). At all times relevant, Tiversa knew precisely where it had stolen the 1718 File. *See* Ex. 2, at 1441-44; *see also* Ex. 3; Exhibit 4, Gormley Dep. Tr., at 25 (Mar. 31, 2014) (“The system determined the IP address of the origination of the file. To determine the precise owner of the file by name, address, the company was sometimes inexact; however, the IP address was exact.”).

9. Contrary to Tiversa’s direct testimony and to documents produced by Tiversa in response to a valid subpoena from Complaint Counsel (and LabMD), the 1718 File was never found anywhere other than the 64.180.92.42 IP address associated with LabMD. *See* Exhibit 5, Robert Boback Dep. Tr., at 24-25, 41, 72-73; CX19; Ex. 3; *see also* Ex. 2 at 1443-44; Exhibit 6 (E-mail from Robert Boback, CEO, Tiversa, to Dan Kopchak & Molly Trunzo (Sept. 5, 2013))¹ (“In 2008, while doing work for a client, our systems downloaded a file (1,718 page pdf) that contained sensitive information including SSNs and health information for over 9000 people. The file had the name ‘LabMD’ in both the header of the file and the metadata. ***The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD’s office to be located.***”) (emphasis added).

10. On November 21, 2013, Boback, Tiversa’s designated deponent, knowingly and willfully testified falsely in this proceeding regarding, *inter alia*: (a) how CX19 was prepared (*compare* CX703 (excerpts of Deposition Testimony of Robert Boback dated Nov. 21, 2013) at

¹ Exhibit 6 was initially proffered as RX547, and is the subject of a pending motion to admit (as RX630, renumbered because of how the exhibit is compiled). It should be admitted into evidence because it is a business record of Tiversa and contains the present sense impression of Boback as of Sept. 5, 2013 concerning the true source of the 1718 File download. *See* Rule 3.43(b); Fed. R. Evid. 803(1), Fed. R. Evid. 803(6), Fed. R. Evid. 801(d)(1), (d)(3). Moreover, Exhibit 6 is “[r]elevant, material, and reliable” and, as such, should be admitted. *See* Rule 3.43(b).

50-51, 60-64, *with* RX541 (excerpts of Deposition Testimony of Robert Boback dated June 7, 2014) at 22, 29, *and* Ex. 2 at 1441-44); (b) whether Tiversa searched for File 1718's hash (*compare* CX703 at 40, *with* RX541 at 94, *and* Ex. 2 at 1411); (c) whether Tiversa downloaded files to find the 1718 File (*compare* CX703 at 73, *with* RX541 at 67, 74, 80); (d) whether Tiversa searched P2P networks or its own system to find the 1718 File (*compare* CX703 at 9, *with* RX541 at 82); (e) whether Tiversa spoke with FTC specifically about LabMD (*compare* CX703 at 141-42, *with* RX541 at 61-62); and (f) whether Tiversa found the 1718 File at four IP addresses (*compare* CX703 at 50, *with* RX541 at 81-82).

11. Tiversa/Boback falsified and withheld documents relevant to this case. *See* Ex. 2 at 1361-1444.

12. Documents given by Tiversa to OGR but withheld from FTC and LabMD contradict Tiversa/Boback's testimony in this proceeding. *Compare* RX543 at 4-6, *with* CX19.

13. A document created in or about June 2014, and offered during Tiversa's deposition of June 7, 2014, is contradicted by an August 2008 Tiversa report. *See* Ex. 3 at 6.

14. Tiversa did not produce to FTC, LabMD, or Congress the two 2012 e-mails it offered as proof in a November 2014 pleading that was stricken by this Court, which provided that Richard Wallace could not have fabricated the IP addresses on CX19 in October 2013. *See* RX543 at 7.

15. A document submitted to OGR, an Incident Report to CIGNA, shows that Tiversa told CIGNA that the 1718 File was first found on April 18, 2008. RX543 at 9, 10, 13. Wallace testified that the 1718 File was stolen on February 25, 2008. *See* Ex. 2 at 1441-42. However, Tiversa provided documents in this case showing that between January 4, 2008 and

January 18, 2008, but no later than January 30, 2008, Tiversa searched P2P networks for Eric Johnson using medical search terms that matched the 1718 File. *See* RX389; RX368.

Discussion

16. It is a crime under 42 U.S.C. § 1320D-6(a) for a person to knowingly obtain or disclose individually identifiable health information relating to an individual if the information is maintained by a covered entity and the person obtained or disclosed such information without authorization. 42 U.S.C. § 1320D-6(b)(3) provides that if the offense is committed with intent to use individually identifiable health information for commercial advantage, the offender should be fined not more than \$250,000, imprisoned not more than 10 years, or both.

17. It is a crime under 18 U.S.C. § 1030(a) to intentionally enter a computer used in or affecting interstate commerce and obtain without proper authorization computer files or data belonging to another, and a felony to do so for commercial advantage or private commercial gain.

18. It is a crime under 18 U.S.C. § 1001 to knowingly and willfully falsify, conceal or cover up “by any trick, scheme, or device a material fact”; to make “any materially false, fictitious, or fraudulent statement or representation”; or to make or use “any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry” in “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.”

19. It is a crime under 18 U.S.C. § 1505 to “corruptly” “influence[], obstruct[], or impede[] or endeavor[] to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States. . . .” The term “corruptly” means “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding,

concealing, altering, or destroying a document or other information.” 18 U.S.C. § 1515(b); *see also U.S. v. Blackwell*, 459 F.3d 739, 761-62 (6th Cir. 2006).

20. It is a crime under 18 U.S.C. § 1519 to “knowingly alter[], destroy[], . . . conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. . . .”

21. It is a crime under 18 U.S.C. § 371 to conspire to do any of these things.

22. The evidence is Boback and Tiversa have violated the above laws and possibly committed other crimes, including but not limited to wire fraud and the destruction, alteration and/or falsification of records in a Federal investigation, with respect to this and other matters.

23. This Court has the authority to entertain all motions that justice requires and to protect the integrity of this proceeding by requesting that the Department of Justice and/or the U.S. Attorney for the District of Columbia investigate whether Tiversa and Boback have violated criminal laws, including those cited herein. *See* 16 CFR § 3.42(c).

WHEREFORE, LabMD respectfully requests that the Court grant this motion and refer this matter to the Department of Justice and/or the U.S. Attorney for the District of Columbia for investigation, and order Tiversa and/or Boback to pay all attorneys’ fees and costs associated with the investigation, discovery, and testimony of their obstruction of justice and fraud.

Dated: June 19, 2015

Respectfully submitted,

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EXHIBIT 1

STAFF REPORT



TIVERSA, INC.: WHITE KNIGHT OR HI-TECH PROTECTION RACKET?

**PREPARED FOR
CHAIRMAN DARRELL E. ISSA
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**

**U.S. HOUSE OF REPRESENTATIVES
113TH CONGRESS
JANUARY 2, 2015**

**EMBARGOED UNTIL AFTER THE TESTIMONY OF RICHARD
WALLACE**

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Key Findings

- Rather than the cyber “white knight” Tiversa purports to be, the company often acted unethically and sometimes unlawfully in its use of documents unintentionally exposed on peer-to-peer networks.
- At least one Tiversa employee, under the direction of CEO Robert Boback, provided intentionally false information to the United States government on more than one occasion. Boback later provided false testimony about fabricated documents to the U.S. House of Representatives.
- According to a whistleblower, Tiversa fabricated that an Iranian IP address downloaded and disclosed the blue prints for the President’s helicopter, Marine One. Tiversa allegedly did so in order to receive press attention for the company. The Committee found that statements made by Tiversa under oath about this matter could not be substantiated.
- After obtaining information on HIV/AIDS patients at a clinic in Chicago, Tiversa employees called the patients, purportedly in an attempt to get the clinic to hire Tiversa. When the clinic refused to hire Tiversa, the company gave the information to a lawyer that worked with the company who filed a class-action lawsuit that eventually settled for a substantial amount of money.
- Tiversa had information about a breach at the House Ethics Committee exposing information about investigations into Members of Congress. Tiversa did not return this information to the Ethics Committee and instead appears to have sought publicity for the leak.
- Tiversa’s co-founder claims the company is in possession of a greater quantity of sensitive and classified information than NSA-leaker Edward Snowden.
- 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.
- Tiversa obtained non-public, advanced knowledge of FTC enforcement actions from which it attempted to profit.
- According to a whistleblower, Tiversa has knowingly accumulated and is in possession of massive amounts of child pornography and classified government documents.

I. *Introduction*

In the summer of 2013, the Committee learned the Federal Trade Commission would bring an enforcement action against LabMD, a Georgia-based cancer screening company, under the guise of its authority under Section 5 of the FTC Act.¹ Serving as the basis for the enforcement action, the FTC filed an administrative complaint against LabMD after the personal information of approximately 9,000 LabMD patients was exposed on a peer-to-peer network.

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.

Committee staff interviewed Tiversa's CEO, Robert Boback, on June 5, 2014. Boback's testimony failed to assuage Committee's concerns and instead raised many more questions about the relationship between Tiversa and various federal government agencies. Two days later, Boback was deposed for a second time in the FTC action against LabMD. There were several major inconsistencies between this testimony and the testimony he provided to the Committee only days earlier.²

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. 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. At least one Tiversa employee, under the direction of Boback, provided intentionally false information to the United States government on more than one occasion. This is a crime. In addition, Boback provided false testimony about fabricated documents to the U.S. House of Representatives.

In many instances, documents that Tiversa produced to the Committee pursuant to a subpoena issued on June 3, 2014 lacked important context without explanation. Such gaps prompted the Committee to ask Tiversa's representatives on several occasions whether the company had produced all documents responsive to the Committee's subpoena as well as search terms proposed by Committee staff. Tiversa did not provide the Committee with assurances or a written statement that all documents had, in fact, been produced. Accordingly, the Committee sought to obtain additional information from third parties. These third parties provided a substantial number of documents to the Committee that Tiversa failed to produce. For example, Tiversa never produced documents showing it had advanced non-public knowledge of FTC

¹ Federal Trade Commission Act, 15 U.S.C. § 45 (2006).

² The Committee sent Boback a lengthy letter demanding explanations for the inconsistencies. Many questions posed in that letter remain unanswered.

enforcement actions and took steps to profit from that knowledge. The Committee also found that Tiversa withheld from the FTC a series of documents that are inconsistent with testimony company officials provided under oath. Tiversa's lack of cooperation with this investigation, and the withholding of key documents from the FTC, lead the Committee to believe that Tiversa has not produced all relevant documents responsive to this Committee's subpoena.

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.

II. Tiversa's Scheme to Defraud the Congress and Executive Agencies

Several years ago, Tiversa CEO Robert Boback began perpetrating a scheme in which at least one Tiversa employee manipulated documents legitimately found on the peer-to-peer network to show that the documents had spread throughout the peer-to-peer network. For example, Tiversa downloaded a file that computer A shared on a peer-to-peer network. The file could be copied and the metadata easily manipulated thoroughly widely-accessible computer software programs to make it appear that it had been downloaded by computers B, C, and D, and thus spread throughout the peer-to-peer network. Tiversa relied on the manipulated documents to create a need for their "remediation" services and to grow the company's reputation through press statements and manipulation of media contacts. Boback told media contacts that certain documents, including sensitive government documents, spread throughout the peer-to-peer network when in fact they had not.

According to a whistleblower, Tiversa not only provided the manipulated information to its clients, but in some instances also provided false documents to various entities of the United States government, including the Congress and several agencies. Not only is this unethical, but it is illegal to give false information to the United States government.³ It is also illegal to obstruct a congressional investigation by providing false information to a congressional committee.⁴

³ See 18 U.S.C. § 1001, which states in pertinent part:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry shall be fined under this title, imprisoned not more than 5 years. . . .

⁴ See 18 U.S.C. § 1505, which states in pertinent part: 18 U.S.C. § 1505 states, in pertinent part:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

Throughout this investigation, the Committee routinely found that information provided by Tiversa either could not be verified, or simply did not make sense. Part of the story always seemed to be missing. The whistleblower’s testimony that Tiversa routinely falsified documents, however, filled in these gaps.

III. *Tiversa’s Lack of Cooperation with this Investigation*

Over the course of this investigation, Tiversa failed to provide full and complete information to the Committee. On multiple occasions, the company received documents from third parties witnesses responsive to the Committee’s subpoena and other document requests, but not produced by Tiversa.

The Committee issued a subpoena to Tiversa on June 3, 2014. The subpoena requested documents responsive to eleven different requests, including:

1. All documents and communications referring or relating to work performed by Tiversa, Inc. on behalf of, in conjunction with, or provided to, any department, agency, or other instrumentality of the U.S. Government.
2. All documents and communications referring or relating to work Tiversa, Inc. performed for the Federal Trade Commission.

* * *

4. All documents and communications referring or relating to internet protocol addresses that Tiversa, Inc. provided to any department or agency of the U.S. Government.

* * *

7. All documents and communications referring or relating to LabMD, Inc.⁵

Tiversa failed to fully comply with the subpoena. A third-party witness provided numerous documents to the Committee in which Tiversa discussed information it provided to the FTC, and knowledge it had of upcoming FTC enforcement actions, with that third-party. Tiversa failed to produce these documents to the Committee despite their clear responsiveness to the subpoena.

Tiversa withheld additional relevant documents responsive to subpoenas issued by the Committee and the FTC from both entities. In October 2014, Tiversa filed a Notice of

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

⁵ H. Comm. on Oversight & Gov’t Reform, Subpoena to Robert Boback, Chief Exec. Officer, Tiversa, Inc. (June 3, 2014) [hereinafter Tiversa OGR subpoena].

Information in the LabMD FTC proceeding.⁶ Tiversa included two e-mails from 2012 as exhibits to the Notice of Information, claiming that the e-mails demonstrate that Wallace could not have fabricated the IP addresses in question. Tiversa did not produce these documents to the Committee even though they are clearly responsive to the Committee's subpoena. Their inclusion in a submission to the FTC proceeding strongly suggests that Tiversa also never produced these documents to the FTC. Tiversa has not explained how and when it identified these documents, why it did not produce them immediately upon discovery, and what additional documents it has withheld from both the FTC and the Committee. The e-mails also contain little substantive information supporting their position that the documents undermine what they assume to be Wallace's testimony.

Tiversa further failed to fully respond to a subpoena issued by the Federal Trade Commission. As discussed in more detail below, the FTC served Tiversa with a subpoena for documents related to its administration action against LabMD, a Georgia-based medical testing laboratory.⁷ Among other categories of documents, the subpoena requested "all documents related to LabMD."⁸ In responding to the subpoena, Tiversa withheld responsive information that contradicted other information it did provide about the source and spread of the LabMD data, a billing spreadsheet file.

Finally, after the Committee learned of Tiversa's involvement with the Open Door Clinic, an AIDS clinic servicing low-income patients outside of Chicago, Tiversa produced selected documents about its involvement with the Open Door Clinic. Committee staff requested specific additional information, including any forensic analysis done by Tiversa of the Open Door Clinic files. Tiversa, through its attorneys, told the Committee that it only analyzed one of the numerous files that it found on the peer-to-peer network about the Open Door Clinic.⁹ In fact, as discussed below Tiversa provided extensive forensic services, including two versions of a forensic report, free of charge to Michael Bruzzese. Bruzzese filed a lawsuit against the Open Door Clinic after receiving information from Tiversa. Tiversa never produced the reports to the Committee. Tiversa's withholding of these reports in the face of a direct request from the Committee, and its false claim that it did not analyze most of the Open Door files, is unacceptable.

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.

⁶ Tiversa Holding Corp.'s Notice of Information Pertinent to Richard Edward Wallace's Request for Immunity, In the Matter of Lab MD, Inc., No. 9357 (U.S. Fed. Trade Comm'n, Oct. 14, 2014) [hereinafter Notice of Information]. Chief Administrative Law Judge D. Michael Chappell has since ordered that the assertions and documents contained in the Notice of Information will be "disregarded and will not be considered for any purpose." Order on Respondent's Motion to Strike, In the Matter of Lab MD, Inc., No. 9357 (Nov. 19, 2014).

⁷ Fed. Trade Comm'n, Subpoena to Tiversa Holding Corp. (Sept. 30, 2013) [hereinafter Tiversa FTC subpoena].

⁸ *Id.*

⁹ Letter from Reginald J. Brown and Madhu Chugh, Wilmer Hale, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Aug. 28, 2014).

Boback created a culture of intimidation at Tiversa. The Committee has unfortunately learned that Boback is continuing his intimidation tactics toward former employees that have cooperated with this Committee's investigation. Tiversa has refused to pay legal fees that Gormely accrued while cooperating with this investigation and the FTC matter against LabMD, despite an agreement with Tiversa that he would be indemnified.¹⁰ Boback has further sued Richard Wallace and lawyers representing LabMD in a defamation action in Pennsylvania. The suit against Wallace effectively questions Mr. Wallace's Constitutional right to speak with Congress after the Committee approached him with questions related to allegations about Tiversa. These are clear instances of witness intimidation and interference with a congressional investigation on the part of Boback and Tiversa.

IV. *Tiversa, Inc.*

A. Background on the company

Robert "Bob" Boback and Samuel Hopkins founded and incorporated Tiversa, Inc., a privately-held corporation headquartered in Pittsburgh, Pennsylvania, in January 2004.¹¹ Prior to joining Tiversa, Boback was a practicing chiropractor who dabbled in other activities including buying and selling residential properties and selling cars on eBay.¹² Hopkins, a high-school dropout, wrote the source code for the proprietary technology that Tiversa later patented.¹³ Hopkins sold his shares in Tiversa for approximately \$3.5 million and left the company in 2011.¹⁴ Boback is currently the Chief Executive Officer.¹⁵

Tiversa promotes itself as a company of "cyberintelligence experts."¹⁶ The company maintains an impressive roster of Advisory Board members, including retired General Wesley Clark; Howard Schmidt, the former Cyber-Security Coordinator for President Obama and previously for President Bush; and Maynard Webb, the former CEO of eBay.¹⁷ The Advisory Board met on one occasion in January 2006.¹⁸

According to Tiversa's website, the company "provides P2P Intelligence services to corporations, government agencies and individuals based on patented technologies that can monitor over 550 million users issuing 1.8 billion searches a day. Requiring no software or

¹⁰ E-mail from Dwight Bostwick, Att'y for Christopher Gormley, to H. Comm. on Oversight & Gov't Reform Majority Staff (Nov. 20, 2014, 4:40 p.m.).

¹¹ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Robert Boback (June 5, 2014), at 7 [hereinafter Boback Tr.].

¹² *Id.* at 7.

¹³ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Samuel Hopkins (July 29, 2014), at 115, 56 [hereinafter Hopkins Tr.]; Boback Tr. at 56.

¹⁴ *Id.* at 8.

¹⁵ Boback Tr., at 8.

¹⁶ Tiversa, Company Overview, <http://www.tiversa.com/about/> (last visited Sept. 15, 2014).

¹⁷ *Id.*

¹⁸ Boback Tr. at 29.

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hardware, Tiversa can locate exposed files, provide copies, determine file sources and assist in remediation and risk mitigation.”¹⁹

On July 24, 2007, during the tenure of Chairman Henry Waxman, Boback testified at a hearing before this Committee titled, “Inadvertent File Sharing Over Peer-to-Peer Networks.”²⁰ Boback’s 2007 testimony focused on the “privacy and security threats [that] are caused by inadvertent misuse of P2P file sharing software,” and his company’s work in this area.²¹ On July 29, 2009, when Rep. Edolphus Towns served as Committee Chairman, Boback again testified about Tiversa’s work in the area of P2P filing sharing and data security breaches.²² One particular statement garnered a great deal of attention from Members of the Committee and the national media. Boback testified:

In February of this year, Tiversa identified an IP address on the P2P networks, in Tehran, Iran, that possessed highly sensitive information relating to Marine One. This information was disclosed by a defense contractor in June 2008 and was apparently downloaded by an unknown individual in Iran.²³

During this hearing, Boback also provided information on files Tiversa obtained from numerous other companies and non-profit groups, including the Open Door Clinic that Tiversa had “discovered” on the peer-to-peer network.²⁴

According to a customer presentation document, Tiversa began working with U.S. government in the spring of 2004. Tiversa claims to have worked “exclusively with the CIA, DoD, DHS, FBI, JCS, and USAF regarding the disclosure of CLASSIFIED [*sic*] information.”²⁵ In reality, Tiversa may not have worked with some of these agencies at all. With others, its relationships were extremely minimal. Overall, the company’s claims are overstated.

From 2008 to 2009, Tiversa frequently contacted non-client companies whose documents it discovered on peer-to-peer networks. Under a “duty of care” policy, Tiversa notified companies whose information they found on peer-to-peer networks, and provided them with examples of the exposed documents.²⁶ Boback explained that by providing this information, Tiversa was essentially providing a public service. In practice, however, Tiversa provided very minimal information to the affected companies. The Committee’s investigation found that Tiversa typically provided one document. Even though Tiversa’s systems automatically captured other relevant information, such as the IP address from which the

¹⁹ *Id.*

²⁰ Peer-to-peer networks are often referred to as “P2P” networks.

²¹ *Inadvertent File Sharing Over Peer-to-Peer Networks: Hearing Before the H. Comm. on Oversight Gov’t Reform*, 110th Cong. (2007) (statement of Robert Boback, Chief Executive Officer, Tiversa, Inc.).

²² *Inadvertent File Sharing Over Peer-to-Peer Networks: How It Endangers Citizens and Jeopardizes National Security*, 111th Cong. (2009) (statement of Robert Boback, Chief Executive Officer, Tiversa, Inc.).

²³ *Id.*

²⁴ *Inadvertent File Sharing Over Peer-to-Peer Networks: How it Endangers Citizens and Jeopardizes National Security: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. at 12 (July 29, 2009) (testimony of Robert Boback, CEO of Tiversa, Inc.).

²⁵ [TIVERSA-OGR-0021275].

²⁶ Hopkins Tr., at 205-06.

document was shared, Tiversa would not provide this information to a company unless it purchased Tiversa's services.

During the course of this investigation, the Committee spoke with several companies that chose not to hire Tiversa. In addition, the Committee located one company that did enter into a contract with Tiversa. Tiversa told the company that it spent a great deal of time "investigating" the source of the peer-to-peer leak, at high cost to the company. It appears, however, that Tiversa only provided information its systems automatically downloaded, such as the IP address that leaked the documents.²⁷ Tiversa further represented to this company that, in order to identify whether any of its computers had peer-to-peer software, it would have to access the company's network remotely and run a search. Tiversa lacks the capability to access a client's network remotely. In this instance, it seems likely that it "identified" the computer using peer-to-peer software by simply looking at the IP address of the computer that shared the confidential document. When the Committee asked Tiversa about its ability to remotely access client computer, Tiversa responded that it never made such a claim to any client.²⁸

In his transcribed interview, Samuel Hopkins described Tiversa as "a highly ethical company."²⁹ After a lengthy investigation, the Committee believes otherwise.

B. Tiversa's claimed abilities to monitor and track files and users on the peer-to-peer network are exaggerated.

Tiversa's business model relies on technology developed by Hopkins, including its trademarked and patented Eagle Vision X1 and Covio. Tiversa claims to have the ability to provide "true cloud security" by seeing the entire peer-to-peer network."³⁰ Further, Tiversa states that its technologies can "detect and record user-issued P2P searches, access and download files available on the P2P networks, determine the actual disclosure source of documents, track the spread of files across the entire P2P networks [*sic*], and remediate P2P file disclosures."³¹

Tiversa claims that its technology "enables us to view the entire network and thus provide real-time, actionable information regarding sensitive file disclosures related to your organization."³² In 2007, Boback's written testimony submitted to the House Oversight Committee summarized Tiversa's technological capabilities. Boback wrote:

Tiversa centralizes what was previously a decentralized P2P file-sharing network. Tiversa can see and detect all the previously untraceable activity on the P2P network in one place to analyze searches and requests. While an individual user can only see a very small portion of a P2P file sharing network, **Tiversa can see the P2P network in its entirety in real time.**

²⁷ Briefing by Company A to H. Comm. on Oversight & Govt' Reform (July 16, 2014).

²⁸ Letter from Reginald Brown, Att'y, Tiversa, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (Sept. 2, 2014).

²⁹ Hopkins Tr.at 54.

³⁰ Tiversa Learning Ctr., *Key Concepts*, <http://www.tiversa.com/learningcenter/resources/keyconcepts/>.

³¹ Marine One forensic report, pg. 2.

³² Tiversa Learning Ctr., *FAQ/Misconceptions*, <http://www.tiversa.com/learningcenter/resources/faq/>.

With this platform, **Tiversa has processed as many as 1.6 billion P2P searches per day**, more than the number of web searches entered into Google per day.³³

It is disputed, however, how many files Tiversa downloads daily off the peer-to-peer network. According to Jason Schuck, Tiversa downloads “maybe a million” files daily.³⁴ However, according to Boback, Tiversa downloads “the equivalent of the Library of Congress every three or four days.”³⁵ The Library of Congress is the largest library in the world, with more than 158 million items, including more than 36 million books and other print materials, 3.5 million recordings, 13.7 million photographs, 5.5 million maps, 6.7 million pieces of sheet music, and 69 million manuscripts.³⁶ In essence, Tiversa claims to be able to see the entire peer-to-peer network, instead of a smaller subset as seen by an individual user.

At the time of the leaks discussed in this report, Tiversa used generic and client-specific search terms, such as “reports,” “credit card,” or “secrets” to query the peer-to-peer network.³⁷ Even Tiversa analysts could not explain exactly how Eagle Vision keyed into the terms to download them into the data store; that is, analysts did not know definitively whether any document was in the data store due a search term hitting on the file’s name, for instance; the search term in the body of the file; or the search term in the name of a folder containing the file. Keith Tagliaferri, Tiversa’s Senior Vice President of Operations, and the individual in charge of Tiversa’s analytical work, stated:

I’m not well versed enough on the technology and how it works to know exactly how things key off and what could have downloaded this and that.

I’m aware of all different types of scenarios that can happen as far as why and when we download files. You know, one is matching a key term within a file title. Another is matching a key term within the content of a file.

I’ve read research that indicates that a folder name can hit on a file. So, for example, if you have a folder called “Work” and somebody searches for “Work,” the results that come back are all of the files that are within that folder.

There’s also a concept of browse host on peer-to-peer that I’m not sure if our systems have the ability to do or not. But you can literally go to an IP once you find one file and hit “Browse Host” and download all the files from that IP.

³³ *Inadvertent File Sharing Over Peer-to-Peer Networks: Hearing Before the H. Comm. on Oversight Gov’t Reform*, 110th Cong., at 20 (2007) (written statement of Robert Boback, Chief Executive Officer, Tiversa, Inc.) (emphasis added)

³⁴ H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Jason Schuck, at 12 (Aug. 1, 2014) [hereinafter Schuck Tr.]

³⁵ Boback Tr. at 143.

³⁶ Library of Congress, Fascinating Facts, <http://www.loc.gov/about/fascinating-facts/> Fascinating Facts (last accessed Dec. 22, 2014).

³⁷ Hopkins Tr. at 74.

So there's all kinds of different scenarios that can occur to cause files to be downloaded. I'm not well versed enough on the technical side of our systems to know exactly what would trigger files to be downloaded.³⁸

To Tagliaferri's knowledge, there was no way to verify by what search term a document was found and downloaded into the data store.³⁹

Tiversa's data store collects and accumulates all the information that is found by Eagle Vision; no documents are deleted.⁴⁰ Information enters Tiversa's data store, or repository of databases, in two ways. Either Tiversa's Eagle Vision software downloads the information from the peer-to-peer network, or the information is found independently from Eagle Vision and "injected" into the data store through an application called the Data Store Importer. Schuck described the application in the following way:

Q. So analysts have the ability to, I guess, inject files into the data store using the Data Store Importer program?

A. Correct.⁴¹

* * *

Q. How does it -- if I'm an analyst and I have a file that I want to put into the data store using this program, do you know what steps I take to do that?

A. Sure. If the file is in the correct format, you would place it in a pickup folder.

Q. What does it mean to have a file in the correct format?

A. So depending on the IP address that it was downloaded from, that would be prepended to the original file name.

Q. Who prepends the IP address?

A. Again, you're talking about for the Data Store Importer, right?

Q. Yes.

A. That would be whoever's bringing it in.

³⁸ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Keith Tagliaferri, at 106-07 (June 17, 2014) [hereinafter Tagliaferri Tr.].

³⁹ *Id.* at 107.

⁴⁰ *Id.* at 88-89.

⁴¹ Schuck Tr. at 19.

Q. Are you aware of specific occasions on which the data store importer was used by analysts to put files into the data store?

A. No, not offhand. That's, again, that's even though I oversee that, I'm not the one that's actually doing that. That would be the analyst.

Q. To your knowledge, has the Data Store Importer been used to put files into the data store?

A. I would assume so, yeah.⁴²

Eagle Vision directly downloads documents that either directly hit on a Tiversa search term, or are related to a Tiversa search term (i.e., other documents shared by a user also sharing a document that hits on a search term).⁴³ According to Hopkins, the creator of the technology, the system does not distinguish between downloaded and injected files.⁴⁴ Tiversa, through its attorneys, stated that analysts can “usually” tell if a file is downloaded or injected, but did not explain how its analysts can make that determination.⁴⁵ This distinction is critically important, as it would aid in understanding more fully Tiversa’s actions.

Tiversa’s Covio system indexes the IP address of all files it downloads from the peer-to-peer network. Every time a document containing a search term is shared on the peer-to-peer network, Tiversa’s system downloads the document and indexes it according to the IP address from which it was downloaded. Even if the document is exactly the same, the system will automatically re-download it and index it with the new IP address.⁴⁶ In this way, Tiversa can determine if a file is spreading, or being shared, throughout the peer-to-peer network.

Boback, however, has offered the Committee conflicting information about whether Tiversa’s technology actually does have the capability to automatically download and index documents as they spread throughout the peer-to-peer network. For example, according to Boback, Tiversa never downloaded a copy of a document belonging to LabMD, a cancer screening company, from one of LabMD’s computers in Georgia.⁴⁷ This document is at the heart of an ongoing FTC action against LabMD. Yet, the document hit on a search term provided by a client, and Tiversa does claim to have downloaded the file from several other IP addresses because of the search term.⁴⁸ Tiversa has never been able to explain to this Committee why its systems did not automatically download the file from LabMD but did download the document from so many other IP addresses. Either Tiversa’s technology can not do what Boback and Hopkins claim it can do, or Boback provided false information to the FTC and this Committee about Tiversa’s downloading of the LabMD document.

⁴² Schuck Tr. at 20-21.

⁴³ Hopkins Tr. at 43.

⁴⁴ *Id.* at 75.

⁴⁵ Letter from Reginald Brown, Att’y, Tiversa, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Sept. 2, 2014).

⁴⁶ Hopkins Tr. at 40.

⁴⁷ *Id.*; *see also* Tiversa, Forensic Investigation Report – LABMD0001 (June 4, 2014).

⁴⁸ Boback Nov. 2013 FTC Tr. at 41 (“I never downloaded the file from them. They only responded to the hash match.”).

Further, Tiversa has not taken steps to screen for illegal content, such as child pornography, before it is downloaded into the data store. In fact, analysts say that it is entirely possible that child pornography is sitting in Tiversa's data store currently. According to a whistleblower, Tiversa has knowingly accumulated and is in possession of massive amounts of child pornography. Tagliaferri stated that he had "heard anecdotally that there may be child pornography" downloaded into the data store.⁴⁹ He explained that "as part of that information that's being pulled down, you know, I suppose anything -- anything could come back. You know, it could be Word documents. It could be .pdf's. It could be images. It could be, you know, whatever."⁵⁰

According to Tiversa, The system also "records all user-issued P2P searches," meaning that Tiversa can see a search and record it.⁵¹ Typically, Tiversa can only see the queried search, and cannot identify the user issuing the search. Under very narrow circumstances, Tiversa can determine the IP address of the user issuing a search. Hopkins described Tiversa's limited ability to identify the IP address issuing a search. He stated:

[The search request] goes to the first three people, they hand it to all the three people there, so it's three and then it's what, nine, so forth. But it only goes five hops. So the three people that I'm connected to, that's the first hop. . . . After five hops, it's dropped off the network. But if you're connected to the three people and the search is one hop away, then you know it came from one of the people you're connected to. But out of the 3,000 people, three people in a security world is nothing.⁵²

Thus Tiversa can only determine the IP address of a user issuing the search if Tiversa is one of the three users directly connected to the searcher.

Boback, however, has exaggerated Tiversa's ability to determine the user issuing a search over the years. In 2011, Tiversa claimed to have information that Wikileaks was obtaining information from peer-to-peer networks.⁵³ Boback claimed that "Wikileaks is doing searches themselves on file-sharing networks."⁵⁴ He continued, "It would be highly unlikely that someone else from Sweden is issuing those same types of searches resulting in that same type of information."⁵⁵ Boback further explained that in a one-hour period in February 2009, Tiversa detected four Swedish computers issue 413 searches.⁵⁶

As explained to the Committee by Hopkins, however, Tiversa can only identify the IP address and geographic location of a computer issuing a search if Tiversa is one of only three peer-to-peer users directly connected to that computer. Otherwise, Tiversa can only see the search request, and not the user or location of the user issuing the search. Given the limitations of Tiversa's technology, Boback's statements are very likely exaggerated, if not outright false.

⁴⁹ Tagliaferri Tr. at 90.

⁵⁰ *Id.* at 91.

⁵¹ *Id.* at 160.

⁵² *Id.* at 169.

⁵³ Michael Riley, *Wikileaks May have Exploited Music, Photo Networks to Get Data*, BLOOMBERG (Jan. 20, 2011) <http://www.bloomberg.com/news/2011-01-20/wikileaks-may-have-exploited-music-photo-networks-to-get-classified-data.html>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Tiversa also claims that it can “remediate” damage from a document leaked over the peer-to-peer network. Tiversa, however, cannot remove an exposed document from the peer-to-peer network. Instead, Tiversa is limited to sending take-down notices to the internet service provider of the IP address. The success of the take-down notices depends, in part, on the location of the ISP.⁵⁷

C. The Marine One leak

In early 2009, Tiversa’s reputation exploded when the company disclosed that it found blueprints for Marine One on a computer in Iran. A whistleblower stated to the Committee, however, that Tiversa only found on the blueprints on a government contractor’s computer. Tiversa then manipulated the document by prepinning an Iranian IP address to make it appear that the plans had been downloaded in Iran via the peer-to-peer network. At Tiversa’s request, the Committee spoke with multiple federal agencies involved in the investigation into the Marine One leak. The Committee reviewed documents provided by Tiversa, including a forensic report prepared by Tiversa in June 2014, and received briefings and documents from federal agencies involved in the government’s investigation of the leak.⁵⁸ The Committee found that statements made by Tiversa about the Marine One leak could not be substantiated.

On September 17, 2007, Tiversa “detected” the Marine One file as being shared on the peer-to-peer network. Tiversa’s Eagle Vision software did not download this file automatically. Instead, a Tiversa analyst found the file using a stand-alone computer to search the peer-to-peer network. Tiversa determined that a government contractor was sharing the document on a peer-to-peer network.⁵⁹ That a contractor inadvertently shared the document on the peer-to-peer network is not in dispute. Tiversa, however, additionally claimed that a computer located in Iran downloaded and shared the file. These explosive allegations garnered large amounts of publicity for the company.

Tiversa claims that on February 25, 2009, it found that an Iranian computer was in possession of the same Marine One blueprints previously shared by the government contractor. According to Tiversa’s forensic report, the Iranian computer disclosed the document on the peer-to-peer network between October 27, 2006 and February 25, 2009.⁶⁰ Thus, Tiversa conveniently found the document on the network the very last day it was made available by the Iranian computer. The fact that the Iranian computer ceased sharing the document made it next to impossible for any agencies Tiversa alerted after February 25 to determine whether that computer was in fact in possession of the Marine One file.⁶¹

⁵⁷ Tagliaferri Tr. at 120, 161.

⁵⁸ All information contained in this report was provided to the Committee in an open and unclassified setting.

⁵⁹ Forensic Report at 4.

⁶⁰ Forensic Report at 10.

⁶¹ If the computer was still sharing the file after Tiversa reported its purported discovery, then individuals investigating the leak could have determined whether the document was, in fact, sharing the file using the peer-to-peer network.

The Committee spoke with Tim Hall, a former NCIS employee who investigated the Marine One leak, on multiple occasions. Hall is now the Director of Government Services at Tiversa.⁶² Hall told the Committee that another federal agency verified the information provided by Tiversa about the Marine One leak—specifically, that another agency verified that the file was being shared by a computer with an Iranian IP address. Hall testified:

Q. And do you know if the information was verified by other task force members?

A. Yes.

Q. How do you know that?

A. Because we worked hand in hand with them daily, just multiple conversations.

Q. Were you ever told how the information was verified?

A. No.

Q. Was all information passed on to other task force members to be verified, to the best of your recollection?

A. Yes. Yes.⁶³

Tiversa's counsel also repeatedly told the Committee that the federal government verified the information Tiversa provided about an Iranian computer being in possession of the Marine One document. But that is simply not the case. The Committee learned from NCIS that the joint task force investigating the incident was only able to verify that the IP address provided by Tiversa was located in Iran.⁶⁴ The agents did not verify whether that computer actually possessed the Marine One file as this was outside the scope of the investigation.⁶⁵

Given the amount of time that has passed, it is not possible to verify today whether the Marine One file ever spread to a computer in Iran. The Committee has great doubts, however, about Tiversa's story. Tiversa discovering that the document had spread to Iran on the very last day that the Iranian computer allegedly disclosed the file is far too convenient. Further, the Iranian computer purportedly shared the computer for over two years before Tiversa located the file. According to Tiversa, the Iranian computer was in possession of the file in September 2007, when Tiversa initially found that a government contractor improperly shared the document. Yet, Tiversa did not locate the file on the Iranian IP address at that time.

⁶² H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Timothy Hall at 26 (Sept. 3, 2014) [hereinafter Hall Tr.].

⁶³ Hall Tr. at 25-26.

⁶⁴ Briefing by Naval Crim. Investigative Service to H. Comm. on Oversight & Gov't Reform Majority and Minority Staff (Sept. 5, 2014). In the course of the investigation, the Committee received a document from a Tiversa whistleblower listing hundreds of IP addresses in rogue nations around the world.

⁶⁵ *Id.*

Tiversa has also not been able to explain to the Committee how it finally learned in February 2009 that the file spread to the Iranian computer. A Tiversa analyst found the original file in 2007, meaning that either no word in the document hit on a Tiversa search term, or Eagle Vision did not download the document when it should have done so.⁶⁶ Given that Eagle Vision also did not download the document between September 2007 and February 2009, it would appear that no word in the document hit on a Tiversa search term.⁶⁷ So, what prompted Tiversa to search for the document again in late February 2009? That the document does not appear to have been downloaded by Eagle Vision makes the fact that Tiversa downloaded the document on the very last day it was shared by the Iranian computer even more fortuitous.

The story is complicated, to be sure. But Tiversa's complicated tale about this leak unwound when the Committee heard from a whistleblower. According to the whistleblower, Tiversa fabricated that the Iranian IP address downloaded and disclosed the Marine One file. Tiversa allegedly did so in order to receive press attention for the company. This is a very serious allegation—one outside the capabilities of the Committee to verify. If true, then Tiversa provided knowingly false information to numerous agents of the federal government, including this Committee, and wasted federal resources as numerous agencies investigated a fraudulent report. Additionally, the publicity associated with this breach allowed Tiversa to exaggerate the degree to which U.S. intelligence was vulnerable to P2P leaks and sell itself as the solution.

D. Boback created a hostile work environment at Tiversa

Not only does Boback appear to have routinely exaggerated the technological capabilities of Tiversa, but he also created a hostile work environment and retaliated against employees who questioned him. In fact, numerous witnesses put Boback at the center of a hostile work environment at Tiversa. One Tiversa employee stated that he “had significant concerns about [Boback’s] ability to execute his job as CEO.”⁶⁸ The employee brought his concerns to a board member, citing Boback’s role in the “creation of a toxic environment,” “certain bullying incidences,” and “certain practices that I thought were reckless or inappropriate.”⁶⁹ A faction of employees, led by Boback, frequently left work, offended other employees, and engaged in unprofessional behaviors, including carrying guns to work.

Boback left the office frequently, sometimes for multiple days. In one instance, in early 2008, Boback left with Richard Wallace, the Director of Special Projects at Tiversa, “to pick up

⁶⁶ As explained above in Section IV(B), Tiversa’s technology should download a document containing a search term each time it spreads throughout the peer-to-peer network. Here, the Iranian computer downloading and sharing the document would create a new document in the eyes of the Eagle Vision system. If the document contained a search term, then it should have been downloaded. If the document contained a search term but was not downloaded for some reason, then Tiversa’s software failed to operate as advertised.

⁶⁷ Given the magnitude of the discovery, the Committee does not understand why Tiversa would not input key terms from the Marine One document into its automatic download system. Given the gap in time between the discovery of the two documents, either Tiversa neglected to perform this basic task for a leak of great national security significance, or its systems failed to perform as advertised.

⁶⁸ H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Christopher Gormley, at 27 (July 14, 2014) [hereinafter Gormley Tr.].

⁶⁹ *Id.* at 27.

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a car in Atlanta.”⁷⁰ They were scheduled to be gone for only a day, but were instead gone two days.⁷¹ A former Tiversa employee said that this was a frequent habit: “Mr. Boback would generally come in late in the morning and leave fairly early in the afternoon as well... I’m not sure where he was during those hours.”⁷²

Boback encouraged inappropriate banter and comments by employees that detracted from the professional atmosphere and mission of Tiversa. One former employee testified:

Q. I'd like to start with a little bit of follow-up from the last hour. You were discussing with my colleagues some joking emails, I guess, for lack of a better term, that Mr. Wallace sent, and I believe you described that there were many of these emails that were sent among a certain group of people. Is that accurate?

A. I wouldn't say so much many emails, but there was a lot of banter, I guess, orally. And I'd say there was a certain amount of that you'd expect, but some of it in this case was out of line for what I considered a company of what we were trying to create was.

Q. Was Mr. Boback ever involved in this banter?

A. Yes.

Q. Did he ever express that he felt the banter was not appropriate for the workplace?

A. No.

Q. Did he make joking comments along the same lines of what other employees were saying?

A. Yes.⁷³

Boback routinely made offensive remarks to Tiversa employees, creating an atmosphere of harassment and intimidation. One employee described described Boback’s inappropriate comments to the Committee:

A lot of, I guess, homosexual jokes, right? This or that. I mean, something akin to being in a junior high school playground, and it was fairly rampant, and it was just, you know, difficult to not engage in that... one particular story that I do remember is we had a company meeting. Well, I entered the company meeting, and one of the -- and I don't remember who -- made a remark to that effect, and everyone in the meeting laughed,

⁷⁰ *Id.* at 38.

⁷¹ *Id.* at 38.

⁷² *Id.* at 40.

⁷³ *Id.* at 79.

including Mr. Boback. It was clearly uncomfortable for many in the room. And I think, you know, those are the issues I was trying to convey to the board member, just that we can't have an environment like that in today's day and age, and that can we at least put some boundaries to that kind of behavior inside the office.⁷⁴

Gormley described another instance of Boback acting in an unprofessional manner :

I remembered receiving an email that copied a colleague of mine, Griffin Schultz, that said, you know, "Chris, you should get a job as a Presidential piss boy," which just out of, you know -- stated very clearly it was a joke, but he stated it, that I should get that kind of job.⁷⁵

* * *

Q. What did you understand him to mean by that phrase?

A. I don't know what was in Mr. Boback's mind when he made that, other than the email said what it said. The context was Mr. Schultz was trying to make an introduction to some congressional staffers or somebody that he had known in the past, and there may have been some mention of various roles, but not Presidential piss boy, but it may have been in the context of that. And then he said, Chris, that's a great job for you, Presidential piss boy, and Griffin Schultz was on that email as well me.

Q. Do you recall when that email was sent?

A. That would have been, I believe, April 2008. It was in 2008. I don't -- I think it's April.⁷⁶

Boback also referred to "teabagging" with Wallace and Hopkins while at work. One employee described conversations he overheard at the office:

I would be at my desk listening to them talk about playing Halo 3 and how they teabagged this person from Russia or this person from -- but it was extremely rampant to the point where it was very disruptive to the business. So that was one of the things I reported to the board member, to say we need to get them engaged back in the business, because, you know, they were needed for doing business, and I, again, didn't think that was an appropriate conversation for a work office.⁷⁷

⁷⁴ *Id.* at 79-80.

⁷⁵ *Id.* at 19-21.

⁷⁶ *Id.* at 57-58.

⁷⁷ *Id.* at 179-80.

Boback also condoned employees carrying and wielding firearms , and brought a gun himself to the office on multiple occasions. Transcribed interviews with Tiversa employees reflect that both Sam Hopkins, the co-founder of Tiversa, and Boback carried guns while at work at Tiversa. Sam Hopkins was aware that Boback carried a gun around at the office:

- Q. Did you ever see any other weapons in the office of any kind?
- A. Bob had a handgun that I saw a few times.
- Q. And did he show you the gun when he was in the office?
- A. In his office, yeah.
- Q. Why did he -- do you know why he showed you this gun or do you--
- A. You know, just two guys talking and he had known that I was carrying.⁷⁸

Keith Tagliaferri saw Boback “walk by with [a gun case],” although he did not look inside the case.⁷⁹ Christopher Gormley was also aware that Boback carried a gun at work. Boback even showed Gormley his gun:

- Q. And what was the context of the meeting at which Mr. Boback pulled out his revolver and showed it to you?
- A. He just came in. He'd come in a lot. I mean, his office was close to mine. And, I believe, that day -- and I can't be certain of this, but I'm pretty sure that he had taken a number of individuals from the company out to shop for guns at a gun store.
- Some people from the company actually departed for the afternoon, and I didn't know where they went. Which was a fairly common activity, that he would disappear for long periods of time. But this particular afternoon, I mean, that was my belief at the time, that they went to a gun store, and this may have been a purchase then. But it was showing me that he had purchased this or had this. I wasn't sure whether he actually got it at the gun store or not. But that activity occurred that day.
- Q. Do you recall approximately when this took place?
- A. Yes. Well, let me think. It would've been in the first quarter of 2008, maybe April.⁸⁰

⁷⁸ Hopkins Tr. at 150.

⁷⁹ Tagliaferri Tr. at 161-62.

⁸⁰ Gormley Tr. at 21-22.

Gormley also described Boback displaying his gun in an intimidating manner:

[] I would later discover that, I mean, **Mr. Boback, at least as far as my personal experience went, had certain bullying tendencies....**

On one occasion, he entered my office and, you know, sat at a desk in front of me and reached into his sock holster and pulled out a revolver and showed me its features and functions. And I thought that that was extremely surprising, that somebody would actually have a concealed weapon in the office and then pull it out to me. And I didn't feel like he was going to use it on me, but I thought, what are you doing with this and why are you showing it to me? And I thought that was -- that was one incident. That was pretty stark.⁸¹

Boback never revealed to the Committee that he brought a gun to work. He was quick to suggest, however, that Hopkins carried a gun to work, out of fear of Wallace:

[Hopkins] told me years ago, that he purchased a gun and a carry permit as protection against Mr. Wallace solely to protect -- as he felt scared for his physical existence against Mr. Wallace....⁸²

Gormley also had personal knowledge of Hopkins bringing a gun to work, including one incident when Hopkins pointed a gun at Gormley:

Q. You mentioned other Tiversa employees carried weapons in the office. Do you recall which employees did that?

A. Well, one incident I remember **Sam Hopkins had gone and pulled it out and pointed at me down a hallway.**

* * *

Q. Did you feel threatened when Mr. Hopkins pointed the gun at you down the hallway?

A. I didn't feel threatened at the time.

Q. Did Mr. Hopkins say anything when he pointed the weapon?

A. I don't remember him saying anything. It may have been the same day that Mr. -- they all went to the gun store, and I don't know if it occurred after or before Mr. Boback, so I may have been more sensitized to the fact that there were weapons in the office that day, silly as that sounds.⁸³

⁸¹ *Id.* at 18-19 (emphasis added).

⁸² Boback Tr. at 205

⁸³ Gormley Tr. at 76 (emphasis added).

Boback also brought swords to the office, and distributed swords to Tiversa employees. According to Schultz, “Bob would hand out a sword to each new employee that he thought represented their character... I believe mine was like a Marine sword or something based on my time at Wharton and a few other things that he thought fit my character... Someone else got the sword Gandalf carried in *The Lord of the Rings* because he thought it fit their [sic] personality.”⁸⁴

The Committee learned of one instance where an employee attempted to take action against Boback and his intimidation tactics. Gormley described a professional disagreement he had with Boback over handling a forensic analysis issue. In a response that the Committee has found to be typical, Boback sent Gormley a threatening e-mail. Gormley testified about the incident:

Mr. Boback and I had a dispute as to how to handle the scope of that particular exercise [regarding how narrow or broad search terms should be kept for a prospective client]. I don’t think either one of us were right or wrong... I contended that we should provide the whole. He contended that we keep it more narrow.

We had a very stark disagreement on how to handle that...And this was a highly negative—well, a very stark email to this effect sent to me, as well as a phone call later that evening when I was at an event with my daughters at school. And he told me to keep it within the scope he told to me, to keep it, **or else there would be consequences—in other words, either terminations or significant consequences.**

[T]hat’s what motivated me to go to Mr. Becker.

I was actually quite concerned to go to Mr. Becker because I feared retaliation.⁸⁵

From that point forward, Gormley chose not to confront Boback because he felt that it “usually wasn’t very productive, because [Boback] would come at you and tuck it away as something that potentially could be used later.”⁸⁶

When Boback heard that a Tiversa employee had approached the board with concerns about his professionalism and leadership, he became irate and sought retaliation:

I was very concerned about retaliation or being—it turned out that the feedback I gave to Mr. Becker, I believe, was incorporated through various actions the board had taken... [T]here was a point in 2008, in September, early September, where Mr. Boback called me up and said he’d just received a review and some feedback from the board, and one of the elements was that an... employee in the company had given that [negative] feedback. And he was extremely angry about that and **wanted**

⁸⁴ Schultz Tr. at 112-13.

⁸⁵ Gormley Tr. at 25-26 (emphasis added).

⁸⁶ *Id.* at 30.

to know who that person was, and he was going to take whatever measures it took to find that out.

In the subsequent week and a half, **he held individual meetings with each person and also held a group meeting where he asked each person in the executive team, did you say it, did you say it?** And he suspected that [redacted name], an employee of the company, may have been the person. My guess is he also suspected me. I denied that at the time, out of concern for my own wellbeing I guess. But he wouldn't let it go.

* * *

He came into my office, everyone had left, shut the door, sat in the same seat that, you know, the pistol and everything had been pulled out, and basically kept asking me questions in different ways to see if it was me[.]

* * *

Now, he also said that... **he thought it was [redacted] and that I needed to fire [redacted] because he suspected that it was her.** [Redacted] happens to be a personal friend of mine, somebody I brought into the company. So I was in a very conflicted situation, because I either fire somebody that I know didn't do it or I admit that I did it. So I told Mr. Boback that it was me that evening and told him why, you know, went through some of the major reasons that I mentioned that I gave to Mr. Becker.

* * *

But, after that point, **there was a lot of fallout that I believe occurred because of that incident.** And it was a very difficult period for me personally at the time, **because at that point I was ostracized from the rest of the company,** had to apologize to different people within the company for having went [sic] out the chain of command and saying things, that, in Mr. Boback's view, weren't true.⁸⁷

Soon after, in September 2008, Gormley was demoted from COO to "Vice President of Data."⁸⁸ Boback explicitly told Gormley that the demotion was the "outcome [of] those discussions with the board."⁸⁹ Nonetheless, Gormley tried to perform his new job. Boback, however, refused to let Gormley succeed. Gormley testified::

This is in 2009, and as part of the data business, I was involved on a potential acquisition of the company by Experian. Mr. Boback and I got into an argument about how to interact with Experian in that discussion. I

⁸⁷ *Id.* at 31-32 (emphasis added).

⁸⁸ *Id.* at 33.

⁸⁹ *Id.* at 33-34.

wanted Lisa Frankovitch to be the person who would interact with Experian and then have Mr. Boback back her up in the discussions. He didn't agree.

We had a disagreement about that, and **subsequently he just said, "Joel wants you off the deal,"** meaning this board member wants me off the deal. This is subsequent to [the]... first board meeting, and I didn't believe that that was the case. I reached out to Lisa Frankovitch, who had that relationship, but then she suggested I talk to Joel directly. I called him up, and he indicated that **he never said that, and he said that I should go talk to Bob and make that clear.** So it was—at the time it clearly caught up with him, no, he didn't, Joel didn't actually state that. So that was one indication.⁹⁰

Gormley was terminated in late 2009, he believes in retaliation for reporting Boback to Tiversa's Board of Directors.⁹¹

Boback's intimidating comments did not end even after Gormley was fired:

Q. Have you had any other communication with Mr. Boback since your termination? I don't know if threats of litigation counts, but have you had any communication with Mr. Boback following your termination?

A. Yes. The points of communication after termination, I guess the first time he communicated with me, I decided not to sell some options that I owned in approximately 2011, and he sent me an email that started with "LOL, LOL, LOL." That means -- you guys know what that means -- "laugh out loud, laugh out loud." And **he ridiculed me for not selling my options and then made fun of my role as the director of downstream marketing and just sent that to me out of the blue.** And I still have that email. That was 2011.⁹²

The Committee has further learned that Boback is continuing his intimidation tactics toward former employees that have cooperated with this Committee's investigation. Tiversa has refused to pay legal fees that Gormley accrued while cooperating with this investigation and the FTC matter against LabMD, despite an agreement with Tiversa that he would be indemnified.⁹³ Boback has further sued Richard Wallace and lawyers representing LabMD in a defamation action in Pennsylvania. Such witness intimidation tactics are unacceptable.

⁹⁰ *Id.* at 89-90 (emphasis added).

⁹¹ *Id.* at 87-88.

⁹² Gormley Tr. at 147 (emphasis added).

⁹³ E-mail from Dwight Bostwick, Att'y for Christopher Gormley, to H. Comm. on Oversight & Gov't Reform Majority Staff (Nov. 20, 2014, 4:40 p.m.).

E. Boback has not been forthcoming regarding the nature of his close relationship with Wallace, or the central role Wallace played at Tiversa

In advancing the narrative that Wallace is the source of all of Tiversa's problems, Boback has repeatedly contradicted his own statements to the Committee. Often, instead of answering the question asked, he instead spoke tangentially about Wallace's bad character and dangerous propensities.

Tiversa recruited Wallace in mid-2007.⁹⁴ Wallace was given substantial responsibilities at Tiversa. In his professional duties, Wallace was tasked with "reflect[ing] the technology of Tiversa to customers when they would come in."⁹⁵ Wallace was "many times called out to be the expert technical person in the data store area of our office."⁹⁶ Wallace also was Tiversa's face for the FBI, and spent around 20-30% of his time "doing work related to the FBI arrangement."⁹⁷ A former Tiversa employee said that Boback "absolutely" trusted Wallace's work.⁹⁸

Boback would like the Committee to believe that Wallace was and continues to be the source of all of Tiversa's problems. If that were true, Boback would be in gross dereliction of his official duties as CEO of Tiversa. However, accounts of multiple Tiversa employees indicate that Boback and Wallace shared an exceedingly close relationship, and that Boback leveraged his status as CEO to manipulate Wallace to act on his behalf.

Numerous Tiversa employees have characterized Boback and Wallace as close, and testified that the two spent a great deal of time together. As one employee stated :

[T]hey were together constantly... Mr. Wallace tended to know where Mr. Boback was. If you needed to know where Mr. Boback was, you'd ask Rick, or Molly Trunzo would ask Rick, because many times he knew where Bob was.

* * *

I mean, my perception of Mr. Wallace was that he was Mr. Boback's spy. And I think one on one I had a decedent relationship with Mr. Wallace, but I think when he was in a group or he was with Mr. Boback, he became different, and he tried to show his worth, I think, in multiple ways with Mr. Boback.⁹⁹

Troublingly, numerous Tiversa employees described Boback and Wallace following cars together. Czarnecki stated that he heard "some kind of talk about [Boback or Wallace using a

⁹⁴ Gormley Tr. at 176-77.

⁹⁵ *Id.* at 50.

⁹⁶ *Id.* at 50.

⁹⁷ *Id.* at 86.

⁹⁸ *Id.* at 178.

⁹⁹ *Id.* at 48-49 (emphasis added).

GPS device] at the old offices”¹⁰⁰ to track a specific individual.¹⁰¹ Another former employee also heard Boback and Wallace talk about putting a tracking device on a vehicle.¹⁰² Gormley believed that he would be followed after he approached a board member with concerns about Boback’s professionalism, “because there was a history of Mr. Boback and Mr. Wallace following people for fun, you know. And so, in this instance, I felt like they may follow me and, you know, a retaliation may occur[.]”¹⁰³

Ultimately, statements made by Boback impugning Richard Wallace simply do not add up with the facts of Wallace’s employment while he was at Tiversa.

a. Wallace received only a glowing performance review while a Tiversa employee.

Wallace received one review during his tenure at Tiversa. This review, given in 2008, described Wallace as a talented analyst and consummate professional. Among his “key accomplishments,” the review stated that Wallace:

Led the work and served as an official informant to F.B.I. related to child pornography on P2P file sharing networks. Rick also managed the day-to-day relationships with two F.B.I agents. This work was new to Tiversa and Rick handled the many ambiguities associated with this work in a highly professional manner that was respected by his F.B.I. counterparts.¹⁰⁴

The review describes Wallace as “critical in aligning Tiversa for a potential deal with the Air Force Office of Special Investigation,” and “*instrumental* in a number of press events serving as an expert for reporter research.”¹⁰⁵ The review stated that as a cyber forensic analyst, Wallace “monitor[ed] accounts of Cigna, American Express, and PGP and [was] a core Cyber Forensic Analyst with, for example, University of Florida, Wagner, Wachovia, GE.” Wallace also “contributed insight into the design and operation of Tiversa F.A.S.T. productivity suite which when fully implemented should substantially improve CFA productivity.”

The review listed Wallace’s strengths as the following:

Work Ethic

Rick has an outstanding work ethic and can always be relied upon to put in the extra effort surrounding a project or finding files to support a Tiversa business opportunity. There have been many weekends and/or late nights where Rick has worked extra hours either in the office or at home to make Tiversa’s business objectives happen.

¹⁰⁰ H. Committee on Oversight & Gov’t Reform, Transcribed Interview of Orion Czarnecki, at 72 (Sept. 16, 2014) [hereinafter Czarnecki Tr.].

¹⁰¹ *Id.* at 72.

¹⁰² *Id.* at 40-41.

¹⁰³ Gormley Tr. at 26.

¹⁰⁴ Tiversa, 2008 Review of Richard Wallace (Aug. 4, 2008).

¹⁰⁵ *Id.* at 1 (emphasis in original).

Client and Media Relations

Rick has received exemplary feedback for his work from client contacts most notably from F.B.I. and Cigna. Rick has also managed relationships and provided P2P background to outside parties and media during their investigations of P2P risks.

Drive for new business / press

Rick is constantly scanning the P2P (literally) for files or individuals that will yield new Tiversa business, yield more tickets for existing Tiversa clients thus strengthening Tiversa's value with existing clients, and finding situations that put the P2P or Tiversa in a strong public relations position. Rick always seems to be able to find a hard hitting file or P2P situation to accelerate our client acquisition, existing relationships or to help serve as a nugget for a powerful news story. For example, recently Rick found a number of American Express internal files in the Philippians [*sic*] which have strengthened our relationship with Amex's CIO and put us in contact with Accenture.

Enthusiasm for the P2P Space

There is no other person at Tiversa that lives and breathes P2P more than Rick. His level of enthusiasm for finding P2p sourced information is contagious and extremely valuable to Tiversa.¹⁰⁶

Going forward, the review pointed to two areas in which Wallace could improve. First, the review suggested that Wallace “[c]onsider [d]ownstream [a]ffects [*sic*]” by

[N]ot only continu[ing] his outstanding work as an individual contributor, but [] seek[ing] to make the whole team more effective, more highly scalable, less Dilbert-like by balancing the short term needs for sales and files with the long term need to make everyone effective and ready to handle more scale. I would ask Rick to please provide me direct feedback on areas that he thinks can be more effective and to **take a leadership role** in addressing the issue.¹⁰⁷

Second, the review suggested that Wallace pursue searching other peer-to-peer networks for “veins’ of file gold”.¹⁰⁸

Rick is a maestro of LimeWire operation and sleuthing. The business benefits greatly every time we find more “veins” of file gold not only including sources on LimeWire, but on wholly new P2P networks. For instance, the addition of eDonkey to our roadmap was guided by the large magnitude of sensitive files that appeared by using the eMule client in

¹⁰⁶ *Id.* at 1-2.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.*

Tiversa's lab. In between leveraging LimeWire for the benefits already highlighted above, I would like Rick to experiment with other clients to discover new caches of files and help guide our product roadmap.¹⁰⁹

In consideration of his performance, the review noted that Wallace was to be given a 9.8% raise, in addition to the 20.6% Wallace received at the end of 2007.¹¹⁰ The review concluded by congratulating Wallace on his achievements.¹¹¹

It is not clear who at Tiversa wrote Wallace's review. Gormley stated that he, Schultz, and Boback would have all had input on the review.¹¹² Although Schultz was Wallace's direct supervisor, and although Schultz reported to Gormley, Boback gave Wallace a direct raise without telling either of Wallace's supervisors.¹¹³ This caused Gormley to think that he, Schultz, and Boback "had split responsibilities for Mr. Wallace."¹¹⁴

Tiversa employees characterized their relationships with Wallace as typical professional relationship. Tagliaferri stated that he and other Tiversa employees socialized with Wallace:

Q. Did you socialize outside of the office with Mr. Wallace?

A. Sometimes. If he would have a bonfire or a Christmas party or something like that at his house then I would attend something like that.

Q. And were these events attended by Tiversa employees generally?

A. Sometimes. There might be, you know, a couple of other Tiversa employees there, and other professionals in the security industry that we all work with that may attend one of his get togethers.¹¹⁵

When asked to describe Wallace's professional contribution to Tiversa, Tagliaferri stated:

[Wallace] found a lot of information that was very sensitive, confidential and bad stuff out on these networks that shouldn't be out there, and he was really good at finding information out on the networks.

And, to that extent, you know, would we have found that information without Rick? I don't know. Maybe we would have. **But the things that Rick found certainly contributed to the company. He was an asset to the company to that extent.**¹¹⁶

¹⁰⁹ *Id.* at 2-3.

¹¹⁰ *Id.* at 3.

¹¹¹ *Id.*

¹¹² Gormley Tr. at 205.

¹¹³ Gormley Tr. at 55.

¹¹⁴ Gormley Tr. at 55.

¹¹⁵ Tagliaferri Tr. at 156.

¹¹⁶ Tagliaferri Tr. at 98 (emphasis added).

Boback and Wallace's relationship extended beyond the professional. When Boback and Wallace interacted in the office, it was not through the traditional hierarchical channels:

- Q. Mr. Boback was the CEO, correct?
- A. Yes.
- Q. And Mr. Wallace was an analyst, correct?
- A. Mr. Wallace was an information forensic engineer.
- Q. And so, in the corporate hierarchy, Mr. Boback was certainly above Mr. Wallace, correct?
- A. Yes, substantially.
- Q. Is the type of direction that Mr. Wallace took from Mr. Boback typical to the type of direction that other employees in Tiversa took from Mr. Boback? Or was there something different about the nature of the direction that Mr. Wallace was taking from Mr. Boback?
- A. It was much more one-on-one, less hierarchy involved. It wasn't like Mr. Boback went to me and then I went to Mr. Schultz and then Mr. Schultz went to Mr. Wallace to ask him to do something. **It was, "Hey, Rick, you're coming with me," and off he went. Or, "We don't know where Rick is. He's with Bob." It was much more direct. So it was independent of any kind of hierarchy that existed.**¹¹⁷

Another Tiversa employee verified that even though Wallace was a forensic security analyst, he reported directly to Boback.¹¹⁸ According to a former Tiversa employee, Boback and Wallace were very close, with Boback exerting greater influence over the relationship:

- Q. Would you describe them as close friends?
- A. Yeah, absolutely... **[T]here was nobody that was closer to Bob in the time frame that Rick was there than him**, with maybe the small exception of Mr. Hopkins, but even Mr. Hopkins had his own life, and he just wanted to go do his thing. Mr. Wallace and Mr. Boback were tied at the hip.

¹¹⁷ Gormley Tr. at 214-15 (emphasis added).

¹¹⁸ Tagliaferri Tr. at 75 ("[M]y understanding was that he reported to Mr. Boback.")

- Q. You would say they're close friends?
- A. Yeah, I would say that.
- Q. **Would you describe one of them as having a dominant role in the friendship?**
- A. **Yeah, Mr. Boback.**
- Q. Could I ask why you would say that?
- A. Well, Mr. Boback had a bigger house, he had all the little—you know, the toys and games, and so that would certainly lead the way, and just the way they interacted with one another. **It was clear that Mr. Wallace was taking direction from Mr. Boback, not the other way around.**¹¹⁹

Boback, on the other hand, has consistently mischaracterized Wallace and his responsibilities to the Committee. When asked a simple question about what duties Wallace performed at Tiversa, Boback could not give a straight answer:

- Q. Okay. When Mr. Wallace was employed at Tiversa, which section or sections did he work in?
- A. I don't know that he necessary -- he really didn't work in -- he was never a cleared individual, so he never had the clearance portion of it when everyone else went through there. **Mr. Wallace's role at Tiversa was regarding, or most of his work was child pornography**, searching for child pornography and providing it as a confidential informant to the FBI, and also identifying new cyber risks for, you know, educational purposes that he would then provide to me and then whenever I would go, I've traveled around the country training law enforcement for FBI LEEDA, L-E-E-D-A and he would sometimes travel with me and, you know, highlight different risks for the cyber world that law enforcement wouldn't see otherwise.¹²⁰

* * *

- Q. Was Mr. Wallace first hired as an analyst?
- A. Yes, he was.

¹¹⁹ Gormley Tr. at 180 (emphasis added).

¹²⁰ Boback 62-63 (emphasis added).

- Q. And when was he first hired by Tiversa as an analyst?
- A. I'm not sure exactly, but I think in 2007, maybe. I'm not sure of the exact date, but the summer roughly, I think I remember around the summer of 2007.
- Q. Was Mr. Wallace first hired for his skills as an analyst or for his work with the FBI?
- A. No, Mr. Wallace was hired as an analyst. Mr. Wallace was a stay-at-home dad in Illinois and his wife was in the military, and Mr. Wallace ran a Web site called SeeWhatYouShare.Com. Essentially, See What You Share, what he did was, he would search for files leaked or exposed on file-sharing networks and he would publish them on his Web site. Essentially, he was the first iteration of WikiLeaks, but he did it under the SeeWhatYouShare.com website.

So an individual, Tom Sydnor, Thomas Sydnor who used to work at -- work with Senator Hatch in the Senate Judiciary, Tom Sydnor told me about this Richard Wallace and said, hey, you should talk to this guy because he's, you know, in the space that you're in where no one knows anything, he's doing some searches that may be of interest to you, and he said, he's a little different but you should talk to him.

So we flew him to Pittsburgh, we met with him and then we offered him as a job as an analyst and that's how he started, as an analyst in our corporate business and that's what he started with a reporting structure of he reported to an individual by the name of Griffin Schultz who reported to the chief operating officer, Chris Gormley, who then reported to me.¹²¹

* * *

- Q. At what point did Mr. Wallace's work transition from part time for the FBI and full time for the FBI?
- A. **Mr. Wallace was very erratic in his time, so I'm not sure. Sometimes you'd see him; sometimes you wouldn't, in the office.** And he was -- I'm not sure. **It was mostly FBI work. Again, he didn't generate revenue so therefore it was hard for me to say,** I couldn't tie it to revenue coming in so I didn't know, you know, what he was doing.

¹²¹ Boback Tr. at 64-65 (emphasis added).

So he, you know, that's how that went. So, I mean, he was still working as an analyst, obviously, in 2008 and then he, like I said, he was doing both work and then it kind of transitioned out, probably closer to 2009, 2010.¹²²

Expanding on the assertion that Wallace did not generate revenue, Boback told the Committee that Wallace and personally received cash payments from the FBI as a confidential informant, while Tiversa did not receive any money as a result of Wallace's FBI affiliation:

Q. So Mr. Wallace worked with the FBI. It sounds like he was, at times, working in the business-to-government section. Is that fair?

A. But we didn't have any contract with the FBI, so that's why I don't necessarily know where to put him. **He was not a revenue generating** [*sic*]. In fact, recently it's come to light that Mr. Wallace, it's our understanding that **Mr. Wallace was receiving revenue from the FBI as a confidential informant, yet none of that money ever made it to Tiversa**. So he was keeping that money, that cash that was being given to him, at a reported, as we were told a reported \$1,000 per child pornography case that he gave to the FBI.¹²³

However, a former Tiversa employee told the Committee that Tiversa—or at least Boback—was compensated in cash for Mr. Wallace's work with the FBI:

Q. And do you know whether Tiversa received any compensation from the FBI for Mr. Wallace's work?

A. Yeah. **They were paid cash. I don't know how much. I recall one instance where there was a bag of cash on Molly Trunzo's desk, and it was apparently from the FBI.**

Q. As someone who was responsible, in part, for –

A. About this much. [Estimating the size of the bag].

Q. -- overseeing financial controls at Tiversa, were you concerned that the FBI was paying the company in bags of cash?

A. Yeah.

Q. Did you raise those concerns with anyone at the company?

¹²² *Id.* at 75 (emphasis added).

¹²³ *Id.* at 63 (emphasis added).

EMBARGOED UNTIL AFTER THE TESTIMONY OF RICHARD WALLACE

- A. This was after my review of Mr. Becker. Yeah, I -- well, I'm trying to remember if I raised those concerns. I definitely raised the concerns during the arbitration hearing, you know, because I wasn't sure whether that was being recorded properly.

The relationship with the FBI itself and how it was set up, I remember Griffin Schultz making a comment and me making a comment at the time as to how we thought it should be handled. And that was another instance of Mr. Boback lashing out at Mr. Schultz. I remember that.

And that was on my -- actually, it was on my comments to Mr. Becker. I remember telling Mr. Becker about any cash and the FBI because I don't know that they were paying us at that time. I think it was just an initial, kind of, trial.¹²⁴

Gormley, the CFO, was apparently not made aware of the cash payments prior to seeing them on Trunzo's desk, and could not say if the money was properly placed in an account.

Later in his transcribed interview, Boback contradicted himself in admitting that Tiversa had received a cash payment from the FBI, although he insisted the money went to Wallace:

- Q. But you don't have any specific information about anything that he downloaded?

- A. He's a confidential informant, and we didn't know. But as I mentioned before, early on Mr. Frankhouser talked to me about knowing that Rick Wallace was on Tiversa's payroll and downloading child pornography presumably for their prosecutions. He discussed paying Tiversa as a confidential informant, of which I think he did. I mean, he may have -- they may have paid us as a confidential informant a little bit. I could double check. I'm not positive. **They may have paid us some money as a confidential informant.**

- Q. So as you understand it, Tiversa is a confidential informant as opposed to Mr. Wallace, personally?

- A. I don't know how the FBI designates it, you would have to look. I know that it ultimately became Mr. Wallace. He said to me, he being Mr. Wallace, said to me, along the way that for work he has been doing with the FBI, he was owed some money, and he was owed so much as a confidential informant. It was like \$1,000, or \$2,000, or something like that.

¹²⁴ Gormley Tr. at 209-210 (emphasis added).

And he said to me, would I mind if he took that as a bonus because he has been doing so much hard work for this. I said, no, I don't mind, meaning put the cash into the account at Tiversa as we always do, record it, because we wanted our revenue to come up, and then we will add the amount to your check with the proper withholdings, and that was the last time, thinking back, that was the last time I ever heard anything talked about money paid as any informant and it's my allegation that he continued to take that money, at a rate of roughly \$1,000 per case, in cash and he took it. So I reported that to the authorities.

Q. I see. And the FBI was paying Tiversa for the information that Mr. Wallace was providing, is that right; there was some kind of contract?

A. No.

[Att'y] No, he didn't say that.

Q. Nothing?

A. Nothing.

Q. I'm sorry if I misunderstood.

A. Yeah, no. It is my allegation that **Mr. Wallace was paid by the FBI as a confidential informant, from monies that should have been directed through Tiversa because he was doing that under our direction and we were paying him a salary to do that**, as I mentioned to you and he decided to take that money himself, which is larceny.¹²⁵

In a separate instance, Boback described Wallace's professional behavior as "normal" before launching into a tangent about how Wallace had a "revenge-based mentality":

Q. How often during the course of his employment at Tiversa, if you could describe it for us, was Mr. Wallace in the office? Was it daily?

A. Yeah. I mean, **he was in there like a normal employee, for the most part. I mean, he would come in and leave just normal.**

Q. Earlier today you mentioned he worked from home a lot and you didn't really know what he was doing.

¹²⁵ Boback Tr. at 120-122 (emphasis added).

A. Well, he worked -- as I testified to, he told us that the best time to catch child pornographers was in the evening. So his working from home was over the night, like at nighttime.

Q. Okay. So –

[Discussion off the record.]

[Att’y] If you could just be clear on that.

A. So he would be in the office and then he would go home and search. I think that Mr. Wallace searched peer-to-peer quite a bit as a part of his normal -- it was almost like his ritual, if you will, for his life, to where he was always searching.

Like he was always in front of a computer screen and always searching something, either online or searching peer-to-peer, whether it was at the office or whether it was at home. He was always –

Q. Did you find that troubling?

A. I work in tech. Everyone's a little bit different. So, I mean, we have -- in tech, you know, you have different personalities. He was no exception of a different personality.

The downside of one of the things that **you recognize is he had a very revenge-based mentality[.]**¹²⁶

However, Boback described Wallace’s duties as much more expansive when the discussion turned to verifying the truth of his testimony before Congress. Boback testified that Wallace was solely responsible for Boback’s testimony before this Committee in 2009. Thus, according to Boback, any blame for inaccuracies in the testimony should fall on Wallace. Boback testified:

Q. Did Tiversa employees identify the source of this information other than France? In other words, France got it from somewhere, so do you know where France got it from? Did Tiversa employees determine that?

A. **You're asking me to testify to what someone else did? I have no idea. I was provided information that I testified to, which I believed to be true and correct, as I just testified to again.**

¹²⁶ *Id.* at 202-03 (emphasis added).

Q. Yeah, no, no, I hear you. I'm just asking you if you know anything else about the facts underlying.

A. **I know that Mr. Wallace would have been doing this type of work and provided this information to me, which I then provided, believing it to be true and correct, to Congress.**

Q. Can you tell us with a little bit more specificity what the information Mr. Wallace provided to you was?

A. Sure. Again, this was 5 years ago, but **Mr. Wallace would have been responsible for discussing breached files; finding, downloading breached files; locating the location of where those files came from; and then, you know, articulating that to us.** So, you know, producing that information, so therefore any information that I received regarding where a file came from, who was the disclosing source, the file itself all came from him.

Q. And did he tell you those things?

A. Yes.

Q. The source?

A. Yes.

Q. The location, the specific location?

A. Yes.¹²⁷

* * *

Q. Just to clarify for us, my understanding -- and please correct me if I'm wrong, but my understanding from our earlier conversation was that, you know, **Mr. Wallace was hired, you used the term charity with respect to him working at Tiversa.** I understood that **Mr. Wallace was working primarily on child exploitation or child pornography cases, did a lot of that work from home, and I believe you said you didn't really have a great idea of what he was doing a lot of the time.** So the work that you testified to seems to fall outside the bounds of how you described Mr. Wallace's responsibilities at the company earlier. **Could you help rectify that for us?**

¹²⁷ *Id.* at 107-09 (emphasis added).

- A. **I don't think it needs rectification**, but this -- maybe you misunderstood what we were saying. Mr. Wallace did do child pornography-type work with the FBI, to the best of my knowledge. **Mr. Wallace, as I already testified to, was an analyst at Tiversa, which then would put him in this information.** He also searched for, on his own, in the time when he was searching his child pornography and other things, he would come up with files. **He would download files outside of our system**, because, as I testified, our system was configured to look for a dynamic signature profile which was specific for each client, which does not just take everything. So therefore, Mr. Wallace would come up with random downloads that, again, because he managed to do the search from end to end, we were confined within a very confined space in the confines of our work product.

Mr. Wallace could put whatever search in at any time. Clearly, as I testified to, I wouldn't have searched for U.S. nuclear information. However, Mr. Wallace apparently came up with this U.S. nuclear information, because, again, he could put whatever search in and see the outcome of it. So therefore, when he came to me and said, here, I have this, this is not through the course of our normal work of Fortune 500 clients. So therefore, he was putting whatever search in any time he wanted to then -- I'm assuming, because then he would come up and provide us these files, and then he also detailed where the file was -- where he downloaded it from. **I had no reason to believe it wasn't true, and I testified to that accordingly.**¹²⁸

Boback reverted again to describe Wallace's role as minimal later in the interview. He stated:

- Q. Have you hired anyone to replace Mr. Wallace's work as an analyst for Tiversa?
- A. No, he hasn't been an analyst for years, so he hasn't logged in for a long time.
- Q. I'm just -- I'm confused about this aspect of it, though. I can't get my head around it --
- A. Yeah, okay.
- Q. -- because is he doing work just for the FBI, or is he acting as an analyst? What -- I just -- sorry, I keep asking the same question. I want to understand, though.

¹²⁸ *Id.* at 110-11 (emphasis added).

- A. Yeah, that's okay. He was not -- in my estimation he was not -- **now, granted nobody watched him.** Like on a daily basis, nobody would say, what is every minute of your day happening? So that was out. **But he was not an analyst. He was not sitting in what the analysts do for years.**

* * *

There was never like one job, specifically that, that's all it was. He could be researching how to delete metadata or do something along those lines. He could be researching other cyber crimes. So he was kind of doing this mix hodgepodge of a bunch of different things.

- Q. But he wasn't doing work for Tiversa's other clients?

- A. Correct.¹²⁹

As noted above, multiple current and former employees described Boback and Wallace as exceedingly close, both at and outside of work. To the Committee, however, Boback repeatedly characterized Wallace as a dangerous alcoholic. Boback told the Committee that he was aware of Wallace's poor performance and inappropriate behaviors but failed to terminate him for years, even though Tiversa had terminated numerous other employees during the same time period.

When staff questioned Boback's judgment in continuing to employ Wallace in the face of his purported poor performance and erratic behavior, Boback evaded questions with convoluted tangents about how unwell Wallace seemed or the dangers he allegedly posed. He failed to address his own decision-making, instead highlighting at length Wallace's destructive personality.

F. Tiversa's Unseemly Business Practices

1. Tiversa used fearmongering tactics to generate business

From its inception, Tiversa has marketed itself as a vital tool to be wielded against the "scary" and complex world of the peer-to-peer network. Tiversa largely creates revenue through contracts with companies who desire cybersecurity services. To build their brand and generate clientele, Tiversa uses fearmongering tactics by citing stories of the very most sensitive documents on the peer-to-peer falling into the hands of criminals and terrorists.

Sam Hopkins, the creator of Tiversa's technology, gave the Committee examples of the type of information Tiversa had found on the peer-to-peer network. He stated, "I didn't want to

¹²⁹ *Id.* at 251-52.

see the stuff, so I just stayed out of it all....There's just scary stuff out there."¹³⁰ When asked to explain, Hopkins continued, "Yeah, I mean everyone knows of Snowden. Tiversa has way more than he does and Tiversa has new information on everybody."¹³¹

Hopkins further described files he had seen during the course of his work with Tiversa:

Q. Let's fast-forward to the discussion of the Marine One schematics. You said at one point that the Marine One schematics were, sort of, the least sensitive thing you've seen. Is that fair?

A. I wouldn't say "least." You know --

Q. One of the least.

A. -- a tax return for somebody is probably the least, but definitely not the scariest. **Scariest would be how to fly a 747 sitting in, you know, the hands of an Arab. You know, that was pretty scary.**

Q. And you've seen that on --

A. Oh, yeah.

Q. -- the peer-to-peer networks?

A. Yeah. **Or, you know, some guy collecting tons of explosive information from the military and also how to tow a boat into the harbor in the Pacific, you know. Or one of our -- or all of our bases in the South Pacific, all of their security cameras, exactly where all the gunners are and what the cameras can see and how to gain access, that's pretty scary.**

How to blow up every, you know, big city in America with improvised explosives and exactly what trash cans to stick them in and how to take out bridges, that's pretty scary. Space-based laser stuff, that's pretty scary. Seeing China, Russia, Iran actually grabbing the stuff and seeing it transferred over to them, that was pretty scary.

Q. So who created these documents?

A. Government agencies. Defense contractors.

Q. And these are all in the Tiversa data store?

A. They're out on the peer-to-peer, and Tiversa has some of them.

¹³⁰ Hopkins Tr. at 26 (emphasis added).

¹³¹ Hopkins Tr. at 26 (emphasis added).

Q. But everything you just described, is that in the possession of Tiversa in its data store?

A. **That's where I've seen them, yeah. And, I mean, there's millions of files. I mean, it's everything -- I would not be shocked if everybody's information in this room is sitting out there, from your doctors and accountants and, you know, whatnot. It's out there.**

[Att'y] To be clear, when you say in possession of Tiversa, it's not exclusively in the possession of Tiversa. You got it off the Internet.

A. Yeah, it's peer-to-peer. It's probably still out there, and anyone could go and grab it.

Q. But at the time you viewed this information, it had been downloaded by Tiversa.

A. Yeah.

Q. Were these documents marked "classified," do you know?

A. **Oh, yeah. Tiversa is, and peer-to-peer in general, there's tons and tons of classified.** And Tiversa turned over -- Tiversa was in the strange situation, not so much anymore, of that, you know, **they had droves and droves of classified information on all the wars that were going on over in the Middle East. We could see what was happening every day, with all the stuff that was being leaked.** And the government would come every once in a while and get it, and then, you know, it would just sort of disappear, you know[.]¹³²

Hopkins statements about Tiversa routinely downloading classified information is at odds with what the Committee heard from Tim Hall. Hall told the Committee that much of the information Tiversa provided to him while at NCIS was unclassified.¹³³ Hall also stated that, since he began working for Tiversa, Tiversa had not determined that it was in the possession of a classified document.¹³⁴

Regardless of how often Tiversa actually downloaded classified information, however, their marketing tactics appear to have worked—Tiversa frequently received press regarding its account of the government security leaks. When Hopkins was interviewed by CNET regarding Tiversa's involvement in the Marine One leak, he stressed the wide-ranging nature of inadvertent leaks on the peer-to-peer, even designating it as “the biggest security problem of all time”:

¹³² Hopkins Tr. at 97-99 (emphasis added).

¹³³ Hall Tr. at 39-40.

¹³⁴ Hall Tr. at 35.

- Q. So your team concluded that the materials fell into the hands of Iran. Is it possible that other actors also are trying to take advantage of similar openings in the system?
- A. Heck yeah. Every nation does that. **We see information flying out there to Iran, China, Syria, Qatar--you name it. There's so much out there that sometimes we can't keep up with it.**
- Q. I would have assumed military contractors would use more secure networks to communicate.
- A. Everybody uses (P2P). Everybody. We see classified information leaking all the time. **When the Iraq war got started, we knew what U.S. troops were doing because G.I.'s who wanted to listen to music would install software on secure computers and it got compromised.**
- Q. This is what your company specializes in, obviously, but what's your professional opinion about the extent of this sort of thing?
- A. **This is the biggest security problem of all time.** Coming from me, it sounds biased. But you can get 40,000 Social Security numbers out there at the drop of a hat. **We've had people come into our data center and we've shown them things that are out there on P2P and they go away with their minds blown.**¹³⁵

Various outlets portrayed Tiversa as partnering with federal authorities. One outlet wrote, “By the end of [2004], Tiversa was working with the CIA, FBI, Homeland Security, and the U.S. Secret Service.”¹³⁶ Regarding a WikiLeaks spreadsheet containing potential terrorist targets in California, another outlet wrote, “Asked to aid in the investigation of the leak by U.S. authorities that the company declined to identify, Tiversa found the spreadsheet was inadvertently exposed by a California state employee using a peer-to-peer network in August 2008, more than a year before WikiLeaks posted it.”¹³⁷

Tiversa capitalized on this press in their presentations at various conferences and to potential clients.

2. Tiversa systematically mined for files for “potential” clients as a solicitation tactic.

¹³⁵ Charles Cooper, *Q&A: Tiversa Co-founder Talks About P2P Leak*, CNet (Mar. 1, 2009), available at <http://www.cnet.com/news/q-a-tiversa-co-founder-talks-about-p2p-leak/> (emphasis added).

¹³⁶ John Foley, *Your Data And The P2P Peril*, InformationWeek (Mar. 13, 2008), available at http://www.informationweek.com/your-data-and-the-p2p-peril/d/d-id/1065643?page_number=2. The Committee found many of Tiversa’s claims regarding its relationships with federal agencies to be greatly overstated.

¹³⁷ Michael Rile, *WikiLeaks May Have Exploited Music Networks to Get Data*, Bloomberg (Jan. 20, 2011), available at <http://www.bloomberg.com/news/2011-01-20/wikileaks-may-have-exploited-music-photo-networks-to-get-classified-data.html>.

A whistleblower told the Committee that Tiversa kept dossiers of information on various companies and executives in an attempt to garner new business. According to the whistleblower, Boback even went so far as to create false documents containing large amounts of sensitive information he obtained through his improper use of a law enforcement database to trick potential clients into purchasing Tiversa's services.

As a matter of practice, Tiversa contacted companies whose documents it found on the peer-to-peer network. Tiversa did so under what it called a "duty of care" policy. However, Tiversa held back critical information from companies whose documents were actually exposed in order to force them to purchase Tiversa's services.

When asked whether Tiversa contacted non-client companies about documents actually exposed on the peer-to-peer network, Boback told the Committee that it did not—that Tiversa only searched the data store for potential clients that had a relationship with Tiversa. He then admitted that Tiversa did in fact "cold call" new clients with documents found on the peer-to-peer network, but stated that it was not a "routine practice." He testified:

Q. Can you describe circumstances in which you would mine the data store for a potential client?

A. If the client -- if we know we are -- **if we were contacted or we have some relationship with a certain client and we know we are going to see that client.** Prospective clients, yes, prospective clients and the prospectives, it usually starts with a phone call with a prospective client, as any prospective client would start, you have a phone call with the client. You explain to them about the risks of file sharing, the risks of, you know, what this is, and how information can get out this way.

Most people don't understand it, and they say, can you give me an example, so we go into the data store, not into Eagle Vision. We go into the data store and we usually prepare an example sheet of whatever we have in the data store without looking for it; providing that example --

Q. **Have you ever contacted a potential client after mining the data store for information concerning that potential client?**

A. **I think I -- you lost me there.**

Q. Absolutely. **Have you ever looked in the data store for information, found information, and then contacted a potential client?**

[Att'y] **He can't answer. I'm not sure I'm following you. So company X, we want to get them. Let's look for stuff on company X. We call company X?**

Q. Correct.

[Att’y] Okay, do you follow that?

A. Yes. **No, I don't believe so. We may have, but I don't believe so. It is not a routine practice by any means.**¹³⁸

The Committee found, however, that Tiversa routinely “cold called” clients with documents found on the peer-to-peer network. Under the company’s “duty of care” policy, Tagliaferri regularly called businesses to alert them to exposed documents. In fact, Tagliaferri called companies nearly every day at some points of his employment with Tiversa.¹³⁹ The Committee also spoke with numerous companies that Tiversa contacted seemingly out of the blue about documents it found on the peer-to-peer network. Documents obtained by the Committee further reveal that Tiversa contacted MetLife, NetXert, Open Door, and LabMD regarding use of their services.

¹³⁸ Boback Tr. at 146-47 (emphasis added).

¹³⁹ *Id.* at 132.

From: ifriedman@metlife.com [ifriedman@metlife.com]
 Sent: Sunday, July 27, 2008 4:56:27 PM
 To: hvaletk@metlife.com
 BCC: hvaletk@metlife.com
 Subject: Re: IMPORTANT: MetLife Disability Census Found on Web
 Attachments: graycol.gif; ecblank.gif; doclink.gif; C2030192.gif; C1078101.gif

Harry - nice work. I thought that might be the case.

Harry Valetk

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

From: Harry Valetk
 Sent: 07/25/2008 05:01 PM EDT
 To: Joseph Carroll
 Co: Ira Friedman; Justin Hixson/Leg/MetLife/US@MetLife; Tom Meenan; Meghan Canty
 Subject: Re: IMPORTANT: MetLife Disability Census Found on Web

“It seems Traversa [sic] solicits business by scanning files online, and bringing them to the company’s attention.”

Hello All,

I found a July 10th article with Traversa cited in it from a separate, but similar incident involving file-sharing networks. It seems Traversa solicits business by scanning files online, and bringing them to the company's attention.

Just a thought.

A Supreme Court justice's birthday and Social Security number were exposed on the Internet after a McLean, Va., investment firm employee used an online file-sharing network at his office.

Supreme Court Justice Stephen Breyer's birthday and Social Security number, and records for about 2,000 other clients of Wagner Resource Group, were stored in the company's private files. The data breach began late last year and ended shortly after a reader of a blog on washingtonpost.com discovered the information in June on LimeWire.

Wagner hired Tiversa to repair the breach.

Tiversa's chief executive said these breaches are common since many employees and contractors install file-sharing software on office computers. LimeWire, like other file-sharing networks, allow computer users to share files directly by linking computers. But Robert Boback said users don't realize such networks may make all files available, not just music or movie files users hope to share.

"This case is unique because of the high profile of the targets. The individuals on this list are at a very high risk, almost imminent, of identity theft," Boback said.

More than a dozen LimeWire members, including some in Sri Lanka and Colombia, downloaded the personal records from Wagner, according to Tiversa officials. The company was alerted after the blog reader told Security Fix blog employees about the breach and the blog contacted Wagner.

Harry A. Valetk
 Corporate Privacy Director
 MetLife Privacy Office
 212.578.2116 (direct)
 Privacy -- Pursue it. Promote it. Protect it. Preserve it.
 Joseph Carroll/Pen/MetLife/US

Joseph Carroll/Pen/MetLife/US
 07/24/2008 03:09 PM

To: Ira Friedman/Leg/MetLife/US@MetLife
 cc: Harry Valetk/Leg/MetLife/US@MetLife, Justin Hixson/Leg/MetLife/US@MetLife,
 Larry Wolff/Leg/MetLife/US@MetLife, Michael Fradkin/Ins/MetLife/US@MetLife,
 Michael Tietz/Ins/MetLife/US@MetLife, Susan

----- Forwarded by Michael Fradkin [mailto:mfradkin@metlife.com] on 08/02/2008 10:02 PM -----

"Ashish Joshi" <A.Joshi@lorandoslaw.com>
 To: "Michael Fradkin" <mfradkin@metlife.com>
 cc: "Justin Hixon" <jhixon@metlife.com>, "Larry Wolff" <lwofff@metlife.com>
 08/02/2008 09:58 PM Subject: Important - Urgent

Michael:

Thank you for your email. I can talk with you and other MetLife persons on Monday, August 4, 2008, Monday afternoon 4:00 a.m. and 11:00 a.m. EST on Monday, August 4, 2008. Monday afternoon 4:00 a.m. EST for me.

As discussed in our teleconference, a few days ago Netxert received a phone call from an agent of Tiversa, Inc. Tiversa's agent informed Netxert that confidential information containing Netxert's employees' personal information (including but not limited to the employees' social security numbers) has been breached and that this information is available on a "P2P server" on the internet. Tiversa's agent refused to disclose the identity or location of this P2P server that contained the personal information of Netxert's employees. However, Tiversa offered to disclose this information, investigate the source of the breach and take remedial steps *if* Netxert agreed to retain Tiversa's services at \$495/hour. Netxert informed Tiversa that Netxert needed to see a sample of personal information that was allegedly available on the P2P server and then would take the necessary steps. Tiversa emailed Netxert a MS-Excel file that contains personal & confidential information of Netxert's employees including their first and last names, social security numbers, date of birth, gender, marital status, primary details, addresses, etc.

After a preliminary investigation, Netxert has determined that there has been no security breach from Netxert's computer systems and/or servers. The MS-Excel file that was sent to Netxert by Tiversa contains metadata that shows MetLife as "author" of the spreadsheet. The Excel spreadsheet states "MetLife Census for Disability" as its heading. The information contained in the spreadsheet was sent to MetLife by Netxert's staff at some point in time in order to obtain disability insurance. At this stage, it appears that MetLife is the source of this security breach.

Frankly, we consider Tiversa's "offer" as nothing short of blackmail. Also, the fact that Tiversa touts itself as MetLife's "vendor" also raises some questions about Tiversa's knowledge and access to this confidential information.

So far, Netxert has not met with the law enforcement authorities to complain about this security breach and Tiversa's tactics. However, soon Netxert will be obligated to (a) inform its employees (residing in several states) and (b) the FBI about this security breach. **Before** we take any of the above steps, we want to meet with MetLife's management and discuss these issues and try and work together to resolve this situation. However, time is of the essence in this matter. **We need to act fast.**

Again, I request you to make MetLife's legal personnel (and other necessary personnel) available for a face-to-face meeting on Monday. If you are not able to get everyone together on this short notice, please try and get your in-house lawyers available for a face-to-face meeting on Monday and the rest can join via teleconference. If not Monday, please schedule a meeting on Tuesday – but it is imperative that we have a face-to-face meeting. I do not want to keep discussing this matter via telephone back and forth.

I await your response. If you have any questions, please feel free to reach me on my cell (734-637-7112) over this weekend.

Thank you.

Ashish

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From: Michael Fradkin [mailto:mfradkin@metlife.com]

"a few days ago Netxert received a phone call from an agent of Tiversa, Inc."

"Tiversa offered to disclose this information, investigate the source of the breach and take remedial steps if Netxert agreed to retain Tiversa's services at \$495/hour"

3. Boback Misrepresented Howard Schmidt's Role in Generating Business Contacts for Tiversa

Tiversa boasts an impressive board of advisors, a corporate governing body separate of the board of directors. The members of the advisory board include Howard Schmidt, General Wesley Clark, Maynard Webb, Larry Ponemon, Michael Dearing, Thomas Keenan, Lynn Reedy, and Patrick Gross.¹⁴⁰ The board purportedly provides “business” and “strategic guidance” to Tiversa.¹⁴¹ Joel Adams praised the involvement of Tiversa’s board. He stated, “Some companies use advisory boards as window dressing...The interaction is minimal, and that type of board isn’t worth much. **Tiversa has been able to get its advisers to interact, to participate. When they walk about of a board meeting, they have to-do lists.**”¹⁴² Contrary to Adams’ praise, however, according to Boback the advisory board met only once, in January 2006.¹⁴³

Instead, Tiversa appears to use the advisory board primarily to solicit clientele. In a bulletin published by Morgan Lewis & Bockius, Boback stated, “when we considered advisers, we asked ourselves, ‘Who can provide instructions? Whose credibility can we leverage to get where we need to be?’”¹⁴⁴ The article goes on to note, “Tiversa added the other [advisors], who became stepping stones to clients... and more.”¹⁴⁵

Howard Schmidt serves on Tiversa’s board of advisors. During his tenure as advisory board member, he was appointed as the White House Cybersecurity Coordinator under President Obama.¹⁴⁶ Upon his appointment, Schmidt put the options he received from Tiversa into a blind trust. When asked by the Committee about Schmidt’s role at Tiversa, Boback expressly denied that Schmidt helped generate business or introduce clients:

Q. Did Mr. Schmidt help generate any business for Tiversa?

A. I don’t believe so.

Q. **Did Mr. Schmidt introduce you or anyone else at Tiversa to potential clients?**

A. **No.**¹⁴⁷

Contrary to Boback’s statement, the Committee has received extensive e-mail correspondence between Boback and Schmidt, where Schmidt systematically introduces Boback

¹⁴⁰ Tiversa Advisory Board, Tiversa, *available at* <http://tiversa.com/about/advisors.html>.

¹⁴¹ Boback Tr. at 28.

¹⁴² Evan Pattak, *Build a Better Board: See How a Solid Board of Directors Can Poise a Company for Success 9*, *Getting It Done II*, *available at* http://www.morganlewis.com/pubs/GettingItDone2BuildABetterBoard_TEQ2007i5.pdf (emphasis added) [hereinafter Pattak].

¹⁴³ Boback Tr. at 29.

¹⁴⁴ Pattak at 8..

¹⁴⁵ *Id.* (ellipsis in original).

¹⁴⁶ Macon Phillips, *Introducing the New Cybersecurity Coordinator*, *The White House Blog* (Dec. 22, 2009) <http://www.whitehouse.gov/blog/2009/12/22/introducing-new-cybersecurity-coordinator>.

¹⁴⁷ Boback Tr. at 41.

to potential clients and media contacts. In one e-mail to Schmidt, Boback praised him as “a lightning rod for business”:¹⁴⁸

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Tuesday, April 25, 2006 7:09 AM
To: howard@schmidt.org
Subject: RE: Demo of P2P issues

Howard:

This should be interesting. I see that Bob Sullivan had the exclusive on the story. Given his background with Kazaa, he should quickly understand what we are talking about.

Also, the "Medical Passwords" file is a 36 page document that lists over 350 user ids/passwords for over 100 medical journal sites, clinical trials information site, etc. It is most likely someone in a large company selling keeping (or attempting to keep) the information for the use of these services (paid).

I also want to personally thank for the valuable time that you had spent with us during your visit to Pittsburgh. As I had mentioned during your visit, you are clearly a lightning rod for business. I was (and am) extremely impressed by your extensive resume and experience which is what lead us to contact you for the advisor position. After spending some time with you, I am even more impressed by the person behind such a resume and experience. It is an honor to work with you.

If you would like to send the topics of your upcoming engagements, we can have Captain PowerPoint put together various brief talking points sharing information and issues that we have seen related to your topics. I see that you have another ID theft talk mid-May at Georgia Tech. We can give some hard hitting points to share for this, if you think it would be helpful.

Hope all is well with you and your family, we'll talk soon.

Best Regards,
 Bob

“[Y]ou are clearly a lightning rod for business. I was (and am) extremely impressed by your extensive resume and experience which is what lead us to contact you for the advisor position.”

Tiversa played in active role in ensuring Schmidt could be an effective advocate. Chris Gormley, copying Boback, gave Schmidt explicit talking points on Tiversa’s business model:¹⁴⁹

¹⁴⁸ TIVERSA-OGR-0017729.

¹⁴⁹ TIVERSA-OGR-0017719.

From: Chris Gormley <IMCEAEX-
_O=TIVERSAINC_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=CGORMLEY@tiversa.com>
Sent: Monday, May 1, 2006 12:40 AM
To: howard@schmidt.org
Cc: Robert Boback <rbboback@tiversa.com>
Subject: Slides
Attach: Howard043006.ppt

Howard,

Thank you for highlighting the problems we're addressing in your talks over the next 6 days. I've attached some information that may help you on Monday that is focused primarily on the problem in general. I put the files in a neutral file format. The example is a medical one, but it is one that had the least sanitization needed.

What I would like to do is speed time after today (Monday) working up a more helpful set of slides / presentation to support your other talks this week. I envision the slides supporting two sections:

Section 1: Slides showing the problem in general

Section 2: Modules providing examples for:

1. ID Theft
2. Fraud
3. Regulatory Violations

To support Section 2, I have to sanitize some existing examples. Please let me know if other examples will be helpful in section 2. Also, please let me know what I could do to make the slides I sent to you today more helpful including putting slides into templates that you can use for your presentations.

Christopher L. Gormley
Chief Operating Officer
Tiversa, Inc.
The Leader in Information Containment Management
Office: 724-940-9030
Fax: 724-940-9033
Mobile: 724-991-3376

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“Howard, Thank you for highlighting the problems we’re addressing in your talks over the next six days. I’ve attached some information that may help you on Monday...”

Schmidt used these talking points to introduce Boback to potential clients. In June 2006, for example, Schmidt introduced Boback to FAA officials:¹⁵⁰

From: Howard A. Schmidt <howard@cyber-security.us>
Sent: Saturday, June 3, 2006 5:19 PM
To: Michael F Brown <michael.f.brown@faa.gov>; Robert Boback <IMCEAEX-
_O=TIVERSAINC_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=RBOBACK@tiversa.com>
Subject: FAA and Data Leakage

Mike,

It was great seeing you at the Arosight meeting and sorry I could not stick around for your presentation.

As I mentioned to you, I have been working with Tiversa and thought that you would find the information that they have found on the P2P networks is unreal. What they have found is not just an errant document here and there but a systemic problem that is found in every sector.

To that end, I would like to introduce you to Bob Boback, the CEO and hopefully you can get a chance to see what they are doing up in Pittsburgh.

Best,
Howard

Sent via BlackBerry - short message and not spell checked.

**“I have been working with Tiversa and thought that you would find the information that they have found on the P2P networks is unreal...
To that end, I would like to introduce you to Bob Boback...”**

¹⁵⁰ TIVERSA-OGR-0017696.

EMBARGOED UNTIL AFTER THE TESTIMONY OF RICHARD WALLACE

During the same time, Schmidt introduced Boback to Paypal officials, joking that he hoped Paypal would not hold Schmidt's affiliation against Tiversa:¹⁵¹

From: Howard A. Schmidt <howard@cyber-security.tiversa.com>
Sent: Saturday, June 3, 2006 5:10 PM
To: Robert Boback <IMCEAEX-OU=TIVERSAINC_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=RBOBACK@tiversa.com>; Barrett <nbarrett@paypal.com>
Subject: "Data Leakage" and PayPal

Michael,

I hope this email finds you well and not too swamped. I would like to introduce you to Bob Boback, CEO of Tiversa a company I started working with on some homeland and defense security issues with.

During a recent call I had with Bob we were talking about the widespread issues around data leakage issues with P2P technology (eDonkey, limewire etc.) and he mentioned that there were a number of PayPal related things that his folks had found. I told him that I would let you know.

For full disclosure, I am their advisory board but hopefully you will not hold that against them. :)

Thanks and seeing what they have found, and continue to find, would be worth your time.

Best,
 Howard
 Sent via BlackBerry - short message and not spell checked.

"I would like to introduce you to Bob Boback... During a recent call I had with Bob we were talking about the widespread issues around data leakage issues... and he mentioned that there were a number of PayPal related things that his folks had found "

"For full disclosure, I am their advisory board but hopefully you will not hold that against them. 😊"

Schmidt also approached Merrill Lynch on behalf of Tiversa, after Boback told him he had unsuccessfully tried to solicit the company:¹⁵²

From: Howard A. Schmidt <howard@schmidt.org>
Sent: Wednesday, April 19, 2006 9:29 AM
To: Robert Boback <IMCEAEX-OU=TIVERSAINC_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=RBOBACK@tiversa.com>; Basile, Anthony (IS&P) <anthony_basile@ml.com>
Subject: Introduction as we talked about.

Hello Tony and Bob,

It was good talking with both of you recently and I hope this email finds you both well. Tony, as I mentioned I am on the advisory board of Tiversa and during a recent demonstration for some government related documents the discussion came up about data leakage and financial services. What Bob demonstrated for me was not an isolated document that was found but a widespread systemic leakage problem across ALL sectors, energy, telecom, transportation, financial etc. I think you mentioned that you had heard something about Tiversa but this is something that you have to see yourself to believe.

Thanks and I look forward to catching up next time I am in NY.

Best,
 Howard

¹⁵¹ TIVERSA-OGR-0017697.
¹⁵² second TIVERSA-OGR-0017740

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From: Howard A. Schmidt <howard@schmidt.org>
Sent: Tuesday, April 11, 2006 11:56 PM
To: Robert Boback <IMCEAEX-
_O=TIVERSAINC_OU=FIRST+20ADMINISTRATIVE+20GROUP_CN=RECIPIENTS_CN=RBOBACK@tiversa.com>
Subject: RE: Merrill Lynch

(IN CONFIDENCE) I am working with them taking a look at their security program for their exec team. I will talk with Anthony Basile who has engaged me. Let me know if you want to send some samples.

Thanks
Howard

-----Original Message-----
From: Robert Boback [mailto:rboack@tiversa.com]
Sent: Tuesday, April 11, 2006 3:02 PM
To: howard@schmidt.org
Subject: Re: Merrill Lynch

Hi Howard,
ML is one of the worst when it comes to leakage. We have made initial contact but have been stopped by a mid level IT individual named Swati Dutta Rey. They don't understand the problem. Any assistance that you can lend would be much appreciated.

Thanks
Bob

-----Original Message-----
From: "Howard A. Schmidt" <howard@cyber-security.us>
Subj: Merrill Lynch
Date: Tue Apr 11, 2006 11:44 am
Size: 227 bytes
To: "Robert Boback" <rboack@tiversa.com>

Hi Bob,

I have a consulting job with ML and as I talk with them I wanted to give them some insights into if they were leaking. Have you seen anything?

Thanks
Howard
Sent via BlackBerry - short message and not spell checked.

"(IN CONFIDENCE) I am working with them taking a look at their security program... I will talk with [ML official] who has engaged me."

"We have made initial contact but have been stopped by a mid level IT individual... Any assistance that you can lend would be much appreciated."

Tiversa also leveraged Schmidt's reputation for publicity. Schmidt contacted news outlets on Tiversa's behalf.¹⁵³

From: Howard A. Schmidt [mailto:howard@schmidt.org]
Sent: Monday, April 24, 2006 11:19 PM
To: Robert Boback; Bob Sullivan (MSNBC-JV)
Subject: Demo of P2P Issues

Bob (and Bob, MSNBC) @ ,

Bob Sullivan and I both spoke at an event with the AG for Ohio today on their ID Theft program. After the lunch, I talked with Bob about what you were doing and some of the really dangerous things that you showed me. I also explained to him that you did not want to alienate potential customers and that it would be counter productive to "report" on who had problems (everyone) but it might be a good way for Bob to raise the awareness. He did a story a while back around Kazzaa but I do not think he has seen anything like you showed me.

To that end, I would like to introduce you to each other to see what you can work out. Please let me know if there is anything I can do to help.

Best,
Howard

"I would like to introduce you to each other o see what you can work out."

¹⁵³ TIVERSA-OGR-0017729

The Committee found that, contrary to Boback's statements about Schmidt's role at Tiversa, Schmidt actively sought out contracts and potential clients for the company. This is yet another example of Boback providing false information during the course of this investigation.

4. **Boback Misrepresented Information about Tiversa's Capabilities to Clients**

According to a former Tiversa employee, Boback had a propensity to exaggerate, or even lie at times. Gormley stated, "the perception at least from what I remember internally was that there was a tendency to exaggerate or at least misrepresent... what was going on at the time."¹⁵⁴ Specifically, the feeling among some employees was that Boback's statements were "60 percent, you know, bullshit; 30 percent not true; and 10 percent truth, I guess, as far as like a representation of the facts."¹⁵⁵

Gormley recalled a specific instance in which Boback misrepresented facts in meeting with a client:

Q. When you say "third parties," do you mean potential clients?

A. I remember the incidents. I mean, one was an existing investor, a limited partner within Adams Capital, came into the meeting, into a discussion, and **the number of employees and the revenues of our companies were overstated at the time.**

The other was, well, to General Wesley Clark and Yahoo around **whether we were profitable or not.** And, again, you know, at the time, we were profitable for one quarter, but we weren't profitable for an entire year. I looked at that as misrepresenting that we're profitable, but you could argue that we were profitable for one quarter.

There were also too many employees attributed to a potential acquirer named SecureWorks. That was later corrected, of course, in diligence, because you know how many employees you have, right?

And those are some of the incidences I remember. And then -- so those are some -- I'm just trying to remember some of the other major areas.

Q. Sir, did you ever confront Mr. Boback about these misrepresentations?

¹⁵⁴ Gormley Tr. at 131-32.

¹⁵⁵ *Id.* at 131, 136.

- A. Yeah, I mean, I told him, you can't do that, they're going to -- particularly in the case of potential acquirers, they're going to find out. I mean, let's not say that. We lose credibility in those instances.

The case of this limited partner, the individual on the other end of the table was someone who friends of mine knew, so I felt personally at odds.

- Q. And this is the gentleman from Adams Capital?

- A. No, it's a limited partner, who was an investor in Adams Capital that came in to see essentially what Adams Capital was investing in. So, I mean, to me, the risks there were lower, because they had already invested. But we can't not state -- now, again, there's all different ways of viewing this. I mean, are you counting every single part-time potential person? Are you counting -- I mean, **but I recall it being an order of magnitude different**; it wasn't close.

So that was one incidence -- set of instances that I remember.¹⁵⁶

In another instance, Boback represented to a potential client that he had a close personal relationship with the FBI, implying retaliatory action if the client did not take action:

[I]n the discussion, Bob mentioned very lightly, but it stood out that he knows people at the local FBI office. And the veiled implication was that continue with monitoring, or else that FBI office might get wind of this.¹⁵⁷

During the course of its investigation, the Committee routinely found that it could not take information provided by Tiversa at face value—and statements made by former employees indicate that clients and potential clients could not do the same. The Committee found that Boback's statements about Tiversa's technological capabilities simply did not match what it found in the documents and testimony, Boback created a hostile work environment, withheld the nature of his relationship with Richard Wallace from the Committee, and created a culture at Tiversa based on a series of unseemly business practices. The Committee found that information provided by Tiversa—such as that on the Marine One leak—not only could not be verified, but at times appeared to be outright false. Given all the Committee has learned about Boback and Tiversa, the extent of its relationship with the Federal Trade Commission is extremely concerning.

V. Tiversa's Relationship with the Federal Trade Commission

¹⁵⁶ *Id.* at 27-29 (emphasis added).

¹⁵⁷ Gormley Tr. at 132-33 (emphasis added).

Tiversa's interactions with the FTC raise questions about the propriety of the relationship. Both Tiversa and the FTC have characterized the relationship as nominal. Overwhelming evidence produced to the Committee, however, demonstrates mutually-beneficial collaboration, wherein the FTC obtained information validated its regulatory authority, and Tiversa gained an ally in a powerful federal agency that provided actionable information that it exploited for monetary gain. Unfortunately, this relationship existed at the expense of good government.

The FTC accepted information from Tiversa through a shell organization without questioning the motives or reason for the third party, or, significantly, the veracity of the underlying information. The FTC's motives for blindly accepting this information are unclear.

In addition, Tiversa's involvement with LabMD, a medical testing laboratory based in Atlanta, Georgia, raises questions. Not only does LabMD's story offer a case study illustrating Tiversa's coercive business practices and relationship with the FTC, but information the Committee obtained shows that Boback lied about material information in the case, which ultimately led to the shuttering of LabMD.

According to a whistleblower, Tiversa withheld from the FTC information about its clients that had data breaches while providing information for companies that rejected the offer to buy Tiversa's services. According to the whistleblower, the FTC blindly trusted Tiversa's data and took only nominal steps to verify the information before embarking on the dissemination of warning letters and enforcement actions. Documents provided by the Federal Trade Commission also indicate the limited steps taken to verify information provided by Tiversa.

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

On July 9, 2009, weeks before Tiversa testified before this Committee for the second time, the FTC sent a civil investigative demand to an entity Tiversa created called the Privacy Institute.¹⁵⁸ Tiversa responded promptly, passing documents and information about peer-to-peer breaches at nearly 100 companies through the Privacy Institute, which the Committee learned was created for the sole purpose of funneling information to the FTC pursuant to the CID. When the Committee asked Boback about Tiversa's relationship with the FTC, however, he painted a picture of a government agency bullying a small company. He testified:

We wanted to create separation, as we felt we were being bullied by the FTC into having to provide information to—a small company having to be forced to provide information.

Because in July of 2009, I testified before this committee and then I was bullied by the FTC the very following month, in my opinion, in providing that information.¹⁵⁹

¹⁵⁸ Letter from Reginald Brown, Att'y, Tiversa to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (July 22, 2014).

¹⁵⁹ Boback Tr., at 43 (emphasis added).

Boback reiterated this sentiment by stating:

And we felt -- frankly, as I mentioned, **we felt bullied or trapped to where we were saying I had no choice but to comply with something that was no benefit to Tiversa, was time-consuming, was costly to a small company**, kind of like I feel today.¹⁶⁰

Boback asserted that Tiversa “denied” the FTC’s request for information, and, under threat of a civil investigation demand (CID), Tiversa was compelled to provide information to the FTC.¹⁶¹

Consistent with his stated reluctance to cooperate with the agency, Boback described his contacts with the FTC as very limited. He testified he only knew one person at the FTC—Alain Sheer—and that he only interacted with Sheer on four occasions.¹⁶² According to Boback, Sheer contacted him after the July 2009 Oversight hearing to set up a visit to Tiversa.¹⁶³ A second contact occurred when Sheer visited Tiversa in August 2009. Boback testified about the FTC’s visit to Tiversa:

So he came to Tiversa. They looked in our data center. They went in and said, "We'd like to talk about having" -- we met in our conference room and they said, "We'd like to talk about getting the copies of the information that you provided to House Oversight."

They went into our data center to look at it. And he said, "I want these copy" -- "I need these printed out for us. I need these sent to us." And we said, "We don't send any information from our data center. Our data store is our data store. That is sacrosanct to us. So that's it." And they said, "Well, we're going to need to get this information, and we can use the CID, if necessary." We didn't know what a CID was. He said, "Civil investigative demand, similar to a subpoena. We're going to get the information." And we went, "Oh, no."¹⁶⁴

Yet, by the time this meeting took place in August 2009, Tiversa had already received the CID. It is unclear why the FTC would threaten Tiversa with a CID a month after the CID was issued to the Privacy Institute.

Boback met with Sheer for the third time in Washington, D.C., after the Privacy Institute responded to the FTC’s CID with information it in turn obtained from Tiversa.¹⁶⁵ Then,

¹⁶⁰ *Id.* at 218 (emphasis added).

¹⁶¹ *Id.* at 43.

¹⁶² *Id.* at 188 (Q: “What other attorneys at the FTC, besides Mr. Sheer, have you interacted with?” A: “There were two other attorneys at my deposition in November, but I don’t recall their names... I don’t know anyone at the—the only person I ‘know’ at the FTC is Mr. Sheer.”).

¹⁶³ *Id.* at 184-85.

¹⁶⁴ *Id.* at 185-186.

¹⁶⁵ 186. As discussed below, representatives of the FTC do not recall meeting with Boback in Washington, D.C. It is not clear whether or not this meeting actually took place.

according to Boback, he did not have contact with Sheer until Sheer took his deposition in November 2013.¹⁶⁶ The fourth meeting occurred in June 2014—just before the Committee interviewed Boback.¹⁶⁷

B. 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.¹⁶⁸ 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.¹⁶⁹

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.¹⁷⁰ 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.¹⁷³

E-mails produced to the Committee—including from entities other than Tiversa—show a much more cooperative relationship between Tiversa and the FTC. Contrary to the assertions Boback made during his transcribed interview as well as those FTC officials made, documents show Tiversa’s relationship with the FTC began in the fall of 2007. In October 2007, Boback participated in a conference call with FTC officials.¹⁷⁴ In December 2007, Boback provided documents to the FTC.¹⁷⁵ In June 2008, FTC attorney Carl Settlemyer thanked Boback for his “cooperation and insights into the area of inadvertent file sharing over P2P networks,” and notified him that “confidential” information Tiversa provided to the FTC related to earlier Committee hearings on P2P networks would be produced to the Oversight Committee.¹⁷⁶ In

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Briefing by FTC officials to H. Comm. on Oversight & Gov’t Reform Staff (Sept. 9, 2014) [hereinafter FTC Briefing].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

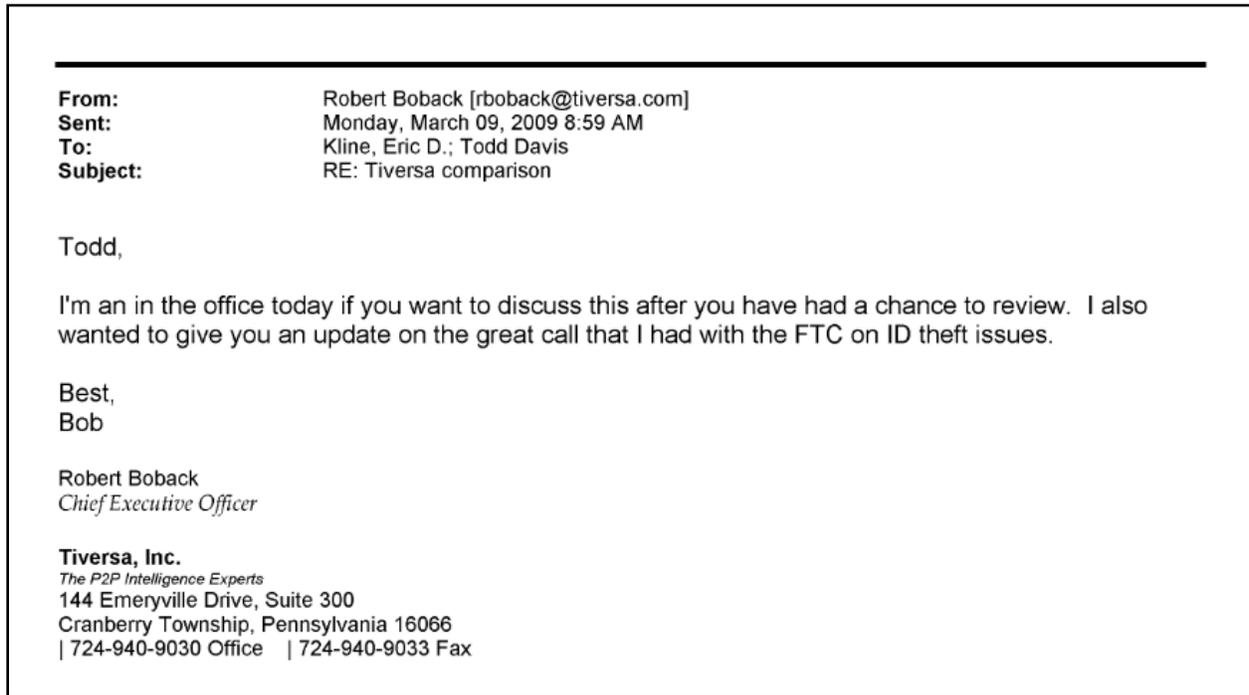
¹⁷⁴ E-mail from Robert Boback to Carl Settlemyer, Att’y, Fed. Trade Comm’n (Oct. 22, 2007 3:25 p.m.) [TIVERSA-OGR-0000071]; GoToMeeting Invitation—FTC Meeting 10:30 a.m. to 11:30 a.m.

¹⁷⁵ E-mail from Robert Boback, CEO, Tiversa to Carl Settlemyer, Att’y, Fed. Trade Comm’n (Dec. 19, 2007 3:08 p.m.) [TIVERSA-OGR-0000065]; E-mail from Carl Settlemyer, Att’y, Fed. Trade Comm’n (June 25, 2008 12:13 p.m.) [TIVERSA-OGR-0000063].

¹⁷⁶ E-mail from Carl Settlemyer to Robert Boback (June 25, 2008 12:13 p.m.) [TIVERSA-OGR-0000063] (attached letter from Carl Settlemyer, Att’y, Fed. Trade Comm’n, to Robert Boback (June 25, 2008) [TIVERSA-OGR-0000064]).

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March 2009, Boback again participated in a conference call with the FTC.¹⁷⁷ Days later, Boback bragged about the call:¹⁷⁸



Personnel from the FTC's Division of Privacy and Identity Protection told the Committee that Tiversa's contacts with the FTC prior to the July 2009 hearing took place with a different division of the FTC.¹⁷⁹ Yet, Alain Sheer was included on e-mails with Boback requesting information about a recent Tiversa press release and scheduling the March 5, 2009, conference call¹⁸⁰—the same call that Boback boasted about days later.

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.¹⁸¹ Documents show that Boback was one of the FTC's main contacts at Tiversa prior to July 2009.

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

¹⁷⁷ E-mail from Robert Boback to Carl Settlemeyer, Att'y, Fed. Trade Comm'n (Mar. 4, 2009 1:55 p.m.) [TIVERSA-OGR-0000052].

¹⁷⁸ E-mail from Robert Boback to Todd Davis, CEO of LifeLock, and Eric Kline (Mar. 9, 2009 8:59 a.m.) [LLOCK-OGR-000147]. Tiversa failed to produce this email to the Committee.

¹⁷⁹ FTC Briefing.

¹⁸⁰ See e-mail from Carl Settlemeyer, Att'y, Fed. Trade Comm'n, to Robert Boback, CEO, Tiversa, Stacey Ferguson, Alain Sheer, & Richard Quaresima, Fed. Trade Comm'n (Mar. 4, 2009 5:25 p.m.) [TIVERSA-OGR-0000052-54].

¹⁸¹ Consolidated Comm'ns, Invoice P7249409030020070816TIVERSA_INC [hereinafter Tiversa Phone Records].

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.

As discussed below, Tiversa used its advanced knowledge of FTC regulatory actions for its own commercial gain.

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

Despite the friendly relationship between Tiversa and the FTC, Tiversa asked the FTC to accept documents from a company it created for the sole purpose of responding to the FTC—the Privacy Institute. The certificate of incorporation was filed in Delaware on June 3, 2009.¹⁸³ Boback testified about Tiversa's purpose in creating the Privacy Institute:

Q. Mr. Boback, what is The Privacy Institute?

A. Privacy Institute is an organization our lawyers set up.

Q. For what purpose?

A. Well, was it originally? I mean, it was –

Q. For what purpose was it set up?

A. Right. It was set up 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.¹⁸⁴

* * *

¹⁸² *Id.*

¹⁸³ Sec'y of State, State of Del., Div. of Corps., Certificate of Incorporation, No. 4694728 (June 3, 2009) . [hereinafter Certificate of Incorporation]. The Privacy Institute was dissolved on June 18, 2013. On the certificate of dissolution, the address for Brian Tarquinio is that of Boback's uncle. In a deposition taken just days after the Committee's transcribed interview, Boback testified that he did not know why his uncle's address was used on the certificate of dissolution. Deposition of Robert Boback, In the matter of LabMD, No. 9357 (June 7, 2014) at 38. Tarquinio also testified that he did not know why the address of Boback's uncle was listed as his own on this document. Tarquinio Tr. at 23-24. Upon learning this information, the Committee asked Boback why the address of his uncle was used on this document. Letter from Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform, to Robert Boback, CEO, Tiversa (June 23, 2014). One month later, Boback, through his counsel, answered that he did not recall. Letter from Reginald Brown, Att'y, Tiversa, to Hon. Darrell Issa, Chairman, H. Comm. on Oversight & Gov't Reform (July 23, 2014).

¹⁸⁴ Boback Tr., at 42.

- A. I don't know if it was their idea or our idea. We wanted to create separation, as we felt we were being bullied by the FTC into having to provide information to -- a small company having to be forced to provide information.

Because in July of 2009, I testified before this committee and then I was bullied by the FTC the very following month, in my opinion, in providing that information.

When we denied providing them information, all of a sudden we were told that, "You have no -- you have no right to deny it, and here's a civil investigative demand that is coming for this."

And we talked to them and said, "We are in acquisition talks at Tiversa and the last thing we want to have is some Federal subpoena or civil investigative demand coming to us."

So our lawyers, in talking to the FTC, they said, "Fine. We'll send this civil investigative demand to this other company, this Privacy Institute, and do it that way."¹⁸⁵

In the same interview, Boback stressed again that the "singular purpose" of the Privacy Institute was to maintain distance between Tiversa and the FTC's CID. Boback stated:

- Q. How would you describe the relationship between the Privacy Institute and Tiversa?

- A. It was one singular purpose that was to make sure or try to do whatever we could so that the FTC did not send a CID, the civil investigative demand, to Tiversa. And that was the only option that our attorneys came up with and the FTC was okay with. So -- or, I don't know if they were okay with it. If they were okay with it, they did it.¹⁸⁶

Boback asked Brian Tarquinio, his financial advisor, to be the President of the Privacy Institute. Tarquinio accepted the requested as a "favor" to Boback.¹⁸⁷ Tarquinio had a different understanding of the purpose of the Privacy Institute. Tarquinio stated:

- Q. Could you describe for us what the Privacy Institute is?

- A. I don't think it's anything at this point.

- Q. How about what it was?

¹⁸⁵ *Id.* at 43.

¹⁸⁶ *Id.* at 48.

¹⁸⁷ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Brian Tarquinio (Sept. 5, 2014), at 57 [hereinafter Tarquinio Tr.].

- A. Sure. To my best recollection, **it was an entity that was established to take bids for either part or all of Tiversa if a company wanted to purchase them.**¹⁸⁸

* * *

- A. Sure. My recollection is **it was set up because at the time there were companies that were interested in potentially purchasing Tiversa, and it would be a separate entity to take those bids.**¹⁸⁹

Tarquino's understanding of the purpose of the Privacy Institute came directly from Boback:

[Att'y] Why don't you just explain how it came to your attention, what your involvement was, and then they'll have follow-ups.

- A. Sure. Mr. Boback came to me and said, we have a company, and at the time I believe it was LifeLock, who was interested in purchasing, you know, some part of Tiversa, which I was aware of. **And he said, we want to create an entity separate from Tiversa to accept those bids, so it is not on our corporate side of everything.** We would like to see if you would be, you know, the head of the Privacy Institute. And as a friend, it seemed pretty reasonable. I said to him, sure, if I get approval [from my employer], fine, glad to.¹⁹⁰

According to Tarquino, Boback did not inform Tarquino that the Privacy Institute was set up to transmit information to the FTC. In fact, Boback did not even mention the involvement of the FTC to Tarquino. Tarquino stated:

- Q. Concurrent with your involvement in the Privacy Institute, were you told that the creation of the Privacy Institute had anything to do with the FTC's interactions with Tiversa?

- A. At that time, no. I had no knowledge of the FTC's interaction with Tiversa.¹⁹¹

Tarquino had no knowledge that the Privacy Institute had ever transmitted information to any government entity,¹⁹² and only recently learned of the Privacy Institute's connection to the FTC:

¹⁸⁸ *Id.* at 16.

¹⁸⁹ *Id.* at 17.

¹⁹⁰ *Id.* at 20.

¹⁹¹ *Id.* at 21.

¹⁹² *Id.* at 22.

Q. At what point in time did you learn that the Privacy Institute was somehow connected to the FTC? Was it during the course of your preparation for today?

A. Yes, ma'am.¹⁹³

Tarquino's testimony contradicts Boback's explanation of the Privacy Institute's creation, and raises questions regarding the true purpose and activities of the Institute, which remain unknown.

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.¹⁹⁴ FTC officials clearly knew that the information was, in fact, coming from Tiversa, despite the use of the Privacy Institute.¹⁹⁵ The FTC admitted that the use of Tiversa's information was unusual relative to standard agency operating procedures for enforcement measures.¹⁹⁶

FTC officials relied heavily on Tiversa's "credible" reputation in "self-verifying" the produced information.¹⁹⁷ The FTC explained to the Committee the steps it took in "self-verifying" the information:

- Tiversa, through the Privacy Institute, certified the information provided under penalty of perjury.
- FTC employees looked up the IP addresses provided by Tiversa to determine if the IP address was affiliated with the company.
- FTC employees looked at the metadata of the documents, when provided, to determine the author or the document.
- FTC employees performed "some" searches on the peer-to-peer networks, both for company names and specific documents. The FTC independently found only one of the files Tiversa submitted on the peer-to-peer network.¹⁹⁸

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. Of the 88 companies Tiversa submitted to the FTC, the agency sent warning letters to 63 companies, and opened investigations into 9 companies.¹⁹⁹ The FTC also issued a press release on the letters

¹⁹³ *Id.* at 22-23.

¹⁹⁴ FTC Briefing.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ [FTC_PROD16732-16964].

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.

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. 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.

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

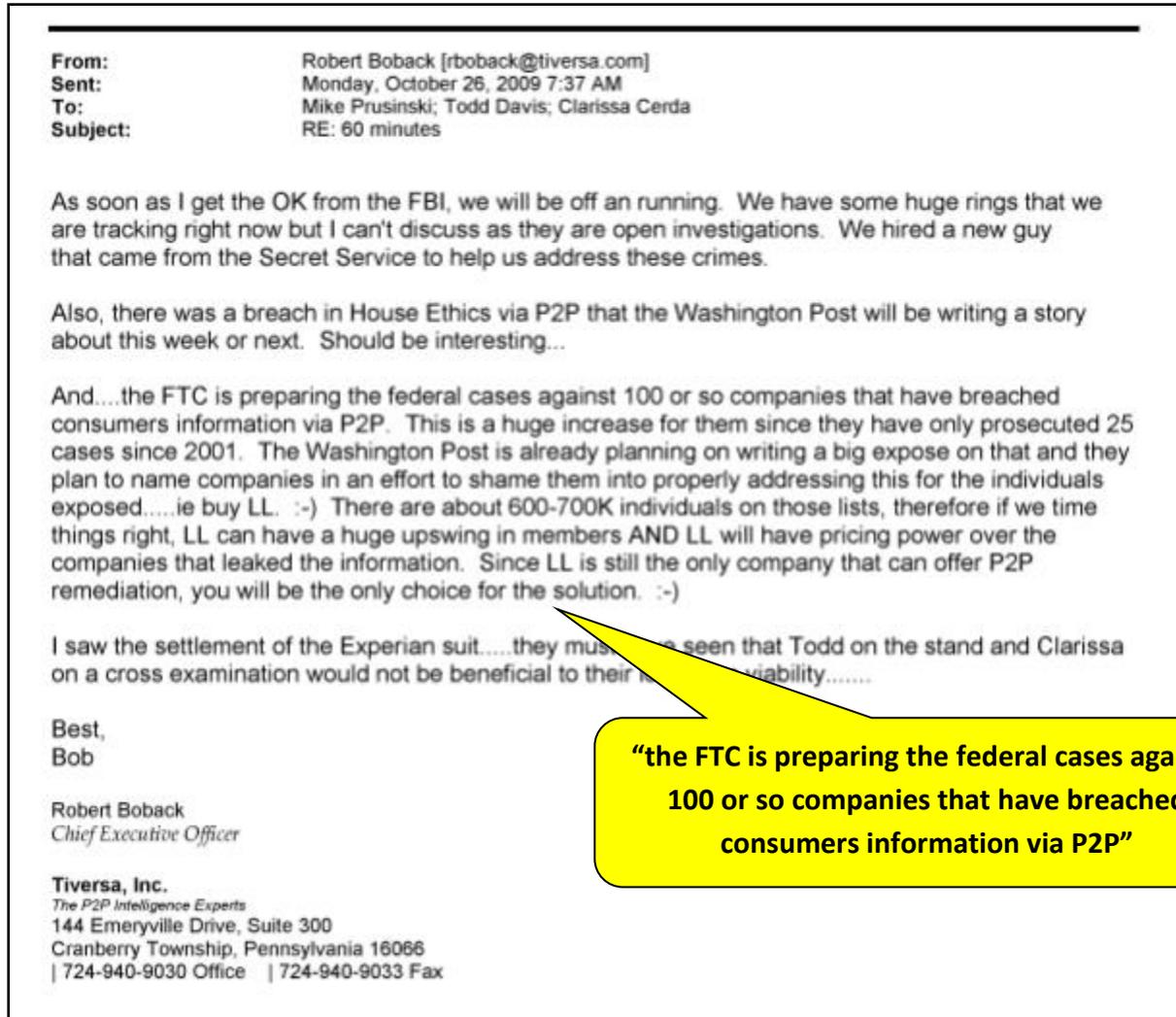
Tiversa had advanced knowledge that the FTC intended to pursue regulatory actions against many of the companies it turned over to the Privacy Institute in response to the CID. FTC officials maintained to the Committee that no one at the FTC provided advance information of the January 2010 regulatory actions to Tiversa.²⁰⁰ Tiversa did not produce the overwhelming majority of the documents indicating Tiversa’s intention to profit off the FTC’s actions. Tiversa failed to produce these documents despite the fact that they were clearly responsive to both the original subpoena, and the search terms provided by Committee staff.²⁰¹ The Committee obtained these documents from other sources.

Armed with non-public knowledge of these impending actions, Tiversa maneuvered to position itself to profit from the FTC’s actions. 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:²⁰²

²⁰⁰ FTC Briefing..

²⁰¹ Subpoena from H. Comm on Oversight & Gov’t Reform to Tiversa, Inc. (June 3, 2014). The subpoena requires production of “all documents and communications referring or relating to work Tiversa, Inc. performed for the Federal Trade Commission. *Id.* The Committee further provided the search terms “FTC” and “Federal /2 trade /2 commission”.

²⁰² E-mail from Robert Boback to Mike Prusinski, Todd Davis, and Clarissa Cerda (Oct. 26, 2009 7:37 a.m.) [LLOCK-OGR-0002009].



The “100 or so companies that have breached consumers [sic] information via P2P” were the same companies that Tiversa itself reported to the FTC. 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.²⁰³

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.”²⁰⁴ He further advised that LifeLock should “be solo” and “suggest Tiversa if asked by the company.”²⁰⁵

²⁰³ *Id.*

²⁰⁴ E-mail from Robert Boback to Anthony Hesano, LifeLock (Oct. 6, 2009 8:40 a.m.) [LLOCK-OGR-0001929]. Tiversa failed to produce this e-mail to the Committee.

²⁰⁵ *Id.*

----- Original Message -----
 From: Robert Boback <rboback@tiversa.com>
 To: Anthony Hesano
 Sent: Tue Oct 06 08:40:21 2009
 Subject: RE: FTC letter

I agree with your approach. The FTC letters did not go out yet so the companies will not know what you will be talking about....yet. I think that it LL should be solo on this.....you could always suggest Tiversa if asked by the company. :-)

It was great to catch up with you and Ally as well. I understand that Jacque is in town this week. Brian is a totally straight up guy that I would absolutely not try anything out of line, or even close to any line.....and I mean that.

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

“The FTC letters did not go out yet so the companies will not know what you will be talking about...yet. I that that... LL should be solo on this... you could always suggest Tiversa if asked by the company. ☺”

The following month, Tiversa and LifeLock’s strategy with respect to the as-yet-unannounced FTC investigations became clear. In a November 3, 2009, e-mail, a LifeLock employee stated that he “spoke with Bob” about repositioning the letter.²⁰⁶ He described the attached version as one that will “get the response we are looking for without overplaying our cards.” Another LifeLock employee responded, stating, “As mentioned, Clarissa has stopped this pending the FTC but our strategy is to send a letter similar to the one outline[d] along with the breach brochure.”²⁰⁷ A later e-mail describes the revised strategy:²⁰⁸

²⁰⁶ E-mail from Gary Woods to Steve McGrady, Eric Warbasse, and Chris Miller (Nov. 3, 2009, 10:35 a.m.) [LLOCK-OGR-0002044].

²⁰⁷ E-mail from Steve McGrady to Gary Woods, Eric Warbasse, Chris Miller, and Austin Colcord (Nov. 3, 2009 12:00 p.m.) [LLOCK-OGR-0002043-2044].

²⁰⁸ E-mail from Gary Woods to Austin Colcord and Chris Miller (Nov. 3, 2009 2:25 p.m.) [LLOCK-OGR-0002043].

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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

“Key points:

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

As discussed, the draft letter, as provided to Boback on November 3, 2009, contains no reference to the FTC, no reference to Tiversa, and no reference to the peer-to-peer networks.²⁰⁹

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.²¹⁰ Boback sent the link to executives at LifeLock:²¹¹

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

Guys,

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

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²⁰⁹ Draft Letter, LifeLock (undated) [LLOCK-OGR-0002045].

²¹⁰ Press Release, FTC, Widespread Data Breaches Uncovered by FTC Probe (Feb. 22, 2010), available at <http://www.ftc.gov/news-events/press-releases/2010/02/widespread-data-breaches-uncovered-ftc-probe>

²¹¹ E-mail from Robert Boback to Gary Woods, Todd Davis, and Mike Prusinski (Feb. 22, 2010 9:30 a.m.) [LLOCK-OGR-0002375].

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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?”²¹² Boback promptly replied, “No problem.”²¹³

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.”²¹⁴ 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.²¹⁵ The *Computerworld* article does not mention that Tiversa acted as the primary source for the FTC’s enforcement actions announced in February 2010.²¹⁶

When asked about the propriety of Tiversa seeking to profit from its dealing with the FTC, FTC attorney Alain Sheer stated that it was routine for the FTC to make clear to third parties that the information was not public.

- Q. In the course of your interactions with Tiversa in the pre-complaint period, did you or one of your colleagues ever tell Tiversa not to discuss the conversations that the FTC and Tiversa were having with third parties?
- A. It is routine for Commission staff to ask entities that are providing information to keep the information confidential.
- Q. Do you recall making that specific request to Tiversa? A I don't recall it. Q It would've been your general practice or your colleagues' general practice to make that request? A Yes.²¹⁷

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.

- Q. Does it concern you that Mr. Boback seems to have obtained some sort of information about what the FTC planned to do as early as October 26, 2009?
- A. The company provided information about roughly 100 companies when they looked at it. They are well aware of what it is they gave to us. So is it a concern?

²¹² E-mail from Mike Prusinski to Robert Boback (Feb. 22, 2010 11:47 a.m.) [LLOCK-OGR-0002375].

²¹³ E-mail from Robert Boback to Mike Prusinski (Feb. 22, 2010 10:00 a.m.) [LLOCK-OGR-0002375].

²¹⁴ Jaikumar Vijayan, *FTC Questions Firms Being Probed for P2P Breaches*, TECHWORLD (Feb. 26, 2010), <http://news.techworld.com/security/3213712/ftc-questions-firms-being-probed-for-p2p-breaches/?olo=rss>

²¹⁵ *Id.*

²¹⁶ Tiversa informed the Committee that it had prior business relationships with 11 companies whose information was included in response to the CID. This conflicts with statements Boback made in the *Computerworld* interview that “14 of the companies contacted over the leaks have already contacted Tiversa for help” and that “all but two of those have CIDs.” Not only is the number of companies with contracts with Tiversa inconsistent, but many of the companies that received CIDs from the FTC did not, in fact, have contracts with Tiversa.

²¹⁷ H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Alain Sheer, Fed. Trade Comm’n, Transcript at 94 (Oct. 9, 2014) (hereinafter Sheer Tr.).

Yes. I'd like it to be kept confidential. That's the point of asking for it to be kept confidential.²¹⁸

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.

Q. Are you aware of Tiversa and LifeLock having a -- having a business relationship -- I guess, what is your awareness of Tiversa and LifeLock's business relationship?

A. I don't know that they have a business relationship other than the statement that was made in the -- in the email that you -- that you presented earlier.

Q. Okay. Was the email I presented earlier the first you'd heard of Tiversa and LifeLock having any relationship?

A. Yes.²¹⁹

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. 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.

E. Information provided by Tiversa formed the basis of the FTC's case against LabMD

Documents produced to the Committee show that in an effort to generate business, Tiversa repeatedly sought to coerce companies to purchase its services. Tiversa's methods have ranged from contacting a company about a leak but failing to provide anywhere close to full information, to referring nearly 100 companies to the FTC. The Committee has spoken to numerous companies on the list Tiversa provided to the FTC—not one of the companies the Committee contacted had entered into a contract with Tiversa. One such business tangled in Tiversa's web was LabMD.²²⁰ In January 2014, it closed its laboratory operations because of costs incurred by its dealings with Tiversa and the FTC.²²¹

²¹⁸ *Id.* at 107.

²¹⁹ *Id.* at 170.

²²⁰ *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., at 18 (July 24, 2014) [hereinafter Daugherty Testimony] (statement of Michael Daugherty, CEO of LabMD).

²²¹ *Id.* at 72.

According to Boback, Tiversa downloaded a file containing patients' personally identifiable health information in February 2008.²²² Tiversa determined that the downloaded file likely belonged to LabMD, and contacted the company in May 2008. Tiversa provided LabMD with a copy of the file, but would not provide the IP address or other information unless LabMD agreed to purchase Tiversa's services.²²³

Tiversa referred LabMD to the FTC as one of the companies listed in the spreadsheet as responsive to the FTC's CID. The FTC, in turn, sent a complaint letter to LabMD. The FTC then initiated an administrative enforcement action against LabMD for unfair and deceptive business practices.

Among the information Tiversa gave to the FTC regarding LabMD was the IP address that was the source of the leak. The origin of the IP address from where the LabMD document was pulled was a matter of contention in the litigation between LabMD and Tiversa. On numerous occasions, Boback maintained that Tiversa had pulled the LabMD document from an IP address in San Diego, California:

Q. Going back to CX 21. Is this the initial disclosure source?

A. If I know that our initial disclosure source believed that that was it, yes. I don't remember the number specifically, but if that IP address resolves to San Diego, California, then, yes, that is the original disclosure source.

Q. When did Tiversa download CX 10?

A. I believe it was in February of 2008.

Q. Has CX 10 changed in any way since Tiversa downloaded it?

A. No.²²⁴

When asked about the Georgia IP address, Boback denied downloading the information from there:

Q. There is an IP address on the right-hand side, it is 64.190.82.42. What is that?

A. That, if I recall, is an IP address that resolves in Atlanta, Georgia.

* * *

²²² Fed. Trade Comm'n, Deposition of Robert Boback, In the Matter of LabMD, Inc. 25-26 (Nov. 21, 2013) [hereinafter Boback FTC Deposition].

²²³ Daugherty Testimony, at 19.

²²⁴ Boback FTC Deposition, at 25-26.

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Q. What other information do you have about 64.190.82.42?

A. I have no other information. I never downloaded the file from them. They only responded to the hash match.²²⁵

In an internal e-mail dated almost three months before the deposition and never produced to the FTC, however, Boback stated that Tiversa downloaded the LabMD file while working for a client. He stated, “The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD’s office to be located. This statement, made by Boback in September 2013, fundamentally calls into question his claim that Tiversa never downloaded the LabMD file from the IP address in Georgia.”²²⁶

From: Robert Boback <rbohack@tiversa.com>
Sent: Thursday, September 5, 2013 3:20 PM
To: Dan Kopchak <dkopchak@tiversa.com>; Molly Trunzo <mtrunzo@tiversa.com>
Subject: Tiversa

I wanted to provide updated information regarding the question of litigation involving Tiversa. During our call, I discussed litigation in which Tiversa is a pla against our former patent firm. That is still ongoing. Earlier in 2013, Tiversa was also engaged in a separate litigation with a company called LabMD, which is base in Georgia. Tiversa, Dartmouth College and Professor Eric Johnson (Tuck Business School) was sued by LabMD by its CEO, Michael Daugherty as he alleged that Tiversa “hacked” his company in an effort to get a file containing nearly 9,000 patient’s SSNs and medical information and provided the information to Dartmouth and Eric Johnson for a DHS-funded research project. Mr. Daugherty has little to no understanding of P2P or Information security which is what caused him to think that he was “hacked” and which resulted in his widespread government conspiracy theory that followed. He also suggested in the litigation that because he would not do business with Tiversa to remediate the problem, that Tiversa “kicked the file over to the feds [FTC]” (and Dartmouth) and the FTC sent him a questionnaire about the breach, which caused him “great harm” due to the widespread “government shakedown of small business.” He claimed that Tiversa was attempting to extort money from him to “answer his questions” as a part of the larger conspiracy. The reason that I did not mention this during our discussion is that the case was dismissed due to jurisdiction (his real estate attorney friend filed it in Georgia). He subsequently appealed two times, and lost both, the final of which was ruled on in February 2013. As an interesting sidebar to this story, Mr. Daugherty began writing a book about the government overreach and his great conspiracy theory o the government war on small business. When our attorneys learned of what was coming in the book (from his blog postings about the book), we quickly served his counsel with a C&D as his “true story” was full of inaccurate statements about me and Tiversa. Unfortunately, Mr. Daugherty sees himself as “Batman” (no joke) and he chose to continue on with his book and starting scheduling speaking engagements where he would discuss his “true story” about how the government is out to “get” small business and that the FTC and Tiversa (and presumably Dartmouth) are the ring leaders. His book, “Devil inside the Beltway” is to be released later this month. While I do not expect this book to be on the NY Times best seller list, I cannot sit idly by and allow such a gross distortion of the facts and mischaracterization of Tiversa, and me, in his efforts to sell his book and create a “name” for himself on any speaking tour.

That said, Tiversa filed a complaint in federal court today citing a number of counts including but not limited to Defamation, Slander, Libel, and others against Mr. Daugherty and LabMD. Tiversa is not litigious and it was our hope that he would conduct himself appropriately after receiving the C&D in November of 2012. But again, he sees himself as Batman.

Here is the real series of events that occurred in this case:

Tiversa, as you know, downloads leaked information on behalf of clients, individual, corporate and/or federal. In the process of downloading information, we often get files that are not related to our clients but are nonetheless sensitive. We call this “dolpin in the tuna net”....for example, if we were looking for “Goldman Sachs” and our system finds a file with the term “Goldman” in it. The file may have the name “Henry Goldman” but our system just saw “Goldman” and downloaded it, in the event it related to Goldman Sachs. After the file would be downloaded, it would be reviewed by an Analyst which would determine that it was NOT related to Goldman Sachs, but it may or may not include SSNs or other sensitive information. This was the case with LabMD.

In 2008, while doing work for a client, our systems downloaded a file (1,718 page pdf) that contained sensitive information including SSNs and health information for over 9000 people. The file had the name “LabMD” in both the header of the file and the metadata. The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD’s office to be located. At this point, we were not positive that the file belonged to LabMD, but it seemed probable. We could have chosen to do nothing at all and pretend that we never saw the file. That approach would leave both LabMD and the 9000 victims at very high risk (and growing) of fraud and identity theft. Needless to say, we contacted the company to inform them of the file with their company name on it. After providing the file with all of the information that we had, the Mr. Daugherty asked us for additional information that we did not have. We told him that we could perform the services but it would take a few weeks and would cost about \$15K. After hearing this, he decided to send him the SOW for the services. 3 weeks after providing the SOW and not hearing anything in return, I reached out to Mr. Daugherty to see if he had any questions (re: SOW) and he told me never to contact him again with no further explanation. We did it.

“The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD’s office to be located.”

²²⁵ Boback FTC Deposition, at 41-42.

²²⁶ E-mail from Robert Boback to Dan Kopchak and Molly Trunzo (Sept. 5, 2013 3:20 p.m.) (“The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD’s office to be located.”) [TIVERSA-OGR-0028866].

Further, the initial report that Tiversa provided to a client about the LabMD document stated that the company first “observed” the LabMD file in San Diego, California on August 5, 2008.²²⁷ Tiversa could not have downloaded the LabMD file from an IP address in San Diego in February 2008 if it did not even observe the file at this IP address until August 2008.

In light of the information uncovered by the Committee’s investigation, it appears the FTC was misled as to how Tiversa came to possess LabMD’s file, which has been a material fact in the litigation of the enforcement action. Mr. Sheer testified that, contrary to information provided to the Committee, the FTC had never been told that the file was originally downloaded in Atlanta, Georgia.

Q. Did anyone from Tiversa ever tell you that they first downloaded the file from Atlanta, Georgia, and not from San Diego, California?

A. That wasn't what the testimony was.

Q. Have you seen any documents during the course of your investigation indicating that Tiversa first downloaded the document from Atlanta, Georgia, and not from San Diego, as it testified to the FTC?

A. Not that I am aware of.²²⁸

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.

Finally, Tiversa recently performed another forensic analysis on the LabMD file after inexplicably telling the FTC that Tiversa had provided misinformation about the case.²²⁹ This analysis stated that the LabMD file was disclosed by an IP address in Atlanta, Georgia between March 7, 2007, and February 25, 2008.²³⁰ Yet, this information does not comport with the facts of the case. When Tiversa contacted LabMD on [DATE], LabMD performed an investigation and found that a billing manager’s computer had LimeWire P2P software installed, and was sharing the LabMD file. Why did Tiversa’s systems determine that the Georgia IP ceased to share the LabMD file in late February 2008, when LabMD’s own investigation determined that the file was still being shared months later? Why wasn’t this information captured by Tiversa’s technology?

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

²²⁷ Tiversa Forensic Investigative Report for Ticket #CIG00081 (Aug. 12, 2008) [TIVERSA-OGR-0017461-17465].

²²⁸ Sheer Tr. at 151.

²²⁹ Boback Tr., at 130.

²³⁰ Tiversa Forensic Investigation Report – LABMD0001 (June 4, 2014) [TIVERSA-OGR-0017467-17482].

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. While the software will not download a document from the same IP address twice, it will download the same file from different IP addresses, which indicates the spread of the document. 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. Even assuming that Tiversa was unable to download a file due to technological problems (for example, because the peer-to-peer user signed off while Tiversa was downloading the file), then its software would make another attempt to download the file the next time it was available. 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.

There is little reason to doubt Boback's statements made to two Tiversa employees—the e-mail clearly shows Boback describing Tiversa's role in the FTC's LabMD enforcement action. Why Boback wrote this e-mail is unknown. It is possible he wanted to make sure he had his facts straight before he was deposed in the FTC matter. Further, Dan Kopchak, to whom Boback sent the e-mail, replied with a draft that made minor edits to the narrative but did not change or question the statement that the IP originated in Georgia.²³¹ Therefore, information the Committee obtained shows that Boback's testimony that source of the IP address came from San Diego is not true. Boback's conflicting statements have broad implications for the future of litigation between LabMD and Tiversa, and calls into question other information he has provided to the FTC.

In short, LabMD witnessed both Tiversa's manipulative business practices and Tiversa's close relationship with the FTC. 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.

A whistleblower's account of the LabMD saga suggests that the patient data file was only found emanating from a LabMD computer in Atlanta, GA. The whistleblower demonstrated for the committee in tremendous detail how he found IP addresses associated with known identify thieves (also referred to as "information concentrators") and created documents later provided to the FTC showing that the file was in the possession of known-identity thieves when in fact there is no evidence to suggest it was downloaded by anyone other than Tiversa. 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.

²³¹ E-mail from Dan Kopchak to Robert Boback (Sept. 5, 2013 4:01 p.m.) (revisions from the earlier draft included changes such as "was" to "were;" qualifying "understanding of P2P Information security" to "*may have* caused him to think that he was 'hacked' and which *apparently* has resulted in his widespread government conspiracy theory that followed;" the deletion of "Needless to say," etc.) [TIVERSA-OGR-0025706].

Ultimately, LabMD began to wind down operations in January 2014 as a result of the FTC enforcement action.²³²

F. Tiversa withheld documents from the FTC

The Committee has obtained documents and information indicating Tiversa failed to provide full and complete information about work it performed regarding the inadvertent leak of LabMD data on peer-to-peer computer networks. In fact, it appears that, in responding to an FTC subpoena issued on September 30, 2013, Tiversa withheld responsive information that contradicted other information it did provide about the source and spread of the LabMD data, a billing spreadsheet file.

1. Despite a broad subpoena request, Tiversa provided only summary information to the FTC about its knowledge of the source and spread of the LabMD file.

Initially, Tiversa, through an entity known as the Privacy Institute, provided the FTC with information about peer-to-peer data leaks at nearly 100 companies, including LabMD.²³³ Tiversa created the Privacy Institute for the specific purpose of providing information to the FTC. Despite Tiversa's claims that it is a trusted government partner, it did not want to disclose that it provided information to the FTC.²³⁴

After the FTC filed a complaint against LabMD, the agency served Tiversa with a subpoena for documents related to the matter. Among other categories of documents, the subpoena requested "all documents related to LabMD."²³⁵ In a transcribed interview, Alain Sheer, an attorney with the FTC's Bureau of Consumer Protection, told the Committee that the FTC did not narrow the subpoena for Tiversa. Sheer stated:

- Q. This is the specifications requested of Tiversa. No. 4 requests all documents related to LabMD. Do you know if Tiversa produced all documents related to LabMD?
- A. I am not sure what your question is.
- Q. Let me ask it a different way. Was the subpoena narrowed in any way for Tiversa?

²³² Michael J. Daugherty, *FTC Actions Force LabMD to Wind Down Operations* (Jan. 28, 2014), <http://michaeljdaugherty.com/2014/01/29/labmd-winds-operations/>.

²³³ Boback Tr. at 42.

²³⁴ See Tiversa, Industry Outlook, Government/Law Enforcement, *available at* <http://tiversa.com/explore/industry/gov> (last visited Nov. 21, 2014); Boback Tr. at 42-43.

²³⁵ Fed. Trade Comm'n, Subpoena to Tiversa Holding Corp. (Sept. 30, 2013) [hereinafter Tiversa FTC Subpoena].

A. Not that I am aware of.²³⁶

In total, Tiversa produced 8,669 pages of documents in response to the FTC's subpoena. Notably, the production contained five copies of the 1,718-page LabMD Insurance Aging file that Tiversa claimed to have found on peer-to-peer networks and only 79 pages of other materials, none of which materially substantiated Tiversa's claims about the discovery of the file.

The information Tiversa gave the FTC included the IP address from which Tiversa CEO Robert Boback has claimed the company first downloaded the LabMD file, as well as other IP addresses that Tiversa claims also downloaded the file. The origin of the IP address from which Tiversa first downloaded the LabMD file was in dispute in other litigation between LabMD and Tiversa. On numerous occasions, including before the FTC, Boback maintained that Tiversa first downloaded the LabMD file from an IP address in San Diego, California. Boback stated:

Q. What is the significance of the IP address, which is 68.107.85.250?

A. That would be the IP address that we downloaded the file from, I believe.

Q. Going back to CX 21. Is this the initial disclosure source?

A. If I know that our initial disclosure source believed that that was it, yes. I don't remember the number specifically, but if that IP address resolves to San Diego, California, then, yes, that is the original disclosure source.

Q. When did Tiversa download [the LabMD file]?

A. I believe it was in February of 2008.²³⁷

Boback also testified that Tiversa performed an investigation into the LabMD file at the request of a client.²³⁸ In the course of this investigation, Tiversa concluded that an IP address in Atlanta, Georgia, where LabMD was headquartered, was the initial disclosure source of the document. Boback stated:

Q. There is an IP address on the right-hand side, it is 64.190.82.42. What is that?

A. That, if I recall, is an IP address that resolves to Atlanta, Georgia.

Q. Is that the initial disclosure source?

A. We believe that it is the initial disclosure source, yes.

²³⁶ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Alain Sheer at 147 (Oct. 9, 2014).

²³⁷ In the matter of LabMD, Inc., Deposition of Robert J. Boback, CEO, Tiversa, transcript at 24-25 (Nov. 21, 2013) [hereinafter Boback Nov. 2013 FTC Tr.].

²³⁸ Boback Nov. 2013 FTC Tr. at 72-73 ("In 2008, when working for another client, we were attempting to identify the original disclosure source of the file that we discovered from 1 the San Diego IP address.").

Q. And what is that based on?

A. The fact that the file, the 1,718 file, when we searched by hash back in that time for our client, we received a response back from 64.190.82.42 suggesting that they had the same file hash as the file that we searched for. We did not download the file from them.

* * *

Q. So, I think you are telling me that chronologically this was the first other location for that file in juxtaposition of when you found the file at 68.107.85.250?

A. We know that the file in early February, prior to this February 25 date, was downloaded from the 68.107.85.250. Upon a search to determine other locations of the file across the network, it appears that on 2/25/2008 we had a hash match search at 64.190.82.42, which resolved to Atlanta, which led us to believe that without further investigation, that this is most likely the initial disclosing source.

Q. What other information do you have about 64.190.82.42?

A. I have no other information. I never downloaded the file from them. They only responded to the hash match.²³⁹

Boback's testimony before the FTC in November 2013 made clear that Tiversa first downloaded the LabMD file from an IP address in San Diego, California, in February 2008, that it only identified LabMD as the disclosing source after performing an investigation requested by a client, and that it never downloaded the file from LabMD.

2. Tiversa withheld responsive documents from the FTC, despite the issuance of the September 2013 subpoena. These documents contradict the account Boback provided to the FTC.

On June 3, 2014, the Committee issued a subpoena to Tiversa requesting, among other information, "[a]ll documents and communications referring or relating to LabMD, Inc."²⁴⁰ This request was very similar to the FTC's request for "all documents related to LabMD."²⁴¹ Despite nearly identical requests from the FTC and the Committee to Tiversa, Tiversa produced numerous documents to the Committee that it does not appear to have produced to the FTC. Information contained in the documents Tiversa apparently withheld contradicts documents and testimony Tiversa did provide to the FTC.

²³⁹ Boback Nov. 2013 FTC Tr. at 41.

²⁴⁰ H. Comm. on Oversight & Gov't Reform, Subpoena to Robert Boback, Chief Exec. Officer, Tiversa, Inc. (June 3, 2014).

²⁴¹ Tiversa FTC Subpoena.

An internal Tiversa document entitled “Incident Record Form,” dated April 18, 2008, appears to be the earliest reference to the LabMD file in Tiversa’s production to the Committee.²⁴² This document states that on April 18, 2008, Tiversa detected a file “disclosed by what appears to be a potential provider of services for CIGNA.”²⁴³ The Incident Record described the document as a “single Portable Document Format (PDF) that contain[ed] sensitive data on over 8,300 patients,” and explained that “[a]fter reviewing the IP address, resolution results, meta-data and other files, Tiversa believes it is likely that Lab MD near Atlanta, Georgia is the disclosing source.”²⁴⁴ The name of the file was “insuranceaging_6.05.071.pdf,” which is the same name as the file in question in the FTC proceeding. According to the Incident Record, the IP address disclosing the file was 64.190.82.42—later confirmed to be a LabMD IP address.²⁴⁵ Upon learning about the file, CIGNA, a Tiversa client, “asked Tiversa to perform Forensic Investigation activities” on the insurance aging file to determine the extent of proliferation of the file over peer-to-peer networks.²⁴⁶

An August 2008 Forensic Investigation Report provided the analysis CIGNA requested. This report identified IP address 64.190.82.42—the Atlanta IP address—as proliferation point zero, and the “original source” of the Incident Record Form.²⁴⁷ A spread analysis included in the August 2008 forensic report stated that the file had been “observed by Tiversa at additional IP addresses” but made clear that Tiversa had not downloaded the file from either additional source because of “network constraint and/or user behavior.”²⁴⁸ Thus, according to this report, Tiversa had only downloaded the LabMD file from one source in Atlanta, Georgia by August 2008. This contradicts Boback’s testimony that Tiversa first downloaded the LabMD file from an IP address in San Diego, California. If Tiversa had in fact downloaded the LabMD file from a San Diego IP address in February 2008, then that fact should be included in this 2008 forensic report. It is not.

One of the two additional IP addresses is located in San Diego, California. It is a different IP address, however, than the one from which Tiversa claims to have originally downloaded the file.²⁴⁹ Further, Tiversa did not observe that this San Diego IP address possessed the LabMD file until August 5, 2008.²⁵⁰ Thus, according to this report, Tiversa did not observe any San Diego IP address in possession of the LabMD file until August 2008. Again,

²⁴² Tiversa Incident Record Form, ID # CIG00081 (Apr. 18, 2008).

²⁴³ *Id.*

²⁴⁴ *Id.* (emphasis added).

²⁴⁵ *Id.*

²⁴⁶ Tiversa, Forensic Investigation Report for Ticket #CIG00081 (Aug. 12, 2008). This letter uses the phrase “forensic report” to describe this and a second report created by Tiversa about the LabMD file because that is the title used by Tiversa. It is not clear what, if any, forensic capabilities Tiversa possesses.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ The IP address reported on the August 2008 forensic report that resolves to San Diego, California is 68.8.250.203. Boback testified, however, that Tiversa first downloaded the LabMD file from IP address 68.107.85.250 on February 5, 2008. Tiversa concluded in the report that the second IP address on which it observed the file was “most likely an IP shift from the original disclosing source.”

²⁵⁰ *Id.*

the report stands in stark contrast to Boback's testimony that Tiversa first downloaded the LabMD file from a different San Diego IP address in February 2008.

In addition, both the April 2008 Incident Record Form and the August 2008 Forensic Investigative Report stated that the LabMD file was "detected being disclosed" in April 2008. Neither report indicated that Tiversa first downloaded the file from the San Diego IP address—an IP address not listed on either report—on February 5, 2008. Boback's deposition testimony and a cursory four-line document marked as exhibit CX-19 seem to be the only evidence that Tiversa first downloaded the LabMD file from a San Diego IP address in February 2008.

These documents contradict the information Tiversa provided to the FTC about the source and spread of the LabMD file. If Tiversa had, in fact, downloaded the LabMD file from the San Diego IP address and not from the Georgia IP address, then these reports should indicate as such. Instead, the San Diego IP address is nowhere to be found, and the Georgia IP address appears as the initial disclosing source on both reports.

Tiversa also produced an e-mail indicating that it originally downloaded the LabMD file from Georgia – and not from San Diego as it has steadfastly maintained to the FTC and this Committee. On September 5, 2013, Boback e-mailed Dan Kopchak and Molly Trunzo, both Tiversa employees, with a detailed summary of Tiversa's involvement with LabMD. Why Boback drafted the e-mail is unclear. He wrote, "[i]n 2008, while doing work for a client, our systems downloaded a file (1,718 page pdf) that contained sensitive information including SSNs and health information for over 9000 people. The file had the name 'LabMD' in both the header of the file and the metadata. The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD's office to be located."²⁵¹

As noted above, according to Alain Sheer, a senior FTC attorney assigned to the LabMD matter, the FTC did not narrow the September 2013 subpoena requiring Tiversa to produce, among other documents, "all documents related to LabMD."²⁵² Tiversa withheld these relevant documents about its discovery and early forensic analysis of the LabMD file from the FTC. These documents directly contradict testimony that Boback provided to the FTC, and call Tiversa's credibility into question. Boback has not adequately explained why his company withheld documents, and why his testimony is not consistent with reports Tiversa created at the time it discovered the LabMD file.

It is unlikely that the LabMD file analyzed in the April 2008 Incident Record Form and the August 2008 Forensic Investigative Report is different from the so-called "1718 file" at issue in the FTC proceeding, particularly given Boback's testimony to the FTC about how Tiversa's

²⁵¹ E-mail from Robert Boback, CEO, Tiversa, to Dan Kopchak & Molly Trunzo (Sept. 5, 2013) (emphasis added) [TIVERSA-OGR-0028866-67].

²⁵² Tiversa FTC Subpoena.

system names files.²⁵³ If, however, the earlier reports do refer to a different file, then Tiversa neglected to inform the FTC of a second, similarly sized leak of LabMD patient information.

3. Tiversa’s June 2014 forensic report is the only report provided to this Committee that substantiates Boback’s claims.

Tiversa produced to the Committee a forensic report on the LabMD file that it created in June 2014. Tiversa created this report and others related to testimony previously provided to the Committee after the investigation began. While outside the scope of the FTC’s subpoena due to the date of the document, this is the only report supporting Tiversa’s claim that it first downloaded the file from the San Diego IP address. This report contradicts information Tiversa provided to CIGNA in the April 2008 Incident Record Form and August 2008 Forensic Investigative Report—documents created much closer to when Tiversa purportedly discovered the LabMD document on a peer-to-peer network. The fact that Tiversa created the only forensic report substantiating its version of events after the Committee began its investigation raises serious questions.

This most recent report states that Tiversa’s systems first detected the file on February 5, 2008 from a San Diego IP address (68.107.85.250) not included in either of the 2008 documents. According to the spread analysis, this San Diego IP shared the file from February 5, 2008 until September 20, 2011. Yet, despite allegedly being downloaded before both the April or August 2008 reports, neither 2008 document mentions that Tiversa downloaded this document.

The June 2014 report also states that the LabMD IP address (64.190.82.42) shared the file between March 7, 2007 and February 25, 2008. Thus, according to this report, by the time Tiversa submitted an Incident Record Form to CIGNA in April 2008, the LabMD IP address was no longer sharing the file. Furthermore, the report does not describe why Tiversa’s system did not download the file from the Georgia IP address, even though the technology should have downloaded a file that hit on a search term, in this case “CIGNA,” each time a different computer shared the document. The June 2014 report includes no reference to the other San Diego IP address discussed in the August 2008 forensic report as being in possession of the LabMD file.

4. Tiversa did not make a full and complete production of documents to this Committee. It is likely that Tiversa withheld additional documents from both this Committee and the FTC.

On October 14, 2014, Tiversa submitted a Notice of Information Pertinent to Richard Edward Wallace’s Request for Immunity.²⁵⁴ Chief Administrative Law Judge D. Michael

²⁵³ Boback Nov. 2013 FTC Tr. at 40-41 (describing that a file’s “hash” or title identifies “exactly what that file is.” The title of the LabMD document described in the April and August 2008 documents is the same as the title of the document in the FTC proceeding).

Chappell has since ordered that the assertions and documents contained in the Notice of Information will be “disregarded and will not be considered for any purpose.”²⁵⁵ Tiversa included two e-mails from 2012 as exhibits to the Notice of Information. According to Tiversa, these e-mails demonstrate that Wallace could not have fabricated the IP addresses in question in October 2013, because he previously included many of them in e-mails to himself and Boback a year prior.²⁵⁶

Tiversa did not produce these documents to the Committee even though they are clearly responsive to the Committee’s subpoena. Their inclusion in a submission in the FTC proceeding strongly suggests that Tiversa also never produced these documents to the FTC. In its Notice of Information, Tiversa did not explain how and when it identified these documents, why it did not produce them immediately upon discovery, and what additional documents it has withheld from both the FTC and the Committee. The e-mails also contain little substantive information and do not explain what exactly Wallace conveyed to Boback in November 2012 or why he conveyed it.

If Boback did in fact receive this information in November 2012, his June 2013 deposition testimony is questionable. It is surprising that Tiversa would have supplied inaccurate information to the FTC when Boback himself apparently received different information just months prior. Tiversa should have located and produced these e-mails pursuant to the September 2013 subpoena, and it should have been available for Boback’s June 2013 deposition.

Tiversa’s failure to produce numerous relevant documents to the Commission demonstrates a lack of good faith in the manner in which the company has responded to subpoenas from both the FTC and the Committee. It also calls into question Tiversa’s credibility as a source of information for the FTC. The fact remains that withheld documents contemporaneous with Tiversa’s discovery of the LabMD file directly contradict the testimony and documents Tiversa did provide.

VI. Tiversa’s Involvement with House Ethics Committee Report Leak

A. The *Washington Post* breaks the story

On October 29, 2009, the *Washington Post* reported that the U.S. House of Representatives Committee on Ethics was investigating the activities of “more than 30

²⁵⁴ Tiversa Holding Corp.’s Notice of Information Pertinent to Richard Edward Wallace’s Request For Immunity, In the Matter of Lab MD, Inc., No. 9357 (U.S. Fed. Trade Comm’n, Oct. 14, 2014), <http://www.ftc.gov/system/files/documents/cases/572572.pdf> [hereinafter Notice of Information].

²⁵⁵ *LabMD Case: FTC gets green light to grant former Tiversa employee immunity in data security case*, PHIprivacy.net, Nov. 19, 2014, <http://www.phiprivacy.net/labmd-case-ftc-gets-green-light-to-grant-former-tiversa-employee-immunity-in-data-security-case/>.

²⁵⁶ Notice of Information at 4.

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lawmakers and several aides.”²⁵⁷ The *Post* based its reporting on a “confidential House ethics committee [*sic*] report” inadvertently disclosed on a peer-to-peer network.²⁵⁸ “A source not connected to the congressional investigations” provided the document to the *Washington Post*.²⁵⁹ The Ethics Committee stated that a junior staffer released the document after installing peer-to-peer software on a home computer.²⁶⁰ The staffer was subsequently fired.²⁶¹

The *Washington Post*’s story indicated that the leaked “Committee on Standards Weekly Summary Report” provided summaries of non-public ethics investigations of nineteen lawmakers and several staff members, as well as non-public investigations into fourteen additional lawmakers undertaken by the Office of Congressional Ethics.²⁶²

The same day that the *Washington Post* published its story, Chairwoman Zoe Lofgren made a brief statement about the leak on the House floor.²⁶³ News of the leak prompted a review of the House’s information systems to determine whether there had been any breach beyond the inadvertent leak of the Ethics Committee document on the peer-to-peer network.

Tiversa began providing written information about the leak to the House Ethics Committee in early November 2009, after the *Washington Post* broke the story. Documents produced by Tiversa, however, show that Boback was aware of the leak and its significance more than a week before the story was published. On October 20, 2009, a Tiversa analyst e-mailed Boback the name, resume, and Facebook profile picture of a House Ethics Committee staffer.²⁶⁴ The subject line of the e-mail read, “US Rep Ethics Doc Leaker.”²⁶⁵ On October 26, 2009, four days before the *Washington Post* published its story, Boback wrote an e-mail to executives at LifeLock. He stated:²⁶⁶

²⁵⁷ Ellen Nakashima & Paul Kane, *Dozens in Congress Under Ethics Inquiry*, WASH. POST (Oct. 30, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/29/AR2009102904597.html>.

²⁵⁸ *Id.*

²⁵⁹ *Id.* In a subsequent *Washington Post* online question and answer forum, the Post further described that the Ethics Committee document was brought to its attention by “a source familiar with those kinds of [peer-to-peer] networks.” *Washington Post Q&A with Carol Leonning 1* (Oct. 30, 2009), available at http://www.washingtonpost.com/wp-dyn/content/liveonline/discuss/transcript_politics131.htm (last visited Sept. 4, 2014).

²⁶⁰ Nakashima.

²⁶¹ *Id.*

²⁶² *Id.*

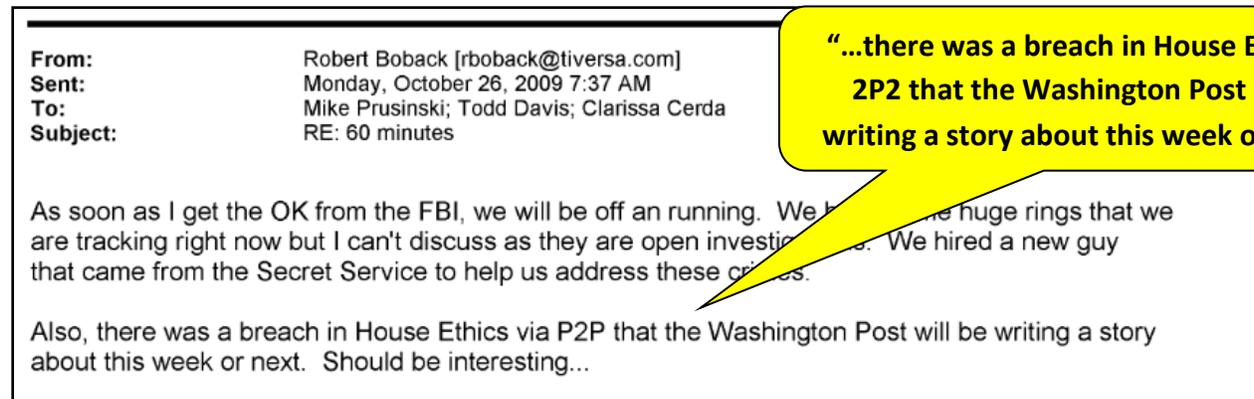
²⁶³ Chairwoman Lofgren stated, “I regret to report that there was a cyberhacking incident of a confidential document of the committee. A number of Members have been contacted by The Washington Post, which is in possession of a document. We don’t know with certainty whether it is an accurate document, but we thought it important to state the relevance of the material.” Statement of Congresswoman Zoe Lofgren, Cong. Record, Announcement by the Chairwoman of the Comm. on Standards of Official Conduct (Oct. 29, 2009).

²⁶⁴ E-mail from Rick Wallace, Analyst, Tiversa, to Robert Boback, CEO, Tiversa (Oct. 20, 2009 12:34 a.m.) [TIVERSA-OGR-0026603 - 26604].

²⁶⁵ *Id.*

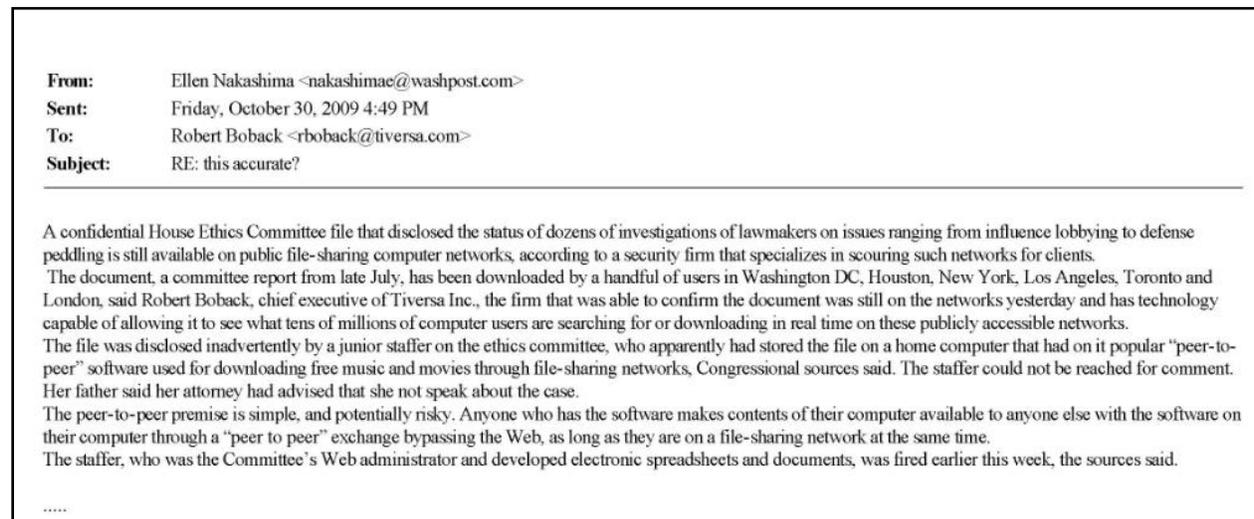
²⁶⁶ E-mail from Robert Boback, CEO, Tiversa, to Mike Prusinski, Vice President, Pub. Affairs, LifeLock, Todd Davis, CEO, LifeLock, and Clarrisa Cerda, Counsel, LifeLock (Oct. 26, 2009 7:37 a.m.) [LLOCK-OGR-0002009].

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Boback did not explain to LifeLock how he had become aware of the breach, or of the upcoming, and then-unpublished, *Washington Post* story.

While it is suspicious that Boback knew of the *Washington Post* story days before its publication, this Committee's investigation did not examine whether Boback or Tiversa acted as the initial source in providing the Ethics Committee document to the *Washington Post*. Documents produced by Tiversa showed that Boback provided information about the leak to the *Washington Post* reporter. On October 30, 2009, at 4:49 p.m., a *Washington Post* reporter e-mailed Boback asking whether a certain statement, including a quote from Boback, was accurate:²⁶⁷



Tiversa did not produce to the Committee any response Boback may have written. This is the earliest document produced to this Committee indicating that the document had "spread," i.e., that other peer-to-peer users had downloaded it. The *Washington Post* does not appear to have used Boback's quote or the information about the spread of the document in stories about the leak.

²⁶⁷ E-mail from Ellen Nakashima, Wash. Post, to Robert Boback, CEO, Tiversa (Oct. 30, 2009 4:49 p.m.) [TIVERSA-OG-0026594].

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The reporter then e-mailed Boback regarding the origin of the leak. The first sentence reiterated the known information about the leaker, and the second sentence outlined generally how peer-to-peer networks operate:

From: Ellen Nakashima <nakashimae@washpost.com>
Sent: Friday, October 30, 2009 7:47 PM
To: Robert Boback <rboack@tiversa.com>
Subject: RE: this accurate?

In the breach, the report was disclosed inadvertently by a junior staffer on the ethics committee, who apparently had stored the file on a home computer that had so-called "peer-to-peer" software, congressional sources said. The popular software, which is easily available online, allows computer users to share music or other files. But it also allows anyone with the software on their computer to access documents of another user without permission, as long as the users are on a file-sharing network at the same time.

Ellen Nakashima
The Washington Post
202 334 4419 direct
202 286 0552 cell

<http://projects.washingtonpost.com/staff/articles/ellen-nakashima/>

Again, Tiversa did not produce any response from Boback. The e-mail does further illustrate, though, that the reporter sought advice from Boback, at the very least, during the drafting of an upcoming piece.

Several hours later, the same reporter e-mailed Boback a third time with additional information about the leak, including "the latest" on the response by House leaders:²⁶⁸

²⁶⁸ E-mail from Ellen Nakashima to Robert Boback (Oct. 30, 2009 8:08 p.m.) [TIVERSA-OGR-0026592].

From: Ellen Nakashima <nakashimae@washpost.com>
Sent: Friday, October 30, 2009 8:08 PM
To: Robert Boback <rboback@tiversa.com>
Subject: amended

File sharing networks are made up of hundreds of millions of users who periodically log on and off, with 25 million or so being active at any given moment. The typical user, when searching for files, will reach only a small portion of the users on the network--from 30 to 3,000 people, depending on the connection strength. A search on the word "meeting" may result in anything from a PTA meeting to an Iraqi operations meeting involving sensitive military details.

Here's the latest :

House leaders on Friday called for an "immediate and comprehensive assessment" of congressional cybersecurity policies, a day after an embarrassing data breach that led to the disclosure of details of confidential ethics investigations.

Speaker Nancy Pelosi (D-Calif.) and Minority Leader John A. Boehner (R-Ohio) said they had asked the chief administrative officer of the House to report back to them on the policies and procedures for handling sensitive data as a result of the breach. The breach led to the inadvertent disclosure of a House Ethics Committee document that summarized the status of investigations into lawmakers' activities on subjects ranging from influence peddling to defense lobbying.

"We are working diligently to provide the highest level of data security for the House in order to ensure that the operations of House offices are secure from unauthorized access," Pelosi and Boehner said in a statement.

The breach angered lawmakers who were the subject of previously undisclosed investigations and raised questions about the security of other sensitive documents. Rep. Gary Miller (R-Calif.), who was named in the document as having his real estate dealings under investigation, said he was so upset about the breach that he complained Thursday evening about the matter to Rep. Zoe Lofgren (D-Calif.), chairman of the ethics committee, during a series of roll-call votes.

"This is ridiculous and amateurish," he said of the breach in the committee's files.

Even as the House leadership sought answers — and the Ethics Committee moved to review its own security policies — the newly disclosed document remained available on public file-sharing computer networks, according to security experts. As of Friday, it had been downloaded by users in Washington, New York, London and elsewhere.

Ellen Nakashima
 The Washington Post
 202 334 4419 direct
 202 286 0552 cell

<http://projects.washingtonpost.com/staff/articles/ellen+nakashima/>

Again, Tiversa did not produce any response to this e-mail Boback may have written. It is therefore unclear if Boback did not respond at all to these three e-mails, responded by phone, or responded in e-mails that Tiversa failed to produce. In the third e-mail, however, information on the spread and availability is no longer attributed to Tiversa. Instead, it is attributed to "security experts." It is thus not clear if Boback asked that Tiversa not be named in the story, or if the reporter amended the information to exclude Tiversa's name without prompting. Two months later, in December 2009, Boback provided the same reporter with information about a TSA document Tiversa found on the peer-to-peer network. In that instance, Boback wrote, "[a]s always, we are not the source. :-).]"²⁶⁹ The reporter responded, asking "[w]hat again is the main reason you don't want to be identified as the source – to avoid charge [sic] that you're doing this for commercial gain? To preserve relationship with govt [sic] customers?"²⁷⁰

²⁶⁹ E-mail from Robert Boback to Ellen Nakashima (Dec. 17, 2009 2:12 p.m.) [TIVERSA-OGR-0008473].

²⁷⁰ E-mail from Ellen Nakashima to Robert Boback (Jan. 4, 2010 10:36 a.m.) [TIVERSA-OGR-0008473]. Even this exchange runs contrary to statements Boback made to a potential client in July 2008. At that time, Boback wrote about another Washington Post reporter, "I know that the WashPost reporter is actively scouring the file sharing networks to find any information relevant to 'DC-area businesses...especially government contractors.' For clarity, we would never provide any information or files to any reporter whether you decided to work with our firm or not, however he will probably find them on his own if he continues to search." E-mail from Robert Boback, CEO, Tiversa, to [Redacted Name], President/CEO [Redacted Company] (July 17, 2008 2:55 p.m.) (Emphasis and ellipsis in original) [TIVERSA-OGR-0019195]. Given that Boback did, in fact, provide information to a reporter on at least one occasion, it is not clear if Boback lied to this customer about Tiversa's relationship with the media, or if Boback changed his mind about this policy sometime later.

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Tiversa did not produce any response to this e-mail from Boback. As such, his reasoning remains unknown.

Less than a year later, in August 2011, Tiversa entered into a contract with TSA for peer-to-peer monitoring and remediation services. The potential value of the contract over five years was \$1,548,000 and the scope of the project included “help[ing] the TSA avoid negative publicity and exposure through P2P file sharing networks.”²⁷¹ TSA did not exercise all option years on the contract. The Committee does not know how many years of the contract passed before TSA ended its contract with Tiversa.

Tiversa received a great deal of press attention in the wake of the House Ethics leak. *Network World* reported that Tiversa had “seen the file at multiple locations including London, Toronto, Washington, Los Angeles, Texas and New York.”²⁷² The leak also sparked additional media interest around Tiversa’s previously announced peer-to-peer discoveries.²⁷³ In one instance, a blogger reported that Tiversa discovered the document.²⁷⁴ Boback insisted that Tiversa deny “discover[y]” of the exposed report to a blogger; he maintained that Tiversa only “investigated” the breach after he was made aware of its occurrence.²⁷⁵ As of September 12, 2014, the article remained unedited.²⁷⁶

Whether or not Tiversa “discovered” the leak, the documents show that although Tiversa was aware of the leak, the company failed to report the leak to the House Ethics Committee, long before the *Washington Post* reported about it.

B. Tiversa “assists” the House Ethics Committee in its investigation

While Tiversa was aware of the Ethics Committee leak more than a week before it became public, Tiversa does not appear to have contacted the Ethics Committee about the leak

²⁷¹ Contract HSTS03-11-C-CIO554 (Aug. 3, 2011) [TIV-0000101-135].

²⁷² Jaikumar Vijayan, *Leaked House Ethics Document Spreads on the Net via P2P*, NETWORK WORLD (Oct. 30, 2009), available at <http://www.networkworld.com/article/2252989/securityeaked-house-ethics-document-spreads-on-the/security/leaked-house-ethics-document-spreads-on-the-net-via-p2p.html> (originally published in *Computerworld*) (last visited Sept. 9, 2014).

²⁷³ J. Nicholas Hoover, *Bill Would Ban P2P Use by Federal Employees*, INFORMATIONWEEK (Nov. 18, 2009), available at <http://www.informationweek.com/regulations/bill-would-ban-p2p-use-by-federal-employees/d/d-id/1084955> (last visited Sept. 9, 2014) (“In October, Tiversa provided the House Oversight and Government Reform committee [*sic*] with evidence that secret military documents on P2P networks had been downloaded in China and Pakistan and that personally identifiable information on U.S. soldiers was widely available.”).

²⁷⁴ John Pescatore, *The Security Risks of Consumerization Hit Home for US Congress*, GARNER BLOG NETWORK (Nov. 2, 2009), http://blogs.gartner.com/john_pescatore/2009/11/02/the-security-risks-of-consumerization-hit-home-for-us-congress/ (last visited Sept. 12, 2014).

²⁷⁵ E-mail from Robert Boback, CEO, Tiversa, to Scott Harrer, Brand Dir., Tiversa (Nov. 11, 2009 10:54 a.m.) (In response to an article by John Pescatore that read “I live in the Washington DC area and much Beltway buzz about the Washington Post article on Tiversa’s discovery of a House ethics report only available on a peer to peer music stealing file sharing network,” Boback said, “Tiversa did not discover the document.... we need to let Pescatore know about that. We only investigated the breach.”) [TIVERSA-OGR-0026558].

²⁷⁶ Pescatore..

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prior to publication of the story by the *Washington Post*. Tiversa appears to have first spoken with the House Ethics Committee on or around November 2, 2009.

On November 2, 2009, Boback provided information about the leak to the House Ethics Committee. Specifically, Boback provided a list of IP addresses at which the House Ethics Committee document had allegedly been downloaded.²⁷⁷

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Monday, November 02, 2009 10:13 AM
To: Stoddard, Clifford
Subject: File Spread Analysis (Tiversa)
Importance: High
Sensitivity: Confidential

Mr. Stoddard,

Please see (below) the preliminary file spread analysis that Tiversa performed. Per our discussion, I have instructed our Security Ops Team to issue takedown notices for all of the cases listed. We will continue to monitor to verify that a) no other instances of spread arise and b) the takedown notices are effective in removing the file from the PCs and therefore the network. The IP address in red below is the original source of the leak.

216.45.59.122	UNITED STATES	CALIFORNIA	LOS ANGELES	OC3 NETWORKS & WEB SOLUTIONS LLC
70.240.108.51	UNITED STATES	TEXAS	HOUSTON	AT&T INTERNET SERVICES SWBELL.NET
69.119.255.103	UNITED STATES	NEW YORK	YONKERS	OPTIMUM ONLINE (CABLEVISION SYSTEMS)
72.225.253.212	UNITED STATES	NEW YORK	NEW YORK	ROAD RUNNER HOLDCO LLC
99.234.251.73	CANADA	ONTARIO	TORONTO	ROGERS CABLE INC.
81.76.50.206	UNITED KINGDOM	ENGLAND	LONDON	ENERGIS UK
69.255.116.72	UNITED STATES	DISTRICT OF COLUMBIA	WASHINGTON	COMCAST CABLE
98.218.86.107	UNITED STATES	VIRGINIA	ALEXANDRIA	COMCAST CABLE
76.111.69.89	UNITED STATES	VIRGINIA	ARLINGTON	COMCAST CABLE
68.48.69.117	UNITED STATES	DISTRICT OF COLUMBIA	WASHINGTON	COMCAST CABLE

If you have any questions, please email or call.

Best Regards,
 Bob

Robert Boback
Chief Executive Officer

Tiversa, Inc.
The 22nd Intelligence Experts
 144 Emeryville Drive, Suite 300
 Cranberry Township, Pennsylvania 16006
 | 724-940-9030 Office | 724-940-6033 Fax

The locations of the IPs—including Washington, D.C., Houston, New York, Los Angeles, Toronto, and London—were the same as those included in the e-mails from the *Washington Post* reporter to Boback several days earlier. In a later e-mail that same day, Tiversa provided additional information about when it first located the Ethics Committee document:²⁷⁸

²⁷⁷ E-mail from Robert Boback, CEO, Tiversa, to Clifford Stoddard, Counsel, Comm. on Standards of Official Conduct, H. Ethics Comm. (Nov. 2, 2009 10:13 a.m.) [TIVERSA-OGR-0002413].

²⁷⁸ E-mail from Robert Boback to Clifford Stoddard (Nov. 2, 2009 4:44 p.m.) [TIVERSA-OGR-0002412].

EMBARGOED UNTIL AFTER THE TESTIMONY OF RICHARD WALLACE

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Monday, November 02, 2009 4:44 PM
To: Stoddard, Clifford
Subject: RE: File Spread Analysis (Tiversa)
Sensitivity: Confidential

Hi Cliff,

Our systems first acquired the file in early August using the term "report." As we provide services for ID theft protection through our partner LifeLock, we issue several general search terms for information related to consumer security such as personal, financial, meeting, password, login, medical, insurance, etc. The results of these, and our other client specific search terms, are downloaded to our storage arrays. We have algorithms and individuals who then review the data via specific criteria (either specific consumer names, SSNs, DOBs, etc. or specific client names like Goldman Sachs, Cigna, Capital One etc.) to determine if our clients information has been exposed. Our searches and downloads happen continuously and downloads have averaged in excess of 100,000 new files per day. As an answer to your question below, the search that resulted in us finding the original source file occurred in early August. It is my assumption it was the same day in which the source of the leak saved it to her home PC. The file, although downloaded in early August, was not reviewed by anyone here at Tiversa until recently (2 weeks ago). I am not sure if I had spoken to Oversight about this specific file as we were discussing several files at that time. Our system can also download additional files (in an automated fashion) from the same source IP in an effort to provide our CFAs (Cyber Forensic Analysts) with additional insight as to the identity of the source of the disclosure. In this situation, our system downloaded two resumes from one of the IP addresses. It was due to the resume that we were able to arrive at a suspected original source.

Unfortunately, there is no way to tell exactly when the secondary IP addresses downloaded the file.

We will continue to monitor for the presence of the file on the network as others may have downloaded the file in addition to the IPs provided. Once detected, we will issue takedown notices with the corresponding ISPs.

Best Regards,
 Bob

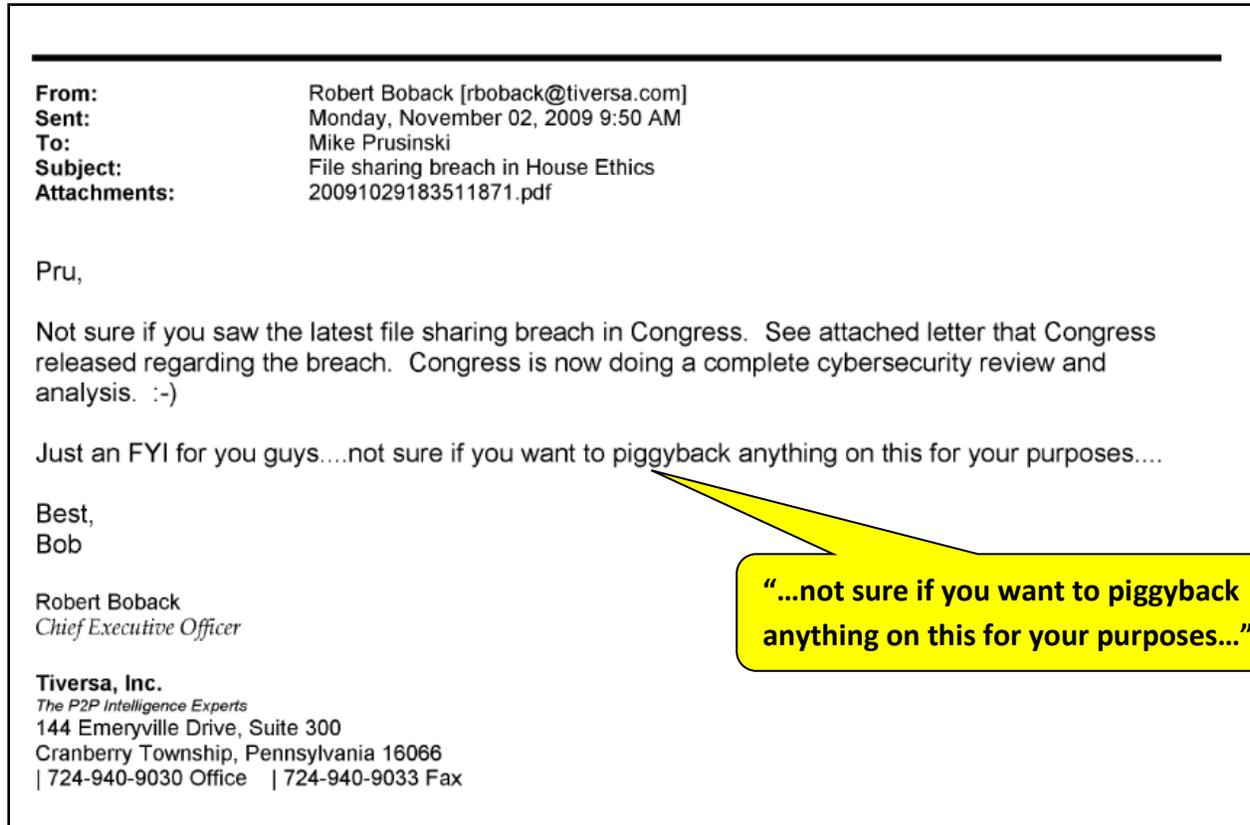
Robert Boback
 Chief Executive Officer

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 The P2P Intelligence Experts
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 | 724-940-9030 Office | 724-940-9033 Fax

“As an answer to your question below, the search that resulted in us finding the original source file occurred in early August. It is my assumption that it was the same day in which the source of the leak saved it to her home PC. The file, although downloaded in early August, was not reviewed by anyone here at Tiversa until recently (2 weeks ago).”

Before Boback sent any e-mails to the House Ethics Committee on November 2, he e-mailed a LifeLock executive about the leak as an “FYI,” in case LifeLock “want[ed] to piggyback anything on this[.]”²⁷⁹

²⁷⁹ E-mail from Robert Boback, CEO, Tiversa, to Mike Prusinski, Vice President, Pub. Affairs, LifeLock (Nov. 2, 2009 9:50 a.m.) [LLOCK-OGR-0002036].



Several days later, Boback traveled to Washington, D.C. to meet with the Chair and Ranking Member of the House Ethics Committee regarding the leak.²⁸⁰ During this meeting, the Ethics Committee appears to have requested a timeline from Tiversa about the leak.²⁸¹ On November 24, the Ethics Committee again requested a timeline, apparently after additional phone conversations between the Committee and Tiversa.²⁸² On December 3, the Ethics Committee requested yet again that Tiversa provide the timeline first requested nearly a month earlier. The Ethics Committee also asked if Tiversa’s systems had picked up the file’s download from Wikisecrets.org and several other websites:²⁸³

²⁸⁰ E-mail from Clifford Stoddard, Counsel, Comm. on Standards of Official Conduct, H. Ethics Comm., to Robert Boback, CEO, Tiversa (Nov. 6, 2009 2:30 p.m.) [TIVERSA-OGR-0002411].

²⁸¹ E-mail from Blake Chisam, Staff Dir. & Chief Counsel, Comm. on Standards of Official Conduct, to Robert Boback, CEO, Tiversa (Nov. 24, 2009 2:43 p.m.) (“I know Cliff’s been chatting with you about the timeline that the Chair and Ranking Member discussed with you at our meeting ... I can’t recall seeing a timeline. Is there any chance you could shoot that over to me?”) [TIVERSA-OGR-0002409]. Tiversa has not produced any documents to this Committee indicating that it replied to this request for information.

²⁸² *Id.*

²⁸³ E-mail from Clifford Stoddard, Counsel, Comm. on Standards of Official Conduct, H. Ethics Comm., to Robert Boback, CEO, Tiversa (Dec. 3, 2009 7:20 a.m.) [TIVERSA-OGR-0002407].

EMBARGOED UNTIL AFTER THE TESTIMONY OF RICHARD WALLACE

On Dec 3, 2009, at 7:20 AM, "Stoddard, Clifford" <Clifford.Stoddard@mail.house.gov> wrote:

Bob,

Sorry to pester you but in turn I am being asked continually about the time-line issue. I understand that Tiversa system discovered the document on August 4. The global search was done on October 30. Between then, you notified the Oversight Committee, specifically, Steven Rangel. Did you find out the specific date you notified Rangel? Also, as you probably know, the document has now been made available by Wikisecrets.org and can be downloaded from several websites. Did your system pick up these new addresses?

Also, could you have someone send us the hash for the file? Thanks.

The Members will be meeting with us in an hour and will ask again for the timeline I am sure.

Regards,

Cliff

Clifford C. Stoddard, Jr.

Counsel

Committee on Standards of Official Conduct

U. S. House of Representatives

HT-2, the Capitol

Washington DC 20515

(202) 226-8810 (direct)

Boback finally responded, with a very general timeline of events:²⁸⁴

From: Robert Boback [mailto:rboback@tiversa.com]
Sent: Thursday, December 03, 2009 10:32 AM
To: Stoddard, Clifford
Subject: Re: information

Hi Cliff

I am in LA training with FBI LEEDA right now but I wanted to drop you a note in advance of your meeting. Our systems located the file on Aug 1 not Aug 4. We did perform a global scan on Oct 30. I spoke to Steven Rangel between those dates but I don't have any record of it to provide clarity as to when. During that period I probably had 15 or so conversations with him regarding other breaches. To the best of my recollection, I think that I spoke to him about the document around the week of 19th of Oct, although it may have been sooner. We only discussed it once. Beyond that, I don't specifically recall anything. It didn't seem that sensitive to me.

Best
 Bob

Sent from my iPhone

Boback did not address the Ethics Committee's concern that the file had been made available by wikisecrets.org and several other websites. Boback also provided information that contradicted his November 2, 2009, e-mail. On November 2, Boback wrote that he "was not sure if [he] had spoken to Oversight about this specific file as we were discussing several files at that time."²⁸⁵ On December 3, 2009, however, Boback wrote that he spoke with an Oversight Committee staffer sometime between August 1 and October 30, likely around October 19.²⁸⁶

²⁸⁴ E-mail from Robert Boback to Clifford Stoddard (Dec. 3, 2009 10:32 a.m.) [hereinafter Boback-Stoddard Dec. 3 E-mail] [TIVERSA-OGR-0002407].

²⁸⁵ E-mail from Robert Boback to Clifford Stoddard (Nov. 2, 2009 4:44 p.m.) [TIVERSA-OGR-0002412].

²⁸⁶ Boback-Stoddard Dec. 3 E-mail..

Boback further explained that he “probably had 15 or so conversations” with the Oversight staffer about other breaches between August 1 and October 30, and that he only discussed the Ethics file with the Oversight staffer on one occasion. Boback explained that the file “didn’t seem that sensitive” to him.²⁸⁷

Further, Boback indicated in the November 2 e-mail that Tiversa reviewed the House Ethics document “about two weeks ago,” meaning that Tiversa became aware of the House Ethics file in mid-October. This timeline fits with an October 19 conversation with the Oversight staffer, and the October 20 internal Tiversa e-mail in which Boback received information about a House Ethics staffer.

Tiversa, by its own admission, learned of the House Ethics document in mid-October. Boback had a conversation about the document with the House Oversight Committee, mentioned the leak to executives at LifeLock, and conducted an investigation into the source of the leak, all before publication of the story. Yet Tiversa does not appear to have contacted the House Ethics Committee about the leak prior to publication of the *Washington Post* story. Boback further appears to have provided information about the spread of the leak to the *Washington Post* days before he provided the same information to the Ethics Committee.

Had Tiversa notified the Ethics Committee about the leak in a timely fashion, then it could have prevented some or all of the alleged spread of the document over the peer-to-peer network. When presented with a chance to minimize harm to the House of Representatives, Boback failed to act. Instead, Boback’s failure to inform the House Ethics Committee of the leak quickly and his failure to provide timely and consistent information about the exposed document are indicative of Tiversa’s questionable business practices in general. Finally, Tiversa stood to benefit from the *Washington Post*’s publication of the House Ethics leak regardless of whether Tiversa was the initial source of the article, or whether the article cited Tiversa. Any news on the vulnerability of sensitive information to leaks breached via peer-to-peer networks—and especially a high-profile breach—would bolster Tiversa’s profile as a firm with the capability to remediate this type of problem. The House Ethics leak is another example of Tiversa’s use of its association with Congress as a platform for intimidation and fearmongering.

A whistleblower’s account of the story states that in the course browsing the P2P network for profitable material, Tiversa came across the Ethics Committee document. Tiversa’s plan, according to the whistleblower was to leak the document to the press and generate publicity for it and then sell its services to the U.S. congress as the solution to the problem while never acknowledging it was the source of the breach. This resulted needlessly in the embarrassment of many Members of Congress who did not receive investigatory due process as a result of the pending investigations being exposed.

VII. *Open Door Clinic*

²⁸⁷ *Id.*

The Open Door Clinic is a small non-profit healthcare organization located in Elgin, Illinois.²⁸⁸ Open Door provides education, testing, and treatment for sexually transmitted infections, including HIV/AIDS.²⁸⁹ Between 2008 and 2009, Tiversa sought to exploit the Open Door Clinic using information Tiversa discovered on a peer-to-peer network.

A. Initial contact with Tiversa

On June 5, 2008, a computer with the IP address of 75.58.87.97 disclosed six files related to the Open Door Clinic on a peer-to-peer network.²⁹⁰ According to information provided by Tiversa, through the Privacy Institute, to the FTC, Tiversa appears to have downloaded these six files from that IP address on or around June 5, 2008.²⁹¹ The documents—spreadsheets of patient information—exposed the names, addresses, telephone numbers, social security numbers, and HIV/AIDS status of approximately 250 Open Door patients.²⁹² The fact that patient information was leaked on a peer-to-peer network is not disputed, nor is the seriousness of the leak in question. The documents contain no information identifying them as the property of the Open Door Clinic—the clinic’s name does not appear on any or the six spreadsheets, nor does its address, phone number, location, or any identifying information appear.²⁹³ Tiversa has not provided information to the Committee about how it determined that these documents belonged to the Open Door Clinic.

On July 14, 2008, a Tiversa sales representative contacted the Open Door Clinic about the leak.²⁹⁴ Tiversa subsequently provided one of the six documents it downloaded to the Open Door Clinic via e-mail.²⁹⁵ In the e-mail, which included the password to open the document, the

²⁸⁸ *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. 25 (July 24, 2014) (testimony of David Roesler, Exec. Dir. of Open Door Clinic) [hereinafter Roesler Testimony].

²⁸⁹ Open Door Clinic, *History*, available at <http://www.opendoorclinic.org/about-us/history/> (last visited Sept. 4, 2014).

²⁹⁰ Microsoft Excel spreadsheet from Tiversa to FTC, “FTC Final 8-14-09pm.xls” [FTC_PROD0000014].

²⁹¹ *Id.* The exact date of download of all six documents is not fully clear to the Committee. The spreadsheet of companies created by Tiversa for the FTC indicates that the “date of disclosure” of the six Open Door Clinic files was June 5, 2008. *Id.* Tiversa informed the Committee, however, that it downloaded one of the files, “Master List.xls,” on May 26, 2008 at 7:29 p.m. Letter from Reginald J. Brown, Counsel for Tiversa, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform (Aug. 28, 2014). Tiversa declined to provide the exact dates it downloaded the additional five files related to the Open Door Clinic “because Tiversa, Inc. believes it only analyzed the origins of the MASTER LIST.xls file.” *Id.* It is not clear how Tiversa determined the date of disclosure of the six files provided to the FTC to be June 5, 2008, and why Tiversa did not inform the FTC that at least one of the files provided was downloaded the previous month. It is also not clear how Tiversa provided a “date of disclosure” to the FTC for all six documents if it in fact only analyzed one of the files.

²⁹² Microsoft Excel spreadsheet from Tiversa to FTC, “Master List.xls” [FTC_PROD0005345].

²⁹³ Microsoft Excel spreadsheets from Tiversa to FTC, “Master List January 15, 2003.xls” [FTC_PROD0005340]; “Master List Michelle.xls” [FTC_PROD0005341]; “Master List Rosa.xls” [FTC_PROD0005342]; “Master List Sally.xls” [FTC_PROD0005343]; “Master List Sharon.xls” [FTC_PROD0005344]; “Master List.xls” [FTC_PROD0005345].

²⁹⁴ E-mail from Perry Maier, Assistant Dir., Open Door, to Anders Riedemann, IT Adm’r, Adnet (July 14, 2008 10:56 a.m.).

²⁹⁵ E-mail from Keith Tagliaferri, Cyber Forensic Analyst, Tiversa, to Anders Riedemann, IT Adm’r, Adnet (July 14, 2008 3:20 p.m.).

sales representative attached a statement of work for the Open Door Clinic to hire Tiversa.²⁹⁶ The quoted rate for Tiversa’s services was \$475 per hour – far beyond the clinic’s modest budget.²⁹⁷ Open Door employees were immediately suspicious as to why Tiversa contacted the clinic:²⁹⁸

Perry Maier

From: Perry Maier [perrym@opendoorclinic.org]
Sent: Monday, July 14, 2008 2:15 PM
To: Anders Riedemann
Subject: Phone call

Importance: High

Anders: I hope that you will have a chance to speak with Katey. It could be an elaborate scheme to get business. Keep me posted. I believe she gave you her cell phone number. Perry

“It could be an elaborate scheme to get business.”

The Open Door Clinic began an internal investigation of the leak after receiving notification from Tiversa. In early September 2008, an IT vendor for the clinic contacted Tiversa by telephone to obtain more information about the leak and what steps the clinic could take to remediate the breach.²⁹⁹ Tiversa provided eight steps that Open Door could undertake to remediate the leak:³⁰⁰

²⁹⁶ E-mail from Katy Everett to Anders Riedemann, IT Adm’r, Adnet (July 14, 2008 3:29 p.m.) [Open Door e-mail #5].

²⁹⁷ Roesler Testimony, at 25.

²⁹⁸ E-mail from Perry Maier to Anders Riedemann (July 14, 2008 2:15 p.m.).

²⁹⁹ E-mail from Katy Everett, Tiversa, to TJ Vinz, Adnet (Sept. 4, 2008 1:34 p.m.).

³⁰⁰ *Id.*

Tuesday, January 26, 2010 1:26 PM

Subject: P2P Disclosure Information
 Date: Thursday, September 4, 2008 1:34 PM
 From: Katy Everett <keverett@tiversa.com>
 To: TJ Vinz <tvinz@adnet.us>

Hi TJ. Thank you for taking the time to speak with me on the phone this afternoon. What follows is some information you can share with the folks at Open Door in terms of recommendations we would make or best practices we have seen others follow when facing similar circumstances regarding a potential breach. First, please know that though this type of incident is not a new problem, the exposure of it as an issue is new. Extremely large companies with very sophisticated IT systems have been victim to sensitive and costly P2P disclosures (such as Pfizer, ABN AMRO, Walter Reed Army Medical Hospital, etc.) and few if any organizations are immune to its risk.

When a disclosure like this occurs, companies often go through the following steps:

1. Identify the offending computer/source (it may or may not be the computer that you have identified)
2. Identify any additional files that might have been disclosed from the offending computer/source (this often determines/confirms the original source because often additional files are disclosed that allow us to profile the individual disclosing them)
3. Remediate/close down the offending computer/source
4. Identify any additional sources that may have acquired the file(s) and are re-sharing it/ them to the P2P networks
5. Remediate/close down any additional sources found in step #4
6. Take any notification steps required by state/industry regulatory bodies based on the severity of the information disclosed (e.g. social security numbers, etc.)
7. Provide services (e.g. credit monitoring, fraud alerts, etc.) to affected individuals
8. Document all steps taken to address both this incident and to prevent others from occurring as required by state/regulatory bodies, customers, other stakeholders, etc., and in support of any future legal defense actions

As I said earlier, Tiversa can assist Open Door with any of the above and in performing the global spread analysis we discussed. This helps many organizations inform their security breach notification proceedings as it will tell you how far the file has spread and how many pcs currently have downloaded it. As we discussed, even though the file itself may appear old, social security numbers never expire and criminals hunt for them every day on these networks in an effort to commit identity theft or fraud against individuals.

Tiversa also offered to “assist Open Door with any of the above and in performing the global spread analysis we discussed.”³⁰¹ The sales representative again attached a statement of work for an Incident Response Investigation for Open Door. The quoted rate remained \$475 per hour.³⁰²

One hour later, the Open Door Clinic’s IT vendor sent these eight steps to the clinic, as well as information on how the clinic had already addressed each step in the course of its internal investigation.³⁰³ The clinic’s internal investigation, based on the limited information provided by

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ E-mail from TJ Vinz, Adnet to Ryan Howater, Adnet (Sept. 4, 2008 2:40 p.m.).

Tiversa, found that none of the computers on the system had peer-to-peer software installed, and that no peer-to-peer network ports into or out of the clinic's computer system were allowed.³⁰⁴ As Executive Director David Roesler testified, the clinic was at a loss as to how the one file Tiversa provided could have been exposed on a peer-to-peer network.³⁰⁵

Later that month, Tiversa again contacted the Open Door Clinic, this time attempting to sell LifeLock's identity theft services.³⁰⁶ A Tiversa sales representative wrote, "Tiversa has recently established an exciting new partnership with a company called LifeLock. LifeLock is a leading provider of identity theft PREVENTION [*sic*] services to many organizations and corporations."³⁰⁷

Ultimately, Open Door declined to purchase Tiversa and LifeLock's services. In his testimony before the Committee, Roesler explained that the clinic did not purchase Tiversa's services because Open Door's IT provider had sufficiently "reviewed its network to confirm that there was no evidence of any P2P software."³⁰⁸

B. Tiversa only provided self-serving information to the Open Door Clinic in July 2008

Tiversa has maintained to the Committee that it went above and beyond in trying to help the Open Door Clinic mitigate the peer-to-peer leak. Such a statement, however, is not only self-serving, but also incorrect. In fact, Tiversa failed to provide full and complete information about the leak to the clinic.

Several of the eight steps for mitigation Tiversa suggested to the clinic—including the suggestions to "identify any additional sources that may have acquired the file(s) and are re-sharing them to the P2P networks" and "remediate/close down any additional sources found in step #4"—are steps that seemingly require the use of Tiversa's technology. Tiversa has maintained that it provides technology and services that no other company can provide. The so-called "steps" Tiversa provided are in fact a blatant sales pitch. Tiversa failed to provide additional files downloaded from the Open Door Clinic on the same day from the same IP address. Tiversa also failed to provide the IP address of the computer leaking the files, information that Tiversa's technology can provide in minutes. Had Tiversa chosen to provide the Open Door Clinic with this information, the clinic could have more readily identified the source of the leak.

Further, Tiversa appears to have begun investigating the source of the Open Door leak even prior to July 14, 2008, when it first contacted the Open Door Clinic. On July 3, 2008, Chris

³⁰⁴ *Id.*

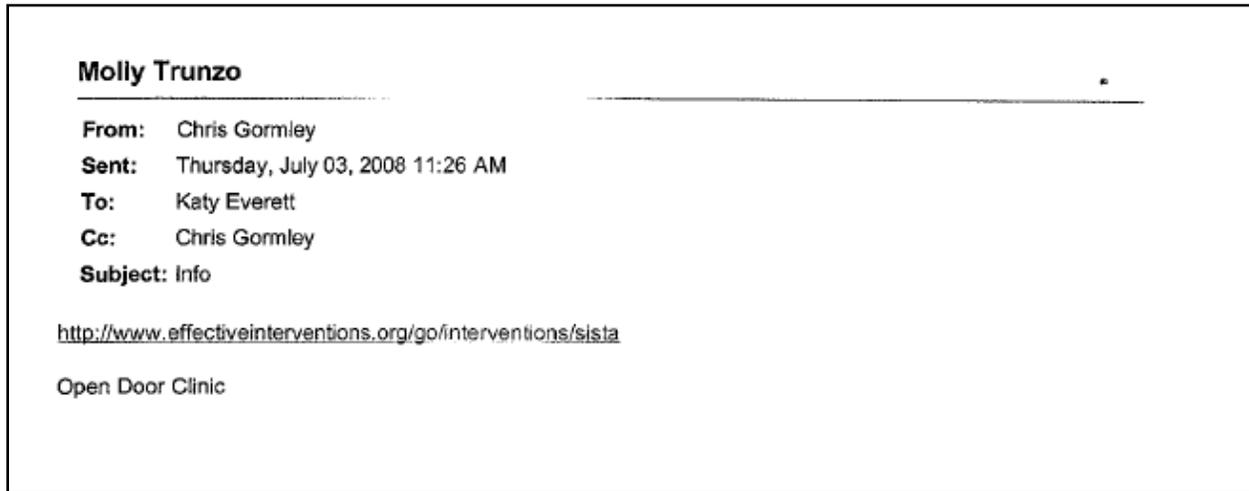
³⁰⁵ Roesler Testimony, at 25.

³⁰⁶ E-mail from Katy Everett, Tiversa, to TJ Vinz, Adnet (Sept. 24, 2008 2:20 p.m.). This e-mail was not produced to the Committee by Tiversa.

³⁰⁷ *Id.*

³⁰⁸ Roesler Testimony, at 25, 60.

Gormley, Tiversa's former Chief Operations Officer, e-mailed a sales representative a web link, with the notation "Open Door Clinic:"³⁰⁹



Tiversa did not produce this e-mail to the Committee. A forensic report Tiversa created in October 2011, which Tiversa also did not produce to the Committee, includes several files about the "SISTA Project" to support its conclusion that the probable disclosure source was a specific Open Door employee.³¹⁰

The July 3, 2008, e-mail indicates that Tiversa had already begun work on step one of the eight steps provided to the Open Door Clinic—"identify the offending computer/source"—but failed to inform Open Door of this information. Further, the same sales representative who sent the eight steps to the Open Door Clinic also received Gormley's e-mail.

Had Tiversa really wanted to help this non-profit clinic, it could have provided all of the files downloaded from Open Door and the IP address of the computer sharing the files in question. Tiversa could have also informed the clinic that it had already begun investigating the source of the breach, and had identified a potential link between documents the computer shared and the identity of the computer's owner.

C. Tiversa facilitates a class action lawsuit against the Open Door Clinic, and contacts Open Door patients directly

On July 29, 2009, Tiversa CEO Robert Boback testified about the Open Door Clinic leak before the Committee. Boback stated that 184 Open Door patients were "now victims of identity

³⁰⁹ E-mail from Chris Gormley, COO, Tiversa, to Katy Everett, Tiversa (July 3, 2008, 11:26 a.m.) [hereinafter July 3 Tiversa E-mail].

³¹⁰ Tiversa, *Forensic Investigation Report: Open Door Clinic*, at 6, 21, 26, 29 (Oct. 13, 2011). One of the excerpted documents in the Investigative Report discusses the SISTA Training Institute, and refers participants to the website www.effectiveinterventions.org – the same main website as the link in Gormley's July 3, 2008 e-mail (July 3 Tiversa E-mail).

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theft.”³¹¹ After this hearing, a Committee staffer expressed concern to Boback that the affected Open Door clients had not been notified that their personal information had been exposed.³¹²

Rather than contacting the Open Door Clinic to provide additional information about the leak that Tiversa initially withheld, such as the IP address of the source computer, the additional files that Tiversa downloaded, or any investigation Tiversa performed into the identity of the disclosing source, Boback provided information on the Open Door leak to Michael Bruzzese, one of Tiversa’s attorneys.³¹³ Shortly after the July 2009 hearing, Boback provided Bruzzese with a verbal summary of what he knew about the Open Door leak.³¹⁴ Boback also provided one of the six documents Tiversa downloaded from the clinic.³¹⁵ At this time, Boback stated that Tiversa had also determined that an “information aggregator” located in Apache Junction, Arizona downloaded Open Door’s documents.³¹⁶ Boback did not provide Bruzzese with information about any other spread at this time.³¹⁷ Boback also did not provide the Open Door Clinic with information about the alleged spread of the file.

Bruzzese and his co-counsel “retained the services of an attorney who devotes his practice to matters involving legal ethics and the rules of professional responsibility to provide us legal advice as to how and in what manner we could solicit potential clients for this case.”³¹⁸ Bruzzese determined that “it was permitted to contact the potential class members by mail” and sent letters to all patients on the list Boback provided.³¹⁹ The letter was a “solicitation to provide legal services,” and asked the recipient to sign on as a class representative for the suit.³²⁰

Tiversa, through one of its current attorneys, explained to the Committee why Tiversa provided information to Bruzzese instead of contacting Open Door or its patients directly. The attorney stated that Tiversa did not have the resources to contact the patients itself, and accordingly provided the information to an attorney:

³¹¹ *Inadvertent File Sharing Over Peer-to-Peer Networks: How it Endangers Citizens and Jeopardizes National Security: Hearing Before the H. Comm. on Oversight & Gov’t Reform*, 111th Cong. 12 (July 29, 2009) (testimony of Robert Boback, CEO of Tiversa, Inc.). Michael Bruzzese, however, told the Committee that he did not know what would have been the basis of this statement; he was not aware of any claims of identity theft until after he assembled plaintiffs for the class action lawsuit between November 2009 and February 2010. H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Michael Bruzzese, at 115 (Sept. 10, 2014) [hereinafter Bruzzese Tr.].

³¹² Letter from Michael J. Bruzzese, Att’y, Johnson, Bruzzese & Temple, LLC, to Hon. Darrell E. Issa, Chairman, H. Comm. on Oversight & Gov’t Reform 2 (July 30, 2014) [hereinafter July 30 Bruzzese Letter].

³¹³ *Id.*

³¹⁴ Bruzzese Tr. at 21-22.

³¹⁵ *Id.* at 22.

³¹⁶ *Id.* at 32. A draft version of the Tiversa Forensic Investigation Report includes a file spread analysis. This analysis indicates that the file spread to four IP addresses unrelated to the initial disclosing source. The spread analysis shows that, in addition to the Apache Junction user, a peer-to-peer user in the Netherlands had also downloaded at least one of the Open Door files on March 12, 2009. It is not clear how Boback knew about the spread of the file in one instance, but not the other. Tiversa, *Forensic Investigation Report: Open Door Clinic* (Oct. 21, 2011) (draft report). At no point was Tiversa’s file spread analysis provided to the Open Door Clinic.

³¹⁷ Bruzzese Tr. at 32-33.

³¹⁸ July 30 Bruzzese Letter at 2.

³¹⁹ *Id.*; see also Letter from Michael Bruzzese & James Cirilano, Cirilano & Associates, to [Open Door Clinic Patient] (Nov. 4, 2009) [hereinafter Bruzzese Patient Letter].

³²⁰ Bruzzese Patient Letter..

Here's what our understanding is. And, again, I think you're going to get a letter. . . . Tiversa found the Open Door file. They called them, as is their policy, just saying, look, we found this on your system, here it is. They said, no, thanks, about getting help.

Getting ready for the testimony in 2009, they told the story to someone on staff. And when they told them the story, they were told back that somebody needs to reach out to the victims.

Tiversa did not have the resources to do it themselves, and they just gave a file to the local Pittsburgh attorney, who they knew, in order to help the victims. And Tiversa didn't get any payment for it.³²¹

He further stated:

Well, what he did with it, I don't think -- Tiversa didn't say, go do this or that. It was, they were asked by staff to make sure the victims knew that their information was compromised. **And since they didn't have the ability to do it themselves, or more than what they did, they gave the information to this guy, and he said he would handle it.**³²²

Bruzzese also explained to the Committee how he contacted the clients of the Open Door Clinic. He stated:

Q. How did you contact [the Open Door clients]?

A. We contacted them one way, the only way, by sending them what in our profession is called an attorney solicitation letter, and prior to doing that, I retained the services of a lawyer in Pittsburgh who kind of concentrates his area of practice on professional responsibility and ethics and asked him whether and how under Illinois law that I could contact these individuals. And he did some research, told me **that I was prohibited from making direct phone calls to them but that I could send a letter as long as I marked on the letter that it was a solicitation from a lawyer.** And that's what we did.

* * *

A. Correct. So let me just make a statement to you. **Prior to the five individuals retaining my services as their lawyer, I did not make any telephone calls to any Open Door Clinic patients.**

³²¹ Hopkins Tr.at 143-44.

³²² *Id.* at 145 (emphasis added).

Q. Did you ask Mr. Boback if Tiversa could make telephone calls to any of the Open Door patients?

A. No.

Q. **Did you ask Mr. Boback to contact the Open Door patients in any way?**

A. **No.**³²³

Documents obtained by the Committee, however, show that Tiversa independently contacted patients of the Open Door Clinic about the leak.³²⁴

As these documents call into question information provided by Tiversa to the Committee, the Committee obtained phone records showing long-distance calls from Tiversa's office during the time in question. **A comparison of the phone records to documents Tiversa downloaded from the Open Door Clinic, which contained patients' personal information, clearly shows that Tiversa called more than 50 patients of the Open Door Clinic between October 29 and November 5, 2009.** Tiversa called at least one patient on multiple occasions. These phone calls from Tiversa took place just days before Bruzzese sent a letter to Open Door patients.

It is not clear why Tiversa provided false information to the Committee about whether the company contacted any Open Door patients. Further, it is not clear why Tiversa lacked the resources to contact Open Door patients, as the company represented to the Committee through its attorney. In fact, Tiversa did contact over 50 patients of the clinic. It is also not clear why Tiversa would contact over 50 patients of the clinic in late October and early November 2009, days before Bruzzese sent a letter to patients of the clinic, and following the Committee staffer's July 2009 alleged notification that patients needed to be notified.

In September 2009, Tiversa again contacted Open Door to report that the breached document was still exposed on the peer-to-peer network.³²⁵ Again, Open Door performed its own investigation of its servers and again found no evidence of any peer-to-peer networks.³²⁶ Tiversa did not tell Open Door that it had referred information about the leak to an attorney, nor did Tiversa provide any of the information previously withheld from the clinic. Although Tiversa professed it was concerned about notifying the patients of Open Door about the leak of personally identifiable information, it still omitted key information.

Six patients agreed to join the class action against the Open Door Clinic, and Bruzzese filed the lawsuit in February 2010. During discovery, Open Door subpoenaed Tiversa and

³²³ Bruzzese Tr. at 35-36 (emphasis added).

³²⁴ See, e.g. e-mail from Barb Cox to David Roesler, Dir., Open Door Clinic (Nov. 5 2009 4:29 p.m.) ("According to [redacted]-tiversa [sic] called him first and asked a ton of questions-did they know that open door had done this etc. I think that Triversa [sic] is affiliated with the law firm and sent them the info they had-I would imagine that they get a finders fee [sic].").

³²⁵ Roesler Testimony, at 25.

³²⁶ *Id.* at 25-26.

finally received the additional files that Tiversa downloaded from the same computer on the same day as the one file it previously provided.³²⁷ This production included information indicating that an IP address in Apache Junction, Arizona, downloaded all six Open Door files.³²⁸ Bruzzese testified to the Committee that he also did not receive a full accounting of all the Open Door files Tiversa downloaded until he received Tiversa's production.³²⁹

After receiving full information from Tiversa, the Open Door Clinic determined that the source of the breach was a computer stolen from the clinic in 2007.³³⁰ Open Door believes that the peer-to-peer software that exposed its patients' personally identifiable information was installed on the computer after it was stolen, and therefore was not a breach of Open Door's network.³³¹

D. Tiversa did not charge Bruzzese for the same information it refused to provide to the Open Door Clinic

Tiversa did not accept payment for any services provided as part of the litigation against the Open Door Clinic.³³² When Boback first told Bruzzese about the Open Door leak, Boback was "adamant"³³³ that Tiversa would provide any required services free of charge:

He said, Tiversa does not want anything. I do not want anything. I am doing this to—words to this effect—discharge my obligation put upon me by the staffer to do something about it. **And he said that, whatever you need, in terms of forensic work, you've got, no matter what.**³³⁴

Pursuant to this professed sense of moral obligation, Tiversa performed forensic analysis of the Open Door Leak. Tiversa examined the source of the leak, including details about the 27 times the IP address shifted, the identity of the leak, and the alleged spread of the leak. Tiversa produced a 42-page forensic investigation draft report,³³⁵ and a 39-page final forensic investigation report³³⁶ for Bruzzese's use in the litigation.

Boback directed that Tiversa expend time and effort to investigate the leak for Bruzzese at no charge. He provided the exact same services to Bruzzese for free that he withheld from the Open Door Clinic. Had Boback really felt a sense of moral obligation to the patients of the Open

³²⁷ *Id.* at 94.

³²⁸ The production included a spreadsheet titled "Open Door Clinic File Listing With Spread" and included a list of files for two IP addresses. One IP address is the disclosing source as identified by Tiversa, and the other IP address at the time resolved to Apache Junction, Arizona. Tiversa Production to Open Door Clinic (Jan. 21, 2011).

³²⁹ Bruzzese Tr. at 34.

³³⁰ Roesler Testimony, at 91.

³³¹ *Id.* at 93.

³³² Bruzzese Tr. at 65-66.

³³³ *Id.* at 65.

³³⁴ *Id.*

³³⁵ Tiversa, *Forensic Investigation Report* (Oct. 13, 2011).

³³⁶ Tiversa, *Forensic Investigation Report* (Oct. 21, 2011)..

Door Clinic, he could have provided these services to the Open Door Clinic. Once again, Tiversa was in a position to help and refused to do so.

According to a whistleblower, Tiversa engaged in numerous attempts to get the Open Door Clinic to pay for its services. When the clinic refused, Tiversa began calling the patients listed on the document it downloaded. Tiversa employees thought that by calling the patients and ginning up the leak, they could scare the clinic into hiring Tiversa. When this plan failed, Boback provided the information to his attorney, Michael Bruzzese, who filed a law suit against the non-profit clinic while Tiversa performed work related to the exposure free of charge to Bruzzese. The clinic was never informed by Bruzzese that Bruzzese received the information from Tiversa.

E. Tiversa provided information on the Open Door Clinic to the FTC

In addition to providing information to assist Bruzzese in his class action lawsuit, Tiversa also provided information on the Open Door Clinic leak to the FTC. Tiversa, through the Privacy Institute, provided all six documents about the clinic to the FTC. As noted above, the spreadsheet Tiversa provided indicated that all six documents were downloaded from the same IP address and disclosed on the same day – June 5, 2008.³³⁷ On January 19, 2010, the FTC sent a letter to Open Door Clinic about the leak.³³⁸ The letter informed the clinic that a file had been exposed on the peer-to-peer network, and noted that the clinic’s failure to prevent the document from leaking could violate federal laws.³³⁹

If Boback was truly motivated to help the patients affected by the Open Door leak, he should have given complete information to Open Door immediately. Instead, Boback withheld critical information about the number of downloaded documents, the IP address of the leak, and any information Tiversa had uncovered about the source of the leak. He referred the leak to an attorney. Even after the referral, Tiversa made unsolicited calls to more than 50 patients of the clinic about the leak for unknown reasons. And, finally, Boback provided the very information and services he denied to the Open Door Clinic for free to the attorney who sued the Open Door Clinic over the leak Tiversa first identified. Boback’s actions toward the Open Door Clinic unfortunately fit a pattern of self-promotion and manipulation, not a heartfelt wish to “discharge [his] obligation” to Open Door’s clients.

VII. Conclusion

The Committee’s investigation raises substantial questions about Tiversa’s business practices. The company’s failure to produce documents responsive to the subpoena hindered the Committee’s investigation. Not only did Tiversa primarily report companies to the FTC that had

³³⁷ Microsoft Excel spreadsheet from Tiversa to FTC, “FTC Final 8-14-09pm.xls” [FTC_PROD0000014].

³³⁸ Letter from Maneesha Mithal, Assoc. Dir., Div. of Privacy & Identity Protection, Federal Trade Comm’n, to Open Door Clinic (Jan. 19, 2014).

³³⁹ *Id.*

refused its services, but it also manipulated its relationship with the FTC—including its knowledge of upcoming investigations—in an attempt to profit from these same companies the second time around. In addition, Tiversa seemingly knew about a breach at the House Ethics Committee nine days before the *Washington Post* reported about the breach. Boback notified LifeLock about the breach and the upcoming article, but failed to notify the House Ethics Committee itself. Boback's communications prior to the publication of the article call into question his claim that he did not act as the *Washington Post's* source. Finally, Boback's actions toward the Open Door Clinic are unethical, and potentially illegal. Boback refused to provide critical information about a leak of incredibly sensitive data. Instead, he reported the clinic to the FTC, provided information on the leak to an attorney, and provided certain services to the attorney free of charge but not to the clinic at all.

Boback's actions on behalf of Tiversa demonstrate that when, in a position to prevent harm to companies or the federal government, he acted to benefit himself and Tiversa. Federal departments and agencies should be aware of these business practices when determining whether to do business with Tiversa.

EXHIBIT 2

In the Matter of:

LabMD, Inc.

May 5, 2015
Trial - Public Record
Volume 9

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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1 FEDERAL TRADE COMMISSION
2 I N D E X
3 IN THE MATTER OF LABMD, INC.
4 TRIAL VOLUME 9
5 PUBLIC RECORD
6 MAY 5, 2015
7
8 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR
9 WALLACE 1337 1414
10 1421 1431
11
12
13 EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED
14 CX
15 (none)
16
17 RX
18 Number545 1419
19 Number546 1426
20 Number549 1423
21
22 JX
23 (none)
24
25

1311

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1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 In the Matter of)
4 LabMD, Inc., a corporation,) Docket No. 9357
5 Respondent.)
6 -----)
7 May 5, 2015
8 10:11 a.m.
9 TRIAL VOLUME 9
10 PUBLIC AND NONPUBLIC RECORD
11
12 BEFORE THE HONORABLE D. MICHAEL CHAPPELL
13 Chief Administrative Law Judge
14 Federal Trade Commission
15 600 Pennsylvania Avenue, N.W.
16 Washington, D.C.
17
18
19 Reported by: Josett F. Whalen, Court Reporter
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1312

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1 MS. MARSHALL: Erica Marshall, Cause of Action.
 2 JUDGE CHAPPELL: Thank you.
 3 Have any of the Cause of Action attorneys filed
 4 appearances?
 5 MR. KHETAN: Yes, Your Honor. I believe we all
 6 have.
 7 JUDGE CHAPPELL: All right.
 8 You'll need to come up during the break and
 9 give the court reporter your names. She couldn't hear
 10 you.
 11 MR. KHETAN: Okay.
 12 JUDGE CHAPPELL: First off, I need the lead
 13 attorneys only to approach the bench.
 14 (At the bench, discussion off the record.)
 15 (In open court.)
 16 JUDGE CHAPPELL: All right. Let me start
 17 with -- is it "Daugherty" or "Daugherty"?
 18 MR. SHERMAN: Daugherty.
 19 JUDGE CHAPPELL: Let's talk about this
 20 Daugherty affidavit which has sprung out of nowhere
 21 here.
 22 I have pending a number of motions pertaining to
 23 an affidavit supposedly executed by LabMD president
 24 Michael Daugherty on or about April 17, 2014.
 25 I have pending complaint counsel's motion to

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1 PROCEEDINGS
 2 - - - - -
 3 JUDGE CHAPPELL: Call back to order Docket 9357,
 4 In Re LabMD.
 5 It's been a while. I'm going to take
 6 appearances of the parties. We'll start with the
 7 government.
 8 MS. VANDRUFF: Good morning, Your Honor.
 9 Laura VanDruff on behalf of complaint counsel.
 10 With me today is Jarad Brown and Alain Sheer and
 11 our technical support, Jon Owens.
 12 JUDGE CHAPPELL: Okay. For the respondents?
 13 MR. SHERMAN: Good morning, Your Honor.
 14 William Sherman from the law firm of
 15 Dinsmore & Shohl on behalf of the respondent.
 16 To my left is Mike Daugherty, owner of LabMD.
 17 To his left is my law partner, Reed Rubinstein.
 18 And to his left is our associate, Sunni Harris.
 19 JUDGE CHAPPELL: Is there anyone here from
 20 Cause of Action?
 21 MR. SHERMAN: Yes, there is, Your Honor. There
 22 are several lawyers here from Cause of Action.
 23 MR. MASSARI: Patrick Massari, Your Honor.
 24 MR. KHETAN: Good morning, Your Honor. I'm
 25 Prashant Khetan.

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1 compel production of that document and an opposition
 2 from respondent.
 3 I have respondent's motion to reconsider an
 4 order granting the motion to compel in part, requiring
 5 an in camera review in my chambers.
 6 And then I have complaint counsel's motion for
 7 in camera treatment.
 8 The motion for in camera treatment states that
 9 respondent is unopposed, but it's unclear to me, does
 10 that mean respondent concurs with all the relief
 11 requested in that motion for in camera treatment?
 12 MR. RUBINSTEIN: Your Honor, Reed Rubinstein.
 13 Without getting too much into the background,
 14 respondent is prepared to produce the affidavit for your
 15 review and for your determination as to whether or not
 16 the pending objections are appropriate.
 17 JUDGE CHAPPELL: So the -- you will then file a
 18 notice to withdraw on your motion to reconsider.
 19 MR. RUBINSTEIN: With the understanding that,
 20 yes, we will produce the affidavit to you -- this is the
 21 result of communications and correspondence the parties
 22 have had with the House counsel with respect to their
 23 claim of legislative privilege. We are prepared to
 24 produce the document to you for your review and
 25 determination.

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1 JUDGE CHAPPELL: All right. Now, it sounds
 2 like we are going to have to get into the weeds
 3 somewhat.
 4 You're still going to maintain it's privileged
 5 even though I have a representation from the government
 6 that the attorney for the Ethics Committee of the House
 7 is not asserting the privilege in this proceeding.
 8 MR. RUBINSTEIN: With the understanding that if
 9 you determine it is a document that should be produced,
 10 that it will be given in camera treatment. That at
 11 least is my understanding of House counsel's position as
 12 it was communicated to me in a phone call.
 13 JUDGE CHAPPELL: So the nonopposition only goes
 14 to me reviewing the document.
 15 MR. RUBINSTEIN: That's correct.
 16 And if you should determine that it is
 17 appropriate to be produced, then my understanding --
 18 and please, Counsel, correct me if I'm wrong -- is that
 19 the affidavit will be designated in camera going
 20 forward.
 21 MS. VANDRUFF: That's the relief sought,
 22 Your Honor, in the complaint counsel's unopposed motion
 23 for in camera treatment, correct.
 24 JUDGE CHAPPELL: But that doesn't get us to the
 25 merits. You're still going to assert your objection

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1 that it should be -- should not be produced.
 2 MR. RUBINSTEIN: Yes, Your Honor. We would ask
 3 that you review the affidavit, and we're prepared to
 4 produce that to you today whenever you should ask us to
 5 do so.
 6 JUDGE CHAPPELL: And if I determine that it
 7 should be produced, where are we then?
 8 MR. RUBINSTEIN: Then it will be designated
 9 in camera and we'll provide a copy to complaint counsel.
 10 MS. VANDRUFF: And Your Honor, complaint counsel
 11 would request, without getting into the merits because
 12 of witnesses who are present in the courtroom, but that
 13 the court conduct that examination as quickly as
 14 possible because it may be relevant to today's
 15 proceeding.
 16 JUDGE CHAPPELL: This might seem obvious, but
 17 when I read the letter from House counsel referring to
 18 the affidavit, I just want to make real sure, we are
 19 talking about the exact same affidavit?
 20 MR. RUBINSTEIN: Yes, Your Honor.
 21 JUDGE CHAPPELL: How soon could you have that
 22 delivered to room 110?
 23 MR. MASSARI: Within the hour, Your Honor.
 24 JUDGE CHAPPELL: Thank you.
 25 All right. Thank you.

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1 MS. VANDRUFF: Your Honor, if I can request
 2 clarification, are you ordering that that be produced
 3 within the hour to your chambers?
 4 JUDGE CHAPPELL: I didn't really have to order
 5 it. They agreed to do it.
 6 MS. VANDRUFF: I just want to be clear for the
 7 record.
 8 JUDGE CHAPPELL: No need to order when I have a
 9 volunteer.
 10 MS. VANDRUFF: Okay. Thank you, Your Honor.
 11 JUDGE CHAPPELL: The Army way.
 12 Let me talk a little bit about rebuttal, since
 13 I'm at a disadvantage here, the attorneys know what
 14 you're planning this week, but I do not.
 15 My position on rebuttal is, as it's always
 16 been, if any party wishes to offer a rebuttal witness
 17 in this case or offer rebuttal evidence, the request
 18 shall be made in writing in the form of a motion to
 19 request a rebuttal witness or rebuttal evidence as soon
 20 as possible.
 21 That motion shall include the name of any
 22 witness being proposed or a detailed description of the
 23 rebuttal evidence being offered.
 24 Next is the most important part.
 25 That motion shall also include a cite to the

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1 record by page and line number to the evidence that you
 2 intend to rebut. That way, I have no misunderstandings.
 3 I don't have to go from memory.
 4 The motion shall also demonstrate that the
 5 witness the party seeks to call has previously been
 6 designated on the witness list or that the evidence the
 7 party seeks to introduce has been previously listed on
 8 the exhibit list, unless good cause can be demonstrated
 9 as to why such exhibit could not have been previously
 10 listed or a witness could not have been previously
 11 listed in this case.
 12 And I suppose, after we hear testimony from
 13 Mr. Wallace, I'll ask complaint counsel if they want to
 14 pursue rebuttal and how much time they need to file a
 15 motion.
 16 And if the respondent just absolutely must do
 17 it, I will allow a reply or opposition to their rebuttal
 18 request, but there will be a very short time fuse on
 19 that as we're trying to move along.
 20 Any questions on that?
 21 MR. SHERMAN: No questions, Your Honor.
 22 MS. VANDRUFF: No, Your Honor. Thank you.
 23 Is Mr. Wallace here?
 24 MR. SHERMAN: He is, Your Honor.
 25 JUDGE CHAPPELL: Is he in the courtroom?

1321	<p>1 MR. SHERMAN: He is, Your Honor. 2 Would you like for me to point him out? 3 JUDGE CHAPPELL: Mr. Wallace? 4 MR. WALLACE: Yes. 5 JUDGE CHAPPELL: Welcome. Thank you. It's been 6 a long and winding road, but here we are. 7 And your attorney is here. 8 MS. BUCHANAN: Yes, Your Honor. 9 Mary Beth Buchanan from the law firm of Bryan Cave and 10 my associate, Jacquelyn Schell. 11 MS. SCHELL: Good morning, Your Honor. 12 JUDGE CHAPPELL: Good morning. 13 And you have filed an appearance in the case? 14 MS. BUCHANAN: Yes, Your Honor, we have. 15 JUDGE CHAPPELL: All right. Thank you. 16 MS. BUCHANAN: And we also have a pending 17 motion before the court to ask the court's 18 permission -- 19 JUDGE CHAPPELL: Whoa. I've got that on my 20 agenda. I'll get to that. 21 Thank you. You can have a seat. 22 MS. BUCHANAN: Thank you, Your Honor. 23 JUDGE CHAPPELL: It's been a while, so I'm going 24 to bring everybody up to speed on where we are. 25 Pursuant to a September 29 order requiring</p>	1323	<p>1 Is the scope of the deposition following 2 Mr. Wallace's direct examination limited to the subject 3 matter of his direct examination? 4 JUDGE CHAPPELL: I don't have that in front me, 5 but I believe that was covered in the order I issued 6 limiting that deposition. 7 It was requested of me that the deposition of 8 Mr. Wallace was only for cross-examination. Is that 9 correct? To allow proper cross-examination, that was 10 the purpose of the request. 11 MS. VANDRUFF: That is the purpose, Your Honor. 12 And I have Your Honor's order in front of me. 13 JUDGE CHAPPELL: Well, you know, we don't have 14 to go that far. They have two hours. They have two 15 hours. 16 Do you intend to go beyond the scope of direct? 17 MS. VANDRUFF: Without hearing the direct, 18 Your Honor, I don't know the scope of the deposition. 19 JUDGE CHAPPELL: All right. Does anyone have a 20 copy of that order? 21 MS. VANDRUFF: Your Honor, with respect to the 22 scope of complaint counsel's deposition, of course it 23 may be necessary for complaint counsel to ask questions 24 that relate to Mr. Wallace's credibility. 25 JUDGE CHAPPELL: Credibility is always within</p>
1322	<p>1 testimony under grant of immunity, Mr. Richard Wallace, 2 formerly of Tiversa, has been ordered to appear to 3 testify at this evidentiary hearing. His testimony 4 will be in public session, absent a showing under 5 rule 3.45 that all or part of his testimony should be 6 given in camera treatment. 7 Also pursuant to the September 29 order and 8 pursuant to the October 9 order and the authorization 9 granted by the attorney general of the United States on 10 November 14, 2014, Richard Wallace shall have immunity, 11 under 18 United States Code Section 6002, in giving 12 testimony or other information that he has refused to 13 give on the basis of the privilege against 14 self-incrimination. 15 Mr. Wallace will be called to the stand on 16 direct by respondent; is that correct? 17 MR. SHERMAN: That's correct, Your Honor. 18 JUDGE CHAPPELL: When respondent has finished 19 its direct examination, we will be in recess to allow 20 complaint counsel to depose Mr. Wallace pursuant to the 21 December 8 order. And these are all 2014. 22 Complaint counsel's deposition of Mr. Wallace shall not 23 exceed two hours without further order from the court. 24 MR. SHERMAN: Your Honor, I have a question 25 concerning the scope of that deposition.</p>	1324	<p>1 the scope of cross. 2 MS. VANDRUFF: Thank you for that 3 clarification. 4 JUDGE CHAPPELL: Credibility, bias, impeachment, 5 always within the scope. 6 Does that help? 7 MS. VANDRUFF: That does help, Your Honor. 8 JUDGE CHAPPELL: All right. Beyond that, I'll 9 refer you to the order I issued with the limitations on 10 the deposition. 11 MR. SHERMAN: Thank you, Your Honor. 12 JUDGE CHAPPELL: And there will be no other 13 limitations other than I've already expressed in that 14 order. That matter is dealt with, previously. 15 MS. VANDRUFF: Thank you, Your Honor. 16 MR. SHERMAN: Thank you, Your Honor. 17 JUDGE CHAPPELL: Pending motion. 18 I have pending before me an unopposed motion to 19 allow Mr. Wallace's counsel to engage in a redirect exam 20 of Mr. Wallace after the conclusion of 21 complaint counsel's cross-exam, provided that 22 complaint counsel and respondent's counsel can 23 thereafter reexamine Mr. Wallace based on the testimony 24 adduced in the redirect questioning by Mr. Wallace's 25 counsel.</p>

1325	<p>1 Is my summary of the motion correct?</p> <p>2 MR. SHERMAN: To my understanding, Your Honor.</p> <p>3 MS. VANDRUFF: Complaint counsel agrees,</p> <p>4 Your Honor.</p> <p>5 JUDGE CHAPPELL: And as I've previously noted,</p> <p>6 Mr. Wallace's counsel has filed an appearance in this</p> <p>7 matter.</p> <p>8 Pursuant to commission rules 3.42(c) and</p> <p>9 3.43(d), the unopposed motion is hereby granted. A</p> <p>10 written order confirming this ruling will issue within</p> <p>11 the next day or so.</p> <p>12 Mr. Sherman, do you intend to call any witnesses</p> <p>13 in addition to Mr. Wallace?</p> <p>14 MR. SHERMAN: We do not, Your Honor.</p> <p>15 JUDGE CHAPPELL: Thank you.</p> <p>16 I've made a number of evidentiary-type rulings,</p> <p>17 in the months since we were here, regarding various RXs</p> <p>18 and CXs.</p> <p>19 Are there any questions or clarification needed</p> <p>20 on any of those rulings?</p> <p>21 MR. SHERMAN: No, Your Honor.</p> <p>22 We would just -- as we've indicated to</p> <p>23 complaint counsel that certain documents that were the</p> <p>24 subject of respondent's motion to admit certain</p> <p>25 documents from the Oversight Committee's letter, that we</p>	1327	<p>1 a motion, and by order dated March 12, 2015, in camera</p> <p>2 treated was granted to a number of provisional</p> <p>3 exhibits.</p> <p>4 If those exhibits are offered into evidence,</p> <p>5 please identify them as in camera subject to the</p> <p>6 March 12 order.</p> <p>7 MS. VANDRUFF: I understand, Your Honor.</p> <p>8 It's complaint counsel's understanding that</p> <p>9 respondent wishes to use portions of certain of those</p> <p>10 documents during his examination, and I defer,</p> <p>11 Your Honor, without having to -- we can address that now</p> <p>12 or we can address it during the examination.</p> <p>13 JUDGE CHAPPELL: Have you conferred on how</p> <p>14 you're going to handle this?</p> <p>15 MR. SHERMAN: We have, Your Honor.</p> <p>16 JUDGE CHAPPELL: Is there a disagreement?</p> <p>17 MR. SHERMAN: Yes, there is.</p> <p>18 JUDGE CHAPPELL: I'll handle the disagreements.</p> <p>19 MS. VANDRUFF: Well, I don't know that it's a</p> <p>20 disagreement, Your Honor.</p> <p>21 MR. SHERMAN: I don't know that it's a</p> <p>22 disagreement.</p> <p>23 We conferred concerning the 1718 File.</p> <p>24 Mr. Wallace, since we last were before Your Honor,</p> <p>25 produced two iterations of the 1718 File. We intend to</p>
1326	<p>1 intend to, as per the court's order, lay the proper</p> <p>2 foundation for admission of those exhibits, certain of</p> <p>3 those exhibits. Complaint counsel is aware of which</p> <p>4 exhibits we intend to comply with the court's order by</p> <p>5 laying a correct foundation.</p> <p>6 JUDGE CHAPPELL: With a witness?</p> <p>7 MR. SHERMAN: Yes, sir.</p> <p>8 JUDGE CHAPPELL: Other than Mr. Wallace?</p> <p>9 MR. SHERMAN: No, sir.</p> <p>10 JUDGE CHAPPELL: Okay. Which is why you said no</p> <p>11 to any other witnesses.</p> <p>12 MR. SHERMAN: That's correct, Your Honor.</p> <p>13 JUDGE CHAPPELL: All right. Thank you. Thanks</p> <p>14 for letting me know that.</p> <p>15 Anything further?</p> <p>16 MS. VANDRUFF: Not from complaint counsel,</p> <p>17 Your Honor. Thank you.</p> <p>18 JUDGE CHAPPELL: Let's talk about in camera</p> <p>19 issues.</p> <p>20 By a February 19, 2015 order, the parties and</p> <p>21 nonparties were directed, "If a party or nonparty has</p> <p>22 material that has been or will be offered into evidence,</p> <p>23 the deadline for filing a motion for in camera treatment</p> <p>24 is February 24, 2015."</p> <p>25 Pursuant to that order, complaint counsel filed</p>	1328	<p>1 introduce those 1718 Files into the record, but we do</p> <p>2 not intend to display those files in toto. We do not</p> <p>3 intend to display any page of those files which</p> <p>4 contains PII or PHI. We only intend to display the</p> <p>5 cover sheet so that Mr. Wallace can identify it for</p> <p>6 what it is.</p> <p>7 JUDGE CHAPPELL: These are different documents</p> <p>8 than we've seen before.</p> <p>9 MR. SHERMAN: They are the same document. They</p> <p>10 are produced from a different source.</p> <p>11 JUDGE CHAPPELL: But they're identical to</p> <p>12 documents that have been granted in camera status?</p> <p>13 MS. VANDRUFF: And Your Honor, I think that the</p> <p>14 response to that question needs to be elicited from</p> <p>15 Mr. Wallace as opposed to characterized by Mr. Sherman.</p> <p>16 JUDGE CHAPPELL: In the event there are</p> <p>17 documents that I would call related to, springing from,</p> <p>18 fruit of a document, for example, 1718 File, that are</p> <p>19 somewhat different, if they would fairly come under the</p> <p>20 in camera ruling, then bring that up, and we'll give</p> <p>21 them an identifier, like if it was RX 54, it would be</p> <p>22 RX 54-A, so we're very clear on the record.</p> <p>23 I don't need to go into another analysis for</p> <p>24 in camera if the document is very similar but in some</p> <p>25 respects different.</p>

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1 Is that clear?
 2 MS. VANDRUFF: I think it is, Your Honor,
 3 although the conference that Mr. Sherman and I had this
 4 morning, complaint counsel doesn't necessarily have any
 5 concerns about the single page that Mr. Sherman intends
 6 to use being granted in camera treatment, if that's
 7 helpful to the court.
 8 MR. SHERMAN: Well, I don't mean to sound flip.
 9 Why would you have a concern with a single page being
 10 granted in camera treatment when I think the issue that
 11 we're trying to address is whether or not it's
 12 necessary to go in camera for Mr. Wallace to identify
 13 the cover page of the document, state what it is and
 14 then --
 15 JUDGE CHAPPELL: I see. We're talking about
 16 two different things. We're talking about a document
 17 that's been granted in camera treatment and we're
 18 talking about an in camera proceeding where we clear the
 19 courtroom. And the general rule there, when in doubt,
 20 we clear out.
 21 But if the attorneys are aware where we are and
 22 the witness is advised, don't go into anything that's
 23 protected without letting us know, then we can keep the
 24 public in the courtroom.
 25 And is Mr. Wallace aware of the information

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1 that's been given in camera treatment?
 2 MR. SHERMAN: I don't know. I've not been able
 3 to speak to Mr. Wallace --
 4 JUDGE CHAPPELL: Mr. Wallace --
 5 MR. SHERMAN: -- given the type of immunity that
 6 he has.
 7 JUDGE CHAPPELL: -- if you or your attorney --
 8 if you need to answer a question and you or your
 9 attorney feel like it's getting into an area that might
 10 be in camera or kept private, just let us know that we
 11 may need to have this answer given in private, and we'll
 12 determine it at that time. All right?
 13 MS. BUCHANAN: I think one of the issues,
 14 Your Honor, is that we do not know precisely which
 15 documents he's seeking in camera treatment for.
 16 JUDGE CHAPPELL: All right. Then the attorneys
 17 questioning the witness are on guard. If the witness
 18 goes into an area that might be in camera, let me know.
 19 We try to make the hearing and proceeding
 20 public to the extent possible, but we don't want any
 21 mistakes. We can't unring the bell if something comes
 22 out in open court. And there is always someone from the
 23 press in the courtroom. And we invite them, bring them
 24 on, but there are certain things that shouldn't be
 25 disclosed.

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1 Any other questions before we hear Mr. Wallace?
 2 MR. SHERMAN: The only other -- there's a couple
 3 of small matters.
 4 I am told that Mr. Wallace is hard of hearing,
 5 so I am going to be speaking probably directly into the
 6 microphone when addressing him. And I would, you know,
 7 suggest and implore complaint counsel to do the same, as
 8 well as the court, may it please the court.
 9 JUDGE CHAPPELL: Would it help to question the
 10 witness from the middle of the courtroom?
 11 MS. BUCHANAN: Yes, Your Honor, it would.
 12 Mr. Wallace also reads lips, and so when you're
 13 questioning the witness and any of the parties, if they
 14 can directly face him, he can hear out of his left ear,
 15 and so he is very hard of hearing and if counsel could
 16 look directly at him when they're asking questions.
 17 JUDGE CHAPPELL: Unfortunately, the acoustics
 18 are not that good. They were, however, state of the art
 19 when this building was built in 54 A.D., but it's
 20 difficult to hear in the courtroom.
 21 With that, call your next witness.
 22 MR. SHERMAN: One other matter, Your Honor.
 23 JUDGE CHAPPELL: All right.
 24 MR. SHERMAN: Mr. Wallace's counsel has
 25 requested that she be allowed to sit at counsel table

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1 while Mr. Wallace is being questioned. We have no
 2 objection to that, but it's your courtroom, Judge.
 3 MS. VANDRUFF: And there's no objection from
 4 us.
 5 JUDGE CHAPPELL: Do you want to sit over
 6 here (indicating)?
 7 MS. BUCHANAN: I'm happy to sit anywhere.
 8 JUDGE CHAPPELL: I mean, have you chosen a
 9 desired location?
 10 MS. BUCHANAN: Well, I actually was thinking the
 11 witness stand was --
 12 JUDGE CHAPPELL: It's over here (indicating).
 13 MS. BUCHANAN: Oh, okay. Well, then sure, the
 14 other side is actually more convenient.
 15 JUDGE CHAPPELL: Our dock is over
 16 here (indicating).
 17 So if you want to give her a chair or if she
 18 wants to -- whatever you guys want to do is fine.
 19 (Pause in the proceedings.)
 20 MR. SHERMAN: One other housekeeping matter,
 21 Your Honor.
 22 If there are any witnesses in the courtroom, I
 23 would request sequestration of any other witnesses,
 24 particularly those who may be called in rebuttal or
 25 those who have testified before. I don't know that

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1 there are.
 2 JUDGE CHAPPELL: The rule has just been
 3 invoked. Anyone who knows they're going to be a
 4 witness in this proceeding needs to leave the
 5 courtroom.
 6 MS. VANDRUFF: Your Honor, may I approach?
 7 JUDGE CHAPPELL: Off the record?
 8 MS. VANDRUFF: We can do it off the record or
 9 in camera. I don't think it's appropriate to do it in
 10 open court.
 11 JUDGE CHAPPELL: All right. Come on up.
 12 MS. VANDRUFF: Thank you.
 13 (At the bench, the following discussion was held
 14 off the public record.)
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 20 (In open court.)
 21 JUDGE CHAPPELL: Are there any Tiversa employees
 22 in the courtroom? If so, please stand and identify
 23 yourselves.
 24 MR. LIBEN: Your Honor, my name is Lucas Liben.
 25 I'm outside counsel for Tiversa. There are no Tiversa

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1 employees in the courtroom this morning.
 2 JUDGE CHAPPELL: Thank you.
 3 (At the bench, the following discussion was held
 4 off the public record.)
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 14 (In open court.)
 15 JUDGE CHAPPELL: Go ahead, Mr. Sherman.
 16 MR. SHERMAN: Your Honor, I will withdraw my
 17 motion for sequestration of the witnesses at this time
 18 with a reservation of rights to remake the motion should
 19 circumstances change.
 20 JUDGE CHAPPELL: Okay. And I'll request that
 21 counsel for Tiversa inform the court if any employees of
 22 your client enter the courtroom.
 23 MR. LIBEN: Absolutely, Your Honor.
 24 JUDGE CHAPPELL: Thank you.
 25 Mr. Sherman, call your next witness.

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1 MR. SHERMAN: Rick Wallace.
 2 - - - - -
 3 Whereupon --
 4 RICHARD EDWARD WALLACE
 5 a witness, called for examination, having been first
 6 duly sworn, was examined and testified as follows:
 7 DIRECT EXAMINATION
 8 BY MR. SHERMAN:
 9 **Q. Mr. Wallace, for the record, could you state**
 10 **your full name.**
 11 A. Richard Edward Wallace.
 12 JUDGE CHAPPELL: If at any time you don't hear a
 13 question, just let us know.
 14 THE WITNESS: Okay.
 15 BY MR. SHERMAN:
 16 **Q. And you can hear me okay?**
 17 A. Yeah.
 18 **Q. Mr. Wallace, are you a former employee of a**
 19 **company known as Tiversa?**
 20 A. Yes, I am.
 21 **Q. When did you begin your employment with**
 22 **Tiversa?**
 23 A. July of 2007.
 24 **Q. When did you end or did your employment end**
 25 **with Tiversa?**

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1 A. Did I do what?
 2 **Q. When did your employment end?**
 3 A. February of 2014.
 4 **Q. When you began your employment with Tiversa --**
 5 **well, how were you contacted to -- strike that.**
 6 **How did you find out that there was an**
 7 **employment opportunity at Tiversa?**
 8 A. I was mentioned in a news article out of
 9 Fox News Chicago, and employees at Tiversa saw that I
 10 was quoted in that article and they made contact with
 11 me.
 12 **Q. What was the substance of that article?**
 13 A. It was the ability to find and expose data, PII,
 14 that is loose on peer-to-peer networks.
 15 **Q. And so you were the subject of an article based**
 16 **on your ability to find PII on peer-to-peer networks?**
 17 A. Yes. Uh-huh.
 18 **Q. And were you finding PII on peer-to-peer**
 19 **networks for any particular purpose at that time?**
 20 A. At that time, no, other than, prior to being
 21 mentioned in this article, my wife was in the Army --
 22 she was a major in Germany -- and we were looking for
 23 soldiers' information that has been inadvertently
 24 exposed.
 25 JUDGE CHAPPELL: She was a major in the

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1 U.S. Army?
 2 THE WITNESS: Yes. Uh-huh.
 3 BY MR. SHERMAN:
 4 **Q. Which employee from Tiversa contacted you?**
 5 A. Bob Boback.
 6 **Q. And who is Bob Boback?**
 7 A. He was the CEO or still is the CEO as far as I
 8 know.
 9 **Q. And did Bob Boback describe for you what he**
 10 **wanted you to do in the course of your employment with**
 11 **Tiversa?**
 12 A. Yes.
 13 **Q. What did he say?**
 14 A. They arranged for me to travel from Illinois out
 15 to Pittsburgh, where there were two meetings that I had
 16 with Bob and then also the rest of the executive team,
 17 and I would be hired as a forensic analyst.
 18 **Q. And what was your understanding of what a**
 19 **forensic analyst at Tiversa would be required to do?**
 20 A. A forensic analyst at Tiversa would not be
 21 limited to but that one function would be to look
 22 through data that has been downloaded and ticket it for
 23 clients, meaning write up a one-page narrative
 24 normally, where the information is found, what type of
 25 information it is and who the disclosing source could

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1 possibly be.
 2 **Q. In your meetings with Tiversa prior to**
 3 **employment, was Tiversa's business explained to you; in**
 4 **other words, did they explain what Tiversa was in the**
 5 **business of doing?**
 6 A. Yes. Data security company.
 7 Data security.
 8 **Q. And being a data security company, they did**
 9 **what?**
 10 A. They would scour peer-to-peer networks and
 11 download information that's available on predominantly
 12 the Gnutella network back in those days.
 13 JUDGE CHAPPELL: I just want the record to be
 14 clear.
 15 Is that what you did or what Tiversa did?
 16 THE WITNESS: Is that what what?
 17 JUDGE CHAPPELL: What you just described, is
 18 that what your job was or is that what Tiversa did?
 19 THE WITNESS: Tiversa's platform was a series of
 20 algorithms that allowed the entire peer-to-peer network
 21 to be captured not going any deeper into any computer
 22 system but just has more breadth.
 23 JUDGE CHAPPELL: So we're probably going to hear
 24 more about what your job was.
 25 Was there anyone else at Tiversa doing what you

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1 did at the time?
 2 THE WITNESS: Yes.
 3 JUDGE CHAPPELL: Who was that?
 4 THE WITNESS: There was Keith Tagliaferri. He
 5 was an analyst. We were just basically the only two
 6 analysts at that time. The other people were sales and
 7 support and executive level.
 8 JUDGE CHAPPELL: So there were two Tiversa
 9 employees, one being you, doing basically the same job.
 10 THE WITNESS: Right.
 11 JUDGE CHAPPELL: Thank you.
 12 BY MR. SHERMAN:
 13 **Q. Can you describe how you did your job when you**
 14 **got to Tiversa, what did you do?**
 15 A. When I was first brought on, we were preparing
 16 for a congressional hearing, and I was told to basically
 17 use any and all means available to find information that
 18 would be relevant for that hearing.
 19 **Q. What kind of information was relevant for that**
 20 **hearing?**
 21 A. Everything from health insurance information to,
 22 you know, PII, Social Security numbers, basically
 23 anything that should not be out, you know, on these
 24 networks.
 25 **Q. Is it safe to assume that you did that and you**

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1 **provided that information to whomever was testifying at**
 2 **the congressional hearing for Tiversa?**
 3 A. Yes, I did.
 4 **Q. And who testified at the congressional hearing**
 5 **for Tiversa?**
 6 A. That was Bob Boback, our CEO.
 7 **Q. Did you attend the hearing?**
 8 A. I did not.
 9 JUDGE CHAPPELL: Let me ask a question.
 10 Sometimes I wait until the end, but there are certain
 11 phrases of things I need to understand. We've been
 12 waiting a long time for Mr. Wallace, so I have a few
 13 things I just need to understand.
 14 I've heard you talk about viewing, searching and
 15 downloading. In the context of your job at Tiversa,
 16 tell me what each term means, "downloading," "viewing"
 17 and "searching." Did you do all of these or do they
 18 mean the same thing? Tell me what they meant in the
 19 context of your work.
 20 THE WITNESS: There were multiple positions --
 21 or multiple activities under my position. One of them
 22 would have been, you know, using a standard,
 23 off-the-shelf peer-to-peer client, such as LimeWire or
 24 BearShare or Kazaa or Morpheus, any of those that are,
 25 you know, affiliated with the Gnutella network. I would

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1 be able to use those clients to supplement other
 2 information that Tiversa's system possibly hadn't
 3 downloaded.
 4 So it would be just another tool to supplement
 5 the information that Tiversa would have in the data
 6 store.
 7 JUDGE CHAPPELL: Who made the decision of what
 8 to download?
 9 THE WITNESS: That would be the person sitting
 10 at the keyboard, so me.
 11 JUDGE CHAPPELL: Did you have a set of written
 12 parameters like if you find this, you download it, or
 13 how did that work?
 14 THE WITNESS: No. Because it would be very
 15 difficult to know what's inside of a file prior to
 16 downloading it. You know, it could be a file titled,
 17 you know, ABC123, and inside of that file could be
 18 several thousand Social Security numbers or it could be,
 19 you know, a child's homework, so you wouldn't really
 20 know what you're downloading until you open it up and
 21 review the data.
 22 JUDGE CHAPPELL: So when you did a search, to
 23 do a view, you would have to download; is that correct?
 24 THE WITNESS: What you would do is you would
 25 issue a search, for example, whatever type of

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1 information you're looking for. You would -- if we were
 2 looking for insurance information for a healthcare
 3 company, I might use the name of that company, I might
 4 use "insurance," I might use "report," anything that
 5 would generate a file to download or would be able to
 6 identify an exposed file at -- on one of these
 7 networks.
 8 JUDGE CHAPPELL: And once you downloaded a
 9 file, what did you do with it? Did you decide that,
 10 okay, this is worth something and then you tell
 11 Mr. Boback?
 12 THE WITNESS: Yes.
 13 JUDGE CHAPPELL: How did that process work?
 14 THE WITNESS: Basically, I worked very closely
 15 at the time with Bob Boback. If it was something of --
 16 significant in nature, then I would definitely go to
 17 Bob and say this is what we have, you know, and he
 18 would make the decision at that point how to best
 19 monetize that information, whether it be giving it to a
 20 salesperson or him calling the company directly.
 21 JUDGE CHAPPELL: All right. Thank you.
 22 BY MR. SHERMAN:
 23 **Q. So, Mr. Wallace, when you were viewing files, is**
 24 **it correct to say that when you were viewing files on**
 25 **the network, you were not actually viewing the content**

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1 **of those files?**
 2 A. You would start out by viewing the file title,
 3 the type of file that it is, and you would record the IP
 4 and port.
 5 **Q. And was a decision made based on the title**
 6 **whether you would then download the file to attempt to**
 7 **view the content?**
 8 A. No. I mean, this is on a DSL line, so it's not
 9 going to cost you any more to download 50 files today
 10 rather than, you know, 150, so basically pulling down
 11 any and all information that was available.
 12 **Q. So is it your testimony that while doing your**
 13 **job, you would search the peer-to-peer networks and pull**
 14 **down any and all information that was available?**
 15 A. That is correct, yes.
 16 **Q. You used the term "pull down."**
 17 **Does that mean that you would download those**
 18 **files?**
 19 A. Yes.
 20 When you are on these networks, you have the
 21 ability to find what you're searching for. You know,
 22 you find a file that you can also browse that host and
 23 see what other files are emanating from that IP
 24 address.
 25 JUDGE CHAPPELL: In your job, did you do a

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1 complete search like a Google search of the Internet or
 2 did you only search peer-to-peer networks?
 3 THE WITNESS: Normally only peer-to-peer
 4 networks. However, if there was not enough information
 5 to identify who the possible source of the files are,
 6 then you might go to Facebook and see if they,
 7 you know -- if you have meta data, you might be able to
 8 go find their Facebook profile or a news article or
 9 something like that on Google that would help you
 10 identify the person that the -- is the source of the
 11 information.
 12 JUDGE CHAPPELL: So am I correct that the first
 13 broad net you cast was a peer-to-peer search only?
 14 THE WITNESS: That is correct, yes.
 15 JUDGE CHAPPELL: And then you would drill down
 16 if need be.
 17 THE WITNESS: And then drill down from there,
 18 yes.
 19 BY MR. SHERMAN:
 20 **Q. After the testimony at the congressional**
 21 **hearing for which you provided some documentation, did**
 22 **there begin to be communications between Tiversa and the**
 23 **FTC?**
 24 A. Yes.
 25 **Q. How soon after the congressional hearing did**

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1 **these communications begin?**
 2 A. I couldn't say for sure, but I would venture to
 3 speculate maybe around two months after.
 4 **Q. And were you present during these**
 5 **communications?**
 6 A. Yes.
 7 **Q. And how often were these communications**
 8 **occurring once they began?**
 9 A. There were different things happening, so
 10 sometimes there would be communication that was quite
 11 frequent, other times, you know, maybe weekly.
 12 JUDGE CHAPPELL: For the record, you asked him a
 13 question about after the congressional hearing. Have
 14 you established on the record when that began?
 15 BY MR. SHERMAN:
 16 **Q. The congressional hearings that you believe I'm**
 17 **talking about occurred in 2007, shortly after you began**
 18 **working at Tiversa; correct?**
 19 A. That's correct. July 2007.
 20 JUDGE CHAPPELL: Just so I'm clear -- I'm asking
 21 you this -- these letters from Chairman Darrell Issa,
 22 the letters that we got, that all began in 2007?
 23 MR. SHERMAN: No, sir.
 24 JUDGE CHAPPELL: This is a different hearing?
 25 MR. SHERMAN: Yes, sir.

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1 JUDGE CHAPPELL: All right. Let's just keep the
 2 record clear then.
 3 MR. SHERMAN: I understand.
 4 BY MR. SHERMAN:
 5 **Q. You said sometimes the communications between**
 6 **Tiversa and the FTC were weekly; correct?**
 7 A. Yes.
 8 **Q. Were there times when they were more frequent**
 9 **than that?**
 10 A. There were times when I was working on a project
 11 specifically for the FTC that there might need to be
 12 several calls in a short period of time to clarify,
 13 you know, rectify, explain.
 14 **Q. And was that during the period two months after**
 15 **the 2007 congressional hearings or was that at some**
 16 **later time?**
 17 A. It was at a later time. I couldn't say
 18 specifically.
 19 **Q. So let's talk about the period more closely**
 20 **related to immediately after the 2007 congressional**
 21 **hearings.**
 22 **Correct me if I'm wrong. I believe your**
 23 **testimony is that there began to be communication**
 24 **between Tiversa and the FTC approximately two months**
 25 **after those hearings took place. Correct?**

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1 A. Yes, approximately.
 2 **Q. And during that time, the communications were**
 3 **how frequent?**
 4 A. It was hit-and-miss.
 5 We did, you know, receive a visit from some
 6 individuals from the FTC where we were able to showcase,
 7 if you will, the technology and type of information
 8 that's available on these networks, but it wasn't --
 9 you know, there was a process there where there were
 10 some legal hurdles, from what I understand, that had to
 11 be dealt with prior to the FTC using the data we could
 12 provide.
 13 JUDGE CHAPPELL: When you say you got a visit
 14 from the FTC, where did these visits take place, city
 15 and town -- I mean, city and state?
 16 THE WITNESS: What was it?
 17 JUDGE CHAPPELL: Where did the visits take
 18 place, what city and what state?
 19 THE WITNESS: Cranberry Township at Tiversa's --
 20 this is prior to Tiversa buying the building in
 21 Pittsburgh.
 22 JUDGE CHAPPELL: In Pennsylvania?
 23 THE WITNESS: Yes.
 24 BY MR. SHERMAN:
 25 **Q. You indicated that you participated in these**

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1 **communications beginning in 2007; correct?**
 2 A. Yes.
 3 **Q. What was the subject matter of those**
 4 **communications? What did you talk about?**
 5 A. We talked about information that was available
 6 on these networks.
 7 You know, there's always the big wow factor when
 8 people would visit our facility, like, you know, my
 9 gosh, I can't believe that this information is available
 10 for anyone to download.
 11 Then it -- it went from there to providing
 12 information that only met a certain threshold that was
 13 relatively fluid at the beginning, but we were able to
 14 work through it.
 15 **Q. So are you saying that the FTC began requesting**
 16 **information that met a certain threshold?**
 17 MS. VANDRUFF: Objection, Your Honor. This is
 18 respondent's witness. I'd ask that he not lead the
 19 witness, please.
 20 JUDGE CHAPPELL: That was a good example of a
 21 leading question. Sustained.
 22 I know you were clarifying, but it was leading.
 23 BY MR. SHERMAN:
 24 **Q. Did the FTC begin requesting information that**
 25 **met a certain threshold?**

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1 A. Yes.
 2 And Bob Boback did not feel comfortable
 3 providing information to the FTC under Tiversa's name.
 4 At the time, there was talk of a possible acquisition,
 5 that Tiversa would be acquired by another large identity
 6 theft company, so we didn't want to muddy the waters at
 7 the time, so that extended the whole process.
 8 **Q. You mentioned the FTC visiting Tiversa in**
 9 **Pennsylvania; correct?**
 10 A. Yes.
 11 **Q. Do you recall what year that occurred?**
 12 A. That would have been the fall or winter of
 13 2007.
 14 **Q. So that was after the congressional hearings and**
 15 **testimony that we have been talking about?**
 16 A. Yes.
 17 **Q. When did the FTC begin requesting information of**
 18 **a certain threshold, as you described?**
 19 A. It was after another entity was set up that a
 20 formal request could be made from the FTC to Tiversa.
 21 That's when that threshold and different types of
 22 information were gathered up and, you know, put
 23 together.
 24 JUDGE CHAPPELL: I have a question.
 25 Do you know who initiated the contact or

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1 communications with Tiversa and the FTC?
 2 THE WITNESS: Well, it was Bob Boback was
 3 testifying along with -- and I'm not -- I don't remember
 4 her name, but it was some executive from the FTC at the
 5 same hearing.
 6 JUDGE CHAPPELL: So there would have been a
 7 meeting at the hearing.
 8 THE WITNESS: They were -- both Bob and the lady
 9 from the FTC were testifying at the same hearing.
 10 JUDGE CHAPPELL: But you're not sure who
 11 suggested meeting, whether it was the FTC or Tiversa.
 12 THE WITNESS: No. I don't know.
 13 JUDGE CHAPPELL: Off the record.
 14 (Discussion off the record.)
 15 Go ahead.
 16 BY MR. SHERMAN:
 17 **Q. Mr. Wallace, do you know what a civil**
 18 **investigative demand is?**
 19 A. Yes. I'm familiar with that.
 20 **Q. And how are you familiar with what that is?**
 21 A. That is a document that came from the FTC to --
 22 well, there was some talk about it being issued to
 23 Tiversa. We backed out of that process and accepted it
 24 through another company.
 25 **Q. What other company accepted the civil**

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1 **investigative demand?**
 2 A. The Privacy Institute.
 3 **Q. Do you know whether the Privacy Institute**
 4 **existed prior to the talk of issuing the civil**
 5 **investigative demand to Tiversa?**
 6 A. No, it did not.
 7 **Q. So is it your understanding that the**
 8 **Privacy Institute was established for the sole purpose**
 9 **of receiving the CID from -- the civil investigative**
 10 **demand from the FTC?**
 11 MS. VANDRUFF: Objection, Your Honor. Leading.
 12 JUDGE CHAPPELL: Any response?
 13 MR. SHERMAN: I can rephrase the question.
 14 JUDGE CHAPPELL: Thank you.
 15 BY MR. SHERMAN:
 16 **Q. What is your understanding as to why the**
 17 **Privacy Institute was established?**
 18 A. It was a way to protect Tiversa from knowingly
 19 giving other entities information because, like I said,
 20 at the time there were some talks about an acquisition.
 21 **Q. Did you do anything in order to help the**
 22 **Privacy Institute respond to the civil investigative**
 23 **demand?**
 24 A. Yes.
 25 **Q. What did you do?**

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1 (Pause in the proceedings.)
 2 Do you still need to approach?
 3 MR. SHERMAN: If he can identify what it is, we
 4 will not.
 5 BY MR. SHERMAN:
 6 **Q. Mr. Wallace, can you identify what that document**
 7 **is?**
 8 A. It looks to me like it's a redacted spreadsheet
 9 that would have information from LabMD in their
 10 insurance aging file. This probably came from a list
 11 that we used for IRCs they're called, incident response
 12 cases.
 13 MS. VANDRUFF: Your Honor, I'm sorry to
 14 interrupt the witness, but his testimony was predicated
 15 with that it probably did, and I'd ask that the witness
 16 be restricted to what's within his personal knowledge as
 17 opposed to his speculation.
 18 JUDGE CHAPPELL: That's sustained.
 19 MS. VANDRUFF: Thank you, Your Honor.
 20 MR. SHERMAN: Your Honor, may we approach?
 21 JUDGE CHAPPELL: Yes.
 22 (At the bench, the following discussion was held
 23 off the public record.)
 24
 25

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1 A. I collected companies' information and the
 2 actual files that were associated, burned those to
 3 discs, and they were provided in compliance with the
 4 CID.
 5 **Q. Did you provide anything else in response to the**
 6 **CID?**
 7 A. Not that I'm aware of.
 8 JUDGE CHAPPELL: I just want to be clear of
 9 something. This is not something within my purview.
 10 Was there only one civil investigative demand
 11 that we're talking about? Was there only one sent to
 12 Tiversa?
 13 THE WITNESS: Yes. Only one that I'm aware of.
 14 JUDGE CHAPPELL: Thank you.
 15 BY MR. SHERMAN:
 16 **Q. Is there a page on the screen in front of you,**
 17 **Mr. Wallace?**
 18 A. Yes. I can't really tell what it is, but there
 19 is.
 20 I'm familiar with what that is.
 21 MR. SHERMAN: Your Honor, can we approach the
 22 bench?
 23 JUDGE CHAPPELL: Yes. But whoever is displaying
 24 the document can increase it to 100 percent. You can
 25 make it larger.

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1 **Q. What is an IRC?**
2 A. An incident response case. It would be if
3 you -- if an individual or a company has a data breach,
4 their information, as the analysts are going through
5 data, they would enter it into a database or a
6 spreadsheet so that the salespeople or Bob or whoever
7 would be able to make the phone call to describe the
8 problem that they're having and then offer them
9 remediation services.
10 **Q. So the document that you have in your hand was**
11 **created in response to the CID?**
12 A. It began as a spreadsheet for the IRCs but was
13 then copied and pasted for response to the CID, yes.
14 And this is a working copy as well.
15 JUDGE CHAPPELL: You said that if there was a
16 data breach, the analysts would --
17 THE WITNESS: Pardon me?
18 JUDGE CHAPPELL: You said that if there was a
19 data breach found, the analysts would create an IRC?
20 THE WITNESS: You would take the information --
21 that's where this came from.
22 JUDGE CHAPPELL: And the analysts would be you
23 or the other name you gave me earlier? You were the two
24 analysts?
25 THE WITNESS: Right.

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3 (In open court.)
4 JUDGE CHAPPELL: Mr. Wallace, we've had an
5 objection which I sustained. You're allowed to testify
6 to what you know, what you saw, what you did. And maybe
7 inadvertently, because you're not an expert witness, you
8 were talking about something probably was or might be.
9 Let's stick to what you know for certain and no
10 speculation.
11 THE WITNESS: Okay.
12 JUDGE CHAPPELL: Thank you.
13 MR. SHERMAN: May I approach the witness,
14 Your Honor?
15 JUDGE CHAPPELL: Yes.
16 BY MR. SHERMAN:
17 **Q. Mr. Wallace, I've just handed you what's been**
18 **marked as RX 551 for identification purposes only.**
19 **I'll ask that you take a look at that document**
20 **and tell me whether or not you recognize it.**
21 A. Yes, I do.
22 **Q. What is it?**
23 A. This began as a list for IRCs and was the
24 information that was provided to the FTC in response to
25 the CID.

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1 JUDGE CHAPPELL: Is there something else you
2 wanted to say?
3 THE WITNESS: Or if there's a salesperson that's
4 in the data store looking around, maybe they would find
5 a company that's on here, they would put the information
6 on there, the amount of people affected, the type of
7 information it was, the file title. The only thing that
8 is not on here is the IP address.
9 JUDGE CHAPPELL: And you referred to something
10 called a data breach.
11 What would be a data breach that would create
12 this IRC?
13 THE WITNESS: It would be any of these
14 individuals who the analyst would come across their
15 information and a way for us to monetize and sell our
16 services, whether it be data monitoring, a takedown
17 notice that we could issue to an ISP.
18 The IRC is different than -- it's more of a
19 one-off, if you will. Rather than purchasing a
20 monitoring contract over an extended period of time,
21 maybe this company only has one file with 5,000 people's
22 PII it's about and they just need the name of the person
23 that is exposing it.
24 JUDGE CHAPPELL: You might have misunderstood my
25 question.

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1 At the time you and the other analysts were
 2 doing this job, what was considered to be a data
 3 breach? You said you would look at a data breach.
 4 What was a data breach? What would constitute a
 5 data breach?
 6 THE WITNESS: There was no guideline. It was
 7 based on what the analyst or the salespeople that were
 8 in the data store, what they would constitute as
 9 information that should not be available publicly.
 10 JUDGE CHAPPELL: And you used the word I think
 11 "monetize"?
 12 THE WITNESS: Yes.
 13 JUDGE CHAPPELL: Something that could be
 14 monetized?
 15 THE WITNESS: We -- early on, we were having
 16 problems at Tiversa, we were having problems selling a
 17 monitoring contract, so we started contacting individual
 18 companies when information came out, and you would be
 19 able to charge them a lesser amount than a yearlong
 20 contract, just basically a one-off to take care of that
 21 problem right then.
 22 JUDGE CHAPPELL: All right. Thank you.
 23 BY MR. SHERMAN:
 24 **Q. So, Mr. Wallace, without naming any of the**
 25 **companies on that list, does this represent -- and I**

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1 **think you've already testified to this -- does this**
 2 **represent the list that you created or compiled to**
 3 **respond to the CID?**
 4 A. Yes.
 5 **Q. Approximately how many companies appear on that**
 6 **list?**
 7 A. I believe there were eighty- -- like 89 I want
 8 to say.
 9 **Q. Was there a criteria for which companies should**
 10 **appear on that list?**
 11 A. There is.
 12 **Q. And what is it?**
 13 A. That was 100 individuals' PII. That was the
 14 threshold, if you will.
 15 **Q. And who determined that threshold?**
 16 A. I am not sure. I know it came -- I received the
 17 threshold from Bob Boback.
 18 **Q. And so is it fair to say then that each**
 19 **company's name who appears on that list had PII exposed**
 20 **for over 100 people?**
 21 A. No. I mean, I can see that that's -- there are
 22 some on here that only have ten people exposed.
 23 **Q. Why does their name appear on the list?**
 24 A. In order to basically get the most bang for our
 25 buck.

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1 **Q. Why does their name appear on the list?**
 2 A. So that the FTC would contact them and notify
 3 them of a data breach and hopefully we would be able to
 4 sell our services to them.
 5 **Q. Did someone tell you to put their name on the**
 6 **list?**
 7 A. Yes.
 8 **Q. Who?**
 9 A. Our CEO, Bob Boback.
 10 **Q. Why?**
 11 A. To use -- to be able to use any means necessary
 12 to let them know that an enforcement action is coming
 13 down the line and they need to hire us or face the
 14 music, so to speak.
 15 **Q. Did you, at the time this was created, have**
 16 **information on companies who fit the threshold but whose**
 17 **names do not appear on that list?**
 18 A. Yes.
 19 **Q. Why does their name not appear on the list?**
 20 A. The list was scrubbed of all clients in the past
 21 and future clients that we felt that there might be,
 22 you know, the prospect of doing business with them.
 23 Their information was removed.
 24 **Q. Clients of Tiversa?**
 25 A. Yes.

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1 **Q. Who made the decision to remove their names from**
 2 **the list?**
 3 A. Bob Boback.
 4 **Q. In response to a question that the judge asked**
 5 **you, you indicated that there was an effort to monetize**
 6 **this information. Do you recall saying that?**
 7 A. Yes.
 8 **Q. How did Tiversa monetize the information that**
 9 **they would gather from the peer-to-peer networks?**
 10 A. Either by selling a monitoring contract which
 11 would look for a certain amount or a certain number of
 12 keywords over a certain period of time or an IRC, which
 13 would be, again, like a one-off, that you would just
 14 take care of that, you know, that breach or that problem
 15 at that given point.
 16 **Q. Were you aware of whether every company that**
 17 **Tiversa contacted accepted the offer to do business with**
 18 **Tiversa?**
 19 A. Did you say did every company accept it? No.
 20 **Q. When a company refused to do business with**
 21 **Tiversa, did Mr. Boback have a certain reaction to**
 22 **that?**
 23 A. Yes.
 24 **Q. What was that reaction?**
 25 A. Usually it would be something to the effect of

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1 they -- you know, they -- I've heard this said many,
 2 many times, that, you know, you think you have a problem
 3 now, you just wait.
 4 It would -- their information would then
 5 proliferate over these networks, actually in our data
 6 store, but we would make it look like data had spread to
 7 multiple places to then follow up with that company
 8 again and try to get them to do business again.
 9 **Q. Are you aware of whether or not LabMD agreed or**
 10 **refused to do business with Tiversa?**
 11 A. I think initially I don't think that there was
 12 a -- I don't think that they did not want to do business
 13 with Tiversa initially, and I think that as the
 14 communication advanced back and forth from Bob and
 15 different people with LabMD, I think that that's when
 16 they decided that they did not want to do business with
 17 Tiversa.
 18 **Q. Did Mr. Boback have a reaction to LabMD's**
 19 **decision not to do business with Tiversa?**
 20 A. Yes.
 21 **Q. And what was that reaction?**
 22 A. Do I say it?
 23 MS. BUCHANAN: Answer the question.
 24 THE WITNESS: He basically said f--- him, make
 25 sure he's at the top of the list.

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1 BY MR. SHERMAN:
 2 **Q. What list?**
 3 A. This list in my hand (indicating).
 4 JUDGE CHAPPELL: Is there an average contract
 5 that you can tell me what -- what would be the cost of a
 6 contract for a company?
 7 THE WITNESS: It would depend on the size of the
 8 company. Some of the larger financial companies we were
 9 selling monitoring services for, you know, in
 10 the million dollar price range, or a small mom-and-pop
 11 company, you know, might be in the low thousands per
 12 month.
 13 JUDGE CHAPPELL: That's a million per month?
 14 THE WITNESS: A million per year. That was one
 15 of our largest contracts.
 16 BY MR. SHERMAN:
 17 **Q. You testified earlier that when a company would**
 18 **refuse to do business with Tiversa, somehow their**
 19 **information would proliferate.**
 20 A. Yes.
 21 **Q. What do you mean by that?**
 22 A. Basically what happened would -- there needed to
 23 be a reason for Bob or somebody at Tiversa to contact
 24 that individual again or that company, so in order to
 25 use the -- you basically say that your file spread to a

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1 bad guy's IP address at, you know, Apache Junction,
 2 Arizona or wherever you could find a bad guy to put the
 3 file there as far as the system sees it, but it's
 4 really -- no data is transferring.
 5 **Q. Can you explain to us --**
 6 A. Pardon me?
 7 **Q. Can you explain to us how you would make it**
 8 **appear as though the data had proliferated?**
 9 A. Sure.
 10 So as we talked about earlier, if you use a
 11 stand-alone client like a LimeWire or Kazaa or BearShare
 12 or whatever you have to supplement the data store with
 13 information, there is a folder that I would direct -- or
 14 that I would put files in that would show up in the data
 15 store, you know, with Coveo or whatever application
 16 you're using to have a front end. It would show up just
 17 like it was downloaded from that IP.
 18 JUDGE CHAPPELL: Let me get this straight.
 19 So it was your job, number one, to make it look
 20 like it was proliferated, but you also did --
 21 THE WITNESS: Yes.
 22 JUDGE CHAPPELL: -- spread the document out
 23 there.
 24 THE WITNESS: Yes.
 25 JUDGE CHAPPELL: You made it look like it and

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1 you actually did it.
 2 THE WITNESS: Pardon me?
 3 JUDGE CHAPPELL: You actually did it. You
 4 actually made it available around the Internet in
 5 peer-to-peer --
 6 THE WITNESS: No. No. We would only make it
 7 appear to have been downloaded from a known bad actor.
 8 So if you have an identity thief in Arizona,
 9 say, for example, we already know law enforcement has
 10 already dealt with that individual. We know that the IP
 11 is dead. We know that the computer is long gone.
 12 Therefore, it's easy to burn that IP address because
 13 who's going to second-guess it.
 14 JUDGE CHAPPELL: So to boil this down, you would
 15 make the data breach appear to be much worse than it
 16 actually had been.
 17 THE WITNESS: That's correct.
 18 JUDGE CHAPPELL: Go ahead.
 19 BY MR. SHERMAN:
 20 **Q. Is there a document on your screen,**
 21 **Mr. Wallace?**
 22 A. Yes.
 23 **Q. I submit to you that what's on your screen has**
 24 **been marked as CX 19 and has been admitted into evidence**
 25 **in this case.**

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1 **Do you recognize that document?**
 2 A. Yes, I do.
 3 **Q. What is that document?**
 4 A. That is a list of IP addresses that was created
 5 in the November 2013 time frame of Bob came to me and
 6 basically said that him and LabMD are having it out,
 7 there's -- I didn't really follow the whole legal
 8 proceedings, but I knew that there was some bad water
 9 there. And Bob said that under no circumstances can the
 10 insurance aging file appear to have come from a 64 IP or
 11 in the Atlanta area.
 12 These IPs that are used here, these are all
 13 identity thieves that was provided from me to Bob.
 14 **Q. How do you know these are identity thieves' IP**
 15 **addresses?**
 16 A. Because you can look in the data store and see
 17 what files they downloaded and what files they're
 18 reexposing. And plus I worked with law enforcement, so
 19 I'm very familiar with all four of these.
 20 **Q. So the purpose of creating the document in front**
 21 **of you was what?**
 22 A. That was after Bob came to me and said that
 23 under no circumstances can the insurance aging file
 24 originate from a Georgia IP address or an Atlanta area
 25 IP address. And in addition to that, he told me to

1 THE WITNESS: Yes.
 2 JUDGE CHAPPELL: "Data store," what does that
 3 mean?
 4 THE WITNESS: It is a depository of ICE long
 5 servers that as data is pulled in from different
 6 networks or peer-to-peer networks, it's stored in the
 7 data store.
 8 JUDGE CHAPPELL: Was it something on your
 9 computer, your server at Tiversa?
 10 THE WITNESS: Yes. It would be accessible from
 11 a workstation at Tiversa. There are several
 12 workstations.
 13 JUDGE CHAPPELL: And what was in the data store?
 14 THE WITNESS: That would be hard copies of
 15 files that were downloaded from the Gnutella network.
 16 JUDGE CHAPPELL: This would not be where these
 17 IP addresses would be located.
 18 THE WITNESS: Yes.
 19 JUDGE CHAPPELL: It would be or would not be?
 20 THE WITNESS: It would be.
 21 JUDGE CHAPPELL: So that was also there, where a
 22 file could be located, as well as the actual file?
 23 THE WITNESS: Yes.
 24 BY MR. SHERMAN:
 25 **Q. Mr. Wallace, during the course of your**

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1 find an individual in San Diego to include with this
 2 list.
 3 **Q. To your knowledge, was the insurance aging file**
 4 **belonging to LabMD ever found at any of these IP**
 5 **addresses on this list?**
 6 A. No, it was not.
 7 **Q. Where was the insurance aging file that belonged**
 8 **to LabMD found?**
 9 MS. VANDRUFF: Objection.
 10 THE WITNESS: It was on our workstation.
 11 MS. VANDRUFF: Mr. Wallace, excuse me. I'm
 12 sorry.
 13 Mr. Wallace may be competent to answer that
 14 question, but I believe that Mr. Sherman needs to lay
 15 the foundation first.
 16 JUDGE CHAPPELL: The question regarding where
 17 the insurance aging file that belonged to LabMD was
 18 found?
 19 MS. VANDRUFF: Correct. How Mr. Wallace would
 20 have personal knowledge of that fact.
 21 MR. SHERMAN: I'll lay a foundation,
 22 Your Honor.
 23 JUDGE CHAPPELL: All right. Go ahead.
 24 Before you do that, Mr. Wallace, you've used the
 25 term "data store."

1 **employment at Tiversa, did you find the LabMD insurance**
 2 **aging file?**
 3 A. Yes, I did.
 4 **Q. How did you find that file?**
 5 A. I was looking, using a stand-alone desktop
 6 computer, looking for a health insurance company who we
 7 were providing data services for. Again, I was using
 8 that to supplement the -- Tiversa's Eagle Vision, is
 9 what it's called or what the secret sauce is, so I was
 10 using that just to look and see if there's information
 11 that our systems were not downloading or not catching.
 12 **Q. And in doing that, you -- did you come across**
 13 **the insurance aging file?**
 14 A. Yes.
 15 **Q. And where did you find the insurance aging file?**
 16 A. That was in Atlanta.
 17 **Q. And were you able to then capture the IP**
 18 **address?**
 19 A. Yes. Basically, I downloaded the insurance
 20 aging file, saw that it was something of interest for
 21 sure, browsed the host and downloaded the additional
 22 files that were at that IP.
 23 JUDGE CHAPPELL: Let me talk about the data
 24 store again.
 25 You were talking about you would make it appear

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1 that a file was proliferated when it actually wasn't.
 2 Could you tell by looking at your data store
 3 where the file actually had been seen or downloaded from
 4 as well as these IPs you had created to make it appear
 5 to be worse?
 6 THE WITNESS: Yes. Because the folder where I
 7 would add that information to or the -- prepend the IP
 8 address to the file title, it would go into a separate
 9 folder that was called Input From Lab, so it wasn't
 10 stored in the normal directories that the rest of the
 11 files would be.
 12 JUDGE CHAPPELL: So you could -- you knew
 13 exactly where the file had been found, but how did you
 14 then show that to -- let's say Company B didn't want to
 15 have a contract and you were told to make it look like
 16 the file was all over the Internet.
 17 How did you show that information to Company B?
 18 How did you demonstrate that?
 19 THE WITNESS: Usually it would be after the
 20 fact, Bob would make contact with the company, without
 21 coming to me or coming to anyone else first, and say,
 22 you know, your file has spread to three additional IP
 23 addresses, it's in Europe and Nigeria and Poland and who
 24 knows.
 25 So then it would be up to me to make it appear

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1 that way in the data store so, if there was ever an
 2 audit or, you know, somebody was catching on, the data
 3 would be there if you -- Coveo is basically a front end
 4 for the data store. It's like a Google site, so you
 5 could type in there "insurance aging" and it's going to
 6 come up with a list of IP addresses along with the file,
 7 date and time.
 8 So in order to have that displayed, it needs to
 9 be inside the data store and indexed.
 10 JUDGE CHAPPELL: In the scenario you just gave
 11 me for fictitious Company B, when Mr. Boback told
 12 Company B that, that was untrue.
 13 THE WITNESS: Yes.
 14 BY MR. SHERMAN:
 15 **Q. So let's look at the document that's on your**
 16 **screen.**
 17 **The first set of numbers on the first horizontal**
 18 **line of information, what is that number?**
 19 A. That is an IP address.
 20 **Q. The second set of numbers, what is that?**
 21 A. That is the -- would be the date and time
 22 modified or downloaded.
 23 **Q. The third set of numbers after the "at" symbol?**
 24 A. That would be the file title and the way that it
 25 would be saved in the Tiversa data store with the IP

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1 address prepended to the file title.
 2 **Q. I think you skipped a couple.**
 3 **Right after the "at" symbol, what is that?**
 4 A. That is the time.
 5 **Q. The time of what?**
 6 A. The time of the modification. It's a date and
 7 time of when the file was either modified or
 8 downloaded.
 9 **Q. And the following numbers after that, what is**
 10 **that?**
 11 A. That is the IP address on the front with the
 12 file title. That is exactly how it would be indexed in
 13 our data store so that the IP addresses would show up
 14 properly. That's why they're in brackets, the IP
 15 address.
 16 **Q. Okay. So if someone were to go to Tiversa's**
 17 **data store around the time that -- shortly after this**
 18 **document was created and they searched the**
 19 **173.16.83.112 IP address, would they find an indication**
 20 **that the insurance aging file was downloaded from that**
 21 **IP address?**
 22 A. Yes. It will be in the Input From Lab
 23 directory.
 24 **Q. How did that information come to be there?**
 25 A. Pardon me?

1376

1 **Q. How did that information come to be there in the**
 2 **data store --**
 3 A. It would be --
 4 **Q. -- under that IP address?**
 5 A. It would be from me inputting it in there.
 6 So you have your Eagle Vision system that is
 7 automatically creating directories and saving data,
 8 files, if you will, and then there's the other half of
 9 it, which was a scratch drive, basically my drive, where
 10 I could deposit files with a modification date to make
 11 it look like on the main screen that, yes, it came from
 12 this IP address; however, if you were to go look at the
 13 file individually, you would see that it was put in
 14 there from the input.
 15 JUDGE CHAPPELL: Hold on a second.
 16 This IP address, let's say the line 1,
 17 173., et cetera, are you familiar with that IP address,
 18 the first line?
 19 THE WITNESS: Yes. 173.16.83?
 20 JUDGE CHAPPELL: What is that site?
 21 THE WITNESS: That is a -- it's important to
 22 understand, IP addresses are only leased for a certain
 23 period of time.
 24 In 2008, this IP address went back to a known
 25 identity thief in Apache Junction, Arizona. Right now,

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1 this IP address resolves to Chicago and it's a complete
 2 separate, you know, different computer.
 3 JUDGE CHAPPELL: I'm just trying to clarify
 4 this.
 5 THE WITNESS: Uh-huh.
 6 JUDGE CHAPPELL: If I understood you correctly,
 7 it was not true that the file was at this IP address.
 8 THE WITNESS: That is correct.
 9 JUDGE CHAPPELL: And if I were Company B in my
 10 earlier scenario, do I have any way to go to
 11 Apache Junction and see if they've downloaded my data?
 12 THE WITNESS: We would see that in our -- in our
 13 real data store, we would show -- like, for example,
 14 with this one, this individual had over -- I was very
 15 familiar with this guy. He had over 3,000 tax returns,
 16 and he was zipping them up and selling them. Therefore,
 17 we knew that he was a bad actor, and it made it easy to
 18 put this file there, so to speak, even though he never
 19 had it physically on that computer, but we made it
 20 look -- appear like he did.
 21 JUDGE CHAPPELL: All right. So if I follow you
 22 correctly, you never -- the file was never actually at
 23 Apache Junction.
 24 THE WITNESS: No.
 25 JUDGE CHAPPELL: But I, Company B, had no way of

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1 ever verifying that or knowing that.
 2 THE WITNESS: Right.
 3 BY MR. SHERMAN:
 4 **Q. For the other three IP addresses and line of**
 5 **information on this document the same is true as for the**
 6 **first line, that you put this information into Tiversa's**
 7 **data store under these IP addresses for the purpose of**
 8 **making it appear that the insurance aging file was found**
 9 **there.**
 10 A. That is correct.
 11 MS. VANDRUFF: Objection, Your Honor. Leading.
 12 JUDGE CHAPPELL: That's sustained.
 13 I'll disregard the response to that question.
 14 Do you want to rephrase?
 15 MS. VANDRUFF: Thank you, Your Honor.
 16 MR. SHERMAN: Yes, sir. We'll move through it.
 17 BY MR. SHERMAN:
 18 **Q. Line 2 on CX 19?**
 19 A. Uh-huh.
 20 **Q. What does the first set of numbers represent?**
 21 A. That is an IP address.
 22 **Q. The second set of numbers?**
 23 A. Pardon me?
 24 **Q. I'm sorry.**
 25 **The second set of numbers, what does that**

1379

1 **represent?**
 2 A. I still didn't hear you.
 3 **Q. What does the second set of numbers --**
 4 A. Oh, second set.
 5 **Q. -- represent?**
 6 A. That is the date, the date and time of the
 7 modification or download.
 8 **Q. And then the third line of information, the**
 9 **third?**
 10 A. That would be the file title as it would appear
 11 in the data store for any input.
 12 **Q. And is it true that you, Rick Wallace, went into**
 13 **Tiversa's data store and entered this information under**
 14 **the 68.107.85.250 IP address to make it appear that that**
 15 **file was found there?**
 16 MS. VANDRUFF: Objection, Your Honor. Leading.
 17 JUDGE CHAPPELL: Yes. Beginning with "is it
 18 true" pretty much indicates it's leading.
 19 Sustained.
 20 MS. VANDRUFF: Thank you, Your Honor.
 21 BY MR. SHERMAN:
 22 **Q. So the information that appears on the second**
 23 **line?**
 24 A. Pardon?
 25 **Q. The information that appears on the second line**

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1 **of this exhibit?**
 2 A. Okay. Yes.
 3 **Q. You're familiar with that information; correct?**
 4 A. Yes.
 5 **Q. Did you place that information in Tiversa's data**
 6 **store?**
 7 A. Yes.
 8 **Q. And why did you place that particular**
 9 **information in Tiversa's data store?**
 10 A. Again, this was after Bob came to me and said
 11 that we needed a new spread on the insurance aging file
 12 because there were some things going on between LabMD
 13 and Tiversa and in no way, shape or form could it ever
 14 have been found in Atlanta. There's something to do
 15 with Bob claiming that we never connected to an IP -- to
 16 a LabMD computer.
 17 **Q. And is that true, that Tiversa never connected**
 18 **to a LabMD computer?**
 19 A. That is not true.
 20 **Q. The third line of information on CX 19?**
 21 A. Yes.
 22 **Q. Oh, by the way, was the insurance aging file**
 23 **ever found, to your knowledge, at 68.107.85.250?**
 24 A. No, it was not.
 25 **Q. The third line of information on CX 19, are you**

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1 **familiar with that information?**
 2 A. That is also a known person who -- called an
 3 information concentrator or an identity thief, someone
 4 who is downloading information that's out there in the
 5 wild that's available.
 6 **Q. And did you place this information in Tiversa's**
 7 **data store?**
 8 A. Yes.
 9 **Q. And the purpose of placing this information in**
 10 **Tiversa's data store was for what?**
 11 A. Because Bob had came to me, explained that we
 12 had to have spread on these files and had to move it off
 13 of the IP address that would emanate from and, you know,
 14 in Atlanta.
 15 **Q. And so that's what you did; correct?**
 16 A. Yes.
 17 **Q. The fourth line of information, are you familiar**
 18 **with that as well?**
 19 A. Yes.
 20 **Q. And did you place this information in Tiversa's**
 21 **data store?**
 22 A. Yes.
 23 **Q. And why did you place this information in**
 24 **Tiversa's data store?**
 25 A. It was just another IP address that was

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1 available that you could see was a bad actor.
 2 **Q. If someone then goes into Tiversa's data store**
 3 **and they see this information, what are they led to**
 4 **believe?**
 5 A. That the file was -- that the file would have
 6 emanated from that IP address. It would -- it would
 7 show up in a way, if you search for that IP address,
 8 where it would be a laundry list of files and insurance
 9 aging would show up in that list based on an IP search.
 10 **Q. If you do an IP search of what?**
 11 A. Of the data store.
 12 **Q. Tiversa's data store?**
 13 A. Yes.
 14 JUDGE CHAPPELL: Who has access to the data
 15 store?
 16 THE WITNESS: Pardon me?
 17 JUDGE CHAPPELL: Who has access to the data
 18 store?
 19 THE WITNESS: Basically every employee at
 20 Tiversa.
 21 JUDGE CHAPPELL: Did LabMD have access to the
 22 Tiversa data store?
 23 THE WITNESS: Did who? LabMD? No. No. We
 24 would --
 25 JUDGE CHAPPELL: I'm sorry. Let me restate

1383

1 that.
 2 Was there a LabMD data store?
 3 THE WITNESS: Was there?
 4 JUDGE CHAPPELL: A LabMD data store.
 5 MR. SHERMAN: May I, Your Honor?
 6 THE WITNESS: I'm not sure --
 7 JUDGE CHAPPELL: Go ahead.
 8 BY MR. SHERMAN:
 9 **Q. The question was: Was there a LabMD data**
 10 **store?**
 11 A. No. LabMD's data, I believe that there were
 12 19 files total. They were all put in their own
 13 directory on the data store along with millions of other
 14 IP addresses.
 15 JUDGE CHAPPELL: And these -- what is this
 16 document number on the screen?
 17 MR. SHERMAN: CX 19.
 18 JUDGE CHAPPELL: CX 19, these four IP addresses
 19 were created by you, and they're actually -- for all
 20 practical purposes, they're fake, as far as the aging
 21 file was not found on these three IP addresses;
 22 correct?
 23 THE WITNESS: On all four of them.
 24 JUDGE CHAPPELL: And you created all four of
 25 these at whose request?

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1 THE WITNESS: At Bob's.
 2 JUDGE CHAPPELL: Bob Boback requested that.
 3 THE WITNESS: Yes.
 4 JUDGE CHAPPELL: How was this information
 5 presented to LabMD?
 6 THE WITNESS: It never was presented in --
 7 other than I typed it up and I think it was either
 8 e-mailed or -- I'm not really sure. But I know that
 9 the actual file was never -- the actual files that were
 10 doctored up were never provided to LabMD. They just --
 11 I just had to put them in the data store so they would
 12 look real.
 13 JUDGE CHAPPELL: But again, if LabMD couldn't
 14 access the data store, what was the point?
 15 THE WITNESS: Because if there was ever an
 16 audit or if somebody were to come in and say, Hey,
 17 you know, show me a bad guy at 173, here he has already
 18 been prosecuted by law enforcement and we know the IP is
 19 dead, I would be able to show, wow, look at this. It
 20 was basically for the wow factor.
 21 One thing I would like to mention is the date
 22 and the time was also adjusted on each file, so it was
 23 very difficult at times and time-consuming because I had
 24 to go backwards, like on the 11-5-2008 at 11:26 p.m.,
 25 that file, the modified date on that had to be changed

1385

1 to reflect the same time frame when actual downloads
 2 were happening from that IP address.
 3 JUDGE CHAPPELL: Go ahead.
 4 BY MR. SHERMAN:
 5 **Q. You mentioned the word "spread."**
 6 A. Uh-huh.
 7 **Q. What does that mean?**
 8 A. That would be where a file is available and it
 9 appears to have been downloaded and being reshared to
 10 the network by multiple people.
 11 **Q. Isn't that a point of CX 19?**
 12 A. Yes.
 13 **Q. Mr. Wallace, have you ever traveled to**
 14 **Washington, D.C. to meet with the FTC?**
 15 A. Yes.
 16 **Q. When did you do that?**
 17 A. I would say it would have been -- it would have
 18 been after the CID was issued, but I'm not sure of the
 19 exact date.
 20 **Q. Would it also have been after the list of**
 21 **companies was provided pursuant to the CID?**
 22 A. Yes. That was the purpose of the meeting, was
 23 to clarify the -- how I put the data together, how it
 24 would correspond with the list and the actual file.
 25 JUDGE CHAPPELL: Is there any dispute as to this

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1 issue? If not, may he place the witness?
 2 MS. VANDRUFF: I'm sorry, Your Honor. I don't
 3 understand the question.
 4 JUDGE CHAPPELL: Is there a dispute as to when
 5 he came to visit with the FTC?
 6 MS. VANDRUFF: I don't believe there's another
 7 witness who has testified about when he came to meet
 8 with the FTC, so I actually -- I don't --
 9 JUDGE CHAPPELL: All right.
 10 BY MR. SHERMAN:
 11 **Q. You testified that the purpose of the meeting**
 12 **was to discuss the information provided pursuant to the**
 13 **CID; is that correct?**
 14 A. Yes.
 15 **Q. And do you recall who was at the meeting?**
 16 A. There were multiple people. I mean, I don't --
 17 I don't remember specific -- I do remember Alain was
 18 there.
 19 **Q. Alain who?**
 20 A. Alain Sheer.
 21 **Q. How long did the meeting last?**
 22 A. Gosh, it's been so long ago. A couple of hours
 23 maybe.
 24 **Q. And was there any discussion of particular**
 25 **companies that appeared on the list? And -- and don't**

1387

1 **name them if there was.**
 2 A. Well, all of them would have been discussed. I
 3 mean, it was something where you could look at the list
 4 and then say okay, this is a file that corresponds with
 5 this entry.
 6 **Q. Was LabMD specifically discussed?**
 7 A. Was LabMD on the list?
 8 **Q. Were they specifically discussed that day, if**
 9 **you remember, at the meeting with the FTC?**
 10 A. I don't remember.
 11 **Q. How did you get to D.C.?**
 12 A. There was a previous commitment that we just
 13 worked in an afternoon meeting. There was I believe
 14 four of us that came from Tiversa.
 15 **Q. Who traveled to D.C. from Tiversa?**
 16 A. Bob Boback was driving. I was in the car,
 17 Anju Chopra and Keith Tagliaferri.
 18 **Q. Following the meeting, did the people from**
 19 **Tiversa have discussions about the meeting?**
 20 A. Yeah. I mean, we -- Bob spoke to me about next
 21 steps on the way home.
 22 **Q. And what were the next steps?**
 23 MS. VANDRUFF: Object to the extent that it's
 24 being offered for the truth of the matter asserted.
 25 MR. SHERMAN: It's background as to what the

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1 next steps were, Your Honor. It's not based on the
 2 truth of what --
 3 JUDGE CHAPPELL: Not for the truth?
 4 MR. SHERMAN: It's not for the truth.
 5 JUDGE CHAPPELL: Overruled.
 6 MR. SHERMAN: He said what the next steps were,
 7 and I want to know what was discussed.
 8 MS. VANDRUFF: Your Honor, I'm sorry. Just to
 9 be clear, the testimony is permitted but not admitted
 10 for its truth; is that correct?
 11 JUDGE CHAPPELL: He said it's not for the truth.
 12 Therefore, by definition, it is not hearsay.
 13 MS. VANDRUFF: Thank you, Your Honor.
 14 BY MR. SHERMAN:
 15 **Q. You said there were next steps discussed.**
 16 **What were the next steps discussed?**
 17 A. Bob had indicated to me that the files needed to
 18 have spread on them, you know, basically look for them
 19 and see if they are available at other IP addresses, and
 20 if they're not, make them appear to have -- you know, be
 21 at different IP addresses.
 22 **Q. In taking the next steps following the meeting**
 23 **with the FTC, did you search for the insurance aging**
 24 **file associated with LabMD?**
 25 A. I did not.

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1 Well, I did search our data store. However, I
 2 did not go out and probe the network for the specific
 3 insurance aging file title, so I did look to see if we
 4 would have picked it up, because we have other
 5 healthcare clients at the time where, because of the
 6 file title, we would have downloaded it multiple times
 7 if it was offered up from any IP address.
 8 JUDGE CHAPPELL: This document on the screen,
 9 CX -- is it 19?
 10 MR. SHERMAN: Yes.
 11 JUDGE CHAPPELL: This was created before or
 12 after the meeting with the FTC?
 13 THE WITNESS: This was created in November of
 14 2013. This was far after.
 15 BY MR. SHERMAN:
 16 **Q. The information that's in Tiversa's data store,**
 17 **where does that information come from?**
 18 A. Well, I'm not sure what information -- it would
 19 come from --
 20 JUDGE CHAPPELL: Are you asking him about LabMD
 21 or in general?
 22 MR. SHERMAN: I'm asking him in general where
 23 does the information that's retained in Tiversa's data
 24 store come from.
 25 THE WITNESS: There are two different ways to

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1 get data in the data store. Using Eagle Vision, it
 2 would automatically download a file based on the file
 3 title. Or there's the scratch drive or -- for the input
 4 where somebody like myself who's using a stand-alone
 5 client, I can insert data in -- you know, legitimate
 6 data is what it was -- the purpose was.
 7 BY MR. SHERMAN:
 8 **Q. And so based on your review of the data store in**
 9 **looking for the insurance aging file, is it your**
 10 **testimony that you did not find that it had been**
 11 **downloaded again from any source into --**
 12 A. That's correct.
 13 **Q. -- the Tiversa data store?**
 14 A. That is correct.
 15 **Q. So that being the case, how did you create**
 16 **spread for the insurance aging file?**
 17 A. I -- like I said, I'm very familiar with these
 18 IP addresses -- and there are several more -- that I
 19 would use not only for LabMD but for other companies as
 20 well. Usually it's reactionary after Bob comes to me
 21 and says, Look, we need this at four different IP
 22 addresses and they need to be bad guys and it can't be
 23 from a certain area. Then that's when this would be
 24 created.
 25 **Q. Was this an unusual request made by you -- made**

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1 **by Mr. Boback to you?**
 2 A. Pardon me?
 3 **Q. Was this an unusual request --**
 4 A. No.
 5 **Q. -- made by --**
 6 A. No. It was common practice.
 7 **Q. Are there any other examples?**
 8 A. Probably every company that we've ever done
 9 business with.
 10 **Q. Is it fair to say that in fact that was**
 11 **Tiversa's business model?**
 12 A. There were ways to ensure that we were able to
 13 constantly provide valuable information to a client,
 14 whether it be having a file spread or hanging on to a
 15 file for a later date.
 16 So I guess having the actual file for a later
 17 date is just as valuable as creating spread.
 18 **Q. Mr. Wallace, is there a document on the screen?**
 19 A. Yes.
 20 **Q. I submit to you that what's on the screen has**
 21 **been marked as RX 545 for identification purposes.**
 22 **Do you recognize that document?**
 23 A. I recognize this incident record, yes.
 24 **Q. Is that the type of document that Tiversa would**
 25 **generate in the regular course of its business?**

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1 A. Yes.
 2 **Q. Can you -- yes, scroll.**
 3 **Go back to page 1, please.**
 4 **Mr. Wallace, if you look at the -- well, what's**
 5 **an Incident Record Form?**
 6 A. That is also referred to as a ticket. It's a
 7 deliverable for a company who subscribes to a monitoring
 8 service.
 9 **Q. And so, Mr. Wallace, if you could read the**
 10 **narrative in the box near the bottom of the screen for**
 11 **us, please.**
 12 MS. VANDRUFF: Excuse me, Counsel. Are you
 13 asking the witness to read this into the record?
 14 MR. SHERMAN: Well, he's on the record. Yes.
 15 MS. VANDRUFF: Okay. Well, then, Your Honor, I
 16 would object on the basis of hearsay and the document
 17 speaks for itself and does not need to be read into the
 18 record.
 19 JUDGE CHAPPELL: Is the document in evidence?
 20 MR. SHERMAN: It is not. It is not. This is
 21 one of the documents that, pursuant to the court's
 22 order, we must lay a foundation for.
 23 And so I'll withdraw the last question and
 24 rephrase.
 25 MS. VANDRUFF: Thank you, Your Honor.

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1 BY MR. SHERMAN:
2 **Q. So, Mr. Wallace, you indicated that you**
3 **recognize this document; correct?**
4 A. I recognize this document, yes.
5 **Q. Did you input the information into this**
6 **document?**
7 A. Yes.
8 **Q. And in doing so, you wrote the narrative in the**
9 **Section 4 Incident Summary?**
10 A. I normally would have, yes. However, I do not
11 believe that it ever stated that one file was detected.
12 I think that that -- that is not correct. I think it
13 has been changed since I would have submitted it to
14 CIGNA.
15 **Q. So CIGNA was a client of Tiversa; correct?**
16 A. Yes.
17 **Q. And they were a client on or about April of**
18 **2008; is that correct?**
19 A. Yes.
20 **Q. And do you recall generating an incident report**
21 **or ticket for CIGNA concerning the information that**
22 **appears on RX 545?**
23 A. Yes.
24 **Q. Your testimony is, however, that you believe**
25 **this document is somewhat different than the information**

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1 **you submitted; is that correct?**
2 A. That is correct.
3 **Q. In what way is it different?**
4 A. There were additional files at the
5 64.190.82.42 IP address that would identify LabMD as
6 being the source of the insurance aging file.
7 **Q. Would you have included that in the narrative?**
8 A. Yes.
9 **Q. When we look at RX 545, in the**
10 **Section 2 Incident Information section, do you see**
11 **that?**
12 A. Yes.
13 **Q. It indicates that the date of the incident is**
14 **4-18-2008.**
15 **Do you see that?**
16 A. Yes.
17 **Q. According to the Incident Record Form, what**
18 **incident occurred on 4-18-2008?**
19 A. Like I had discussed previously or tried to
20 explain -- and maybe I didn't do a very good job --
21 when there's a lot of information for specific
22 companies that we're providing monitoring services for,
23 you don't want to bombard them with a whole bunch of
24 information and then have a dry run with no tickets, so
25 you'd basically stack the information or hang on to it

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1 for a rainy day.
2 The actual incident on this one I believe
3 happened on the 25th of February of 2008. That was when
4 the actual file was downloaded from the Atlanta IP.
5 **Q. But the report or the incident report -- the**
6 **Incident Record Form was generated to indicate that the**
7 **incident occurred on April 18, 2008; correct?**
8 A. Right. That's what I'm reading, yes.
9 **Q. And that information is not true; is that**
10 **right?**
11 A. It's not uncommon for -- when providing
12 monitoring services for a company, it would not be
13 uncommon to not ticket it immediately and hang on to
14 it.
15 **Q. That's fine, but why then doesn't the form**
16 **indicate the actual incident date?**
17 A. That would be the date that we would provide
18 this to a client, not necessarily the date of the
19 incident.
20 **Q. Even though the form says that it's the incident**
21 **date; correct?**
22 A. Right.
23 **Q. So it was a common practice for Tiversa to give**
24 **false information concerning when and where they found**
25 **certain documents to their clients.**

1396

1 A. Yes.
2 **Q. Do you recognize -- in section 3, under**
3 **IP Address, do you recognize that IP address?**
4 A. Yes, I do.
5 **Q. And who does that IP address belong to?**
6 A. I believe it's Cypress Communications.
7 **Q. And under Summary Disclosure Name/ID, why does**
8 **the name LabMD appear there?**
9 A. Because that is who the data appears to be
10 originating from, a device owned or operated by them.
11 **Q. Does this information indicate that the**
12 **insurance aging file was downloaded from a computer at**
13 **LabMD?**
14 A. Yes.
15 JUDGE CHAPPELL: Mr. Sherman, how much more time
16 do you think you're going to need on direct?
17 MR. SHERMAN: Maybe an hour, 45 minutes.
18 MS. BUCHANAN: Your Honor, could I suggest a
19 restroom break. Mr. Wallace is a little uncomfortable.
20 JUDGE CHAPPELL: That's where we're going.
21 Why don't we take a short break and we will
22 reconvene at 12:30.
23 (Recess)
24 JUDGE CHAPPELL: Before we go back to
25 Mr. Wallace, let me try to wrap up some of these pending

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1 motions.
 2 I've reviewed the affidavit and I'm prepared to
 3 make my ruling.
 4 First of all, let me make sure the status is
 5 clear.
 6 The motion to reconsider is being withdrawn.
 7 There will be a notice to withdraw filed.
 8 MR. RUBINSTEIN: That's correct, Your Honor.
 9 JUDGE CHAPPELL: So that's off the table.
 10 I had granted in part the motion to compel for
 11 in camera review, which was voluntarily agreed to. I've
 12 done that review. What I have pending now after the
 13 review is my ruling on the motion to compel.
 14 I find the document is responsive to discovery
 15 requests. I find it is relevant and may not be withheld
 16 on grounds of privilege.
 17 Respondent is ordered to produce it to
 18 complaint counsel immediately. It will be given
 19 in camera treatment, as requested by complaint counsel.
 20 Any questions?
 21 MS. VANDRUFF: No, Your Honor. Thank you.
 22 MR. RUBINSTEIN: Thank you, Your Honor.
 23 MS. VANDRUFF: If I may inquire, is it something
 24 that we can receive now?
 25 JUDGE CHAPPELL: We're all wondering what that

1398

1 is, Mr. Sherman.
 2 That was an anticipatory delivery.
 3 MR. SHERMAN: Someone is thinking ahead of me,
 4 that's for sure.
 5 JUDGE CHAPPELL: Well, off the record.
 6 (Discussion off the record.)
 7 (Pause in the proceedings.)
 8 JUDGE CHAPPELL: Go ahead.
 9 BY MR. SHERMAN:
 10 **Q. Mr. Wallace, is there a document up on your**
 11 **screen?**
 12 A. Yes.
 13 **Q. Mr. Wallace, you've been -- you haven't been**
 14 **handed, but it might be easier if I do hand it to you.**
 15 **Mr. Wallace, up on your screen I'll represent to**
 16 **you is what has been marked as Exhibit RX 546 for**
 17 **identification purposes at this point.**
 18 **Your Honor, may I approach the witness?**
 19 JUDGE CHAPPELL: Go ahead.
 20 BY MR. SHERMAN:
 21 **Q. This might make it easier.**
 22 A. Yeah.
 23 **Q. Mr. Wallace, if you could look through each page**
 24 **of what I just handed you, which is marked for**
 25 **identification purposes RX 546.**

1399

1 **(Pause in the proceedings.)**
 2 MS. BUCHANAN: Excuse me, Your Honor. May I
 3 make a request?
 4 When this witness is being questioned with
 5 regard to the document in front of him, could counsel
 6 be directed to tell him where he got it, what -- why he
 7 is -- what is it that he's showing him. Because it's
 8 my understanding that these documents came attached to
 9 a congressional letter, and if he's going to be
 10 questioned about the document, it would be important I
 11 think to tell him where this letter came from to
 12 question him about it.
 13 JUDGE CHAPPELL: Which I wouldn't -- I'm okay
 14 with that, but I think he's perhaps laying a
 15 foundation.
 16 Are you finished reviewing?
 17 THE WITNESS: Pardon?
 18 JUDGE CHAPPELL: Are you finished reviewing the
 19 documents?
 20 THE WITNESS: Yes.
 21 BY MR. SHERMAN:
 22 **Q. Mr. Wallace, after having reviewed what's been**
 23 **marked as RX 546, is this the type of document that**
 24 **Tiversa would create and send to its clients?**
 25 A. Yes.

1400

1 **Q. And the document is titled Forensic**
 2 **Investigation Report for Ticket and there's a ticket**
 3 **number; correct?**
 4 A. Yes. This would be a follow-up to a ticket.
 5 **Q. And I think you referred to Exhibit RX 545 as a**
 6 **ticket, and I can refresh your --**
 7 A. I believe so, yeah.
 8 MR. SHERMAN: May I approach, Your Honor?
 9 JUDGE CHAPPELL: Go ahead.
 10 BY MR. SHERMAN:
 11 **Q. I've just handed you what has been marked as**
 12 **Exhibit 545.**
 13 **Would you refer to that as a ticket?**
 14 A. Yes, I would.
 15 **Q. Having looked through Exhibit RX 546, did you in**
 16 **any way provide any information for this report?**
 17 A. No. I -- I do not remember ever reviewing
 18 this.
 19 I mean, one thing that I can pick up on right
 20 out of the gate, it shows the specifics of this ticket
 21 were reported as follows. It shows 19 total files, yet
 22 in the copy of the write-up it only shows one file
 23 again, so I'm not familiar with this, no.
 24 **Q. And where does it say 19 total files on this**
 25 **document?**

1401

1 A. It shows it right below the introduction, is
 2 that there's one CIGNA related file and 19 files total.
 3 The other thing that I find shocking is the
 4 data -- the date of disclosure, I know it to be
 5 February 25, 2008. It's recorded on here as 4-18-2008,
 6 yet the front cover of this report shows August 12,
 7 2008, so I don't know. I mean, something is not making
 8 sense.
 9 **Q. In Tiversa's ordinary course of business, when**
 10 **it would issue a forensic investigation report for a**
 11 **ticket, would that forensic investigation report be**
 12 **closer in time to the date of the incident, in your**
 13 **experience?**
 14 A. Especially something this severe as this would
 15 be considered, yes.
 16 The idea of having a forensic investigation
 17 report is to provide more information when the ticket
 18 does not provide enough to cease the disclosure from
 19 continuing.
 20 **Q. I would ask that you turn to page 3 of**
 21 **Exhibit 546.**
 22 **Looking at the figure marked 2-1-1, there is a**
 23 **column in that figure that is entitled**
 24 **Proliferation Point.**
 25 **Do you see that?**

1402

1 A. Yes, I do.
 2 **Q. What is a proliferation point?**
 3 A. It would be the same thing as a spread, where
 4 the file is available, has been downloaded by another
 5 individual, that is available then to be redownloaded
 6 from a different IP address.
 7 **Q. So the first proliferation point third column**
 8 **has the IP address; correct?**
 9 A. The third column, yes.
 10 **Q. Do you recognize that IP address?**
 11 A. Yes, I do.
 12 **Q. And what IP address is that?**
 13 A. That would be the originating source.
 14 **Q. Do you know who was utilizing that IP address at**
 15 **that time?**
 16 A. I believe that that was a LabMD-owned or
 17 controlled device.
 18 **Q. Do you recognize the other two IP addresses**
 19 **below the LabMD address?**
 20 A. I do not.
 21 I do recognize the San Diego IP address.
 22 The other, the 64.190.79.36, is probably an IP
 23 shift.
 24 **Q. And what is an IP shift?**
 25 A. An IP shift would be most likely a traveling

1403

1 computer like a laptop that would access the same ISP,
 2 however, would not have, you know, the same IP address
 3 all the time. It's not leased or dedicated.
 4 The 68.8.250.203 is a known information
 5 concentrator or identity thief and located in San Diego.
 6 That is an IP address that was attached to the insurance
 7 aging file and put in the data store.
 8 **Q. If we go back to page 2 on RX 546, under**
 9 **subsection 1.1, does the same IP address appear under**
 10 **bullet point -- on the second bullet point, Disclosing**
 11 **IP Location?**
 12 A. Yes.
 13 MS. VANDRUFF: I'm sorry, Your Honor. I'm not
 14 clear what counsel is asking. Same as what? We just
 15 discussed three IP addresses.
 16 JUDGE CHAPPELL: Do you want to rephrase?
 17 MR. SHERMAN: Yes. Thank you.
 18 BY MR. SHERMAN:
 19 **Q. Are you at page 2 of RX 546?**
 20 **Mr. Wallace, are you at page 2 of RX 546?**
 21 A. Yes.
 22 **Q. Under section 1.1, do you see the second bullet**
 23 **point?**
 24 A. Yes.
 25 **Q. Do you recognize that IP address under the**

1404

1 **second bullet point?**
 2 A. Yes.
 3 **Q. What does "Disclosing IP Location" mean?**
 4 A. That would mean the originating source of this
 5 file.
 6 **Q. Does that necessarily mean where the source was**
 7 **found or located or viewed?**
 8 A. It would be the source that whoever is creating
 9 this document would believe to be the originating
 10 source.
 11 So it would be an actionable IP, so this
 12 forensic report could then be used by CIGNA to go to
 13 LabMD and say, Hey, there's a computer at
 14 64.190.82.42 that's disclosing information on our
 15 customers or our patients.
 16 **Q. Now, earlier you used the phrase "to browse the**
 17 **host."**
 18 **What does that mean?**
 19 A. That would mean that if you find something that
 20 would be of interest, you would then look at their
 21 shared directory and see all the other files that are
 22 available at that IP and at that client.
 23 **Q. When you found the insurance aging file at the**
 24 **LabMD IP address, did you browse that host?**
 25 A. Yes, I did.

1405

1 **Q. Did you find other documents at that host?**
 2 A. Yes.
 3 **Q. And did those documents help you identify the**
 4 **owner of those documents?**
 5 A. Yeah. Well, it only -- you know, not only did
 6 it support who we believed the originating source was,
 7 but there were things in there that were confidential to
 8 LabMD where only an employee there would have it, user
 9 names and passwords and things like that in a Word
 10 document.
 11 **Q. And did you download then --**
 12 A. Yes.
 13 **Q. -- those documents as well?**
 14 A. Yes, I did.
 15 **Q. And when you downloaded those documents, were**
 16 **they then put into the Tiversa data store?**
 17 A. Yes, they were.
 18 **Q. And in downloading them into the Tiversa data**
 19 **store, would they carry with them the IP address from**
 20 **where they were downloaded?**
 21 A. Yes.
 22 **Q. So there is, as of the date that you downloaded**
 23 **not only the insurance file, the insurance aging file,**
 24 **but the other files from LabMD, there is evidence in the**
 25 **Tiversa data store of where those documents were**

1406

1 **downloaded from, the date and time?**
 2 A. Yes. That's -- in this one ticket summary, the
 3 data store would be wherever the analyst pulled this
 4 information from, where it shows the 19 total files, one
 5 of them is related to CIGNA, the disclosing source,
 6 severity, and this says the date submitted is 4-18-2008.
 7 That's also the detection date supposedly, according to
 8 this.
 9 One more thing that I find it very interesting
 10 is the -- if this was created in 2008, how is the
 11 68.8.250.203 IP address on there when I believe that
 12 that was one that I submitted to Bob with the list of
 13 four in November of 2013. And that is showing a date of
 14 8-5-08, and it's showing that person being an identity
 15 thief or information concentrator, but like I said, if
 16 that was submitted in 2013, how could it be on this
 17 document in 2008.
 18 **Q. Looking also at the third bullet point under**
 19 **1.1 on page 2 of RX 546?**
 20 A. Okay.
 21 **Q. Is it your testimony that the 19 total files**
 22 **represent the other files that you downloaded from the**
 23 **LabMD IP address other than the insurance aging file?**
 24 A. The insurance aging file would be in the 19-file
 25 total, 18 additional. I'm not sure why that was -- why

1407

1 it's written this way.
 2 **Q. Do you know whether the FTC ever asked Tiversa**
 3 **to verify the IP addresses where the insurance aging**
 4 **file was found?**
 5 A. No.
 6 JUDGE CHAPPELL: Just so we're clear, you don't
 7 know or the answer was no, they did not?
 8 THE WITNESS: I am not aware or I was not
 9 present for that conversation. I provided the spread to
 10 Bob Boback on multiple occasions, and I'm not sure where
 11 he used that information.
 12 BY MR. SHERMAN:
 13 **Q. You mentioned that you attended a meeting in**
 14 **Washington, D.C. with the FTC and Bob Boback and a**
 15 **couple of other Tiversa employees.**
 16 **Were you present in the meeting for the entire**
 17 **meeting?**
 18 A. Yes. I -- yes, I was there for the entire
 19 meeting.
 20 **Q. And you were present in the room for the entire**
 21 **meeting?**
 22 A. As best as I can remember, yes.
 23 **Q. During that meeting, did the FTC ever mention**
 24 **its capabilities using Interlab or Internet Lab?**
 25 A. I believe that that was a -- I believe that that

1408

1 was a way to view files that we had submitted for the
 2 CID, but I'm not -- it is ringing a bell, but I'm not --
 3 I couldn't say for sure what it is.
 4 **Q. Did they mention having capability under a**
 5 **program called Sentinel?**
 6 JUDGE CHAPPELL: Who's "they"?
 7 MR. SHERMAN: The FTC.
 8 THE WITNESS: What was the name again?
 9 BY MR. SHERMAN:
 10 **Q. Sentinel?**
 11 A. I'm not familiar with that.
 12 MR. SHERMAN: Your Honor, may we approach?
 13 JUDGE CHAPPELL: Go ahead.
 14 (At the bench, the following discussion was held
 15 off the public record.)
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18 (In open court.)
19 MR. SHERMAN: May I approach the witness?
20 JUDGE CHAPPELL: All right.
21 BY MR. SHERMAN:
22 **Q. Mr. Wallace, you've been handed what has been**
23 **marked as RX 549. I will tell you for the record that**
24 **the entire document is 1719 pages long. It has been**
25 **granted in camera status, which means that it cannot be**

1410

1 **disclosed to the public because of the sensitivity of**
2 **the information contained therein.**
3 **Have you had a chance to look at that document?**
4 A. Yes.
5 **Q. Do you recognize what that sheet of paper is?**
6 A. Yes.
7 **Q. What is it?**
8 A. It's the insurance aging file.
9 **Q. Okay. It is in fact the cover sheet of the**
10 **insurance aging file; is that correct?**
11 A. It is the first page of the insurance aging
12 report.
13 **Q. And you've had an opportunity to look at the**
14 **entire insurance aging report; is that correct?**
15 A. Yes.
16 **Q. And you can identify it upon sight; correct?**
17 A. Yes.
18 **Q. Is that the same cover sheet and attendant**
19 **insurance aging report that you found at the LabMD IP**
20 **address?**
21 A. Yes.
22 **Q. And is that the same insurance aging file that**
23 **you downloaded from the LabMD IP address?**
24 A. Yes.
25 **Q. And did you ever in your experience find on a**

1411

1 **peer-to-peer network that same insurance aging file?**
2 A. Not from any other IP address, no.
3 **Q. Did you ever download the insurance aging file**
4 **from any other IP address?**
5 A. No.
6 **Q. In looking at the lab -- or looking in the LabMD**
7 **data store, outside of the information that you**
8 **admittedly inserted into the data store concerning the**
9 **insurance aging file, did you ever find any other**
10 **indication in the data store that the LabMD insurance**
11 **aging file had been downloaded from some other IP**
12 **address?**
13 A. No.
14 MR. SHERMAN: If I may have a moment,
15 Your Honor?
16 MS. VANDRUFF: And Your Honor, before
17 Mr. Sherman continues, just for the benefit of the
18 record, the document that Mr. Wallace has been shown,
19 while granted in camera status, the single page that's
20 been displayed in the courtroom does not contain any
21 sensitive personal information, and as we discussed at
22 the bench, neither the court nor complaint counsel had
23 any concerns about it being displayed.
24 JUDGE CHAPPELL: Thank you.
25 MR. SHERMAN: Your Honor, at this point I would

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1 request that Exhibits 545 and 546 be admitted into
2 evidence.
3 JUDGE CHAPPELL: Any objection?
4 MS. VANDRUFF: If you'll bear with me,
5 Your Honor.
6 (Pause in the proceedings.)
7 The court's indulgence, Your Honor.
8 JUDGE CHAPPELL: All right.
9 (Pause in the proceedings.)
10 MR. SHERMAN: Your Honor, as well as
11 Exhibit 549, which is the cover sheet.
12 MS. VANDRUFF: Okay. Well, I am pleased to
13 address these in turn, Your Honor.
14 With respect to the document that's been marked
15 for identification as RX 545, Mr. Wallace testified that
16 this was a document that had been altered.
17 JUDGE CHAPPELL: So you're saying that even
18 though it was offered under a business records
19 exception, there is indicia of unreliability.
20 MS. VANDRUFF: I don't know the basis on which
21 Mr. Sherman is -- has advanced --
22 JUDGE CHAPPELL: Well, we need to know that
23 first if you don't know that.
24 What's your basis for admissibility of 545?
25 MR. SHERMAN: The basis for admissibility is

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1 that Mr. Wallace, an employee of Tiversa, identified
2 this document as something that he in fact put
3 information in, as something that Tiversa kept and
4 created in the ordinary course of its business and
5 provided to its clients.
6 He did, however, say that it was different from
7 the document that he actually produced, although the
8 information in it is information that he's familiar with
9 and put into the report.
10 It is also important I think that it has been
11 mentioned that these documents come from the letter from
12 the chairman of the House Committee on Oversight and
13 Government Reform, and they were produced to that
14 committee by Tiversa, and so to the extent that
15 Mr. Wallace can identify them as business records for
16 Tiversa, I think that they should be admitted, even
17 though he indicates that it was not the business record
18 that he created, although most of the information in
19 there he does recognize as information he put in the
20 business record that he created.
21 JUDGE CHAPPELL: So did he say the information
22 was incorrect or it's just not the way he would have
23 done the document?
24 MS. VANDRUFF: Your Honor, I believe it was
25 Mr. Wallace's testimony that this was not a true and

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1 accurate copy of the document that he created because he
2 testified specifically --
3 JUDGE CHAPPELL: Let's do this. He's offered it
4 under business record. If you want to go ahead and
5 question him on that offer, go ahead.
6 MS. VANDRUFF: Certainly.
7 - - - - -
8 CROSS-EXAMINATION
9 BY MS. VANDRUFF:
10 **Q. Mr. Wallace, do you have a copy of RX 545 in**
11 **front of you?**
12 A. Yes, I do.
13 **Q. Okay. Thank you.**
14 **And in section 4 of RX 545, Mr. Sherman had**
15 **directed your attention to the first sentence.**
16 **Are you with me?**
17 A. Yes.
18 **Q. Okay. And after reviewing that sentence, am I**
19 **correct that it was your testimony that this is not a**
20 **true and accurate copy of the document that was**
21 **maintained at Tiversa?**
22 MR. SHERMAN: Objection. Because it
23 mischaracterizes the question that he was asked.
24 JUDGE CHAPPELL: Overruled.
25 MS. BUCHANAN: You can answer the question.

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1 THE WITNESS: Yes. In the first sentence it
2 says one file was detected. I can remember
3 specifically providing a ticket to CIGNA that clearly
4 stated that there were 19 files available at that IP
5 address.
6 BY MS. VANDRUFF:
7 **Q. So I believe it's your testimony, Mr. Wallace,**
8 **that the document that's been marked as RX 545 is not a**
9 **true and accurate copy of the document that was created**
10 **at the time that you were an employee at Tiversa. Is**
11 **that correct?**
12 A. That's correct.
13 JUDGE CHAPPELL: All right. Your motion to
14 admit RX 545 is denied.
15 MR. SHERMAN: Your Honor, just in response to
16 that, it never was represented that this exhibit was in
17 fact the exhibit that he created.
18 JUDGE CHAPPELL: Well, what I just heard the
19 witness say, this document is inaccurate. Therefore,
20 it's not coming in.
21 MR. SHERMAN: Well, under the business record
22 exception, Mr. Wallace, as an employee of Tiversa, can
23 testify that this in fact is the type of business record
24 that Tiversa normally provided to its clients. His
25 knowledge --

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1 JUDGE CHAPPELL: Well, maybe what's going on
2 here is maybe what we have is a failure to communicate.
3 Mr. Wallace, are you saying this document is
4 inaccurate because it contains information that's
5 false?
6 THE WITNESS: Yes.
7 JUDGE CHAPPELL: But is it an accurate depiction
8 of the document that was prepared in the normal course
9 of business by Tiversa?
10 THE WITNESS: No. I believe that the original
11 ticket was altered to show only one file was available
12 at this IP address.
13 JUDGE CHAPPELL: So you have reason to believe
14 that this is not a normal business document that Tiversa
15 would have in its files.
16 THE WITNESS: This is a document that Tiversa
17 would have in its files, yes. But it has -- in the
18 section 4, the incident summary, it describes one file
19 being detected.
20 JUDGE CHAPPELL: Okay. So listen closely.
21 I think I follow you that you think this
22 document contains inaccurate information. Correct?
23 THE WITNESS: Yes.
24 JUDGE CHAPPELL: But this document as you see it
25 would be in Tiversa's files?

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1 THE WITNESS: Yes, it would be.
 2 JUDGE CHAPPELL: There you go. Therefore,
 3 unless you can clarify, I'm changing my ruling.
 4 MS. VANDRUFF: Well, Your Honor, I mean, to the
 5 extent that --
 6 JUDGE CHAPPELL: So what he's saying is, the
 7 document is not true, but it's a document we maintain in
 8 our files. Therefore, it's a business record. It's an
 9 accurate depiction of a record in the files of Tiversa,
 10 which brings it under the hearsay exception, if I
 11 understood the witness.
 12 MS. VANDRUFF: Your Honor --
 13 JUDGE CHAPPELL: You may consult if you need to.
 14 MS. VANDRUFF: I'm sorry, Your Honor?
 15 JUDGE CHAPPELL: You may consult. I'm seeing a
 16 lot of people popping up here.
 17 MS. VANDRUFF: I will do that. Thank you,
 18 Your Honor.
 19 (Pause in the proceedings.)
 20 Your Honor, for this witness to sponsor the
 21 document that's been marked as RX 545 as a business
 22 record of Tiversa, he would need to testify on the basis
 23 of his personal knowledge that this is a true and
 24 accurate copy of the document that was maintained at
 25 Tiversa. And I believe that it is his testimony

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1 unambiguously that the document that may have been in
 2 the business records has been altered, so I don't
 3 believe he can lay that foundation on the basis of his
 4 personal knowledge.
 5 JUDGE CHAPPELL: I disagree that the business
 6 record exception has a prong that requires him to have
 7 personal knowledge of the particular document. That's
 8 wrong. He just needs to know it's a document kept in
 9 the ordinary course of business, by information
 10 transmitted to somebody at Tiversa, that this is what
 11 they do, and he's basically told me it may be
 12 inaccurate, but this is what they do.
 13 MS. VANDRUFF: Well, I believe what he's told
 14 Your Honor is this is the type of document that was
 15 created at Tiversa, but because of the discrepancy
 16 between the first line in section 4 and Mr. Wallace's
 17 testimony, only a custodian of records at Tiversa could
 18 testify as to whether or not this document is a business
 19 record of Tiversa.
 20 JUDGE CHAPPELL: Is this a document that you
 21 maintained while you were at Tiversa, this type of
 22 document?
 23 THE WITNESS: Yes. This is a standard ticket
 24 form for --
 25 JUDGE CHAPPELL: This document as it is, true or

1419

1 false, is it the type of document, if you went and
 2 pulled the file, it would be in there as it exists right
 3 here in front of you?
 4 THE WITNESS: Yes.
 5 JUDGE CHAPPELL: There you go.
 6 545 is admitted.
 7 (RX Exhibit Number 545 was admitted into
 8 evidence.)
 9 JUDGE CHAPPELL: Next objection.
 10 MR. SHERMAN: Your Honor, I think the same
 11 arguments apply to 546 as well.
 12 MS. VANDRUFF: Your Honor, before Mr. Wallace
 13 was even examined about the exhibit that's been marked
 14 as 546, his counsel asked that Mr. Sherman describe the
 15 document for the witness. The witness was not asked
 16 whether this is a document with which he was familiar.
 17 Instead, he was walked through information contained in
 18 the document and has not indicated that he has any
 19 personal knowledge whatsoever of the document that's
 20 been marked as RX 546. Therefore, he is not a witness
 21 competent to sponsor this document.
 22 JUDGE CHAPPELL: I believe she's correct. I
 23 don't think I heard a proper foundation for this
 24 document.
 25 MR. SHERMAN: Your Honor, he was asked whether

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1 or not this was the type of document that Tiversa
 2 created and kept in the normal course of its business.
 3 MS. VANDRUFF: And again, Your Honor, the fact
 4 that it is a type of document that Tiversa created is
 5 not sufficient to admit -- to lay the foundation to
 6 admit the document that's been marked as 546.
 7 MR. SHERMAN: Your Honor, I think also one of
 8 the reasons to mention that this was given to the
 9 oversight committee, congressional oversight committee,
 10 is that that gives it an additional layer of
 11 reliability.
 12 JUDGE CHAPPELL: I don't get that. Just because
 13 it was given to them, that doesn't convince me it's any
 14 more or less reliable. It means it was provided to the
 15 committee.
 16 Anything else?
 17 MR. SHERMAN: Well, yes, Your Honor. I mean, a
 18 review of the record -- if that makes a difference, a
 19 review of the record will show that he testified that it
 20 is the type of document they kept and created in the
 21 ordinary course of their business.
 22 JUDGE CHAPPELL: Would you like to question him
 23 on the foundation?
 24 MS. VANDRUFF: I believe that the foundation is
 25 clear that he can't lay it. If you'd like me to examine

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1 him, Your Honor, I shall.
 2 JUDGE CHAPPELL: Well, we have a difference of
 3 opinion of what was asked, and I don't recall everything
 4 that was asked earlier today, so if you would like to
 5 question the witness, go ahead.
 6 MS. VANDRUFF: I'd be happy to do that.
 7 Thank you, Your Honor.
 8 - - - - -
 9 CROSS-EXAMINATION
 10 BY MS. VANDRUFF:
 11 **Q. Mr. Wallace, do you have the document that's**
 12 **been marked as RX 546 in front of you?**
 13 A. Yes, I do.
 14 **Q. Prior to reviewing this document today, had you**
 15 **seen this document before?**
 16 A. No, I had not.
 17 MS. VANDRUFF: Do you require any further
 18 examination, Your Honor?
 19 (Pause in the proceedings.)
 20 JUDGE CHAPPELL: Are we waiting on him?
 21 MS. VANDRUFF: No. I asked if Your Honor
 22 required any further examination. The witness testified
 23 he had never seen this document before it was shown to
 24 him today.
 25 JUDGE CHAPPELL: I'm sorry. I thought you asked

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1 him to look at it.
 2 MS. VANDRUFF: I did ask him to look at it and
 3 then I asked him --
 4 JUDGE CHAPPELL: Well, I was flipping back, and
 5 I can confirm that a proper foundation was not laid.
 6 What's the document number?
 7 MS. VANDRUFF: It is RX 546, Your Honor.
 8 JUDGE CHAPPELL: Your request to admit -- your
 9 motion to admit 546 is denied.
 10 Next?
 11 MS. VANDRUFF: The third document that
 12 Mr. Sherman sought to admit has been marked for
 13 identification purposes as RX 549. To the extent that
 14 this is the single-page document that Mr. Wallace
 15 testified to, I don't know that complaint counsel has an
 16 objection, but I want to clarify with respondent's
 17 counsel what it is exactly that respondent seeks to
 18 admit.
 19 JUDGE CHAPPELL: Isn't the document already in
 20 evidence, 549?
 21 MR. SHERMAN: It is not. It is one of several
 22 insurance aging files that have been produced in this
 23 litigation. This was recently produced by Mr. Wallace,
 24 in response to the FTC's subpoena, from Mr. Wallace's I
 25 think hard drive.

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1 JUDGE CHAPPELL: So 549 is not the cover sheet?
 2 MS. VANDRUFF: That's my question, Your Honor,
 3 is whether respondent is seeking to move this single
 4 page or whether he's seeking to move something more.
 5 It's not clear to me what's being moved.
 6 JUDGE CHAPPELL: Single page?
 7 MR. SHERMAN: Well, for the purpose of
 8 establishing that Mr. Wallace is familiar with the
 9 1718 File, the insurance aging file that we've been
 10 talking so much about, without --
 11 JUDGE CHAPPELL: Well, hold on a second. She
 12 wanted to know if this was all you're offering, one
 13 page.
 14 If he is, do you object?
 15 MS. VANDRUFF: If he's offering the single page,
 16 549, complaint counsel does not have an objection. If
 17 he's -- Your Honor, I want to be clear.
 18 JUDGE CHAPPELL: There's no need for an if. He
 19 said it's only the single page.
 20 RX 549 is admitted.
 21 (RX Exhibit Number 549 was admitted into
 22 evidence.)
 23 MR. SHERMAN: Thank you, Your Honor.
 24 I don't have any further questions for
 25 Mr. Wallace.

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1 MS. VANDRUFF: Your Honor, before we discuss any
 2 break that Your Honor might be willing to undertake,
 3 could I ask that counsel approach?
 4 JUDGE CHAPPELL: All right.
 5 (At the bench, the following discussion was held
 6 off the public record.)
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3 JUDGE CHAPPELL: Are we in agreement?
4 MS. VANDRUFF: Let me make sure that I
5 understand what the question is, Your Honor.
6 If the question is whether counsel for
7 Mr. Wallace may conduct a redirect before
8 complaint counsel proceeds with its deposition, we are,
9 Your Honor.
10 JUDGE CHAPPELL: Okay.
11 MS. VANDRUFF: She may conduct that
12 examination.
13 JUDGE CHAPPELL: Does anyone object to taking a
14 break now, we'll come back and have the redirect, and
15 then we'll break for the deposition?
16 MR. SHERMAN: May I put on the record the
17 renewal of the motion to have RX 546 admitted into
18 evidence. It's being offered not for the truth.
19 MS. VANDRUFF: And Your Honor, at this time, I
20 understand the court's position, but complaint counsel
21 renews its objection that Mr. Wallace has not laid a
22 foundation for this document.
23 JUDGE CHAPPELL: If the document is offered not
24 for the truth, then it's by definition not hearsay. I
25 do find it's relevant. Therefore, RX 546 is admitted

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1 not for the truth of the matter asserted therein.
2 (RX Exhibit Number 546 was admitted into
3 evidence.)
4 MR. SHERMAN: Thank you, Your Honor.
5 JUDGE CHAPPELL: All right. We're going to take
6 a lunch break now. We will reconvene at 2:45.
7 We're in recess.
8 (Whereupon, at 1:48 p.m., a lunch recess was
9 taken.)
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1 AFTERNOON SESSION
2 (2:54 p.m.)
3 JUDGE CHAPPELL: Let's go back on the record.
4 I believe now we're going to have redirect by
5 Ms. Buchanan.
6 MS. BUCHANAN: Thank you, Your Honor.
7 JUDGE CHAPPELL: And we all agreed to take this
8 out of order before the cross so the record will make
9 more sense.
10 MS. BUCHANAN: That's correct, Your Honor.
11 And I also spoke with both complaint counsel and
12 respondent counsel to ask if they would have any
13 objection to my leading Mr. Wallace through a few points
14 of redirect in an effort to shorten those areas in which
15 I can address issues that may not have been adequately
16 addressed in the -- in his direct testimony this
17 morning.
18 MS. VANDRUFF: And complaint counsel has no
19 objection, Your Honor. The only reason I rise is that
20 my LiveNote doesn't appear to be working and I just
21 wanted to be sure that I got it working before
22 Ms. Buchanan started her exam.
23 (Pause in the proceedings.)
24 JUDGE CHAPPELL: Can we talk about scheduling on
25 the record. I think you told me that the government

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1 will not have any idea about rebuttal until after the
2 deposition?
3 MS. VANDRUFF: No, Your Honor. I think that
4 prior to our break for lunch I advised you that we would
5 have a much better sense of that after lunch.
6 JUDGE CHAPPELL: Okay.
7 MS. VANDRUFF: I will tell you that that's
8 modified slightly in that we will be able to advise
9 Your Honor with much greater precision after
10 Ms. Buchanan completes her redirect.
11 JUDGE CHAPPELL: I'm wondering if we should --
12 since you're going to need to request rebuttal in
13 writing and Mr. Sherman may want to oppose it, I'm
14 wondering if that's even doable in the next couple days
15 or if we should just concede we're not going to wrap
16 this up by the end of the week.
17 MS. VANDRUFF: Well, Your Honor, from the
18 perspective of complaint counsel, today's testimony is a
19 lot to digest, and so it certainly would be helpful to
20 have time to consider what rebuttal, if any,
21 complaint counsel wishes to seek leave to present.
22 JUDGE CHAPPELL: All right. I think what I'll
23 do now is, why don't we just say we're going to skip
24 Thursday, we're here today, we're here tomorrow, and
25 then Friday is available.

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1 Any objection to that?
 2 MR. SHERMAN: No objection.
 3 MS. VANDRUFF: No objection.
 4 JUDGE CHAPPELL: So everyone can plan ahead,
 5 schedule whatever you need to do.
 6 And I know what you said, Ms. Buchanan, but I
 7 think Mr. Wallace will be finished tomorrow.
 8 MS. BUCHANAN: Okay.
 9 JUDGE CHAPPELL: All right?
 10 MS. BUCHANAN: Thank you, Your Honor.
 11 JUDGE CHAPPELL: So we will take a break all day
 12 Thursday. That way, if you file a written request for
 13 rebuttal, you'll have time -- respondent will have time
 14 to respond, and then I can make my decision and let you
 15 know in time for Friday hopefully.
 16 MS. VANDRUFF: So, Your Honor, just to make sure
 17 that I understand, we're seeking time to evaluate
 18 today's testimony after we receive a copy of the
 19 transcript --
 20 JUDGE CHAPPELL: Yes.
 21 MS. VANDRUFF: -- and to assess what, if
 22 anything, requires rebuttal. And to meet Your Honor's
 23 standards set forth this morning during preliminaries,
 24 we would ask for -- and I understand some scheduling
 25 constraints with respect to the bench -- but for,

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1 you know, as much time as we can have for that, and I
 2 don't know that 24 hours is going to be sufficient.
 3 JUDGE CHAPPELL: Well, and if it's not and we
 4 don't finish this week, then we'll wait a few weeks.
 5 And I'm fine with that. I just -- as long as it's been
 6 now, let's just get everything resolved. And if that
 7 happens by Friday, that's fine; if not, it will be a few
 8 weeks later.
 9 MR. SHERMAN: I'd prefer to get things
 10 resolved. I understand complaint counsel's concern
 11 with reviewing the record. But since we have a say, our
 12 say would be to push forward and get this resolved or
 13 completed by Friday.
 14 MS. VANDRUFF: And Your Honor, I'm confident
 15 that we can file our motion within a week, but I'm not
 16 confident that we can conduct the assessment that's
 17 necessary so that Your Honor can rule by Friday. And I
 18 know that that crunches some other deadlines, and for
 19 that I apologize.
 20 JUDGE CHAPPELL: Okay. Well, for now, we'll
 21 just -- we won't be here Thursday, and then we'll
 22 reassess tomorrow after Mr. Wallace is finished.
 23 MS. VANDRUFF: Thank you, Your Honor.
 24 JUDGE CHAPPELL: And I think from what I'm
 25 hearing from you, you'll have a better idea -- in fact,

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1 right now we don't know that you want rebuttal. You may
 2 want rebuttal. And if you do, we have a process. And I
 3 understand it's going to take time.
 4 MS. VANDRUFF: That's correct, Your Honor.
 5 JUDGE CHAPPELL: So you'll get whatever time is
 6 reasonable.
 7 MS. VANDRUFF: Thank you, Your Honor.
 8 JUDGE CHAPPELL: All right?
 9 MS. VANDRUFF: Yes, Your Honor.
 10 JUDGE CHAPPELL: All right. Thanks.
 11 Go ahead.
 12 MS. BUCHANAN: Thank you, Your Honor.
 13 - - - - -
 14 REDIRECT EXAMINATION
 15 BY MS. BUCHANAN:
 16 **Q. Good afternoon, Mr. Wallace.**
 17 **You testified this morning that you were**
 18 **contacted in about 2007 by Bob Boback about a job**
 19 **opportunity with Tiversa; is that correct?**
 20 A. That's correct.
 21 **Q. And he contacted you after he saw you quoted in**
 22 **a Fox News story in Chicago.**
 23 A. That's correct.
 24 **Q. In this news story that you were quoted in, you**
 25 **talked about the ease at which peer-to-peer networks**

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1 **could be used to disclose personal identifying**
 2 **information.**
 3 A. Yes.
 4 **Q. And when he contacted you, did he tell you that**
 5 **he liked this ability of yours to be able to find this**
 6 **information and he wanted to incorporate this into the**
 7 **Tiversa --**
 8 A. Yes. I mean, that's where he saw the value in
 9 hiring me.
 10 **Q. And at the time that you joined Tiversa, you**
 11 **already had in your possession a number of files of**
 12 **personal information that you had discovered on the**
 13 **Internet while doing your own searching prior to even**
 14 **joining Tiversa.**
 15 A. Yes.
 16 **Q. And in the late 2007 when Mr. Boback was**
 17 **testifying before Congress at a hearing regarding**
 18 **peer-to-peer networks and identity theft, he asked you**
 19 **to help him prepare for that testimony; is that**
 20 **correct?**
 21 A. Yes.
 22 **Q. And did you provide him with documents that you**
 23 **had found on the Internet long before ever joining**
 24 **Tiversa?**
 25 A. Yes.

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1 **Q. And at the time Mr. Boback testified at the**
 2 **congressional hearing, did he tell Congress who had**
 3 **found those documents?**
 4 A. Yes. He said that Tiversa's system had
 5 downloaded the documents.
 6 **Q. And that was not true, was it?**
 7 A. No.
 8 **Q. The documents, in fact, the majority of the**
 9 **documents that Mr. Boback referred to in his first**
 10 **congressional testimony in 2007 were documents that were**
 11 **identified by you rather than by Tiversa.**
 12 A. That's correct.
 13 **Q. And I believe that you indicated this morning in**
 14 **your direct testimony that there were other members of**
 15 **the panel who testified before Congress in late 2007 on**
 16 **the topic of identity theft.**
 17 A. Yes.
 18 **Q. And at that time you were told if the**
 19 **commissioner of the Federal Trade Commission,**
 20 **Edith Ramirez, was also on the panel.**
 21 A. I believe that that's who was testifying with
 22 Bob. I believe it was Bob Boback, Tom Sydnor from the
 23 Patent and Trademark Office, and I believe that it was
 24 Edith Ramirez.
 25 **Q. Now, you were not at the testimony; correct?**

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1 A. But I was not there. No. I did watch it
 2 online.
 3 **Q. And you read the transcript of the hearing.**
 4 A. Yes.
 5 **Q. And you talked to Mr. Boback about how the**
 6 **hearing went; is that correct?**
 7 A. Yes.
 8 **Q. And then following the 2007 FTC hearing,**
 9 **Mr. Boback began to have some communications with**
 10 **individuals from the Federal Trade Commission.**
 11 A. Individuals from where?
 12 **Q. From the Federal Trade Commission.**
 13 A. Yes.
 14 **Q. Now, this morning, during your direct testimony,**
 15 **you made reference to a meeting that was held at**
 16 **Tiversa's offices in the Pittsburgh, Pennsylvania area**
 17 **in which members of the Federal Trade Commission came to**
 18 **visit the Tiversa facilities.**
 19 A. That's correct.
 20 **Q. And you initially indicated on your direct**
 21 **examination that you thought that that had occurred at**
 22 **some point in late 2007. Is that correct for what you**
 23 **said this morning?**
 24 A. I think that it was probably spring of 2008.
 25 **Q. And can you describe what the purpose of this**

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1 **visit was?**
 2 A. It was a -- kind of like a show-and-tell, if you
 3 will. Basically, we would present our technology to the
 4 members -- or the representatives from the FTC, and they
 5 would evaluate whether or not they could use it. The
 6 main purpose of the meeting, though, was to further
 7 investigate, I believe, the examples that were shown at
 8 the House oversight hearing.
 9 **Q. So the visit to Pittsburgh included a tour of**
 10 **the Tiversa facilities led by Mr. Boback; correct?**
 11 A. Right. Yes.
 12 **Q. And did it also include a description by**
 13 **Mr. Boback of the forensic capabilities of the computer**
 14 **system that Tiversa operated?**
 15 A. Yes.
 16 **Q. And can you tell me if there was anything that**
 17 **the FTC was told that day by Mr. Boback regarding the**
 18 **capabilities of Tiversa that was not true?**
 19 A. Yes. Well, there -- I couldn't say specifically
 20 for that day, but one of the capabilities that we have
 21 always talked about at Tiversa is having the ability to
 22 record searches and IP address that issue searches, and
 23 that's just completely not true.
 24 **Q. Now, you also performed a demonstration for the**
 25 **FTC; is that correct?**

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1 A. Yes.
 2 **Q. And you showed the FTC how you were able to find**
 3 **personal identifying information, which was referred to**
 4 **this morning as PPI (sic), by a review of peer-to-peer**
 5 **networks.**
 6 A. Yes.
 7 **Q. And what was the response of the members of the**
 8 **FTC when you demonstrated how easily it was that this**
 9 **information could be found on the Internet?**
 10 A. They were very excited to see if there's an
 11 opportunity for us to work together.
 12 **Q. So following the 2008 visit by members of the**
 13 **FTC to Tiversa, you indicated this morning that frequent**
 14 **conversations began to occur between individuals at**
 15 **Tiversa and members of the FTC; correct?**
 16 A. Yes.
 17 **Q. Now, those conversations were between either**
 18 **Mr. Boback and the FTC or Mr. Kopchack and the FTC, but**
 19 **not necessarily between you and the FTC.**
 20 A. That's correct.
 21 **Q. But were you present often -- or were you**
 22 **present for some of these communications in that you may**
 23 **have been standing in the room and you overheard**
 24 **conversations on the telephone?**
 25 A. Yes.

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1 Q. This morning you testified regarding IRCs that
2 were developed from --

3 A. Yes.

4 Q. -- information that is found on the Internet,
5 and you record this information by logging in the
6 company that had the disclosure, what was disclosed,
7 when it was disclosed; is that correct?

8 A. Yes.

9 Q. And is that something that you did as a daily
10 part of your duties at Tiversa?

11 A. Yes. All the analysts that would review files
12 would update that spreadsheet several times throughout
13 the day as data is found and cataloged.

14 Q. So would you say that the information that was
15 compiled on these spreadsheets -- was it more
16 information about clients that Tiversa actually had or
17 was it more aspirational with regard to clients Tiversa
18 would like to have?

19 A. It would be a list of companies that would be
20 put together on a spreadsheet for the simple reason to
21 make a sales call, to make a cold call.

22 Q. So to be clear, to be clear, Mr. Wallace, your
23 job was to search the Internet to find disclosures of
24 personal information and to log that in; is that
25 correct?

1 A. Yes.

2 Q. When you searched peer-to-peer networks for
3 personal identifying information, at the time you found
4 a file that you wanted to download, would you know where
5 that file came from? Would you have some idea of how
6 that file was disclosed?

7 A. Yeah. The program that I used was
8 self-modified, and an IP address would definitely
9 display.

10 Q. So from the very moment or shortly thereafter
11 that you discovered information, you pretty much knew
12 where it came from; correct?

13 A. Yes.

14 Q. But according to Tiversa's standard business
15 model, when Tiversa would make phone calls to potential
16 clients, what information would they make available to
17 companies that had -- that their information had been
18 detected by you?

19 A. Usually they would say that the IP address,
20 port, client, any of that information was not recorded
21 as they're not a client yet, and if they would sign on
22 as a client, then that information could be found in
23 databases or somewhere that don't exist.

24 Q. And was that true?

25 A. No.

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1 A. That was one of the functions, yes.

2 Q. And then you would turn this information over to
3 Mr. Boback or to others on Mr. Boback's sales force;
4 correct?

5 A. Yes.

6 Q. And then Mr. Boback and his sales force would
7 use this information to contact these companies whose
8 information was found by you.

9 A. Yes.

10 Q. And did you ever participate in these
11 conversations, meaning you personally calling companies
12 and telling them that their information was found
13 somewhere, somewhere out on the Internet?

14 A. No. I used to, but the last conversation that I
15 had was with the Social Security Administration, and I
16 was accused by Bob of giving them way too much
17 information, not holding back IP addresses that would
18 allow them to function and do work with the information
19 without hiring Tiversa, so I was basically accused of
20 sabotaging a business deal, and that was the end of me
21 reaching out to anyone.

22 Q. So after that point, you were kept in the back
23 room trolling the Internet, finding the information,
24 and it was left to others to actually make the sales
25 calls.

1 Q. Can you tell us whether Mr. Boback and his
2 sales staff had much success gaining clients in this
3 manner?

4 A. Yes.

5 So the first thing that we would do, like
6 especially with an IRC client, would be -- or a
7 prospective IRC client, would be to strip the IP
8 address off the front and remove any meta data that's
9 in that file that might give that company or
10 organization the ability to shut down the data source
11 without Tiversa's help, so we would make sure that all
12 that went away.

13 Q. And is that something that you personally did,
14 Mr. Wallace? Did you personally strip the meta data off
15 of --

16 A. Yes.

17 Q. -- files so that the originating source could
18 not be detected?

19 A. Yes.

20 Q. And would you also maintain other files that
21 would allow you to keep it all straight in your head
22 where these files were actually really found?

23 A. Yes.

24 Q. Now, with respect to the 1718 File that we
25 heard so much about this morning, you are the one, the

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1 **analyst at Tiversa, who actually found that file;**
 2 **correct?**
 3 A. Yes. I downloaded that file.
 4 **Q. And at the time you found the file, you also**
 5 **found other documents along with it.**
 6 A. Yes. But I downloaded the file and the other
 7 documents on a stand-alone machine. I did not use
 8 Tiversa's system, so I didn't find it in the data store.
 9 I found it live online.
 10 **Q. But after you found it live online, you**
 11 **actually inputted that information into the Tiversa**
 12 **data store.**
 13 A. Yes.
 14 **Q. And just to make sure we're clear on exactly**
 15 **what a data store is, Tiversa maintained a record of the**
 16 **files that it actually found along with files that it**
 17 **wanted to create the appearance that they were found in**
 18 **other locations on the Internet.**
 19 A. Right.
 20 **Q. Now, with respect to the 1718 File, I believe**
 21 **you indicated this morning that you found this file in**
 22 **February of 2008. Correct?**
 23 A. Yes. February 25.
 24 **Q. And at the time you found that file, is there**
 25 **any doubt in your mind that this file was found on a**

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1 **LabMD computer in Atlanta, Georgia?**
 2 A. Yeah -- well, after I downloaded the file, I
 3 immediately went and browsed the host because I wanted
 4 to get any other piece of information that would be at
 5 that IP address, because when you pull open a PDF and
 6 it's packed full of, you know, 8,000 people's healthcare
 7 information or however many that are in there, chances
 8 are there's other information there that would be
 9 valuable as well.
 10 **Q. And after you found this file in February 2008,**
 11 **did you tell Mr. Boback that you found this?**
 12 A. Yes. Within just a few minutes of opening it,
 13 he was standing over my shoulder looking at it.
 14 **Q. And when you showed this file to Mr. Boback,**
 15 **what did he do next? Did he do anything himself or did**
 16 **he direct you to do anything?**
 17 A. He was very excited and told me that he was
 18 going to take the lead on it.
 19 **Q. I'm sorry. He was going?**
 20 A. He was going to take the lead on it. He was
 21 going to make contact with LabMD.
 22 **Q. And do you know if he actually contacted LabMD?**
 23 A. I would imagine he probably did. I mean, I was
 24 not in the room.
 25 **Q. But do you know today whether he has contacted**

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1 **LabMD?**
 2 A. I would say yes.
 3 **Q. Have you heard conversations in the Tiversa**
 4 **offices about contacts that Mr. Boback made with LabMD?**
 5 A. Yes.
 6 **Q. Did LabMD ever hire Tiversa to do anything for**
 7 **them?**
 8 A. No.
 9 **Q. So they did not accept Boback's proposal to**
 10 **remediate their problem.**
 11 A. No.
 12 **Q. Was LabMD ever told by Tiversa where their file**
 13 **had been found on the peer-to-peer networks?**
 14 A. I believe that the initial contact, there was no
 15 identifying information as far as the location on it. I
 16 think it was the usual sales pitch where, if you pay us,
 17 we can go look, but we don't know right now.
 18 And then I think that there was a subsequent
 19 e-mail that went out. After things went cold, Bob
 20 reached back out to LabMD that, hey, your files --
 21 either your files are being searched for or it is being,
 22 you know -- it's spread all over the peer-to-peer space
 23 and you need to remediate it.
 24 **Q. But that wasn't true, was it?**
 25 A. No.

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1 **Q. In fact, the file was never -- never spread**
 2 **anywhere on the Internet.**
 3 A. No. No. The originating source in Atlanta is
 4 the only source that it's ever been seen at.
 5 **Q. Now, there was a lot of talk this morning about**
 6 **IP addresses that you provided to Mr. Boback, and at**
 7 **least four of them were found on a document that has**
 8 **been discussed today as CX 19; correct?**
 9 A. Yes.
 10 **Q. Now, these were not the only IP addresses that**
 11 **Tiversa used to make it appear that files spread to**
 12 **other locations on the Internet.**
 13 A. No.
 14 **Q. Do you have any idea today of approximately how**
 15 **many different IP addresses that may have been used by**
 16 **Tiversa to make it appear as though files were spread on**
 17 **the Internet?**
 18 A. I would say approximately twenty.
 19 **Q. Twenty?**
 20 A. Twenty.
 21 **Q. And were there certain IP addresses that you**
 22 **seemed to use more frequently than others?**
 23 A. Yes.
 24 **Q. And why was that?**
 25 A. Like we were talking about this morning, if you

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1 know that the IP address is dead and there's no computer
2 on the other end of it, especially if law enforcement
3 has already taken action, whether it be somebody who has
4 material that's used to exploit children or, you know,
5 banking information for identity theft or for whatever
6 the reason is, if law enforcement has already acted on
7 it, that computer is gone, so therefore, it's going to
8 be impossible to say was this insurance aging file at
9 173 in Apache Junction when that's -- like I say, that's
10 long gone, so there's no way to contradict what Tiversa
11 is saying.

12 **Q. Now, just briefly, Mr. Wallace, in addition to
13 the duties that you had in the regular course of your
14 business for Tiversa, did you also from time to time
15 assist law enforcement in different investigations that
16 would give you access to some of these IP addresses?**

17 A. Yes.

18 **Q. And Mr. Boback, was he aware that these were IP
19 addresses that --**

20 A. Yes.

21 **Q. -- you had found from known criminals?**

22 A. Yes.

23 **Q. Now, looking at CX 19, Mr. Sherman directed you
24 to a series of questions about the pieces of information
25 contained on this document.**

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1 **And the first column contains an IP address;
2 correct?**

3 A. Which one are we looking at?

4 **Q. I'm sorry. I'm looking at CX 19 with the list
5 of four IP addresses.**

6 A. Yes. Yes.

7 MS. VANDRUFF: And Your Honor, if I may,
8 Counsel, are we going to -- do you intend to elicit
9 questions that Mr. Sherman didn't -- answers to
10 questions that Mr. Sherman did not ask?

11 Okay. Because it sounds like you're asking the
12 same questions.

13 THE WITNESS: I don't have that because it was
14 on the screen, but yes, the first column would be an IP
15 address. The next would be a date and a time when that
16 file was supposedly downloaded. Then there would be a
17 file title that would have the IP address prepended to
18 it.

19 BY MS. BUCHANAN:

20 **Q. The only point that I really want to clarify
21 with respect to this document is that in the third
22 column -- and I know you don't have it in front of you
23 right now -- excuse me. Jackie, would you give this to
24 the witness.**

25 THE WITNESS: I know what it is.

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1 BY MS. BUCHANAN:

2 **Q. Just to be clear, the third column lists a time,
3 like the first one, for example, is 11:26 p.m., the
4 second is 3:49 p.m.**

5 A. Yes.

6 **Q. These times do not actually represent when these
7 files were actually downloaded.**

8 A. No. That time -- it was simple to -- it's
9 simple to change them, but it took a lot of keeping
10 track of what times to use because, for example, that
11 173.16 IP address, the date modified of that file has
12 to correspond with when that IP address was really
13 active.

14 And the other thing that you have to look for is
15 to make sure that you're not creating a previous
16 exposure before the original source.

17 **Q. And this particular document, CX 19, you
18 compiled this at or around the time of Mr. Boback's
19 deposition in this proceeding; correct?**

20 A. Yes.

21 **Q. And he asked you to come up with IP addresses
22 that would relate to locations other than Atlanta,
23 Georgia; correct?**

24 A. Yes.

25 **Q. But this is by no means the only set of IP**

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1 **addresses that you may have ever given Mr. Boback or
2 used on prior occasions.**

3 A. No.

4 JUDGE CHAPPELL: I have a question.

5 You told me earlier that you wanted to make sure
6 the IP address was valid at the time you listed in case
7 you were audited.

8 THE WITNESS: Pardon me?

9 JUDGE CHAPPELL: In case you were audited, is
10 that what you said, in case of an audit?

11 THE WITNESS: Yes. Or that way, when you go and
12 you pull up the main screen on any of the operating
13 centers or the user centers, those files will show up as
14 looking like they're coming from that IP address.

15 JUDGE CHAPPELL: But let's say you gave that IP
16 address to LabMD. They can't do anything with that IP
17 address, can they?

18 THE WITNESS: Yes.

19 JUDGE CHAPPELL: What can they do with the IP
20 address?

21 THE WITNESS: They would be able to identify
22 where -- what part of the country it's coming out of,
23 what the ISP is, what the carrier is. And if the file
24 actually continued to be disclosed from that IP address
25 and, say, LabMD was not able to find the laptop or find

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1 the station that's broadcasting it, you could contact
 2 the ISP and request them to cease service for that
 3 ISP -- or for that IP address based on their terms of
 4 user -- terms of service user agreement.
 5 JUDGE CHAPPELL: I understand they could trace
 6 the IP address, but you were talking earlier about
 7 whether they were active or not.
 8 If LabMD had that IP address, could they find
 9 out a history of that IP address, whether it was valid
 10 and when it was valid?
 11 THE WITNESS: You could do some searching
 12 online. Yes.
 13 BY MS. BUCHANAN:
 14 **Q. I'd like to direct your attention to**
 15 **Respondent's Exhibit RX 545, which is the CIGNA ticket**
 16 **that you testified about this morning.**
 17 A. Yes.
 18 **Q. And with regard to this CIGNA ticket, in the**
 19 **section 4 labeled Incident Summary?**
 20 A. Yes.
 21 **Q. This summary purportedly indicates that a**
 22 **disclosure of the CIGNA files, which would have**
 23 **contained the same files from the insurance aging file,**
 24 **was found on April 18.**
 25 A. Yes.

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1 **Q. But that's not correct, is it?**
 2 A. No.
 3 **Q. And you indicated this morning that it was part**
 4 **of the business practice that information needed to be**
 5 **continually flowing to customers so that they could see**
 6 **that things were being done.**
 7 A. Right.
 8 MS. VANDRUFF: And Your Honor, just if I may,
 9 while complaint counsel agreed that Ms. Buchanan can
 10 examine her client, rehashing this morning I don't think
 11 is efficient, so I just want to make sure that
 12 Ms. Buchanan covers areas where there was some
 13 confusion.
 14 MS. BUCHANAN: I'm getting to the point.
 15 MS. VANDRUFF: Okay. Thank you.
 16 BY MS. BUCHANAN:
 17 **Q. Now, with respect to this particular ticket, it**
 18 **indicates that a disclosure was discovered by Tiversa on**
 19 **April 18, 2008, and you indicated this morning that that**
 20 **wasn't the actual date that it was found.**
 21 A. That's correct.
 22 **Q. But this ticket that was provided to CIGNA, this**
 23 **ticket that was actually paid for by CIGNA, was supposed**
 24 **to be disclosed to CIGNA in real time as in like right**
 25 **after the disclosure was made.**

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1 A. That's correct.
 2 **Q. And would it have helped CIGNA to know that the**
 3 **disclosure of their files actually occurred in February**
 4 **as opposed to April so they could have taken some**
 5 **investigation and found the disclosure source for**
 6 **themselves?**
 7 A. Right.
 8 JUDGE CHAPPELL: At the time indicated on this
 9 document, was CIGNA a client or were they being groomed
 10 to be a prospective client?
 11 THE WITNESS: CIGNA was a client, a monitoring
 12 client, so we were providing peer-to-peer monitoring
 13 services for CIGNA.
 14 But the other thing that we would do is, say,
 15 for example, if LabMD did not purchase our services, we
 16 could reach out to CIGNA and say, LabMD has disclosed
 17 one hundred and -- I forget how -- 113 of your
 18 insureds' information, you need to reach out to LabMD,
 19 and you know, you could strong-arm people that way as
 20 well.
 21 JUDGE CHAPPELL: And why would you do that?
 22 THE WITNESS: If they did not want to become
 23 customers.
 24 JUDGE CHAPPELL: To monetize the target?
 25 THE WITNESS: No. What we would do is there

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1 would be a delay before we -- before we give it to
 2 somebody else to give Tiversa the chance to reach out to
 3 that customer and let them become a customer before
 4 going the third way around, before having an existing
 5 customer reach out to them.
 6 JUDGE CHAPPELL: So if I understood you
 7 correctly, the process you just described would help
 8 force LabMD to become a client.
 9 THE WITNESS: Right.
 10 BY MS. BUCHANAN:
 11 **Q. You testified this morning that in like the fall**
 12 **of 2009 you traveled to the FTC along with others from**
 13 **Tiversa to discuss the CID that had been produced.**
 14 A. Right.
 15 **Q. And essentially you were asked to explain how**
 16 **this spreadsheet was constructed and what information**
 17 **was contained on it; correct?**
 18 A. Right. Uh-huh.
 19 **Q. Can you tell us whether, in addition to**
 20 **providing the spreadsheet to the FTC, whether Mr. Boback**
 21 **made other use of this list?**
 22 A. Yes. This was the master list that we would
 23 cold-call people for IRCs off of as well.
 24 **Q. And after he actually delivered it to the FTC,**
 25 **did he tell clients that they in fact were aware of**

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1 **their disclosures?**
2 A. Yes. He actually contacted a lot of the people
3 on this list after the FTC was notified that they --
4 that these companies had a disclosure and would be
5 saying that the FTC is going to be taking action against
6 you if you don't become clients.
7 JUDGE CHAPPELL: Does this list have a document
8 number?
9 MS. BUCHANAN: Yes, Your Honor, it does. My
10 apologies. It's RX 551.
11 JUDGE CHAPPELL: Thank you.
12 MR. SHERMAN: Your Honor, it was not admitted
13 into or even presented for admission into evidence.
14 There is a redacted version of the list that is in
15 evidence. The only name that appears on that list is
16 LabMD. And that is document -- it's 307 I believe.
17 Yes, CX 307.
18 JUDGE CHAPPELL: So the list you're talking
19 about, Counselor, in evidence is a document labeled
20 RX 307 which is redacted.
21 MS. BUCHANAN: Correct. Thank you, Your Honor.
22 BY MS. BUCHANAN:
23 **Q. Now, in addition to all the companies that are**
24 **listed on this exhibit, which would represent companies**
25 **in which Tiversa would have created the appearance that**

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1 **their documents were spread all over the Internet, in**
2 **addition to these examples, were there other times when**
3 **Mr. Boback would go out and make statements, then ask**
4 **you to try to create a scenario that would make it look**
5 **like the information that he was given was actually**
6 **true?**
7 A. Yes. There were multiple, multiple times. Some
8 of them were very high level, very well publicized.
9 You know, one example would be, there was a
10 defense contractor in Washington, D.C., actually western
11 Virginia, and he was in charge of -- well, he was CEO of
12 a company that was working on a project to upgrade the
13 cockpit avionics for Marine One. And that file had
14 already been dealt with by law enforcement, had already
15 been remediated and taken off-line. The CEO knew about
16 it. It was gone.
17 Mr. Boback found out about it sometime later and
18 said we need to make hay out of this, so the media was
19 contacted and the story then was that the file had been
20 found at an Iranian IP address.
21 **Q. So basically Mr. Boback asked you to create the**
22 **appearance that the file had been found on an Iranian**
23 **address as opposed to where it was actually found.**
24 A. Right.
25 **Q. Now, Mr. Wallace, you are testifying today for**

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1 **the first time; correct?**
2 A. Yes.
3 **Q. And your deposition was noticed back in 2014;**
4 **correct?**
5 A. It -- I've never been deposed.
6 **Q. The parties here to this proceeding wanted to**
7 **take your deposition.**
8 A. Oh, yes. Yes.
9 **Q. And that was in 2014; correct?**
10 A. Yes. It was around the same time Bob's
11 deposition was done as well.
12 **Q. And did you ever give a deposition in this**
13 **case?**
14 A. Did I ever what?
15 **Q. Did you ever provide a deposition --**
16 A. No.
17 **Q. -- testimony?**
18 A. No, I did not.
19 **Q. Did you ever have discussions with Mr. Boback**
20 **about you giving a deposition testimony?**
21 A. Yes. Especially in regard to the LabMD file,
22 there was a lot of pressure to give false information,
23 which I just was not willing to do.
24 **Q. And so that Mr. Boback specifically asked you to**
25 **lie to the FTC in connection with your deposition;**

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1 **correct?**
2 A. There was not much asking. It was more
3 telling.
4 **Q. And on this occasion, you finally refused to do**
5 **something that Boback asked you to do that you knew was**
6 **wrong.**
7 A. Yes.
8 MS. BUCHANAN: I don't have any other questions,
9 Your Honor.
10 JUDGE CHAPPELL: All right.
11 MS. VANDRUFF: Your Honor, may I ask for the
12 court's indulgence for just a moment because I think
13 we're going to ask to approach.
14 JUDGE CHAPPELL: Okay.
15 MS. VANDRUFF: If I may? Thank you.
16 (Pause in the proceedings.)
17 MS. BUCHANAN: I just have actually one
18 follow-up question.
19 BY MS. BUCHANAN:
20 **Q. It was your testimony this morning with regard**
21 **to the kinds of documents that you found along with the**
22 **1718 File from LabMD computers -- and I don't think that**
23 **you -- that it was stated on the record what kind of**
24 **documents they were and why you believed that they came**
25 **from LabMD.**

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1 A. Yes. They were -- several of them were -- it
 2 had the red and white LabMD logo on the top of them.
 3 There were -- in the meta data of the Word document it
 4 clearly showed LabMD.
 5 Then there was also a Word document that had
 6 what an employee for LabMD would use to log in to
 7 different Web portals for insurance carriers to I
 8 believe submit information to it for payment.
 9 Like I say, every single one of the files was
 10 related to LabMD in one way or another.
 11 **Q. And finally, you made reference -- I had asked**
 12 **you whether there were other examples of times in which**
 13 **Mr. Boback would make statements and ask you to create a**
 14 **scenario that made it seem as though information was**
 15 **found in one place and it was really found somewhere**
 16 **else. And you made reference to him making statements**
 17 **about a disclosure of information, that you were**
 18 **directed to make it look like this information was found**
 19 **on an Iranian IP address?**
 20 A. Yes.
 21 **Q. And you made reference to Marine One; is that**
 22 **correct?**
 23 A. That is true.
 24 **Q. And are you referring to the president's**
 25 **helicopter?**

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1 A. Yes.
 2 It was a very publicized story. Tiversa,
 3 you know -- it was very good press for Tiversa. And
 4 believe it or not, it was not easy to find an active
 5 Iranian IP address that law enforcement couldn't get
 6 ahold of.
 7 **Q. And this is just one of the many --**
 8 A. This is one of many.
 9 **Q. -- examples of occasions where you were asked to**
 10 **create a scenario that information was found in**
 11 **locations where it never existed.**
 12 A. That is true.
 13 MS. BUCHANAN: I have no further questions.
 14 JUDGE CHAPPELL: All right.
 15 MS. VANDRUFF: May respondent's counsel and I
 16 approach, Your Honor?
 17 JUDGE CHAPPELL: All right.
 18 (At the bench, discussion off the record.)
 19 (In open court.)
 20 JUDGE CHAPPELL: We're going to take a short
 21 recess. We will reconvene at 4:00 p.m.
 22 (Recess)
 23 JUDGE CHAPPELL: Let's go back on the record.
 24 Mr. Sherman?
 25 MR. SHERMAN: May we approach, Your Honor?

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1 JUDGE CHAPPELL: Yes.
 2 MR. SHERMAN: I think that was the plan.
 3 (At the bench, discussion off the record.)
 4 (In open court.)
 5 JUDGE CHAPPELL: Mr. Wallace, you're excused.
 6 Thank you for your time.
 7 THE WITNESS: Oh.
 8 JUDGE CHAPPELL: Just like that. No deposition.
 9 You're free.
 10 THE WITNESS: Thank you.
 11 (At the bench, discussion off the record.)
 12 (In open court.)
 13 JUDGE CHAPPELL: So, Ms. VanDruff, can you tell
 14 us for the record your position on any cross or
 15 deposition of Mr. Wallace?
 16 MS. VANDRUFF: Yes, Your Honor. At this time,
 17 complaint counsel will not be proceeding with the
 18 deposition permitted by Your Honor's order, and we are
 19 not conducting cross-examination.
 20 JUDGE CHAPPELL: All right. Then the only
 21 question left to ask is whether Mr. Sherman has
 22 follow-up questions based on the redirect of
 23 Ms. Buchanan.
 24 MR. SHERMAN: I do not have any follow-up
 25 questions of Mr. Wallace, Your Honor.

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1 There is the issue of the admission of certain
 2 documents as exhibits.
 3 JUDGE CHAPPELL: Before that, Mr. Wallace and
 4 his counsel are excused.
 5 All right.
 6 MR. SHERMAN: In terms of those documents,
 7 complaint counsel and I have --
 8 JUDGE CHAPPELL: Do we have exhibit numbers?
 9 MR. SHERMAN: I think it is Exhibit Number -- or
 10 it should be --
 11 JUDGE CHAPPELL: Well, there's a chance we will
 12 reconvene, if there's rebuttal, we will reconvene, so we
 13 may not need to deal with this at the moment. And if
 14 there's no objection -- well, let me get this clear.
 15 The government is not in a position to say
 16 whether or not they will request rebuttal at this time?
 17 MS. VANDRUFF: That's correct, Your Honor.
 18 JUDGE CHAPPELL: Okay. So we're going to
 19 recess here shortly, and then I assume, if you want
 20 rebuttal, you'll be filing a motion requesting
 21 rebuttal.
 22 MS. VANDRUFF: Yes, Your Honor. And I would ask
 23 for one week to file that motion.
 24 JUDGE CHAPPELL: Any objection?
 25 MR. SHERMAN: No objection to that, Your Honor,

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1 if -- if it would then be proper after that week, should
 2 she -- should the -- should the FTC decide not to put on
 3 any rebuttal, then at that time we could deal with the
 4 submission of the exhibit that we were discussing
 5 before.
 6 MS. VANDRUFF: And Your Honor, complaint counsel
 7 would be amenable to doing that by consent motion or
 8 otherwise.
 9 JUDGE CHAPPELL: A joint motion.
 10 MS. VANDRUFF: Well, it would not be
 11 complaint counsel's motion, Your Honor, but I can see
 12 that we would --
 13 JUDGE CHAPPELL: He could offer the attachments,
 14 but from what I'm hearing, what I heard in our
 15 conference at the bench, you're going to -- these are
 16 going to need to be in camera?
 17 MR. SHERMAN: That's correct, Your Honor. There
 18 is some sensitive information contained in some of the
 19 documents.
 20 JUDGE CHAPPELL: So we're going to need a motion
 21 for in camera treatment.
 22 MR. SHERMAN: And we would be willing to make
 23 that motion if the court would indulge us to wait until
 24 the FTC has made its decision on rebuttal. Or -- and
 25 not that that is a mechanism for us making the motion,

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1 we could do it in the meantime. It's --
 2 JUDGE CHAPPELL: Is the offer of these exhibits
 3 contingent upon rebuttal or not connected?
 4 MR. SHERMAN: They are not.
 5 MS. VANDRUFF: And Your Honor, it would be
 6 easier for at least complaint counsel to assess the
 7 rebuttal to know that respondent has closed its
 8 evidence.
 9 I think the only outstanding issue are these
 10 18 documents that Mr. Sherman has described.
 11 JUDGE CHAPPELL: Well, I think you raise a good
 12 point.
 13 Does respondent rest? Other than these
 14 documents we're talking about.
 15 MR. SHERMAN: Yes, Your Honor.
 16 JUDGE CHAPPELL: Okay.
 17 MR. SHERMAN: Respondent rests.
 18 JUDGE CHAPPELL: Okay.
 19 MS. VANDRUFF: That addresses my concern,
 20 Your Honor. Thank you.
 21 JUDGE CHAPPELL: I'm just trying to figure out
 22 how to handle these exhibits if there's no rebuttal and
 23 whether we would need to get together again here for me
 24 to wrap everything up.
 25 Because there's no need for provisional

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1 in camera if we're not referring to a document in open
 2 court, we need to go with the standard in camera, so
 3 we'll need a motion to be filed, and you know the
 4 guides, the standards, et cetera, that apply to that, so
 5 we'll need a motion for in camera treatment.
 6 And I could rule on that. And I will not be
 7 able to close the record until that's resolved.
 8 So I think I've handled everything I can
 9 today.
 10 We will give -- you have a week to file a motion
 11 for rebuttal or to notify us that you don't intend to
 12 request rebuttal; right?
 13 MS. VANDRUFF: Yes, Your Honor.
 14 JUDGE CHAPPELL: And you have a week for that.
 15 You can get this in camera motion in pretty
 16 quickly; right?
 17 MR. SHERMAN: Yes, Your Honor.
 18 JUDGE CHAPPELL: How many pages are we talking,
 19 just ballpark?
 20 MR. SHERMAN: 56. 50.
 21 JUDGE CHAPPELL: Okay. Not thousands.
 22 MR. SHERMAN: No, sir.
 23 JUDGE CHAPPELL: And I believe if the calendar
 24 is right that you have until May 12 for your rebuttal
 25 motion.

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1 MS. VANDRUFF: Thank you, Your Honor. That's
 2 exactly what I was counting.
 3 MR. SHERMAN: Your Honor, the only procedural
 4 step I think we need to take at this point, having
 5 rested our case, we would renew our motion to dismiss.
 6 JUDGE CHAPPELL: Yes. I have that in writing.
 7 MR. SHERMAN: And we would submit that on the
 8 brief that's been submitted already.
 9 JUDGE CHAPPELL: I have that in writing.
 10 So we'll see what develops with the rebuttal
 11 request and the document. Until then --
 12 MR. SHERMAN: Your Honor, one more thing.
 13 JUDGE CHAPPELL: Okay. Go ahead.
 14 MR. SHERMAN: One more thing.
 15 I think there's a -- there's a request
 16 Mr. Rubinstein wants to make on the record.
 17 JUDGE CHAPPELL: All right.
 18 MR. RUBINSTEIN: Good afternoon, Your Honor.
 19 This is to give you notice that we will be
 20 filing a motion with you in very short order, asking
 21 that you to consider a referral of Tiversa and
 22 Mr. Boback, under 18 U.S.C. 1505, for obstruction of
 23 this proceeding.
 24 Based on the testimony taken in this case, the
 25 document productions and the information obtained from

1465	<p>1 the House Oversight and Government Reform Committee and 2 based on the testimony heard today, we believe there is 3 ample evidence to suggest that Tiversa provided false 4 testimony under oath, that Mr. Boback provided false 5 testimony under oath, that documents that were 6 responsive to subpoenas from the government were not 7 produced or willfully withheld, and that for these 8 reasons it would be appropriate for this court to ask 9 for criminal investigation. 10 And we are going to ask the government to join 11 us in that motion. 12 JUDGE CHAPPELL: Okay. Let me just tell you, 13 thanks for the warning or notice, but I'm not going to 14 accept that orally in open court. That will need to be 15 done in writing. 16 MR. RUBINSTEIN: Yes, Your Honor. We will 17 provide that to you in writing fairly soon. 18 JUDGE CHAPPELL: All right. 19 Anything further? 20 MS. VANDRUFF: No, Your Honor. Just -- except 21 for just an administrative point. 22 With respect to cleanup of exhibit lists, 23 et cetera, is that something that you expect the parties 24 to resolve or do you want us to present on that at our 25 next proceeding?</p>	1467	<p>1 JUDGE CHAPPELL: All right. Until we meet 2 again, we're adjourned. 3 (Whereupon, the foregoing hearing was adjourned 4 at 4:16 p.m.) 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
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1466	<p>1 JUDGE CHAPPELL: I would like for you to work on 2 eliminating any duplicative exhibit, one that's a CX as 3 well as an RX, so it becomes much easier in posttrial 4 briefing. And hopefully you can do that without my 5 involvement. 6 MR. SHERMAN: I think we can handle that, 7 Your Honor. 8 JUDGE CHAPPELL: And as far as I'm concerned, it 9 gets no greater weight for one side or the other whether 10 it's a CX or an RX. It's just an exhibit. 11 MS. VANDRUFF: And so we can resubmit then, 12 Your Honor, in the coming days? 13 JUDGE CHAPPELL: I think the best way to do it 14 is if we have, for example, a CX 5 and an RX 25 and 15 they're the same exhibit, then I think create a list 16 of what you're withdrawing, and in open court you can 17 say we're withdrawing, for example, RX 25 because it's 18 the same exhibit as CX 5, so that the record is clean. 19 MS. VANDRUFF: Okay. 20 JUDGE CHAPPELL: It's better to withdraw than to 21 add. 22 MS. VANDRUFF: Understood. 23 JUDGE CHAPPELL: Okay. Anything else? 24 MR. SHERMAN: Nothing further, Your Honor. 25 MS. VANDRUFF: Nothing further, Your Honor.</p>	1468	<p>1 CERTIFICATION OF REPORTER 2 3 DOCKET/FILE NUMBER: 9357 4 CASE TITLE: LabMD, Inc. 5 HEARING DATE: May 5, 2015 6 7 I HEREBY CERTIFY that the transcript contained 8 herein is a full and accurate transcript of the notes 9 taken by me at the hearing on the above cause before the 10 FEDERAL TRADE COMMISSION to the best of my knowledge and 11 belief. 12 13 DATED: MAY 6, 2015 14 15 16 JOSETT F. WHALEN, RMR 17 18 19 CERTIFICATION OF PROOFREADER 20 21 I HEREBY CERTIFY that I proofread the transcript 22 for accuracy in spelling, hyphenation, punctuation and 23 format. 24 25 ELIZABETH M. FARRELL</p>
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EXHIBIT 3

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LAWRENCE J. BRADY
STAFF DIRECTOR

December 1, 2014

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

Dear Ms. Ramirez:

The Committee on Oversight and Government Reform has been investigating the activities of Tiversa, Inc., a Pittsburgh-based company that purportedly provides peer-to-peer intelligence services. The Federal Trade Commission has relied on Tiversa as a source of information in its enforcement action against LabMD, Inc., a Georgia-based medical testing laboratory. The Committee has obtained documents and information indicating Tiversa failed to provide full and complete information about work it performed regarding the inadvertent leak of LabMD data on peer-to-peer computer networks. In fact, it appears that, in responding to an FTC subpoena issued on September 30, 2013, Tiversa withheld responsive information that contradicted other information it did provide about the source and spread of the LabMD data, a billing spreadsheet file.

Despite a broad subpoena request, Tiversa provided only summary information to the FTC about its knowledge of the source and spread of the LabMD file.

Initially, Tiversa, through an entity known as the Privacy Institute, provided the FTC with information about peer-to-peer data leaks at nearly 100 companies, including LabMD.¹ Tiversa created the Privacy Institute for the specific purpose of providing information to the FTC. Despite Tiversa's claims that it is a trusted government partner, it did not want to disclose that it provided information to the FTC.²

After the FTC filed a complaint against LabMD, the agency served Tiversa with a subpoena for documents related to the matter. Among other categories of documents, the subpoena requested "all documents related to LabMD."³ In a transcribed interview, Alain Sheer,

¹ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Robert Boback, Chief Executive Officer, Tiversa, Inc., Transcript at 42 (June 5, 2014) [hereinafter Boback Tr.].

² See Tiversa, Industry Outlook, Government/Law Enforcement, available at <http://tiversa.com/explore/industry/gov> (last visited Nov. 21, 2014); Boback Tr. at 42-43.

³ Fed. Trade Comm'n, Subpoena to Tiversa Holding Corp. (Sept. 30, 2013) [hereinafter Tiversa FTC Subpoena].

an attorney with the FTC's Bureau of Consumer Protection, told the Committee that the FTC did not narrow the subpoena for Tiversa. Sheer stated:

Q This is the specifications requested of Tiversa. No. 4 requests all documents related to LabMD. Do you know if Tiversa produced all documents related to LabMD?

A I am not sure what your question is.

Q Let me ask it a different way. Was the subpoena narrowed in any way for Tiversa?

A Not that I am aware of.⁴

In total, Tiversa produced 8,669 pages of documents in response to the FTC's subpoena. Notably, the production contained five copies of the 1,718-page LabMD Insurance Aging file that Tiversa claimed to have found on peer-to-peer networks and only 79 pages of other materials, none of which materially substantiated Tiversa's claims about the discovery of the file.

The information Tiversa gave the FTC included the IP address from which Tiversa CEO Robert Boback has claimed the company first downloaded the LabMD file, as well as other IP addresses that Tiversa claims also downloaded the file. The origin of the IP address from which Tiversa first downloaded the LabMD file was in dispute in other litigation between LabMD and Tiversa. On numerous occasions, including before the FTC, Boback maintained that Tiversa first downloaded the LabMD file from an IP address in San Diego, California. Boback stated:

Q What is the significance of the IP address, which is 68.107.85.250?

A That would be the IP address that we downloaded the file from, I believe.

Q Going back to CX 21. Is this the initial disclosure source?

A If I know that our initial disclosure source believed that that was it, yes. I don't remember the number specifically, but if that IP address resolves to San Diego, California, then, yes, that is the original disclosure source.

Q When did Tiversa download [the LabMD file]?

A I believe it was in February of 2008.⁵

⁴ H. Comm. on Oversight & Gov't Reform, Transcribed Interview of Alain Sheer, Fed. Trade Comm'n, Transcript at 147 (Oct. 9, 2014).

⁵ In the matter of LabMD, Inc., Deposition of Robert J. Boback, CEO, Tiversa, transcript at 24-25 (Nov. 21, 2013) [hereinafter Boback Nov. 2013 FTC Tr.].

Boback also testified that Tiversa performed an investigation into the LabMD file at the request of a client.⁶ In the course of this investigation, Tiversa concluded that an IP address in Atlanta, Georgia, where LabMD was headquartered, was the initial disclosure source of the document. Boback stated:

Q There is an IP address on the right-hand side, it is 64.190.82.42. What is that?

A That, if I recall, is an IP address that resolves to Atlanta, Georgia.

Q Is that the initial disclosure source?

A We believe that it is the initial disclosure source, yes.

Q And what is that based on?

A The fact that the file, the 1,718 file, when we searched by hash back in that time for our client, we received a response back from 64.190.82.42 suggesting that they had the same file hash as the file that we searched for. We did not download the file from them.

* * *

Q So, I think you are telling me that chronologically this was the first other location for that file in juxtaposition of when you found the file at 68.107.85.250?

A We know that the file in early February, prior to this February 25 date, was downloaded from the 68.107.85.250. Upon a search to determine other locations of the file across the network, it appears that on 2/25/2008 we had a hash match search at 64.190.82.42, which resolved to Atlanta, which led us to believe that without further investigation, that this is most likely the initial disclosing source.

Q What other information do you have about 64.190.82.42?

A I have no other information. I never downloaded the file from them. They only responded to the hash match.⁷

Boback's testimony before the FTC in November 2013 made clear that Tiversa first downloaded the LabMD file from an IP address in San Diego, California, in February 2008, that it only identified LabMD as the disclosing source after performing an investigation requested by a client, and that it never downloaded the file from LabMD.

⁶ Boback Nov. 2013 FTC Tr. at 72-73 ("In 2008, when working for another client, we were attempting to identify the original disclosure source of the file that we discovered from 1 the San Diego IP address.").

⁷ Boback Nov. 2013 FTC Tr. at 41.

Tiversa withheld responsive documents from the FTC, despite the issuance of the September 2013 subpoena. These documents contradict the account Boback provided to the FTC.

On June 3, 2014, the Committee issued a subpoena to Tiversa requesting, among other information, “[a]ll documents and communications referring or relating to LabMD, Inc.”⁸ This request was very similar to the FTC’s request for “all documents related to LabMD.”⁹ Despite nearly identical requests from the FTC and the Committee to Tiversa, Tiversa produced numerous documents to the Committee that it does not appear to have produced to the FTC. Information contained in the documents Tiversa apparently withheld contradicts documents and testimony Tiversa did provide to the FTC.

An internal Tiversa document entitled “Incident Record Form,” dated April 18, 2008, appears to be the earliest reference to the LabMD file in Tiversa’s production to the Committee.¹⁰ This document states that on April 18, 2008, Tiversa detected a file “disclosed by what appears to be a potential provider of services for CIGNA.”¹¹ The Incident Record described the document as a “single Portable Document Format (PDF) that contain[ed] sensitive data on over 8,300 patients,” and explained that “[a]fter reviewing the IP address, resolution results, meta-data and other files, Tiversa believes it is likely that Lab MD near Atlanta, Georgia is the disclosing source.”¹² The name of the file was “insuranceaging_6.05.071.pdf,” which is the same name as the file in question in the FTC proceeding. According to the Incident Record, the IP address disclosing the file was 64.190.82.42—later confirmed to be a LabMD IP address.¹³ Upon learning about the file, CIGNA, a Tiversa client, “asked Tiversa to perform Forensic Investigation activities” on the insurance aging file to determine the extent of proliferation of the file over peer-to-peer networks.¹⁴

An August 2008 Forensic Investigation Report provided the analysis CIGNA requested. This report identified IP address 64.190.82.42—the Atlanta IP address—as proliferation point zero, and the “original source” of the Incident Record Form.¹⁵ A spread analysis included in the August 2008 forensic report stated that the file had been “observed by Tiversa at additional IP addresses” but made clear that Tiversa had not downloaded the file from either additional source because of “network constraint and/or user behavior.”¹⁶ Thus, according to this report, Tiversa had only downloaded the LabMD file from one source in Atlanta, Georgia by August 2008. This contradicts Boback’s testimony that Tiversa first downloaded the LabMD file from an IP address

⁸ H. Comm. on Oversight & Gov’t Reform, Subpoena to Robert Boback, Chief Exec. Officer, Tiversa, Inc. (June 3, 2014).

⁹ Tiversa FTC Subpoena.

¹⁰ Tiversa Incident Record Form, ID # CIG00081 (Apr. 18, 2008).

¹¹ *Id.*

¹² *Id.* (emphasis added).

¹³ *Id.*

¹⁴ Tiversa, Forensic Investigation Report for Ticket #CIG00081 (Aug. 12, 2008). This letter uses the phrase “forensic report” to describe this and a second report created by Tiversa about the LabMD file because that is the title used by Tiversa. It is not clear what, if any, forensic capabilities Tiversa possesses.

¹⁵ *Id.*

¹⁶ *Id.*

in San Diego, California. If Tiversa had in fact downloaded the LabMD file from a San Diego IP address in February 2008, then that fact should be included in this 2008 forensic report. It is not.

One of the two additional IP addresses is located in San Diego, California. It is a different IP address, however, than the one from which Tiversa claims to have originally downloaded the file.¹⁷ Further, Tiversa did not observe that this San Diego IP address possessed the LabMD file until August 5, 2008.¹⁸ Thus, according to this report, Tiversa did not observe any San Diego IP address in possession of the LabMD file until August 2008. Again, the report stands in stark contrast to Boback's testimony that Tiversa first downloaded the LabMD file from a different San Diego IP address in February 2008.

In addition, both the April 2008 Incident Record Form and the August 2008 Forensic Investigative Report stated that the LabMD file was "detected being disclosed" in April 2008. Neither report indicated that Tiversa first downloaded the file from the San Diego IP address—an IP address not listed on either report—on February 5, 2008. Boback's deposition testimony and a cursory four-line document marked as exhibit CX-19 seem to be the only evidence that Tiversa first downloaded the LabMD file from a San Diego IP address in February 2008.

These documents contradict the information Tiversa provided to the FTC about the source and spread of the LabMD file. If Tiversa had, in fact, downloaded the LabMD file from the San Diego IP address and not from the Georgia IP address, then these reports should indicate as such. Instead, the San Diego IP address is nowhere to be found, and the Georgia IP address appears as the initial disclosing source on both reports.

Tiversa also produced an e-mail indicating that it originally downloaded the LabMD file from Georgia – and not from San Diego as it has steadfastly maintained to the FTC and this Committee. On September 5, 2013, Boback e-mailed Dan Kopchak and Molly Trunzo, both Tiversa employees, with a detailed summary of Tiversa's involvement with LabMD. Why Boback drafted the e-mail is unclear. He wrote, "[i]n 2008, while doing work for a client, our systems downloaded a file (1,718 page pdf) that contained sensitive information including SSNs and health information for over 9000 people. The file had the name 'LabMD' in both the header of the file and the metadata. The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD's office to be located."¹⁹

As noted above, according to Alain Sheer, a senior FTC attorney assigned to the LabMD matter, the FTC did not narrow the September 2013 subpoena requiring Tiversa to produce, among other documents, "all documents related to LabMD."²⁰ Tiversa withheld these relevant

¹⁷ The IP address reported on the August 2008 forensic report that resolves to San Diego, California is 68.8.250.203. Boback testified, however, that Tiversa first downloaded the LabMD file from IP address 68.107.85.250 on February 5, 2008. Tiversa concluded in the report that the second IP address on which it observed the file was "most likely an IP shift from the original disclosing source."

¹⁸ *Id.*

¹⁹ E-mail from Robert Boback, CEO, Tiversa, to Dan Kopchak & Molly Trunzo (Sept. 5, 2013) (emphasis added) [TIVERSA-OGR-0028866-67].

²⁰ Tiversa FTC Subpoena.

documents about its discovery and early forensic analysis of the LabMD file from the FTC. These documents directly contradict testimony that Boback provided to the FTC, and call Tiversa's credibility into question. Boback has not adequately explained why his company withheld documents, and why his testimony is not consistent with reports Tiversa created at the time it discovered the LabMD file.

It is unlikely that the LabMD file analyzed in the April 2008 Incident Record Form and the August 2008 Forensic Investigative Report is different from the so-called "1718 file" at issue in the FTC proceeding, particularly given Boback's testimony to the FTC about how Tiversa's system names files.²¹ If, however, the earlier reports do refer to a different file, then Tiversa neglected to inform the FTC of a second, similarly sized leak of LabMD patient information.

Tiversa's June 2014 forensic report is the only report provided to this Committee that substantiates Boback's claims.

Tiversa produced to the Committee a forensic report on the LabMD file that it created in June 2014. Tiversa created this report and others related to testimony previously provided to the Committee after the investigation began. While outside the scope of the FTC's subpoena due to the date of the document, this is the only report supporting Tiversa's claim that it first downloaded the file from the San Diego IP address. This report contradicts information Tiversa provided to CIGNA in the April 2008 Incident Record Form and August 2008 Forensic Investigative Report—documents created much closer to when Tiversa purportedly discovered the LabMD document on a peer-to-peer network. The fact that Tiversa created the only forensic report substantiating its version of events after the Committee began its investigation raises serious questions.

This most recent report states that Tiversa's systems first detected the file on February 5, 2008, from a San Diego IP address (68.107.85.250) not included in either of the 2008 documents. According to the spread analysis, this San Diego IP shared the file from February 5, 2008, until September 20, 2011. Yet, despite allegedly being downloaded before both the April or August 2008 reports, neither 2008 document mentions that Tiversa downloaded this document.

The June 2014 report also states that the LabMD IP address (64.190.82.42) shared the file between March 7, 2007, and February 25, 2008. Thus, according to this report, by the time Tiversa submitted an Incident Record Form to CIGNA in April 2008, the LabMD IP address was no longer sharing the file. Furthermore, the report does not describe why Tiversa's system did not download the file from the Georgia IP address, even though the technology should have downloaded a file that hit on a search term, in this case "CIGNA," each time a different computer shared the document. The June 2014 report includes no reference to the other San Diego IP address discussed in the August 2008 forensic report as being in possession of the LabMD file.

²¹ Boback Nov. 2013 FTC Tr. at 40-41 (describing that a file's "hash" or title identifies "exactly what that file is." The title of the LabMD document described in the April and August 2008 documents is the same as the title of the document in the FTC proceeding).

Tiversa did not make a full and complete production of documents to this Committee. It is likely that Tiversa withheld additional documents from both this Committee and the FTC.

On October 14, 2014, Tiversa submitted a Notice of Information Pertinent to Richard Edward Wallace's Request for Immunity.²² Chief Administrative Law Judge D. Michael Chappell has since ordered that the assertions and documents contained in the Notice of Information will be "disregarded and will not be considered for any purpose."²³ Tiversa included two e-mails from 2012 as exhibits to the Notice of Information. According to Tiversa, these e-mails demonstrate that Wallace could not have fabricated the IP addresses in question in October 2013, because he previously included many of them in e-mails to himself and Boback a year prior.²⁴

Tiversa did not produce these documents to the Committee even though they are clearly responsive to the Committee's subpoena. Their inclusion in a submission in the FTC proceeding strongly suggests that Tiversa also never produced these documents to the FTC. In its Notice of Information, Tiversa did not explain how and when it identified these documents, why it did not produce them immediately upon discovery, and what additional documents it has withheld from both the FTC and the Committee. The e-mails also contain little substantive information and do not explain what exactly Wallace conveyed to Boback in November 2012 or why he conveyed it.

If Boback did in fact receive this information in November 2012, his June 2013 deposition testimony is questionable. It is surprising that Tiversa would have supplied inaccurate information to the FTC when Boback himself apparently received different information just months prior. Tiversa should have located and produced these e-mails pursuant to the September 2013 subpoena, and it should have been available for Boback's June 2013 deposition.

Tiversa's failure to produce numerous relevant documents to the Commission demonstrates a lack of good faith in the manner in which the company has responded to subpoenas from both the FTC and the Committee. It also calls into question Tiversa's credibility as a source of information for the FTC. The fact remains that withheld documents contemporaneous with Tiversa's discovery of the LabMD file directly contradict the testimony and documents Tiversa did provide. In the Committee's estimation, the FTC should no longer consider Tiversa to be a cooperating witness. Should the FTC request any further documents from Tiversa, the Commission should take all possible steps to ensure that Tiversa does not withhold additional documents relevant to the proceeding.

²² Tiversa Holding Corp.'s Notice of Information Pertinent to Richard Edward Wallace's Request For Immunity, In the Matter of Lab MD, Inc., No. 9357 (U.S. Fed. Trade Comm'n, Oct. 14, 2014), <http://www.ftc.gov/system/files/documents/cases/572572.pdf> [hereinafter Notice of Information].

²³ *LabMD Case: FTC gets green light to grant former Tiversa employee immunity in data security case*, PHIprivacy.net, Nov. 19, 2014, <http://www.phiprivacy.net/labmd-case-ftc-gets-green-light-to-grant-former-tiversa-employee-immunity-in-data-security-case/>.

²⁴ Notice of Information at 4.

The Honorable Edith Ramirez

December 1, 2014

Page 8

I have enclosed the documents discussed herein with this letter, so that your staff may examine them. All documents are provided in the same form in which Tiversa produced them to the Committee.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at "any time" investigate "any matter" as set forth in House Rule X. If you have any questions, please contact the Committee staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,



Darrell Issa
Chairman

Enclosures

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

Ms. Kelly Tshibaka, Acting Inspector General, U.S. Federal Trade Commission

Ms. Laura Riposo VanDruff, Complaint Counsel, U.S. Federal Trade Commission

EXHIBIT 4

Transcript of the Testimony of **Christopher Gormley**

Date: March 31, 2014

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



ORIGINAL

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

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

In the Matter of:

DOCKET NO. 9357

Lab MD, Inc, a Corporation,

- - - -

DEPOSITION OF: CHRISTOPHER GORMLEY

- - - -

DATE: March 31, 2014

Monday, 9:30 a.m.

LOCATION: DINSMORE & SHOHL
2800 One Oxford Centre
301 Grant Street
Pittsburgh, PA 15219

TAKEN BY: LabMD, Inc.

REPORTED BY: G. Donavich, RPR, CRR

Notary Public

Ref. No. 34281

1 DEPOSITION OF CHRISTOPHER GORMLEY, a
2 witness, called by the LabMD, Inc. for examination,
3 in accordance with the Federal Rules of Civil
4 Procedure, taken by and before G. Donavich, RPR,
5 CRR, a Court Reporter and Notary Public in and for
6 the Commonwealth of Pennsylvania, at the offices of
7 2800 One Oxford Centre, Pittsburgh, Pennsylvania, on
8 Monday, March 31, 2014, commencing at 9:30 a.m.

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13 Michael Daugherty

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1 customers; three, they would isolate documents
2 that would be of interest to the clients; and,
3 four, they would write reports to the clients
4 describing what they found; and, five, they
5 would discover whether that information was
6 present --

7 They would identify where that
8 information came from peer-to-peer as best
9 they can given the exact nature.

10 Q. In terms of No. 5 you indicated that the
11 information analyst would identify where
12 information came from given the inexact
13 nature.

14 Is that to suggest that there were
15 times when the origination of the information
16 was not available or was not knowable?

17 A. Let me rephrase what I mean by that. The
18 system determined the IP address of the
19 origination of the file. To determine the
20 precise owner of the file by name, address,
21 the company was sometimes inexact; however,
22 the IP address was exact.

EXHIBIT 5

FEDERAL TRADE COMMISSION

I N D E X

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EXHIBIT:	DESCRIPTION	FOR ID
No. CX 8	[173.16.83.112]	
	Insuranceaging_6.05.07	42
No. CX 9	[201.194.118.82]	
	Insuranceaging_6.05.0	49
No. CX 10	Tiversa insurance aging file 3	23
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No. CX 18	[71.62.145.247]daily credit card	
	Transactions.pdf	65
No. CX 19	Four IP addresses	50
No. CX 20	2-page Document with insurance	
	Aging info	38
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1 UNITED STATES OF AMERICA

2 FEDERAL TRADE COMMISSION

3 In the Matter of:

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

5 Respondent.

6
7 Thursday, November 21, 2013

8
9 REED SMITH, LLP

10 225 Fifth Avenue

11 Suite 1200

12 Pittsburgh, PA 15222

13
14 The above-entitled matter came on for deposition,
15 pursuant to notice at 9:09 a.m.

16
17 - - - -

18 C O N F I D E N T I A L

19 Pursuant to Protective Order

20 - - - -

21
22
23
24
25

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20

21

22

23

24

25

1 A. Okay.

2 Q. Have you seen this exhibit before?

3 A. I have.

4 Q. What is it?

5 A. Appears to be what is referred to as the 1,718
6 document. It is a looks like an insurance aging report
7 by a company called Lab MD.

8 Q. Is CX 10 a true and accurate copy or correct copy
9 of the file that you downloaded?

10 A. It appears to be, yes.

11 Q. Was it downloaded in the ordinary course of
12 Tiversa's business?

13 A. It was.

14 Q. Was it maintained in the ordinary course of
15 Tiversa's business?

16 A. It was.

17 Q. What is the significance of the IP address, which
18 is 68.107.85.250?

19 A. That would be the IP address that we downloaded
20 the file from, I believe.

21 Q. Going back to CX 21.

22 Is this the initial disclosure source?

23 A. If I know that our initial disclosure source
24 believed that that was it, yes. I don't remember the
25 number specifically, but if that IP address resolves to

1 San Diego, California, then, yes, that is the original
2 disclosure source.

3 Q. When did Tiversa download CX 10?

4 A. I believe it was in February of 2008.

5 Q. Has CX 10 changed in any way since Tiversa
6 downloaded it?

7 A. No.

8 Q. How did Tiversa find CX 10?

9 A. In the normal course of business, Tiversa was
10 providing services for a customer that the search
11 criteria, that we were looking for, it came in with
12 those, with that search criteria. We weren't looking
13 for it.

14 Q. What technology did you use or search engines did
15 you use to find it?

16 A. We just used peer-to-peer technology and our
17 Tiversa's search tool in the peer-to-peer technology.
18 But, again, it just has more breadth. It has no more
19 depth. Anyone else could have found the file as well.

20 Q. So, I think you told us earlier that that is now
21 called Eagle Vision, but the name may have changed along
22 the way.

23 Is this a precursor to Eagle Vision?

24 A. Correct. That's true.

25 Q. Did Tiversa use any other device or application

1 file's DNA or hash, as a term in technology, is the same
2 hash as the file that was downloaded from San Diego.

3 Q. That is from 68.107.85.250?

4 A. Correct, from 68.107.85.250.

5 Q. There is an IP address on the right-hand side, it
6 is 64.190.82.42.

7 What is that?

8 A. That, if I recall, is an IP address that resolves
9 to Atlanta, Georgia.

10 Q. Is that the initial disclosure source?

11 A. We believe that it is the initial disclosure
12 source, yes.

13 Q. And what is that based on?

14 A. The fact that the file, the 1,718 file, when we
15 searched by hash back in that time for our client, we
16 received a response back from 64.190.82.42 suggesting
17 that they had the same file hash as the file that we
18 searched for. We did not download the file from them.

19 Q. Would that not be true if you found the file on a
20 third site?

21 A. If they had the same file as well, the same hash,
22 that would also show another IP address, which could
23 potentially be the initial disclosure source. However,
24 this was the only disclosure source that we found at
25 that time when we looked at it for our other client to

1 A. It changes over time.

2 Q. Does the probe cover operating systems?

3 A. It is agnostic to the operating system.

4 Q. Does it cover anything else besides the
5 applications you've mentioned?

6 A. It just works in an open source environment. It
7 just is issuing searches in an open source environment
8 to anyone that has joined this file sharing network. If
9 you haven't joined or if you are not on the network,
10 there is no ability to Tiversa to touch your system or
11 exchange files with you in any way.

12 Q. Did Tiversa conduct a network probe for a Lab MD
13 file?

14 A. A network probe? Never.

15 (Deposition Exhibit CX 22 was marked for
16 identification.)

17 BY MR. SHEER:

18 Q. I'm passing to you an exhibit called CX 22?

19 A. Let me clarify that last question. Can you ask
20 it the same way you just asked it?

21 MR. SHAW: Can you read back the question?

22 BY MR. SHEER:

23 A. Clarify, yes. In 2008, when working for another
24 client, we were attempting to identify the original
25 disclosure source of the file that we discovered from

1 the San Diego IP address. So, we issued a hash based
2 search on that file. We could not confirm at that time
3 that it belonged to Lab MD. Someone could have put Lab
4 MD on it. We didn't know that it was a Lab MD file at
5 the time, even though it said that on the top of the
6 document, Lab MD. We were trying to identify is there
7 any other source, because our client, whose information
8 was listed into this file, would want to know, where did
9 this come from, mainly, because they were concerned, did
10 it come from them, frankly. And we wanted to find out
11 if that was the case, so --

12 Q. Did you find anything other than the one file
13 that you described?

14 A. The only thing that -- we didn't download any
15 files. We just used the hash based search for the file
16 and came up with an IP address located in Atlanta
17 Georgia, which we reported as suspected, that that is
18 where we thought the original source is, based on the
19 Lab MD being in Georgia and the IP address being in
20 Georgia. We didn't do any further investigation to
21 determine it, because we didn't need to.

22 Q. Could you have gotten a response to the hash
23 based search if a file sharing application had not been
24 running on the IP address, I think it is at 164 IP
25 address that you are referring to?

EXHIBIT 6

RX630

From: Robert Boback <rboback@tiversa.com>
Sent: Thursday, September 5, 2013 3:20 PM
To: Dan Kopchak <dkopchak@tiversa.com>; Molly Trunzo <mtrunzo@tiversa.com>
Subject: Tiversa

I wanted to provide updated information regarding the question of litigation involving Tiversa. During our call, I discussed litigation in which Tiversa is a plaintiff against our former patent firm. That is still ongoing. Earlier in 2013, Tiversa was also engaged in a separate litigation with a company called LabMD, which is based in Georgia. Tiversa, Dartmouth College and Professor Eric Johnson (Tuck Business School) was sued by LabMD by its CEO, Michael Daugherty as he alleged that Tiversa "hacked" his company in an effort to get a file containing nearly 9,000 patient's SSNs and medical information and provided the information to Dartmouth and Eric Johnson for a DHS-funded research project. Mr. Daugherty has little to no understanding of P2P or Information security which is what caused him to think that he was "hacked" and which resulted in his widespread government conspiracy theory that followed. He also suggested in the litigation that because he would not do business with Tiversa to remediate the problem, that Tiversa "kicked the file over to the feds [FTC]" (and Dartmouth) and the FTC sent him a questionnaire about the breach, which caused him "great harm" due to the widespread "government shakedown of small business." He claimed that Tiversa was attempting to extort money from him to "answer his questions" as a part of the larger conspiracy. The reason that I did not mention this during our discussion is that the case was dismissed due to jurisdiction (his real estate attorney friend filed it in Georgia). He subsequently appealed two times, and lost both, the final of which was ruled on in February 2013. As an interesting sidebar to this story, Mr. Daugherty began writing a book about the government overreach and his great conspiracy theory of the government war on small business. When our attorneys learned of what was coming in the book (from his blog postings about the book), we quickly served his counsel with a C&D as his "true story" was full of inaccurate statements about me and Tiversa. Unfortunately, Mr. Daugherty sees himself as "Batman" (no joke) and he chose to continue on with his book and starting scheduling speaking engagements where he would discuss his "true story" about how the government is out to "get" small business and that the FTC and Tiversa (and presumably Dartmouth) are the ring leaders. His book, "Devil inside the Beltway" is to be released later this month. While I do not expect this book to be on the NY Times best seller list, I cannot sit idly by and allow such a gross distortion of the facts and mischaracterization of Tiversa, and me, in his efforts to sell his book and create a "name" for himself on any speaking tour.

That said, Tiversa filed a complaint in federal court today citing a number of counts including but not limited to Defamation, Slander, Libel, and others against Mr. Daugherty and LabMD. Tiversa is not litigious and it was our hope that he would conduct himself appropriately after receiving the C&D in November of 2012. But again, he sees himself as Batman.

Here is the real series of events that occurred in this case:

Tiversa, as you know, downloads leaked information on behalf of clients, individual, corporate and/or federal. In the process of downloading information, we often get files that are not related to our clients but are nonetheless sensitive. We call this "dolphin in the tuna net"....for example, if we were looking for "Goldman Sachs" and our system finds a file with the term "Goldman" in it. The file may have the name "Henry Goldman" but our system just saw "Goldman" and downloaded it, in the event it related to Goldman Sachs. After the file would be downloaded, it would be reviewed by an Analyst which would determine that it was NOT related to Goldman Sachs, but it may or may not include SSNs or other sensitive information. This was the case with LabMD.

In 2008, while doing work for a client, our systems downloaded a file (1,718 page pdf) that contained sensitive information including SSNs and health information for over 9000 people. The file had the name "LabMD" in both the header of the file and the metadata. The IP of the download was found to be in Georgia, which after a Google search, is where we found LabMD's office to be located. At this point, we were not positive that the file belonged to LabMD, but it seemed probable. We could have chosen to do nothing at all and pretend that we never saw the file. That approach would leave both LabMD and the 9000 victims at very high risk (and growing) of fraud and identity theft. Needless to say, we contacted the company to inform them of the file with their company name on it. After providing the file with all of the information that we had, the Mr. Daugherty asked us for additional information that we did not have. We told him that we could perform the services but it would take a few weeks and would cost about \$15K. After hearing this, he asked us to send him the SOW for the services. 3 weeks after providing the SOW and not hearing anything in return, I reached out to Mr. Daugherty to see if he had any questions (re: SOW) and he told me never to contact him again with no further explanation. We did not.

Tuck Business School at Dartmouth (and Professor Eric Johnson) used Tiversa in early 2006 for a research project to determine to what extent, if any, leaked financial documents were able to be found on P2P networks. The research consisted of Dartmouth providing simple and straightforward search terms to Tiversa like "bank" and "account" to locate and download files using Tiversa's engine to a hard drive that Dartmouth owned and controlled. Tiversa only issued the searches but was not able to see the actual downloads. The downloads were stored on a hard drive that graduate students at Dartmouth were to later evaluate. Although Dartmouth was researching this using resources from a grant by DHS, Tiversa was not paid anything for our participation. The research was impactful and resulted in a number of articles being published. With the prior success of the financial research, Dartmouth wanted to followup with a second research project focused on medical information in 2008. Following the exact same procedure, the medical research was completed and widely published in early 2009. Again, Tiversa did not receive any compensation whatsoever for our part in the project. Upon reading the research paper, one of the many example files that were used to demonstrate the problem was the file in question with LabMD. Tiversa did not know that the file was included in the research as we did not see the downloads, only the search terms. Frankly, it was not surprising that the file was found because it was never addressed with LabMD therefore the file continued to spread across the P2P network.

I was called to testify before Congress twice in 2009, once in May and the second in July, as they were investigating breaches of security via P2P. At the direction of Congress, Tiversa was asked to demonstrate the extent and severity of the problem. Tiversa then provided Congress with numerous, redacted, examples of file disclosure that affected government, private and public enterprises, and individuals. Shortly after the hearings, Tiversa was visited by the FTC. The senior representatives from the FTC wanted to see the non-redacted versions of the files discussed with Congress as one of their missions is to help consumers handle ID theft. When Tiversa asked what would happen if we refused to provide the information, the FTC stated that they would issue a Civil Investigative Demand (CID) which acts as a federal subpoena to gain access to the information. We told them that they would need to do that and then we would provide the information in accordance with the subpoena. The FTC issued a subpoena that asked us to provide any file, regardless of source, that disclosed >100 SSNs. We provided over 100 files to the FTC in accordance with the federal subpoena and the LabMD file was still one of them as it remained on the P2P network. We had no insight/control as to what the FTC was going to do with the information once they received it. Tiversa was not compensated in any way for providing this information to the FTC.

Apparently, the FTC sent questionnaires to some, if not all, of the companies or organizations that breached the sensitive information. The FTC posted on its website a copy of a standard letter(s) that was sent, which is how we knew that they had sent a letter or letters. We had no further communication with the FTC regarding the breaches or their investigations.

LabMD sued Tiversa/Dartmouth/Eric Johnson. Case was dismissed (all three times) for jurisdiction issues.

LABMD - SUPP. PROD.

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Mr. Daugherty starts writing his book about his problems and blames everyone but himself and his lax security measures at LabMD. He refuses to provide any information to the FTC questionnaire saying it's a "witch hunt."

To this date, I have not heard of Mr. Daugherty spending a single penny in notification or protection of ANY of the over 9000 cancer/medical patients in which he violated their privacy and well established HIPAA laws. He sees himself as the "victim" when he is actually the perpetrator. He intends to capitalize on his "victim" status by becoming "Batman" on a crusade for all Americans against government overreach.

The FTC sued Mr. Daugherty and LabMD last week for his non-compliance with a federal subpoena (CID). In the FTC complaint, it noted that over 500 people (of the 9000 in the LabMD file) have become victims of ID theft and fraud according to a Sacramento, CA Police Department investigation. I would suppose that multiple states AG's offices could pursue litigation against LabMD and Mr. Daugherty as well for not notifying the individuals (that reside in the various states) that their information had been breached. It is a requirement in 47 of the 50 states. I also only suppose that it is matter of time before there will be a class action suit file against LabMD and Mr. Daugherty for the continued reckless breach of patient information.

Mr. Daugherty continues to hype his book, even going as far to have a cheesy trailer made about the book which is full of false statements regarding Tiversa and me. He continues to suggest that Tiversa is "government funded" which we are not, and never have been. Tiversa has only received one round of funding in 2006 by Adams Capital Management.

In my opinion, he needs to draw some connection between Tiversa, "hacking" and the government in an effort to sell his book and, more importantly, claim that he was not required to compensate the 9000 true victims of this story.

Tiversa filed a Defamation suit against LabMD and Mr. Daugherty in federal court on September 5, 2013.

Essentially, Tiversa was trying to help the 9000 people by informing LabMD that there was a problem. Unfortunately, LabMD took the "shoot/sue the messenger" approach.

LABMD - SUPP. PROD.

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

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

[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.’S UNOPPOSED MOTION TO REFER TIVERSA, INC., TIVERSA HOLDING CORP., AND ROBERT BOBACK FOR INVESTIGATION REGARDING POTENTIAL CRIMINAL VIOLATIONS OF 42 U.S.C. § 1320D-6(a), 18 U.S.C. §§ 371, 1001, 1030, 1505, AND 1519

Upon consideration of Respondent LabMD, Inc.’s Unopposed Motion To Refer Tiversa, Inc., Tiversa Holding Corp., And Robert Boback For Investigation Regarding Potential Criminal Violations Of 42 U.S.C. § 1320D-6(a), 18 U.S.C. §§ 371, 1001, 1030, 1505, and 1519, it is hereby ORDERED that

The Motion is hereby GRANTED, and

By copy of this Order, Tiversa, Inc., Tiversa Holding Corp., and Robert Boback shall be and are hereby referred to the Department of Justice and the U.S. Attorney for the District of Columbia for investigation into potential criminal violations of 42 U.S.C. § 1320D-6(a), 18 U.S.C. §§ 371, 1001, 1030, 1505, and 1519, due to and as a result of their conduct in this matter as set forth in the Motion and the Exhibits attached thereto.

SO ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

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

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

STATEMENT REGARDING MEET AND CONFER

LabMD, Inc., respectfully submits this Statement, pursuant to Additional Provision 4 of the Scheduling Order. On May 28, 2015, and again on June 15-16, 2015, Complaint Counsel Laura Riposo Van Druff advised Respondent LabMD, Inc.’s Counsel Prashant K. Khetan that Complaint Counsel is not joining Respondent’s Motion but that it **does not oppose** the relief sought by LabMD.

Dated: June 19, 2015

Respectfully submitted,

/s/ Prashant K. Khetan
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Counsel for Respondent, LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2015, 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 on June 19, 2015, I delivered via electronic mail and caused to be hand-delivered 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 on June 19, 2015, I delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.
Laura Riposo Van Druff, Esq.
Megan Cox, Esq.
Ryan Mehm, Esq.
John Krebs, Esq.
Jarad Brown, Esq.
Division of Privacy and Identity Protection
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Room CC-8232
Washington, D.C. 20580

Dated: June 19, 2015

By: /s/Patrick J. Massari

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: June 19, 2015

By: /s/Patrick J. Massari

Notice of Electronic Service

I hereby certify that on June 19, 2015, I filed an electronic copy of the foregoing RESPONDENT LABMD, INC.'S UNOPPOSED MOTION TO REFER TIVERSA, INC., TIVERSA HOLDING CORP., AND ROBERT BOBACK FOR INVESTIGATION REGARDING POTENTIAL CRIMINAL VIOLATIONS OF 42 U.S.C. § 1320D-6(a), 18 U.S.C. §§ 371, 1001, 1030, 1505, AND 1519, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on June 19, 2015, I served via E-Service an electronic copy of the foregoing RESPONDENT LABMD, INC.'S UNOPPOSED MOTION TO REFER TIVERSA, INC., TIVERSA HOLDING CORP., AND ROBERT BOBACK FOR INVESTIGATION REGARDING POTENTIAL CRIMINAL VIOLATIONS OF 42 U.S.C. § 1320D-6(a), 18 U.S.C. §§ 371, 1001, 1030, 1505, AND 1519, upon:

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