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Analyst Backs LabMD In FTC Row, Alleges Fraud At Tiversa

By Jimmy Hoover

Law360, Washington (May 05, 2015, 9:16 PM ET) -- LabMD Inc. on Tuesday scored a major hit in its data security fight with the Federal Trade Commission after a former analyst at the cybersecurity firm Tiversa Inc. testified that his company lied to the agency about the extent of LabMD's data leaks after the medical testing firm turned down its services.

Richard E. Wallace said in a hearing that during his time as one of the company's chief forensic analysts from 2007 to 2014, he helped Tiversa and CEO Robert J. Boback spin lies to the FTC about the "proliferation" of LabMD-held insurance records among identity thieves — which LabMD claims is the sole basis for the agency's 2013 administrative complaint against it for alleged data protection failures.

Wallace said that, rather than a proliferation, he merely downloaded a file off of LabMD's own server and manufactured those claims per Boback's orders, who he said wanted to steer LabMD into using Tiversa's monitoring and remedial services.

According to Wallace, Boback became infuriated that LabMD's president and CEO, Michael J. Daugherty, rejected their services.

"[Boback] basically said F-him, make sure he's at the top of the list," Wallace said at the hearing, describing the Tiversa CEO's reaction to LabMD's refusal of services.

Atlanta-based LabMD conducts laboratory tests on samples that physicians obtain from patients and also performs medical testing for consumers around the country.

Tuesday's proceedings before Administrative Law Judge D. Michael Chappell had **stalled** for several months after Wallace revealed that Tiversa had emerged as the subject of an investigation from the House Committee on Oversight and Government Reform and that he was pursuing immunity for his testimony in the FTC proceedings — immunity he finally received.

Wallace said that he left the company in February 2014 after Boback had pressured him to lie under oath in a planned deposition from LabMD's attorneys about the extent of LabMD's data leaks.

According to LabMD's attorney Reed Rubinstein of Dinsmore & Shohl LLP, the testimony marked a "remarkable day" in the case and vindicated the company's assertion that "the FTC action was based on manufactured evidence." At the close of the hearing Tuesday, Rubenstein announced that LabMD will seek a criminal investigation against the Tiversa.

"Obviously the FTC never checked what came in from Tiversa," Rubinstein said in an interview with Law360.

Under direct examination from William A. Sherman II of Dinsmore & Shohl, Wallace outlined a pattern of fraud and deception at his former company and said it was "common practice" at Tiversa to deceive companies into believing identity thieves had stolen their files off of peer-to-peer networks in an effort to charge for remedial services.

Wallace said Tiversa carried out the scheme by inserting the IP addresses of known identity thieves into a "data store" and making it appear to the companies that the identity thieves had pilfered their files, despite the fact that they had already been shut down by law enforcement. Because their computers were down, Wallace said, "there was no way to contradict what Tiversa was saying."

During a re-direct examination Tuesday from his own attorney, Mary Beth Buchanan of Bryan Cave LLP, Wallace also recounted an episode in which Boback allegedly forced him to conjure up a report claiming that trade secrets related to the avionics found in the cockpit of Marine One, the helicopter for presidential transport, had been stolen by Iranian nationals — a fake story later plastered in headlines across major news outlets including, CBS News, NBC News and Fox News.

"It was very big press for Tiversa. And believe it or not, it was not easy to find an active Iranian IP address that law enforcement couldn't get a hold of," Wallace said.

The FTC declined an opportunity to depose as well as cross-examine Wallace on Tuesday, though FTC attorney Laura Riposo VanDruff indicated that she may file a motion to introduce a rebuttal witness within the next week.

Counsel for Tiversa and Boback could not be immediately reached Tuesday for comment.

LabMD is represented by William A. Sherman II, Reed Rubinstein and Sunni Harris of Dinsmore & Shohl LLP and Hallee Morgan, Kent Huntington, Daniel Epstein, Patrick Massari and Prashant K. Khetan of Cause of Action.

The FTC is represented by Alain Sheer, Laura Riposo VanDruff, Megan Cox, Ryan Mehm, John Krebs and Jarad Brown.

The case is In the Matter of LabMD Inc., docket number 9357, before the Federal Trade Commission Office of the Administrative Law Judges.

--Editing by Emily Kokoll.