

**TIVERSA HOLDING CORP. and ROBERT J. BOBACK,
Plaintiffs,**

v.

LABMD, INC. and MICHAEL J. DAUGHERTY, Defendants.

Civil Action No. 13-1296.

United States District Court, W.D. Pennsylvania.

April 21, 2014.

By Mark Wilson, Anahit Torossian, and Andreas Torossian

- #1 - Tiversa identified LabMD as the source of the File. At that time, LabMD was a Georgia corporation, with its principal place of business in Atlanta, Georgia. (Docket No. 37 at 10). It functioned as a cancer detection facility performing testing and diagnostic services for urologists in several states. (Id.). Tiversa concluded that LabMD inadvertently shared the File via a peer-to-peer file-sharing program downloaded onto a LabMD computer. (Docket No. 31 at 3). Following discovery of the File, and the sensitive information contained therein, Mr. Boback contacted LabMD, and provided LabMD with a copy of the File. (Docket No. 31 at 3). Mr. Boback offered Tiversa's services to LabMD, as well. (Id. at 3). LabMD requested a quote for the cost of Tiversa's services, but ultimately declined to engage Tiversa. (Id.). No further communications ensued. (Id.).

- LabMD started as a Georgia corporation located in Atlanta, Georgia. LabMD was a Cancer detection facility. They did testing and diagnostic services on patients for urologists in several states. Tiversa provides P2P (peer to peer) Intelligence and Security services to corporations, global law enforcement, government agencies and individuals based on patented technologies that monitor over 550 million users issuing 1.8 billion searches a day. Requiring no software or hardware, Tiversa can locate exposed files, provide copies, determine file sources and assist in remediation and risk mitigation. LabMD collectively exposed the personal information of approximately 10,000 consumers. The complaint alleges that Mr. Baback by Tiversa Company found LabMD billing information for over 9,000 consumers. Mr. Baback contacted LabMD and offered their services for a fee, but LabMD declined the services. In 2012, LabMD documents containing sensitive personal information of at least 500 consumers were found in the hands of identity thieves.

- #2 As a part of investigations into security breaches resulting from the use of peer-to-peer networks, the Federal Trade Commission ("FTC") "visited Tiversa, and attempted to obtain any and all non-redacted files which contained more than 100 Social Security Numbers." (Id. at 4). Tiversa did not turn over the File. (Id.). An entity identified as the "Privacy Institute" received a copy of the File.[1] (Id.). A civil investigative demand ("CID") was subsequently issued by the FTC to the Privacy Institute, and on August 18, 2009, the Privacy Institute provided the File to the FTC.[2] (Id.). Following an investigation into LabMD, on or about August 29, 2013 the FTC filed an administrative complaint against the company for failure to use reasonable measures to protect the security of sensitive consumer data (i.e. the File). (Docket No. 31 at 4).
- The Federal Trade Commission (FTC) is the nation's consumer protection agency. The FTC works to prevent fraudulent, deceptive and unfair business practices in the marketplace. FTC obligations are investigating security breaches to protect citizen's private information. FTC in its course of regular inspections on Peer to Peer networks visited Tiversa, in an attempt to do an inspection, FTC was looking for files with more than 100 Social Security numbers as SS numbers must be redacted. Tiversa never turned over LabMD file to the FTC. However a group called " Privacy Institute" did after the FTC issued a civil investigation demand (CID). FTC after its investigations on the owner of the file LabMD, issued a complaint against LabMD for failure to use reasonable measures to protect the security of sensitive consumer data.

- #3 On September 24, 2013, Mr. Dougherty authored "The Devil Inside the Beltway" (the "Book"). (Id.). The Book was marketed as a "Shocking Expose of the US Government's Surveillance and Overreach into Cybersecurity, Medicine and Small Business." (Docket No. 31 at 4-5). As part of his promotional effort for the book, Mr. Dougherty created a website that included a video "trailer" including commentary on Tiversa's interaction with LabMD with respect to the File. (Id. at 5). Among other things, the video included allegations that Tiversa was part of a "Government Funded Data Mining & Surveillance" scheme, engaged in "Psychological Warfare," and assisted with "Abusive Government Shakedown[s]." (Id.).
- Mr. Dougherty of LabMD wrote a book titled "The Devil Inside the Beltway" about the US movement's overreach of Internet surveillance. The challenge comes when Mr. Dougherty started to Blog. He talked and made videos about the experience he had with the Tiversa interaction with LabMD in order to promote his book. Mr. Dougherty was making Tiversa look bad with many unsubstantiated claims. He said that Tiversa was part of a "Government dunded Data Mining & Surveillance" scheme engaged in "psychological Warfare," and assisted with "Abusive Government Shakedowns.

- #4 - Plaintiffs thereafter filed a Complaint in this Court on September 5, 2013 against Defendants. (Docket No. 1). Plaintiff's First Amended Complaint followed on December 24, 2013, and alleged in Counts I through III that Defendants were liable for damage resulting from: 1. Defamation under 42 PA. CONS. STAT. §§ 8341, et seq; 2. Slander per se under the common law of Pennsylvania; and, 3. Commercial Disparagement/ Trade Libel under the common law of Pennsylvania.
- The Plaintiffs, "TIVERSA HOLDING CORP. and ROBERT J. BOBACK," filed a complaint against the Defendants, "LabMD, INC. and MICHAEL J. DAUGHERTY," in court on September 5, 2013 for Slander per se under the common law of Pennsylvania; and, 3. Commercial Disparagement/ Trade Libel under the common law of Pennsylvania.

- #5 Defamation under the law of the Commonwealth of Pennsylvania requires Plaintiffs to make specific showings. To this end, Plaintiffs must make a prima facie demonstration of: (1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; and, (5) the understanding by the recipient of it as intended to be applied to the plaintiff. *Graboff v. Colleran Firm*, 2014 ___ F. 3d ___, 2014 WL 642951 at *4 (3d Cir. Feb. 20, 2014) (quoting *Tucker v. Fischbein*, 237 F. 3d 275, 281 (3d Cir. 2001); 42 PA. CONS. STAT. § 8343(a)). Defendants first dispute Plaintiffs' prima facie showing, at Count I, of the offensive character of Mr. Dougherty's communications relative to Tiversa's interactions with LabMD. (Docket No. 37 at 28-32).

Under the law of the commonwealth of Pennsylvania, The Plaintiffs Require to make specific showings in order to prevail:

- (1) The defamatory character of the communication. (How was the Deformation done verbally, in writing, video or other?)
- (2) Its publication by the defendant. (How was it spread. disseminated?)
- (3) Its application to the plaintiff. (What relationship does the information have to the plaintiff?)
- (4) The understanding by the recipient of its defamatory meaning. (What was the conclusion of the recipient of this information and why do they believe it to hold them in a bad light to others?)
- Defendants first dispute Plaintiffs' prima facie showing, at Count I, of the offensive character of Mr. Dougherty's communications relative to Tiversa's interactions with LabMD.

•#6 First, a statement may not be actionable when a defendant shows that it was purely opinion. *Green v. Mizner*, 692 A. 2d 169, 174 (Pa. Super. Ct. 1997) ("[S]tatements of opinion, without more, are not actionable."). Yet, even opinions may constitute defamation if "reasonably understood to imply the existence of undisclosed defamatory facts." *Id.* Further explaining this principle, the court in *Mizner* quoted the Restatement (Second) of Torts § 566—adopted by Pennsylvania courts—as follows: A simple expression of opinion based on disclosed or assumed no defamatory facts is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is. But an expression of opinion that is not based on disclosed or assumed facts and therefore implies that there are undisclosed facts on which the opinion is based, is treated differently. The difference lies in the effect upon the recipient of the communication. In the first case, the communication itself indicates to him that there is no defamatory factual statement. In the second, it does not, and if the recipient draws the reasonable conclusion that the derogatory opinion expressed in the comment must have been based on undisclosed defamatory facts, the defendant is subject to liability.

- A statement may be unlawful when the Defendant is showing what has stated is based on opinion, You can not be actionable if your statement is based on one person's opinion. So if Mr. Doughtry had negative things to say about Tiversa, They need to be prove that it is purely based on fact not opinion. "If reasonably understood to imply the existence of undisclosed defamatory facts", meaning Mr. Doughtry implying negative comments about Tiversa could be opinions turned into facts. If the Undisclosed facts are proven correct, It will be considered a whole different outcome and the defendant Mr. Doughtry will be subject to liability.

- #7 Here, Plaintiffs put forth numerous examples of allegedly defamatory statements made by Mr. Dougherty. The statements range from mere insults to accusations of criminal activity. Defendants argue that these statements by Mr. Dougherty — when viewed in the context in which the statements were made — could not be susceptible to any interpretation other than that of opinion and hyperbole. (Docket Nos. 37, 42). Based upon the facts as pled by Plaintiffs in their First Amended Complaint, the Court however finds multiple statements capable of defamatory meaning. Tiversa, a company providing data protection and review services, and styling itself as a cyber-intelligence company, is accused of using proprietary software to illegally search private files and use said files to extort other companies into engaging Tiversa's services. (Docket No. 31 at ¶¶ 27-35). Tiversa is also accused of collusion in government shakedowns involving the FTC. (Id. at ¶¶ 29, 33). Given Tiversa's line of business, it is undisputable that such statements, as pled by Plaintiffs, could clearly damage Tiversa's reputation and motivate current and/or potential clients to avoid interacting with Plaintiffs. See *Krajewski*, 53 A. 3d at 805 ("A communication is also defamatory if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his proper business, trade or profession."). Defendants' arguments notwithstanding, the statements appearing in the Book and other promotional materials disseminated publicly by Mr. Dougherty could reasonably be interpreted by an audience — anyone listening to the radio, using the internet, or purchasing books — that Plaintiffs were secretly stealing files from otherwise uncompromised private networks to illegally force private entities to purchase unnecessary services in return for not being reported to federal authorities. As the Court must accept all factual statements in Plaintiffs' First Amended Complaint as true, *Revell v. Port Auth. of New York, New Jersey*, 598 F. 3d 128, 134 (3d Cir. 2010) (citing *Gross v. German Found. Indus. Initiative*, 549 F. 3d 605, 610 (3d Cir. 2008)), the Court can conclude nothing other than that many of Defendants' statements went beyond mere opinion.

- **The Court found that the cumulative communications from Mr. Doughty to the general public was defamatory to the plaintiff in nature. But does not extend to a reasonable person thinking the defendant actions were criminal in nature. There was no substantial proof that the plaintiff communications could be interpret as collusion in government shakedowns involving the FTC.**

• #8 While the Court reserves judgment with respect to Plaintiffs' status as public figures prior to discovery, the Court notes that even if Plaintiffs were public figures for purposes of this action, actual malice is adequately pled in the First Amended Complaint. (Docket No. 31 at ¶¶ 64-81). To this end, Plaintiffs allege that Defendants received direct notices from Plaintiffs both before and after publication of the Book which advised that Mr. Dougherty was spreading false information about the nature of Plaintiffs' work and their interactions with LabMD. (Docket No. 31 at ¶¶ 36-43). These letters went without response, and Mr. Dougherty did not change the nature or content of his publications. (Id.). Plaintiffs also averred that Mr. Dougherty, having personally interacted with Plaintiffs, was well aware of the facts and consciously disregarded such in the Book and his promotional efforts. (Id. at ¶¶ 16-19). Given the Court's duty to accept all of Plaintiffs' factual allegations as true and to draw all inferences therefrom in Plaintiffs' favor, the Court is satisfied at this stage in the litigation that Plaintiffs have met their burden of pleading actual malice.

- **The court did not decide but reserved the right to decide if the plaintiffs are public figures. But the court went on to say that if the plaintiffs were public figures then they had shown due diligence in notifying the defendants of their inaccuracies but the defendants had done nothing to correct it.**

- #9 - Based upon the foregoing, accepting all factual allegations by Plaintiffs as true, and drawing all inferences therefrom in favor of Plaintiffs as the non-moving party, the Court finds that Plaintiffs have pled sufficient facts to demonstrate a plausible right to recovery against Defendants for defamation. Accordingly, Defendants' Motion to Dismiss (Docket No. 36) Plaintiffs' First Amended Complaint (Docket No. 31) is denied. An appropriate Order follows.
- The court decided that the plaintiffs had enough proof to move forward with a deformation complaint. So the motion from the defendant was denied.

- #10 State who won the case and provide your conclusion
- **The Defendant Lost on the Deformation but won on the criminal aspect.**
- **Defendants motioned to dismiss the case based of rule 12(b) was denied because plaintiffs have plead sufficient facts to demonstrate the plausibility of recovering**