47 F.4th 164
United States Court of Appeals, Third Circuit.

LABMD INC., Appellants
v.
Robert J. BOBACK; Eric D. Kline; Tiversa Holding Corp.;
LabMD, Inc.,
v.
Tiversa Holding Corp., fka Tiversa Inc.; Robert J. Boback; M. Eric Johnson; Does 1-10
LabMD Inc., Appellant in 20-1731, 20-3191 and 21-1429
*James W. Hawkins, Appellant in 20-1732
*Pursuant to Fed. R. App. P. Rule 12(a)
Marc E. Davies, Appellant in 20-3316

No. 20-1446
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Nos. 20-1731, 20-1732, 20-3191, 20-3316, and 21-1429
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Nos. 20-1446, 20-1731, and 21-1429 Argued November 16, 2021
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Nos. 20-1732, 20-3191, and 20-3316 Submitted under Third Circuit L.A.R. 34.1(a) November 15, 2021
|
(Filed August 30, 2022)

OPINION OF THE COURT

JORDAN, Circuit Judge.

In 2008, Tiversa Holding Corp., a cybersecurity company, informed LabMD, Inc., a medical testing business, that it had found some of LabMD's confidential patient information circulating in cyberspace and that it could provide services to help LabMD respond to the data leak. LabMD's own investigation revealed no such leak, and it accused Tiversa of illegally accessing the patient information. Tiversa submitted a tip to the Federal Trade Commission ("FTC"), prompting an investigation into LabMD's cybersecurity ***172** practices, and the regulatory pressure resulting from that and a subsequent FTC enforcement action, along with the reputational damage associated with public disclosure of the supposed leak, ultimately ran LabMD into the ground. Later, in 2014, a former Tiversa employee confirmed LabMD's suspicions about Tiversa when he claimed that the patient information in question did not spread from a leak but that Tiversa itself had accessed LabMD's computer files and then fabricated evidence of a leak.

Following that accusation, LabMD initiated numerous lawsuits against Tiversa and its affiliates. Two of those suits form the basis of this appeal. The complaint in the first asserted, among other things, claims for defamation and fraud. The District Court dismissed all of those claims, except for one defamation claim that was subsequently defeated on summary judgment. The Court limited the scope of discovery on that defamation claim, including a prohibition on the discovery or use of expert testimony. It then imposed severe sanctions when, in its view, LabMD and its counsel breached those limits. In addition to awarding fees and costs to the defendants, the Court struck almost all of LabMD's testimonial evidence and revoked its counsel's pro hac vice admission. When LabMD's replacement counsel later tried to withdraw, the Court denied that request, and when LabMD failed to pay the monetary sanctions, the Court held it in contempt. The second lawsuit proceeded in somewhat the same timeframe as the first and asserted similar claims for fraud. The District Court dismissed that case in its entirety, for a variety of procedural and substantive reasons.

LabMD now appeals the dispositive rulings in both cases, along with the rulings on sanctions, contempt, and the motion to withdraw. We agree with LabMD that, in the first case, the District Court erred in granting summary judgment, primarily because the Court's prohibition on expert testimony was unwarranted. We also hold that the Court abused its discretion in imposing sanctions and that it erred in denying the motion to withdraw. But we agree with the District Court in general that LabMD's other claims in that case were properly dismissed. Thus, we will affirm in part and vacate in part the judgment of the District Court in that matter. In the second case, because LabMD does not challenge independently sufficient grounds for the District Court's decision, we will affirm in full.

I. BACKGROUND[1]

LabMD is a privately owned Georgia corporation based in Atlanta, Georgia. It had been a cancer-testing enterprise and, at its peak, employed approximately forty medical professionals. Before ceasing its ordinary business operations, it had served many thousands of patients. Its CEO is Michael J. Daugherty, a citizen of Georgia.

Tiversa is a Delaware corporation based in Pittsburgh, Pennsylvania. It is a self-proclaimed world leader in peer-to-peer ("P2P") network cybersecurity.[2] Tiversa ***173** has provided to the FTC information about data breaches on P2P networks, and representatives from Tiversa have testified before Congress about cybersecurity. Tiversa's CEO is Robert J. Boback, a citizen of Pennsylvania. During times relevant to this litigation, Tiversa had an agreement with Professor M. Eric Johnson, a former director of the Center for Digital Strategies at Dartmouth College, pursuant to which the professor worked with Tiversa on cybersecurity research. Johnson is a citizen of Tennessee.

A. The Alleged Data Leak and FTC Actions

In mid-2008, Tiversa informed LabMD that it had obtained a 1,718-page computer file containing the confidential data of more than 9,000 LabMD patients (the "1718 File"). Tiversa represented that it had found the 1718 File on a P2P network and that it "continued to see individuals ... downloading copies of the [1718 File]." (1731 App. at 223.) Tiversa tried to use that purported breach to persuade LabMD to purchase its incident response services. LabMD rejected the offer but still "spent thousands of dollars, and devoted huncdreds of man hours," seeking to detect and remedy the supposed data leak. (1731 App. at 223.)

In what LabMD alleges to be retaliation for its refusal to purchase Tiversa's services, Tiversa took two actions. First, it gave the 1718 File to Johnson for use in an upcoming research paper. That paper, published in April 2009 under the title "Data Hemorrhages in the Health-Care Sector," prominently featured a redacted version of the 1718 File, although it did not name LabMD as the company whose data had been leaked. (1731 App. at 226-28.) Second, Tiversa provided the 1718 File to the FTC. It told the FTC that it had found the 1718 File on a P2P network and that third parties were also downloading the file from that network.

Relying on Tiversa's tip, the FTC commenced an investigation in 2010 into the suspected failure of LabMD to protect its customers' personal information. That investigation eventually resulted in an FTC enforcement action against LabMD in August 2013. According to LabMD, the repercussions of the investigation and enforcement action were devasting to its business:

> As a direct consequence of the FTC's proceedings, including the attendant adverse publicity and the administrative burdens that were imposed on LabMD to comply with the FTC's demands for access to current and former employees and the production of thousands of documents, LabMD's insurers cancelled all of the insurance coverage for LabMD and its directors and officers, and LabMD lost virtually all of its patients, referral sources, and workforce, which had included around 40 full-time employees. Consequently, LabMD was effectively forced out of business by January 2014, and it now operates as an insolvent entity that simply provides records to former patients.

(1731 App. at 229.)

LabMD, for its part, believes that its data was secure, despite some indications to the contrary. (*See* 1731 App. at 53 (Daugherty noting in his book, *The Devil Inside the Beltway*, that a particular P2P file-sharing program "was an unruly beast that could cause [LabMD] to expose ... workstation files without ... ever knowing").)[3] It did, however, "suspect[ ] from as ***174** early as May 2008 that [Tiversa was] lying about the source of the 1718 File." (1731 App. at 909.)

B. The Georgia Action

In October 2011, during the early days of that FTC investigation, LabMD filed a lawsuit against Tiversa in Georgia (the "Georgia Action").[4] The suit included claims for violations of the federal Computer Fraud and Abuse Act ("CFAA") and Georgia's computer crimes statute, along with conversion and trespass claims, all of which were based on allegations that Tiversa had unlawfully obtained the 1718 File. Tiversa was represented in the Georgia Action by the law firm of Pepper Hamilton LLP – now constituted as Troutman Pepper Hamilton Sanders LLP ("Troutman Pepper") – and, in particular, by a partner named Eric D. Kline.

Tiversa moved to dismiss the Georgia Action for lack of

personal jurisdiction. In support of its motion, it submitted a declaration from its CEO, Boback, asserting that it did not regularly solicit business in Georgia, and it argued that its only solicitation of business in Georgia was its contact with LabMD in 2008 regarding the 1718 File. The U.S. District Court for the Northern District of Georgia accepted those representations and dismissed the claims against Tiversa for lack of personal jurisdiction. The Eleventh Circuit affirmed. LabMD now alleges, however, that Tiversa and its lawyers knowingly omitted from Tiversa's briefs and from Boback's declaration the fact that Tiversa had also "solicited business from at least five other companies" in Georgia. (1446 App. at 214-15.) Nevertheless, at the time, LabMD did not refute the factual assertions about Tiversa's lack of Georgia contacts, nor did it refile its claims in another jurisdiction or otherwise pursue further action against Tiversa.

C. The Whistleblower and the Government's Investigation of Tiversa

LabMD was moved to action again in April 2014, when a former Tiversa employee, Richard Wallace, called to share his account of how Tiversa actually obtained the 1718 File. According to Wallace, Tiversa had located the file on one of LabMD's own computers on a P2P network, downloaded it, and then fabricated the file's metadata in forensic reports to make it appear as if the 1718 File had leaked and spread across the network. Wallace later told LabMD that Tiversa was able to search for and access the 1718 File only because it had used secret, government-owned software called "enhanced P2P." According to Wallace, and contrary to Tiversa's earlier representations, the 1718 File had never leaked; Tiversa stole it from LabMD's own computer.

Wallace blew the whistle on Tiversa to the FTC as well, telling them that Tiversa had essentially made an extortionate business model out of accessing a company's files, fabricating evidence of the files spreading across a network, using the false ***175** impression of a leak to sell data security remediation services to the company, and reporting the company to the FTC if it refused to purchase Tiversa's services. In response, the U.S. House of Representatives Oversight and Government Reform Committee commissioned an investigation into Tiversa's business practices and its relationship with the FTC. It found that Tiversa "often acted unethically and sometimes unlawfully in its use of documents unintentionally exposed on peer-to-peer networks" and that the information it provided to the FTC "was only nominally verified but was nonetheless relied on by the FTC for enforcement actions." (1446 App. at 297.) Armed with Wallace's testimony and the findings of the congressional investigation, LabMD fought the FTC enforcement action and eventually prevailed. Although it was awarded attorneys' fees from the government in the amount of almost $850,000, that was too little too late. LabMD's business was destroyed.

Through all those dramatic events, Boback vigorously defended Tiversa, proclaiming that the company had done nothing wrong. In February 2015, he published an online post on the Pathology Blawg in which he called LabMD's accusations baseless and reiterated Tiversa's assertion that LabMD's lax security had allowed the 1718 File to be leaked onto the internet. Boback later wrote a letter to the editor of *The Wall Street Journal*, published in December 2015, in which he similarly defended Tiversa and said that LabMD had publicly exposed the 1718 File.

D. The First Pennsylvania Action

At the beginning of 2015, LabMD filed a new lawsuit against Tiversa, Boback, and Johnson in the U.S. District Court for the Western District of Pennsylvania (the "First Pennsylvania Action"). It asserted Pennsylvania state-law claims for conversion, defamation, tortious interference with business relations, fraud, negligent misrepresentation, and civil conspiracy, as well as federal RICO claims. Upon the defendants' motion, the District Court dismissed some of the claims with prejudice, including the RICO claims, but it dismissed the rest without prejudice and gave LabMD an opportunity to amend those claims. LabMD filed an amended complaint in February 2016, in which it asserted, among other things, a claim for defamation based on statements Tiversa and Boback made variously to the FTC, in a press release, on the Pathology Blawg, and in *The Wall Street Journal.*

The defendants again moved to dismiss the complaint. This time, the District Court dismissed all of the claims with prejudice, except for the defamation claim, which survived dismissal only as to two allegedly defamatory statements. The first statement, labeled "Statement 13" in the complaint, was one that Boback made for Tiversa on the Pathology Blog:

> LabMD lawsuit – The claims are baseless and completely unsubstantiated ... even in the

> complaint itself. This appears to be another attempt by Daugherty to distract people from the INDISPUTABLE FACT that LabMD and Michael Daugherty leaked customer information on nearly 10,000 patients.

(1731 App. at 4897.) The second statement to survive dismissal, listed as "Statement 16," was one that Boback, again speaking for Tiversa, made in *The Wall Street Journal*:

> LabMD's CEO Michael Daugherty admits that a LabMD employee improperly installed ... file-sharing software on a company computer. Doing so made confidential patient information publicly available.

(1731 App. at 4898.)

The First Pennsylvania Action proceeded to discovery on the defamation claim. ***176** LabMD's counsel, James Hawkins, first deposed Joel Adams, a former Tiversa employee. Tiversa believed that Hawkins's questioning was entirely unrelated to the defamation claim, and it moved for a protective order, which the District Court granted. The Court highlighted examples of irrelevant questions Hawkins had asked, including "if there was something secretive about [Adams's] children, strengths and weaknesses of a certain employee, the workplace culture at Tiversa, leadership styles, guns in the workplace, an AIDS clinic in Chicago, Edward Snowden, an Iranian IP address[,] and whether the witness had 'ever met [the judge presiding over the case].' " (1731 App. at 1709, 1775.) It then ordered that "[t]he scope of the depositions in this action must be limited to the remaining portion of the defamation per se claim, specifically Statements #13 and #16, LabMD's alleged damages and defenses thereto." (1731 App. at 1713.) The protective order did not otherwise specify what categories of questioning were off limits.

Over the next two weeks, Hawkins deposed six more current and former Tiversa employees, including Boback and Wallace. After completion of the depositions, Tiversa moved for sanctions against LabMD and Hawkins. It argued that Hawkins had continued to ask irrelevant questions at those depositions, in violation of the protective order. The District Court agreed, finding that Hawkins had asked "no questions" or "very minimal questions" related to Statements 13 and 16 and had instead "used the depositions to obtain discovery for other cases" and to conduct "fishing expeditions[.]" (1731 App. at 1798-800.) As examples of such off-limits conduct, the District Court quoted numerous questions from each of the depositions. Those questions fell under the following general topics: the alleged false spread of the 1718 File, including the fabrication and alteration of metadata on the 1718 File; the technology that Tiversa used to search for and access documents on P2P networks; the legality of Tiversa's products and services; Tiversa's prior representations to the FTC and Congress; Boback's alleged attempts to intimidate Wallace into not testifying against Tiversa; and the culture at Tiversa's workplace, including whether there was a "gun culture."

Having concluded that Hawkins's questioning violated the protective order, the Court decided the violations warranted severe sanctions. Although it declined to dismiss the case, the Court ordered the following sanctions (the "First Sanctions Order"): LabMD was to pay Tiversa's and Boback's attorneys' fees and costs related to the filing of the motion for sanctions ($12,056); Hawkins personally was to pay Tiversa's court reporter fees and transcript costs for the six depositions ($4,737.75); and LabMD was barred from using any testimony elicited in those six depositions for any purpose in this case or any other case in any other forum. The Court also put Hawkins on "final notice" that "further litigation misconduct or disregard of orders" would result in the termination of his pro hac vice admission. (1731 App. at 1804.) LabMD moved for reconsideration of the First Sanctions Order, which the District Court denied.

At a status conference ahead of Tiversa's anticipated motion for summary judgment, LabMD indicated that it might have to use an expert witness to respond to issues raised on summary judgment as to its defamation claim. In response, the District Court stated that it was "[not] going to need expert reports for the motion for summary judgment[,]" and that it would set a schedule for expert discovery only if the claim survived summary judgment. (1731 App. at 1766-67.) Tiversa and Boback then moved for summary judgment on the ***177** defamation claim. LabMD, in its brief opposing summary judgment, did not cite to any of the depositions outlawed by the First Sanctions Order. It did, however, simultaneously file an "offer of proof" in which it submitted transcripts of all six depositions and explained how it would use the depositions to rebut Tiversa's factual claims if it were permitted to do so. (1731 App. at 4264-71.) LabMD also submitted a declaration from Daniel Regard, a specialist

in computer forensics (the "Regard Declaration"). Regard opined that the 1718 File was never "publicly available" on any P2P network and was only accessible using secret, government-owned software.

Tiversa moved to strike the offer of proof and the Regard Declaration, and the District Court granted that motion. It determined that the submission of the deposition transcripts violated the First Sanctions Order and that the submission of the Regard Declaration violated its directive prohibiting experts. It thus imposed additional sanctions (the "Second Sanctions Order"): Hawkins's pro hac vice admission was revoked, and LabMD was to pay Tiversa's and Boback's attorneys' fees and costs related to the filing of the motion to strike. That same day, the Court also granted summary judgment for the defendants on the defamation claim, holding that there was not sufficient evidence to establish actual or presumed damages.

Because Hawkins had lost his pro hac vice admission, LabMD retained attorney Marc Davies to appeal the two Sanctions Orders and the summary judgment order. Hawkins, in his individual capacity, separately appealed the Sanctions Orders. In the meantime, LabMD did not pay the monetary sanctions the District Court had ordered. Instead, it asked the Court to vacate, or at least stay, the monetary sanctions, asserting that it lacked the financial ability to pay. After a quick briefing schedule, which required Davies to file a supplemental brief and a reply brief for LabMD, the District Court denied LabMD's motion and set a deadline for payment. When LabMD missed that deadline, the Court ordered it to show cause for its nonpayment. Davies, on behalf of LabMD, filed a response to that order.

The next day, Davies moved to withdraw as counsel. He explained that he had originally been engaged only for appellate matters, that the motions practice before the District Court was outside the scope of his engagement, and that LabMD had terminated him as its counsel. He said that LabMD was "currently seeking pro bono counsel" to resolve the sanctions issues. (1429 App. at 683.) The District Court denied his motion. It held that, because a corporation must be represented by a lawyer, Davies could not withdraw without first naming his successor counsel. LabMD and Davies each appealed the denial of the motion to withdraw.

The District Court then held a hearing on the order to show cause. At the hearing, Davies read an email from LabMD's CEO, Daugherty, in which Daugherty explained that he was skipping the hearing because he "did not anticipate [it] going forward" and had scheduled other matters at the same time. (1429 App. at 699.) Daugherty's email also reiterated that "LabMD discharged [Davies] as its attorney long ago" and that Davies had "no authority from LabMD to speak or act on its behalf." (1429 App. at 699.) The District Court found LabMD in civil contempt for failing to comply with the Sanctions Orders. LabMD then appealed the contempt ruling.

In summary, LabMD has appealed the District Court's rulings on dismissal, summary judgment, sanctions, contempt, and the withdrawal of counsel. Additionally, Hawkins has appealed the sanctions orders, ***178** and Davies has appealed the order denying his withdrawal.

E. The Second Pennsylvania Action

On July 8, 2016, while the First Pennsylvania Action was ongoing, LabMD and Daugherty filed a complaint against Tiversa, Boback, Troutman Pepper, and Kline, among others, in Georgia federal court, and the case was subsequently transferred to the Western District of Pennsylvania (the "Second Pennsylvania Action"). The complaint asserted Georgia state RICO claims against all the defendants. It also brought claims against Troutman Pepper and Kline for violations of the federal RICO statute, along with state-law claims of fraud, negligence, fraudulent misrepresentation, negligent misrepresentation, and common-law conspiracy. The defendants filed a motion to dismiss, which the District Court granted in full. LabMD and Daugherty timely appealed,[5] and we combined for argument the appeals from the two Pennsylvania Actions.

II. DISCUSSION[6]

We begin with the issues on appeal from the First Pennsylvania Action and then turn to the issues in the Second Pennsylvania Action.

A. The Issues in the First Pennsylvania Action

The District Court's dismissal of the federal RICO claims and the claims for tortious interference with business relations, fraud, and negligent misrepresentation against Tiversa, Boback, and Johnson will be affirmed, but we will vacate in large part the District Court's decisions on

the defamation claim – both the dismissal with respect to certain allegedly defamatory statements and the grant of summary judgment with respect to the two statements that had originally survived dismissal. We will also vacate the imposition of sanctions, the finding of contempt, and the denial of Davies's motion to withdraw.

1. Dismissal[7]

i. Federal RICO Claims

LabMD alleges that Tiversa, Boback, and Johnson violated the federal RICO statute, 18 U.S.C. § 1962(c),[8] in three ways: first, by lying about how and where Tiversa found the 1718 File, so as to induce LabMD to purchase Tiversa's incident response services; second, by using the 1718 File in Johnson's research paper on data leaks in the medical field; and third, by turning over the 1718 File to the FTC ***179** after LabMD refused to hire Tiversa. The District Court dismissed the RICO claims as being time-barred, and we agree with that conclusion.

"Establishing liability under ... the RICO statute requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, plus [(5)] an injury to business or property," and (6) the racketeering activity must have been "the 'but for' cause as well as the proximate cause of the injury." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 483 (3d Cir. 2015). The limitations period for a federal RICO claim is four years. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). LabMD filed its complaint on January 21, 2015. Thus, absent any tolling of the statute of limitations, LabMD's federal RICO claims were time-barred if they accrued before January 21, 2011.[9]

The statute of limitations begins to run when the plaintiff knows or should know of both its injury and the source of its injury. *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 359 F.3d 226, 233 (3d Cir. 2004);[10] *Forbes v. Eagleson*, 228 F.3d 471, 483 (3d Cir. 2000). Thus, we start by identifying LabMD's injury and the injury's source. As for its injury, LabMD says that, due to the FTC's investigation and enforcement action, it suffered a "reduction in value of its business, lost revenue, and expenses associated with insolvency," as well as costs associated with "attempting to resolve the purported security breach and to comply with the investigations and [their] demands," and finally "the substantial and irreparable loss of goodwill and business opportunities[.]" (1731 App. at 904.)[11] As for the source of the injury, LabMD alleges that Tiversa used fraudulent representations to "proximately cause[ ] the FTC to investigate and bring an enforcement action against LabMD." (1731 App. at 905.)

Determining *when* LabMD knew of its alleged injuries is complicated because the extent of the injuries grew over time. For example, when the FTC launched its investigation in 2010, LabMD faced "administrative burdens ... to comply with the FTC's demand for access to current and former employees and the production of thousands of documents[.]" (1731 App. at 229.) But once the FTC filed the enforcement ***180** action in 2013, LabMD suffered more severely from "adverse publicity" resulting in the loss of "all of [its] insurance coverage" and "virtually all of its patients, referral sources, and workforce." (1731 App. at 229.)

Certainly, LabMD may not have expected that the FTC's initial involvement in 2010 would result in the demise of its business. But "[a] cause of action accrues even though the full extent of the injury is not then known or predictable. Were it otherwise, the statute would begin to run only after a plaintiff became satisfied that [it] had been harmed enough, placing the supposed statute of [limitations] in the sole hands of the party seeking relief." *Kach v. Hose*, 589 F.3d 626, 634-35 (3d Cir. 2009) (quoting *Wallace v. Kato*, 549 U.S. 384, 391, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007)). For purposes of assessing the accrual of its claims, then, we conclude that LabMD knew of its injuries in 2010, at the latest.[12]

LabMD also knew or should have known by 2010 that Tiversa was the source of the injuries flowing from the FTC's investigation and subsequent enforcement action. Right from the beginning of the "leak" ordeal, LabMD was suspicious of Tiversa. It alleges that it "suspected from as early as May 2008 that Defendants were lying about the source of the 1718 File." (1731 App. at 909.) Even if LabMD did not have actual knowledge that the FTC had gotten its information about the 1718 File from Tiversa, there were enough "storm warnings" that it should have known that Tiversa was the source. *Cf. Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 507 (3d Cir. 2006) ("[W]hen plaintiffs should have known of the basis of their claims depends on whether and when they had sufficient information of possible wrongdoing to place them on 'inquiry notice' or to excite 'storm warnings' of culpable activity." (internal quotation marks and alterations omitted)). Tiversa had demonstrated a willingness to disclose the 1718 File to others, such as when it collaborated with Johnson on a research paper that included a redacted version of the 1718 File. That

paper, published in April 2009, begins by noting that Johnson's research was "conducted in collaboration with Tiversa[.]" (1731 App. at 310.) Tiversa had also demonstrated a close relationship with government investigators. In 2007, Boback testified alongside FTC representatives before the Senate Oversight and Government Reform Committee about the dangers of P2P networks. Two years later, he testified before the House Subcommittee on Commerce, Trade and Consumer Protection about P2P network data leaks, and produced the 1718 File as an example. LabMD's complaint also highlights two news articles from *Computerworld* in February 2010, in which Boback and Johnson were both interviewed about the FTC opening investigations into almost 100 companies regarding data leaks on P2P networks. Based on all those circumstances, LabMD knew or should have known by 2010 that Tiversa was very likely the source behind the FTC's investigation and eventual enforcement action.[13]

***181** Because LabMD knew or should have known by 2010 about its injuries and their source, its federal RICO claims accrued more than four years before it filed its complaint in January 2015. Thus, unless the limitations period was tolled, the RICO claims are time-barred.

The limitations period for a RICO claim may be equitably tolled "where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it[.]" *Rotella v. Wood*, 528 U.S. 549, 561, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000). Equitable tolling is "the exception, not the rule." *Id.* It requires active misleading by the defendant. *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 256 (3d Cir. 2001). Active misleading involves "tak[ing] steps beyond the challenged conduct itself to conceal that conduct from the plaintiff." *Gabelli v. S.E.C.*, 568 U.S. 442, 447 n.2, 133 S.Ct. 1216, 185 L.Ed.2d 297 (2013). Here, the only purported acts of active misleading that LabMD cites are Tiversa's assertions that LabMD had a data leak and that the 1718 File was spreading across cyberspace. But those misrepresentations, if they are that, are not acts of concealment "beyond the challenged conduct itself." *Id.* Rather, they are at the very heart of LabMD's claims. When LabMD was asked to identify the predicate acts for its RICO claim, it listed a half-dozen acts of alleged "wire fraud" involving Tiversa and Boback "making misrepresentations about the 1718 File" in telephone calls and emails to LabMD. (1731 App. at 889.) LabMD has not pointed to any other independent instances of active misleading that would entitle it to equitable tolling of its RICO claims. As a result, those claims are time-barred, and we will affirm the District Court's dismissal of them.

Remainder of opinion omitted.

Footnotes

1

Unless otherwise noted, the narrative in this section is based on undisputed facts or the evidence produced in discovery (for LabMD's defamation claim on the motion for summary judgment) and the allegations of LabMD's complaints (for all the other claims on the motions to dismiss), all viewed in the light most favorable to LabMD. *Tundo v. Cnty. of Passaic*, 923 F.3d 283, 287 (3d Cir. 2019); *Matrix Distribs., Inc. v. Nat'l Ass'n of Bds. of Pharmacy*, 34 F.4th 190, 195 (3d Cir. 2022). Citations to the appendices from Case Nos. 20-1446, 20-1731, and 21-1429 are designated by reference to the last four digits of the respective case number.

2

P2P networks are networks in which internet-connected computers share resources. They allow users to download a computer file directly from other network participants who already possess that file.

3

In reviewing the FTC's enforcement action, the Eleventh Circuit accepted as supported by substantial evidence that, "contrary to LabMD policy, a peer-to-peer file-sharing application called LimeWire was installed on a computer used by LabMD's billing manager[,]" and that the contents of a "My Documents" folder on that computer could have exposed the 1718 File. *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1224, 1227, 1233 n.35 (11th Cir. 2018). It also noted, however, that the ALJ who presided over the enforcement action determined that "Tiversa's representations in its communications with LabMD that the 1718 File was being searched for on peer-to-peer networks, and that the 1718 File had spread across peer-to-peer networks, were not true." *Id.* at 1224 n.6.

4

The case was filed in state court and subsequently removed to federal court.

5

The District Court dismissed the complaint as to all defendants, but LabMD appealed the decision only with respect to defendants Tiversa, Boback, Kline, and Troutman Pepper.

6

The District Court had jurisdiction in both cases under 28 U.S.C. §§ 1331, 1332, and 1367. We have appellate jurisdiction under 28 U.S.C. § 1291 over all the appeals, including those from the orders on sanctions, contempt, and the motion to withdraw. *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 706 (3d Cir. 1996) ("Under the 'merger rule,' prior interlocutory orders merge with the final judgment in a case[.]"); *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676, 678 (3d Cir. 1986) (per curiam) ("[M]ost post judgment orders are final decisions within the ambit of 28 U.S.C. § 1291 as long as the district court has completely disposed of the matter.").

7

"We review a District Court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) *de novo.*" *Schmidt v. Skolas*, 770 F.3d 241, 248 (3d Cir. 2014).

8

That statute makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" 18 U.S.C. § 1962(c).

9

"[T]he law of this Circuit ... permits a limitations defense to be raised by a motion under Rule 12(b)(6), but only if the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations. If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (internal quotation marks and citations omitted).

10

There may be some tension between the accrual rule we laid out in *Prudential* – that a federal RICO claim accrues only after a plaintiff knows of both the injury and the source of the injury, 359 F.3d at 233 – and the Supreme Court's instruction that a federal RICO claim accrues upon "discovery of the injury, not discovery of the other elements of a claim," *Rotella v. Wood*, 528 U.S. 549, 555, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000); *see also* *Robert L. Kroenlein Tr. ex rel. Alden v. Kirchhefer*, 764 F.3d 1268, 1278 (10th Cir. 2014) (rejecting the "injury plus source discovery" rule). Nevertheless, because we would conclude that LabMD's RICO claims accrued before 2011 under either the injury-discovery-rule or the injury-plus-source-discovery-rule, we need not address any such tension now.

11

Those injuries were alleged in LabMD's RICO case statement, a document required by local rules to be filed as a supplement to a RICO complaint. *See* W.D. Pa. Civ. R. 7.1(B). It may be considered as part of the pleadings on a motion to dismiss. *E.g.*, *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir. 1993) (affirming dismissal of RICO claims "[a]fter reviewing the amended complaints and RICO case statement").

12

LabMD's allegations of injury also arguably encompass the "thousands of dollars" and "hundreds of man hours" that LabMD spent trying to remedy a purported data breach after Tiversa – in 2008 – fed it misleading information about the purported leaked. (1731 App. at 223.) To the extent that LabMD's theory of liability focuses on Tiversa misleading the FTC into investigating LabMD, the injurious effects of that conduct first arose by 2010.

13

It is further telling that, in a September 2010 letter to Tiversa and in evident anticipation of government action, LabMD accusingly asked Tiversa to describe its relationship with the FTC and to disclose any communications with the FTC about the 1718 File. Nevertheless, because that letter was not mentioned in the complaint nor attached thereto, we do not rely on it in reaching our conclusion here. *Schmidt*, 770 F.3d at 249.