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1 Wednesday Morning Session

2 May 7, 2014

3 9:44 a.m.

4 -- -- --

5 P R O C E E D I N G S

6 -- -- --

7 (In open court:)

8 THE COURT: Good morning, everybody.

9 This is the hearing that is scheduled pursuant to
10 my amended scheduling order which is dated April 9th this
11 year. It's a hearing on the motion for preliminary
12 injunction that's been requested by LabMD.

13 And absent anything that you want to discuss before
14 we start, I would say let just get started. Any objection to
15 doing that?

16 MR. RAIDER: No, Your Honor.

17 MS. FASCETT: No, Your Honor.

18 THE COURT: All right. And, LabMD, this is your
19 hearing. You may begin.

20 MR. RAIDER: Thank you, Your Honor.

21 We would like to start by presenting some live
22 testimony from Mr. Daugherty.

23 THE COURT: That would be fine.

24 MR. RAIDER: We also have Mr. Baker here.

25 Is it okay that he sits in the back or do you want

1 him out in the witness room?

2 THE COURT: Do you want him sequestered?

3 MS. FASCETT: I don't think that's necessary,
4 Your Honor.

5 THE COURT: I agree.

6 Okay. Let's begin, then.

7 (The oath is given by the Courtroom Deputy Clerk.)

8 MR. RAIDER: Your Honor, just as Mr. Daugherty is
9 getting some water, we have presented a notebook with all of
10 the exhibits that plaintiff has on its exhibit list, and we
11 will be using some of those in his examination.

12 So the witness has a copy, government counsel has a
13 copy, and I think a copy has been made available to you.

14 THE COURT: I have got it.

15 And let's make sure all the appearances are noted
16 on the record.

17 I guess we have Mr. Rubinstein, Mr. Singleton,
18 Mr. Meyer, Mr. Raider for LabMD; is that correct?

19 MR. RAIDER: Yes.

20 THE COURT: And for the FTC, Ms. Fascett, Mr. Gorji
21 is it?

22 MR. GORJI: Correct, Your Honor.

23 THE COURT: And Mr. Marcus, who I don't think has
24 made an appearance in the case.

25 MR. MARCUS: That's correct. For the FTC, I am

1 just serving as of counsel here. I would be happy to enter
2 an appearance if you would like.

3 THE COURT: Well, I mean, if you are just sitting
4 there because you are an observer and not in the case, that's
5 fine. But if you are in the case, you need to make an
6 appearance.

7 MR. MARCUS: I will do that, Your Honor.

8 THE COURT: And please do that today.

9 All right. Let's begin.

10 MR. RAIDER: And, Your Honor, just to introduce
11 myself as counsel for LabMD, I am Mr. Raider.

12 THE COURT: All right.

13 -- -- --

14 MICHAEL JOHN DAUGHERTY

15 being first duly sworn by the Courtroom Deputy Clerk,
16 testifies and says as follows:

17 -- -- --

18 DIRECT EXAMINATION

19 BY MR. RAIDER:

20 Q. Would you please state your name for the record?

21 A. Michael John Daugherty.

22 Q. What is your role at plaintiff LabMD?

23 A. I'm the founder and CEO of LabMD.

24 Q. How long have you been CEO of LabMD?

25 A. Since 1996.

1 Q. What services has LabMD offered?

2 A. We are a medical laboratory doing cancer detection,
3 tumor markers, bacterial detection in the urology
4 marketspace.

5 Q. What services are you currently offering?

6 A. Currently we are billing services for prior specimens
7 that were tested and access to medical records for the
8 physicians and -- physicians that need to still have access.

9 Q. And when did you stop offering cancer detection testing
10 services?

11 A. Our last specimen I believe was taken around the 9th of
12 January of 2014 and our last result was released around
13 January 15th, 2014.

14 Q. And what caused LabMD to stop offering cancer detection
15 services?

16 A. The overriding cloud and draining ongoing investigation
17 by the Federal Trade Commission.

18 Q. Could you turn to Tab 14 in your notebook?

19 A. Okay, I am in front of 14.

20 Q. And what is Exhibit 14?

21 A. 14 is the letter that I sent out to physicians,
22 administrators, nurses and support staff of our client base
23 on the 6th of January, 2014, letting them know we would no
24 longer be accepting specimens so that they could make
25 arrangements for other -- for their patients for future

1 medical testing.

2 Q. And if you would look at the third paragraph, could you
3 please explain the reasons you provided to your clients for
4 your business reason?

5 A. I said that FTC has subjected LabMD to years of
6 debilitating investigation and litigation regarding an
7 alleged patient information data security vulnerability
8 without standards, information or congressional approval and
9 without a consumer victim from the alleged breach, which is
10 in quotations.

11 The FTC has taken upon itself to spend your tax dollars
12 to ruin LabMD and regulate medical data security over and
13 above HIPAA.

14 THE COURT: And do you intend to introduce this?

15 MR. RAIDER: Yes.

16 THE COURT: Well, before you publish it, don't you
17 think you should do that?

18 MR. RAIDER: We were going to offer to tender the
19 exhibits at the end unless there was an objection made to the
20 exhibit.

21 THE COURT: Well, have you worked that out with the
22 FTC?

23 MR. RAIDER: We have not.

24 THE COURT: All right. Well, you probably
25 shouldn't publish anything until it's been introduced in

1 evidence, and basically that's what Mr. Daugherty has
2 done. So you can either see if there is an objection, and if
3 there is --

4 MS. FASCETT: There is no objection, Your Honor.

5 THE COURT: Then it's admitted. But you need to do
6 that for each of the exhibits.

7 MR. RAIDER: Okay. Thank you, Your Honor. We
8 will.

9 BY MR. RAIDER:

10 Q. Where are LabMD's records today?

11 A. LabMD's records are in the cooperate condominium and the
12 basement of my residence.

13 Q. What outside sources have access to your servers in the
14 condo?

15 A. There is a support volunteer that's helping who has had
16 years of experience in medical urology office space. He's
17 helping with the billing and winding down and answering
18 questions. And then myself.

19 Q. Is there remote access to the servers?

20 A. There is no remote access except to the billing
21 software. There is no remote access to any of the vast
22 majority of electronic records in the laboratory information
23 system.

24 Q. The FTC has issued a proposed order addressing LabMD's
25 future conduct. What are the obligations the FTC has

1 proposed to be imposed against LabMD?

2 A. They wanted a consent decree that wanted twenty years of
3 biannual audits from an outside source at our expense. It
4 would also open us up to additional penalties and/or fines.

5 MR. GORJI: Your Honor, I'm going to object. It's
6 not something that -- negotiations are not something that
7 would be held against the FTC at this point. There is an
8 administrative complaint that's been filed, but a consent
9 decree is a negotiation.

10 THE COURT: Well, have you offered -- have you
11 shown them a consent decree with a proposal that that would
12 resolve the matter?

13 MR. GORJI: There have been negotiations,
14 Your Honor, in the past.

15 THE COURT: Well, is it -- would the FTC ever agree
16 not to resolve this case without an ongoing consent decree
17 subjecting them to monitoring over a long period of time,
18 which is my experience with the FTC?

19 MR. GORJI: Your Honor, my understanding is that
20 negotiations are no longer occurring. There is an
21 administrative complaint and an ongoing administrative
22 process that doesn't necessarily request the exact same
23 relief.

24 THE COURT: Well, you can cross-examine him on
25 that, and once the cross-examination is done, I will

1 determine whether or not that's something that would go into
2 my consideration.

3 MR. GORJI: Sure, Your Honor.

4 Your Honor, if I may? I plan on handling the
5 cross-examination, Ms. Fascett plans on handling the argument
6 today, if that's all right with the Court?

7 THE COURT: That's fine.

8 MR. GORJI: Thank you.

9 BY MR. RAIDER:

10 Q. Is it your understanding that the fact that LabMD is
11 merely archiving its records today would change the relief
12 the FTC is seeking against LabMD?

13 A. No, it's not. That's not my understanding.

14 Q. Let's go back a step and discuss LabMD when it was
15 providing cancer detection services in 2013 and the years
16 before.

17 How much revenue did LabMD generate each year roughly?

18 A. It ranged between three and a half to seven and a half
19 to eight million approximately.

20 Q. And how much revenue has LabMD generated in calendar
21 year 2014?

22 A. Approximately fifty thousand dollars.

23 Q. And how much revenue has LabMD projected to generate in
24 the second half of 2014?

25 A. Probably another fifty to seventy-five thousand

1 dollars.

2 Q. And how much profit did LabMD generate in the years it
3 was generating millions of dollars in revenue?

4 A. With the exception of 2013, our profit margin was
5 approximately 25 percent. In 2013 we lost approximately half
6 a million dollars.

7 Q. How much profit has LabMD generated so far in calendar
8 year 2014?

9 A. None.

10 Q. And looking to the second half of calendar year 2014,
11 how much profit is LabMD expected to generate?

12 A. Zero.

13 Q. How many employees did LabMD have on its payroll in
14 2013?

15 A. Between 25 and 30.

16 Q. And how many employees does LabMD have today?

17 A. One.

18 Q. I want to shift topics again and talk a little bit about
19 LabMD's insurance program.

20 A. Okay.

21 Q. What types of insurance did LabMD have when it was
22 offering cancer detection services?

23 A. We had medical malpractice for the company, we had
24 malpractice for the physicians, we had directors and officers
25 insurance, we had general liability insurance, we had medical

1 insurance, dental insurance, workmen's comp and vision.

2 I think that's everything.

3 Q. Which of these policies does LabMD currently have?

4 A. We have a COBRA for medical and dental, and that is
5 all.

6 Q. In the years 2013 and before, what issues did LabMD
7 encounter in obtaining insurance?

8 A. We never had problems getting insurance prior to 2013.

9 Q. Were you told why your insurance -- why LabMD's
10 insurance policies would not be renewed?

11 A. Yes. Because of the -- the claims that weren't renewed,
12 is was because of the FTC investigation, the ongoing cloud,
13 and the fact that it involved medical records. So that even
14 the policy that wasn't even covering a claim of that type was
15 refused for that reason, meaning the medical malpractice
16 insurance.

17 Q. And let me refer you to Exhibit 15 in your notebook.

18 A. Yes.

19 Q. And let me ask you some --

20 MR. RAIDER: Your Honor, I would like to show this
21 to the witness and establish a foundation.

22 BY MR. RAIDER:

23 Q. What is this document?

24 A. This is an e-mail string from our broker that was sent
25 to me between I believe our broker and one of his staff

1 members and an underwriter for OneBeacon Pro.

2 Q. And how did you receive a copy of this?

3 A. Because the broker sent it to me to show me that the
4 company wasn't going to be interested in insuring --

5 MR. GORJI: Objection, Your Honor. Hearsay.

6 THE COURT: Is there any objection to this e-mail?

7 MR. GORJI: Your Honor, I can get into it on cross.

8 THE COURT: Pardon me?

9 MR. GORJI: I can get into it on cross.

10 THE COURT: So is there any objection to the
11 introduction of the e-mail?

12 MR. GORJI: No, Your Honor.

13 THE COURT: It's admitted.

14 BY MR. RAIDER:

15 Q. Who is Mr. Coscarelli?

16 A. Mr. Coscarelli is an underwriter at OneBeacon Pro who
17 communicated with my broker.

18 Q. Who is Mr. Seilkop?

19 A. Fred Seilkop is the owner of -- I believe of Healthcare
20 Professional Services and my broker.

21 Q. And who is Ms. Garrido?

22 A. Betsy Garrido is an assistant that works for Mr. Seilkop
23 at Healthcare Professional Services.

24 Q. What insurance policies are being discussed in this
25 e-mail thread?

1 A. This is the facility, what we call tail coverage or ERP,
2 which is extended reporting period coverage. After a
3 practitioner, a medical facility, ceases practicing their
4 operations in that manner, then you have to get coverage to
5 extend any claims that come for that reporting period where
6 they were working there.

7 Q. What reason is Mr. Coscarelli offering for declining to
8 offer insurance to LabMD?

9 A. He says, The potential volatility due to the FTC
10 investigation is something we want to stay away from,
11 particularly because it pertains to medical records.

12 Q. Has LabMD been able to obtain an offer for an extended
13 reporting period after January 2014?

14 A. I split the search. We had almost everyone say no.

15 I did have -- I found a company in Florida who offered
16 tail coverage to the physicians, so I split them off and got
17 their own tail coverage, and we don't have any medical
18 coverage, medical malpractice coverage.

19 Q. You mentioned having comprehensive general liability
20 insurance. What is the status of your efforts to renew that
21 policy?

22 A. They nonrenewed effective May 5th of this year -- that
23 was Hartford -- because of the Federal Trade Commission
24 claims history.

25 Q. And what impact does that have on LabMD's ability to

1 offer cancer detection services?

2 A. Well, to offer cancer detection services, you obviously
3 have to have a facility where you can offer that, and we are
4 required to have general liability insurance in our facility
5 and under our lease or anywhere else where we want to open up
6 space.

7 So without being able to get general liability
8 insurance, we can't function.

9 Q. I want to switch topics again and talk a little bit
10 about the regulatory oversight of LabMD as an ongoing
11 provider of cancer detection services.

12 Separate from the FTC, was LabMD subject to government
13 regulation?

14 A. Yes.

15 Q. By whom?

16 A. By the federal -- the U.S. government and the State of
17 Georgia under CLIA and DHR has a -- there is a laboratory
18 oversight group within the Department of Human Resources in
19 the State of Georgia.

20 Q. And in years 2013 and before, how many times has HHS
21 raised concerns about LabMD's compliance with HHS
22 regulations?

23 A. We never had a problem.

24 Q. And what about as to the State of Georgia?

25 A. No, no problems.

1 Q. If you could turn to Exhibit 23 in your notebook?

2 A. Okay.

3 Q. What is this document, just at a high level so we can
4 get it introduced into evidence?

5 A. It is a -- we are required to submit specimens to an
6 independent source that reports to the government our testing
7 and accuracy, and so that's what that is.

8 Q. Is this a business record of LabMD?

9 A. Yes, it is.

10 MR. RAIDER: We tender this into evidence,
11 Your Honor.

12 THE COURT: Any objection?

13 MR. GORJI: No objection, Your Honor.

14 THE COURT: It's admitted.

15 BY MR. RAIDER:

16 Q. What does it mean to have a rating of 100 percent
17 compliance?

18 A. That means that all the tests came within 100 percent of
19 the acceptable range of the independent agency on the
20 testing -- on the results we reported. So it's an accuracy
21 of test reporting reports.

22 Q. The certificate indicates a November 2013 expiration
23 date. What was the status as of January 2014?

24 A. I'm sorry, can you point the certificate out? I'm not
25 seeing it.

1 Are you on 23?

2 Q. Yes. I'm looking at the --

3 A. I'm on a different 23.

4 Q. -- expiration date on the right?

5 A. My 23 is not the same as your 23.

6 THE WITNESS: Can he show me --

7 THE COURT: This is not my hearing. This is your
8 lawyer's.

9 THE WITNESS: Okay. That's my 23.

10 THE COURT: Why don't we do this. Since you have
11 three other lawyers here with you, maybe they could find this
12 for you and we can move on.

13 MR. RAIDER: Okay, we will.

14 MR. GORJI: Your Honor, I would also like to make
15 sure the government has the correct 23 as well.

16 MR. RAIDER: Yes. I apologize for that.

17 THE COURT: My understanding is that Exhibit 23 is
18 a one-page document that is sent by the American Proficiency
19 Institute and it's dated March 5th of 2014.

20 MR. RAIDER: Yes.

21 THE COURT: Is that Exhibit 23?

22 THE WITNESS: No.

23 MR. RAIDER: That's what we are asking to have
24 admitted.

25 THE COURT: Well, that one-page document has been

1 admitted.

2 MR. RAIDER: Yes. And I will move on.

3 BY MR. RAIDER:

4 Q. You said that HHS has not raised any concerns about
5 LabMD's compliance with HHS regulations. What issues
6 specifically, if any, has HHS raised concerning LabMD's data
7 security program?

8 A. None.

9 Q. Has HHS launched an enforcement action against LabMD
10 because of concerns over its data security program?

11 A. No.

12 Q. Have they, to your knowledge, instituted an
13 investigation?

14 A. No.

15 Q. Have they issued notices of violation or documents to
16 that effect?

17 A. No, sir.

18 Q. Okay. I want to switch topics one more time and talk
19 about your website and your blog.

20 Have you created a blog?

21 A. Yes.

22 Q. And what is the website that hosts that blog?

23 A. *MichaelJDaugherty.com*.

24 Q. And on your blog, have you posted opinions about the
25 FTC?

1 A. Yes, I have.

2 Q. And could you describe what you have said about the
3 FTC?

4 A. I have -- I'm very opinionated about the overreach and
5 lack of standards for rules or clarification and yet still
6 the exhaustive investigation. So I have posted what
7 I consider to be my opinion and First Amendment right
8 speech about how they have conducted themselves throughout
9 this.

10 Because we have never known what we have done wrong, and
11 that's been a huge frustration, and it's so damaged the
12 organization that I have spoken about that in several blogs.

13 Q. In your dealings with FTC employees as part of this
14 LabMD enforcement action, what did you perceive to be the
15 reaction to your blog posts criticizing the FTC?

16 A. My perception is that they are very upset and unhappy
17 about it. They don't like any public criticism.

18 Q. Is it your opinion that the FTC has retaliated against
19 LabMD because of your blog criticizing the FTC?

20 MR. GORJI: Objection.

21 THE COURT: Overruled.

22 A. Yes, it's my opinion that they retaliated.

23 Q. Has the FTC monitored your website with the blogs?

24 A. Yes, they have.

25 Q. Okay. I want to discuss Google Analytics. What is

1 Google Analytics?

2 A. Google Analytics is a tool provided by Google to analyze
3 the traffic and effectiveness of --

4 MR. GORJI: Objection, Your Honor, to the basis for
5 his knowledge. There is no foundation here. He does not
6 work for Google.

7 The attachments that he's provided to his
8 declarations he has no basis for authenticating. We are
9 objecting on those grounds, Your Honor.

10 THE COURT: Are you denying that the FTC has
11 monitored his blog?

12 MR. GORJI: No, I'm not denying that. But,
13 Your Honor, the specificity of representations made in the
14 declaration have no foundation.

15 THE COURT: All right. Well, maybe we could bring
16 somebody in from Google and extend this hearing, if you would
17 like.

18 It seems odd that if you are an enforcement
19 regulatory body, that rather than doing your regulatory
20 activity, that you would be monitoring somebody's blog that
21 is criticizing the FTC, unless you are thin-skinned about
22 that.

23 MR. GORJI: Your Honor --

24 THE COURT: You have just acknowledged that the FTC
25 is monitoring his blog. Are you doing that in connection

1 with your regulatory investigation or are you doing that for
2 your interest in his company and what they are saying about
3 it, about the FTC?

4 MR. GORJI: Your Honor, the government and agencies
5 monitor individuals' websites on a routine basis. In
6 addition, here, Your Honor --

7 THE COURT: Why?

8 MR. GORJI: To determine whether or not there is
9 any information that they might be able to add to their
10 case.

11 THE COURT: So are you doing that in connection
12 with your regulatory activities and responsibilities in
13 connection with this investigation of LabMD?

14 MR. GORJI: Your Honor, I would have to confer with
15 the FTC officials on the exact reason. I haven't been
16 provided an exact reason.

17 And, again, the suggestion that it's for
18 retaliatory purposes is purely speculative. There hasn't
19 been any --

20 THE COURT: Well, under the Federal Rules of
21 Evidence, somebody who has an experience that would provide a
22 foundation for an opinion is admissible as a lay opinion.

23 He has now gone through this investigation
24 beginning with the FTC's investigative activity beginning in
25 2010, which is now four years ago, and it would seem to me

1 that if he is able to establish when he began these public
2 criticisms of the FTC and compare that with the investigative
3 activity of the FTC and its various responses to actions that
4 he's taken, that he could reach an opinion about whether or
5 not he believed it to be or that it was his opinion that they
6 were acting in a retaliatory manner, and, therefore, I'm
7 going to overrule the objection.

8 MR. RAIDER: Your Honor, as to the specific
9 reports, I just want to make clear that those also, I mean,
10 if we establish a foundation, they would be admissible at
11 this point. Is that part of your --

12 THE COURT: Probably not through him.

13 MR. RAIDER: Well, we would argue under Federal
14 Rule 807 that there is sufficient reliability, that this is a
15 service Google makes available to website owners to pull down
16 information about traffic on their website.

17 THE COURT: Yeah, but the question would be the
18 reliability of the information being provided by Google, and
19 I don't think he has a basis to express that opinion.

20 MR. RAIDER: Understood, Your Honor.

21 BY MR. RAIDER:

22 Q. Just to go back and make sure, what is Google
23 Analytics?

24 A. Google Analytics is a service or/and a tool that Google
25 provides to website users, owners, to analyze and pull

1 reports down from Google's data of who is looking at the
2 website, how long they stay, how deep they go, who they are,
3 and so you can -- as a website owner, you can assess the
4 effectiveness of reaching the audience you want to reach and
5 you can see what audience you are pulling in.

6 Q. Have you generated website visit reports for your web --
7 for your blog post website?

8 A. I have, yes.

9 Q. What type of reports did you generate?

10 A. I generated the reports that would show who the top
11 users were and what dates they were on and what ranges, and
12 coincided those to some blog posts.

13 Q. What type of blog posts were you focusing on?

14 A. Well, as an example, there was a blog post when I first
15 really announced that the FTC was suing me, which came out
16 approximately September 17th, 2012.

17 And while I noted the Federal Trade Commission up until
18 September 1, 2012, had never looked at my site one time, on
19 that day or approximately that day or the day after the
20 Federal Trade Commission had looked at that blog 75 times.

21 MR. GORJI: Objection, Your Honor. Again, there is
22 no reliability for this testimony.

23 THE COURT: Is that true, that after this blog
24 post, that there were 75 hits by the FTC in response to his
25 criticism?

1 MR. GORJI: I don't know the answer to that,
2 Your Honor. I haven't --

3 THE COURT: Will you find that out for me? Will
4 you?

5 MR. GORJI: Your Honor --

6 THE COURT: Will you find that out for me?

7 MR. GORJI: I could contact Google and have FTC
8 experts --

9 THE COURT: Why don't you contact your agency and
10 find out if anybody in response to a critical blog post 75
11 times the next day accessed the blog?

12 MR. GORJI: Well, Your Honor --

13 THE COURT: And explain to me what was on the blog
14 post that was of interest to your investigation of this
15 company.

16 MR. GORJI: Your Honor, one --

17 THE COURT: Will you do that?

18 MR. GORJI: I can have FTC provide an explanation
19 for that.

20 Your Honor, one aspect of this case is that there
21 is retaliation, and in order to demonstrate retaliation,
22 there has to be that his freedom of speech has been adversely
23 affected. So it would make sense, Your Honor, for the
24 government to continue to monitor whether or not he's still
25 continuing to express his speech.

1 And I believe he is still effectively expressing
2 his speech, and, therefore, there is a legitimate reason.

3 THE COURT: Are you telling me as an officer of the
4 court that after a critical blog post, that somebody at the
5 FTC, in order to make sure that he was -- that he was not
6 impeded in his First Amendment rights, decided the next day
7 to 75 times make sure that the same post was up there and,
8 therefore, it could come in and make an argument like you
9 have just made, that the purpose of that access was to make
10 sure that he was unimpeded in the exercise of his First
11 Amendment rights?

12 MR. GORJI: Your Honor --

13 THE COURT: Is that what you are saying?

14 MR. GORJI: Your Honor, that is not the sole
15 explanation.

16 THE COURT: Is that what -- is that one of your
17 explanations?

18 MR. GORJI: I believe that is a legitimate reason
19 for --

20 THE COURT: And is that why the -- is that why you
21 are representing to me that the FTC accessed his blog, was to
22 make sure that his First Amendment rights were not being
23 impeded?

24 MR. GORJI: No, I'm not making that representation,
25 Your Honor, that that is the sole reason.

1 THE COURT: So you are backing from what you just
2 told me?

3 MR. GORJI: No, no, Your Honor. I believe that one
4 legitimate basis for --

5 THE COURT: Was that a legitimate basis on behalf
6 of your client, the FTC, the reason why they accessed the
7 blog post 75 times the day after the post was made?

8 MR. GORJI: Your Honor, I would have to get FTC to
9 provide an explanation as to why they accessed it. I can --

10 THE COURT: You just told me twice that's one of
11 the reasons they accessed it. Is that one of the reasons why
12 they accessed it?

13 MR. GORJI: Well, Your Honor, I know that's one of
14 the reasons why I accessed it, for example, during the course
15 of this litigation.

16 THE COURT: Did you access it on September 17th or
17 September 18th?

18 MR. GORJI: No, Your Honor.

19 THE COURT: How many times have you accessed it?

20 MR. GORJI: Maybe a handful, Your Honor. But --
21 and that was my motivation.

22 But I can also surmise, Your Honor, that a
23 government agency might think that there is possibility of
24 statements related to the conduct -- to the conduct that FTC
25 is trying to regulate on his postings and looking for that

1 reason.

2 Now, whether or not that is the actual motivation
3 here, Your Honor, I can't attest to that. I can ask FTC to
4 provide you with their explanation.

5 THE COURT: This is taking an interesting and
6 troubling turn which I never expected, for an admission by an
7 FTC lawyer that they monitor blogs routinely of companies for
8 whatever purposes, and you don't even know the purposes
9 except for this purpose, that the only purpose that you have
10 expressed, which I find incredible, is that you stated on
11 behalf of your agency that the day after this blog posting
12 was made, that the 75 times -- assuming that's true, but even
13 if it was seven times, that they monitored it to make sure
14 that his First Amendment rights were not being impeded, is
15 incredible.

16 MR. GORJI: Your Honor, that's not my sole
17 explanation. My other explanation --

18 THE COURT: But it's one of your explanations,
19 isn't it?

20 MR. GORJI: Your Honor --

21 THE COURT: Isn't it?

22 MR. GORJI: Your Honor, I think perhaps that is
23 probably an explanation as to why I personally did it. With
24 respect to the FTC, I don't know whether or not that
25 motivated --

1 THE COURT: Was my question unclear about the
2 accessing of the website the day after the posting? Did you
3 not understand that?

4 MR. GORJI: Your Honor, your question was
5 not unclear. I perhaps was confused, but not because of the
6 lack of clarity of your question. I apologize to the
7 Court.

8 Again, I can have the FTC provide an explanation as
9 to why they are monitoring, and my explanation is again what
10 I surmise, but it may not be sufficient here. And,
11 Your Honor, if Your Honor would like, we could have FTC
12 provide an explanation to the Court.

13 THE COURT: Well, let's have this rule between you
14 and me at least. This is a hearing. I am a judicial
15 officer, and you are an officer of the court. When I ask you
16 a question, don't duck and cover the question. Answer the
17 question so that I know that what you are telling me is
18 accurate and I can rely upon it. Is that fair?

19 MR. GORJI: That's fair, Your Honor. I didn't
20 intend to give the impression that I knew what the reason
21 was. I was providing an explanation as to why I think it
22 might be reasonable.

23 THE COURT: Well, that's not what you said, and the
24 record will be clear that in answer to my two questions, that
25 is not what you said.

1 MR. GORJI: I apologize.

2 THE COURT: Instead you were coming up with a
3 defense for the conduct. And that's a problem that lawyers
4 have when they are unarmed with the facts.

5 MR. GORJI: I agree, Your Honor, I do not have the
6 facts with respect to what their specific reasoning was.

7 THE COURT: Then the next time you answer a
8 question, tell me that.

9 MR. GORJI: I apologize that I gave a misimpression
10 to the Court, Your Honor.

11 THE COURT: Well, that's not a misimpression. You
12 apologized for making an inaccurate statement in response to
13 a question from the bench.

14 MR. GORJI: I apologize, Your Honor.

15 THE COURT: Thank you.

16 BY MR. RAIDER:

17 Q. Mr. Daugherty, if you could turn to Tab 31. Hopefully
18 these numbers are correct.

19 A. I'm at 31, sir.

20 Q. Are those the Google Analytic reports that you
21 generated?

22 A. Let me just review them, please.

23 Yes, sir. I believe those are all of them, yes, sir.

24 Q. And did you generate those reports?

25 A. Yes, I did.

1 Q. And how did you go about generating those reports?

2 A. I just signed onto my account or my password and ID
3 that's hooked up to the website and started using the tool.

4 Q. I want to turn to the report. And I have the single
5 pages in my notebook, unfortunately. I'm not sure how far
6 into the exhibit it is. January 1 --

7 MR. RAIDER: Well, Your Honor, we tendered these
8 reports for Mr. Daugherty to explain the information on them
9 that he received.

10 THE COURT: So what does that mean, tendered to
11 what?

12 MR. RAIDER: We would like to admit these reports
13 into evidence.

14 THE COURT: Any objection?

15 MR. GORJI: Again, Your Honor, the government
16 objects based on reliability.

17 THE COURT: Sustained.

18 BY MR. RAIDER:

19 Q. Was there information posted to your blog website that
20 would shed light on the adequacy of LabMD's data security
21 practices?

22 A. No, sir.

23 Q. Were you surprised by the number of times the FTC
24 visited your website?

25 A. Very.

1 Q. Was there any reason that you are aware of why the FTC
2 employees would have to view your blog website so many
3 times?

4 A. As involved the investigation, no.

5 Q. I want to switch topics one last time. What is LabMD
6 asking from the Court?

7 A. We are asking the Court to stop or pause the
8 investigation so that we can try to recover from the cloud
9 and loss of business revenue and loss of employees and loss
10 of insurance and loss of reputation and revenue and we can
11 try to start to recover.

12 Since they don't have standards and rules and won't tell
13 us what we have done, they just point to consent decrees that
14 say no wrongdoings in them and we have -- we just have --
15 it's been ongoing for years of not knowing what we are
16 supposed to do or what we did wrong, and we have just been
17 torpedoed.

18 Q. If the Court were to stop the FTC's enforcement
19 proceedings against LabMD, would you restart the business to
20 begin offering cancer detection testing services?

21 A. It would -- I would start the attempt to. We can't get
22 insurance with this over our head. That's the first thing.
23 And we have to -- and we are also being sued by the
24 landlord. So we have a long stretch to get back.

25 And our key employees have left to other labs. Our

1 clients have left to other labs. Our landlord is suing us
2 because we had to leave the lease earlier -- early.
3 We have -- the insurance is not there.

4 And all that healing has to happen. So that will be
5 able to start that, and also prevent us from going deeper in
6 the hole by having no longer -- no longer having access for
7 the physicians for the records they need now, which are
8 required by us to keep, depending on the record, from five to
9 ten years.

10 MR. RAIDER: Thank you, Mr. Daugherty. I have no
11 further questions.

12 THE COURT: All right. Cross?

13 MR. GORJI: Yes, Your Honor.

14 -- -- --

15 CROSS-EXAMINATION

16 BY MR. GORJI:

17 Q. Good morning, Mr. Daugherty. How are you?

18 A. Good morning.

19 Q. I have got a question about the investigation and your
20 speech. You agree that the investigation was already
21 underway before you started criticizing the FTC's conduct
22 here?

23 A. Well, in January of 2010 they started a nonpublic
24 inquiry. If you consider that an investigation, yes.

25 Q. And you began your criticism in early 2012; is that

1 correct?

2 A. My public criticism?

3 Q. Yes, your public criticism.

4 A. That was my blog. Yeah, I think the public criticism
5 started with the *Atlanta Business Chronicle* interviewing me,
6 and I believe that came out in September approximately 7th of
7 2012.

8 And that was because I had to do it because the Federal
9 Trade Commission had filed suit for me to -- let me think.
10 Let me just think here.

11 I mean, in August of '12, I believe that's when they
12 sued for the CID, and that's when people started noticing and
13 contacting me. Up until that point no one had known and
14 I hadn't told anyone. But I was really forced to respond at
15 that point.

16 Q. And your understanding is that the company Triversa
17 found information about your patients, your customers? That
18 was in 2008, is that correct, that you learned of Triversa
19 finding that information?

20 A. Tiversa was contacted -- contacted me or my company
21 LabMD in May of 2008.

22 Q. And the CID, the subpoena for information and documents
23 from FTC to your company, that was in December 2011; is that
24 right?

25 A. I'm sorry, yeah. You know, that's why my memory -- I

1 believe they filed the CID in December of 2011, and then the
2 Department of Justice filed in August of 2012 to have the
3 Court decide whether I had to sit for a CID.

4 Q. So your public criticisms began well after the CID was
5 served on the company; is that right?

6 A. Well, it didn't -- the CID service from 2012 -- 2011, I,
7 believe that was. Okay, I'm getting my years mixed up. Yes,
8 yes.

9 So '11 they served right at Christmas, and no one picked
10 it up publicly. And then when the DOJ I believe filed to
11 have the Court decide whether I was required to, that's when
12 the public started to come to me. That was the first
13 time. So that's --

14 Q. So just so we are clear, and without focusing on dates,
15 the CID came first, and then you started publicly
16 criticizing?

17 A. Yeah, the CID -- I mean, yeah, the CID came in December
18 23rd, 2011, and the criticism was in September 2012.

19 Q. During the course of that time frame, between the CID
20 coming and your public criticism, were there any depositions
21 that took place with respect to employees of your company?
22 Were there any other investigative things that occurred that
23 impacted your company before you started publicly
24 criticizing?

25 A. Well, yeah. The Federal Trade Commission was repeatedly

1 demanding more and more and more and more information,
2 totally side-swiping my management team. Because we were in
3 a house of mirrors, never-never land, not knowing what they
4 wanted, and they wouldn't tell us what we did wrong, and it
5 was relentless.

6 So it was -- and you are talking a company of like
7 thirty people that diagnose cancer with one VP of
8 operations.

9 Q. So the FTC was actively investigating before you started
10 your public criticism?

11 A. Yes.

12 Q. I want to draw your attention to the FTC administrative
13 complaint. Have you had a chance to look at that document?

14 A. Can you refresh my memory or bring it to me, please?

15 MR. GORJI: One moment, Your Honor.

16 THE WITNESS: I assume I can close this?

17 MR. GORJI: You should have it --

18 THE WITNESS: Oh, it's in the book?

19 MR. GORJI: You should have it as your Exhibit 8.

20 THE WITNESS: Okay.

21 BY MR. GORJI:

22 Q. Okay. Are you familiar with this document?

23 A. Yes, sir, I am.

24 Q. Okay. To date, has the FTC ordered you to do anything
25 that would change your business conduct with respect to

1 managing patient-protected information?

2 A. No.

3 Q. Now, in your verified complaint in your declaration, you
4 say that the cause of your company having to essentially wind
5 down its business is a result of the FTC investigation?

6 A. That's correct.

7 Q. But it's not a result of anything that FTC has actually
8 ordered you to do with respect to how to manage your
9 patients', customers' protected information, is it?

10 A. We would have liked to have known that long ago. No, we
11 haven't gotten that answer.

12 Q. Would you say that that is the primary reason why?

13 A. Yes.

14 Q. Have you ever given a contrary reason as to why your
15 company had to wind down?

16 A. Contrary?

17 Q. Yes.

18 A. I have given additional. I wouldn't say contrary.

19 Q. What reason would you say?

20 A. I said that the Federal Trade Commission set the stage
21 for our having to wind down operations because as a small
22 company this was an overarching fishing expedition that never
23 gave us standards, rules, reasons, and that just unspeakably
24 slowed down a cancer detection center.

25 Because we only have so much energy, and so we had to

1 focus on this, and the only answers we were getting back was
2 look at this consent decree, which was vague at best with
3 fine print about no wrongdoing is admitted.

4 So we were in a never-never land. So we had to shoot --
5 we don't know where we had to shoot, so we felt the only way
6 to get in a safe place would be to shoot for perfection.

7 So I had, you know, the management staff, especially the
8 IT and my VP of operations, just spending so much time on
9 that, and that energy was taken away from prepping for what
10 we knew what was coming, which was Obamacare.

11 And so when we had plans to go into molecular science or
12 into breast pathology, we couldn't get off the ground because
13 we were getting diverted over here.

14 Because as a cancer detection center in a niche market,
15 you specialize in just one area, and the expertise is just --
16 or the differentiation in the market is our expertise by our
17 pathologists because they just read that kind of cancer, and
18 that is something that physicians around the country want and
19 patients benefit from, because practice makes perfect.

20 With Obamacare it was coming that that priority was
21 fading away, and we were aware of that, and we were going to
22 have to diversify our base.

23 And the Federal Trade Commission tied our feet
24 together. We only have so much energy and time, and it was
25 just overpounding for this small company.

1 So I have said several times that the Federal Trade
2 Commission set the stage during this time so that we could
3 not function and deal with what came with Obamacare.

4 And then with four weeks' notice due to sequestration,
5 which usually it's more, we found out that our 2013
6 reimbursement was cut 30-something percent for pathology, and
7 we started bleeding cash like crazy. And we were just so
8 overwhelmed. It was like too many spinning plates.

9 And so -- and then that's just -- that's just the
10 business model. Then you go into the specific knowledge that
11 the VP of operations especially had and the IT guys, and
12 really just how the fear and the unknown and the uncertainty,
13 and eventually it just wore them down, and my VP left and he
14 moved to Denver in August. And when that happened, that was
15 just it.

16 And so we started losing, losing money. And then by --
17 I didn't want to ruin everyone's Christmas, but around
18 December I knew this is just not looking good. It was just
19 reality. We just were overwhelmed with reality.

20 So the FTC is not going away, we are not going to get
21 more money, our reputation has been hashed, people that are
22 employees are just afraid and so they are just leaving.
23 And I couldn't give answers.

24 And so, you know, the ship just went down.

25 Q. Well, how would you say Obamacare itself impacted your

1 business?

2 A. Because CMS starts cutting costs for costs containment,
3 and ancillary services went first. And so, you know, for
4 cost containment those fee schedules were cut.

5 Q. And how about customers that you previously had, were
6 they going to be referred to you for services under
7 Obamacare?

8 A. Well, no, because what happened was what Obamacare does
9 is it really forces a marketplace consolidation, and so
10 physicians in the short term to survive were going to have
11 to -- the physicians that we had -- I mean, this is not all
12 physicians, period. I mean, this is just urologists and
13 office-based urologists. So that's another reason why we've
14 got to diversify.

15 But they were forced to either -- they either get huge
16 and merge together, they either sell their practice to
17 hospitals, or they retire.

18 And so we saw people having to basically survive for a
19 consolidation reason, and so the purchasing -- you know, we
20 knew that physicians were going to have to have economies of
21 scale, so we were going to have to broaden who our customers
22 could be to be able to get enough customers to survive
23 because reimbursement was going down.

24 Q. So as a result of Obamacare, you lost a considerable
25 amount of business?

1 A. No, we didn't -- well, we didn't lose business. We lost
2 the revenue for the business we performed, and we were
3 prevented because of the FTC action from building the
4 business to survive. We could only handle one tidal wave at
5 a time. We had two coming at us.

6 Q. Well, isn't it true that physicians and customers were
7 not -- under Obamacare were no longer going to be able to
8 refer to you for services?

9 A. In the urology marketplace, no.

10 MR. GORJI: One moment, Your Honor.

11 Your Honor, at this time I would like to
12 cross-examine Mr. Daugherty with material that comes from the
13 FTC administrative proceedings. It involves a deposition
14 transcript.

15 Under FTC regulations it is protected and
16 confidential, but there is a provision under the regulations
17 that allows for its disclosure provided that we give
18 notice. We did so last week, Your Honor.

19 But because it was previously confidential, I would
20 like to give counsel an opportunity to take whatever measures
21 they think necessary before I present it in open court.

22 THE COURT: And is this related to his direct
23 testimony?

24 MR. GORJI: Your Honor, it addresses specifically
25 whether or not Obamacare was the cause of loss of revenue and

1 the winding down of the company.

2 THE COURT: It is being offered as a prior
3 inconsistent statement?

4 MR. GORJI: Yes, Your Honor.

5 THE COURT: So, Mr. Raider, what do you say about
6 that?

7 MR. RAIDER: Your Honor, we would ask that a
8 protective order apply and it be sealed at least for now
9 until we see where it's going consistent with its status in
10 the administrative proceeding.

11 THE COURT: I mean, can you introduce as a prior
12 inconsistent statement a statement that you elicited in his
13 examination?

14 Because he didn't say anything about Obamacare on
15 direct examination. So you elicited the explanation on cross
16 regarding Obamacare, and now you want to impeach the
17 statement that you elicited with a prior inconsistent
18 statement? And if so, how can you do that?

19 MR. GORJI: Well, Your Honor, he testified on
20 direct that FTC's actions are the reason why his company had
21 to wind down.

22 I asked him here whether or not he believes
23 Obamacare is what caused it, and he says no, but I would like
24 to point him to his testimony where he says the opposite in a
25 deposition, sworn statement.

1 THE COURT: I know, but it's still testimony that
2 you elicited on cross, and now you want to -- can you offer a
3 prior inconsistent statement to rebut a statement that you
4 elicited?

5 MR. GORJI: Your Honor, I think I can impeach him
6 if he says something that's inaccurate. I can't bring in
7 rebuttal evidence, bring somebody else in to impeach him, but
8 I have a deposition, a sworn deposition.

9 THE COURT: Right. So what's your authority for
10 that? Since you have been laying in wait to do this, so you
11 must have a case or two for me to support the admissibility
12 of --

13 MR. GORJI: Your Honor, I do not have any case law
14 with me, and I wasn't at this moment seeking to introduce the
15 exhibit. I was simply seeking to make use of it in open
16 court to contradict the testimony here.

17 THE COURT: And do you have any authority that this
18 protected material that I assume you got through this
19 deposition under these circumstances should be allowed?

20 MR. GORJI: Your Honor, there is a provision, a
21 regulation, 16 CFR Section 410 (g), that allows for its use
22 upon notice to the party who has given the testimony in the
23 deposition.

24 THE COURT: Of course, nobody ever told me you had
25 done that. I had no idea this was coming up. I would like

1 to say I'm a pretty diligent fellow, but because nobody told
2 me about these regulations, I will admit I haven't gone to
3 look at them and I haven't memorized them.

4 So I do like to make careful rulings, and, you
5 know, maybe there is another way of doing this, that you
6 could submit after the hearing those portions that you claim
7 are prior inconsistent statements, and the lawyer for LabMD
8 can weigh in on whether or not it is or not, and then I can
9 consider it after that.

10 But it seems to me fundamentally unfair that, one,
11 you knew this was coming; two, you don't have any authority
12 for me; and that you now want to disclose because you have
13 given notice in this very public setting something which
14 I think you know is not going to be favorable to this man
15 individually and reputationally and in the lawsuit.

16 MR. GORJI: Your Honor, we did provide notice last
17 week that we were going to make use of this transcript, so it
18 wasn't trying to ambush anybody here.

19 THE COURT: Well, make use of it? Did you tell
20 them in what specific way?

21 MR. GORJI: Actually, our filing from last week
22 indicated that it would be to cross-examine him.

23 THE COURT: For whatever happens to be in that,
24 without focusing on specifically what it is that you were
25 going to use it for?

1 MR. GORJI: Well, we didn't identify the specific
2 topic.

3 THE COURT: But you knew that's the topic that you
4 were going to use, didn't you?

5 MR. GORJI: Yes, Your Honor.

6 THE COURT: Did you even have a communication with
7 opposing counsel to say, look, this is why we want to use it,
8 we don't -- our contention is that there were various and
9 sundry reasons why the business failed, and we have this and
10 you were there, and I just want you to know with respect to
11 this notice that that's the purpose?

12 MR. GORJI: Your Honor, I didn't believe that
13 providing an additional layer of specificity as to exactly
14 what from the transcript we were planning on using was
15 something that was necessary, and in light of the fact that
16 we told them we were planning on using it and that would
17 alert them as to whether or not their confidentiality
18 interests were going to be implicated, the use of the
19 transcript or not, not what the specific content of what I
20 was about to say in court would implicate --

21 THE COURT: Let me just make this observation.
22 There is a lot of acrimony in this case, and that impedes the
23 sort of professionalism that I expect at a hearing that
24 allows me to make a decision on a motion. I believe that
25 that is impeding and affecting your judgments as to the

1 fairness of this hearing.

2 And, you know, I preside over very difficult
3 criminal cases all the time where people's liberty is at
4 stake, and I find more cooperation between lawyers in those
5 on much more difficult issues, including evidentiary issues,
6 than I see in this proceeding, which is the government coming
7 in, which -- and I think it's the responsibility of the
8 government to be fundamentally fair to the people that it's
9 regulating, and that it would be in your interest and I would
10 hope your motivation as an employee of the government to say
11 here is what -- here is our position, here is how we are
12 going to advocate it, because we want the Judge to have a
13 clean record to make a decision.

14 So your explanation that you didn't think the
15 additional level of specificity may be technically correct --
16 I don't know, because I haven't looked at the -- at what the
17 requirement is with respect to disclosure -- but I will say
18 this, it's now interrupted the proceeding, it's made it more
19 difficult for me to understand the position of the parties,
20 and I think it abrogates your responsibility as an employee
21 and representative of the United States government and
22 particularly this agency.

23 But that's sort of the theme I see in this whole
24 investigation.

25 MR. GORJI: Your Honor, if I may address that? I

1 apologize if that is what has occurred in this case.

2 THE COURT: You know what my mother used to say?
3 My mother, bless her heart, who is now dead, used to say when
4 I apologized, she said you can't live a life of I'm
5 sorries. Now you are living through a hearing of I'm sorries
6 because this is now your third apology.

7 But it comes from the fundamental refusal of you
8 and your colleagues with candor and with transparency to say
9 here is where we are going on this.

10 Your whole position on this is that I don't have
11 jurisdiction to do this, and that has -- and that's all you
12 briefed is that I am not authorized to review the authority
13 of your agency under Section 5 to conduct this
14 investigation.

15 And so you are relying upon those what you think
16 are bright line rules about a section, which in my course of
17 doing this for for ten years is fairly ambiguous to me.
18 But this is the first time where it hasn't been a direct
19 consumer action, and I frankly think there is a legal
20 question.

21 Now, the question for me is whether or not I have
22 the authority to decide that or whether there is some other
23 process that has to first be exhausted or however you want to
24 advocate it through in order to get a final opinion that can
25 be appealed to a court.

1 MR. GORJI: Your Honor, the jurisdictional
2 arguments are the primary arguments we do make. We do also
3 make the 12 (b) (6) arguments, Your Honor, that do not deny
4 your authority but that we believe the causes of action fail
5 to state a claim.

6 But I would just like to put something in
7 perspective on behalf of the government here, Your Honor,
8 which is the history of acrimony that you perceive, this is a
9 case that I was just very recently assigned to along with
10 co-counsel here. Counsel who was on this case is no longer
11 with the Department of Justice.

12 And so I just became aware of this transcript last
13 week, Your Honor. And so there certainly wasn't any --

14 THE COURT: That's not the defendant's or my fault
15 or my problem. That's your problem. If you want to switch
16 lawyers, you switch lawyers.

17 And if you are talking about the fellow who was
18 here on the CID, I could tell you as a result of that hearing
19 that there was already a history of acrimony and I think on
20 behalf of the agency the exertion of authority in a
21 mean-spirited way.

22 MR. GORJI: Well, Your Honor, I can just say
23 that --

24 THE COURT: And you might -- you know, I'm
25 not saying that -- if you are just new to this case, which

1 I think is the reason why I put this off, to allow you time,
2 that I would hope that change in lawyers would change
3 atmosphere.

4 MR. GORJI: Your Honor, there was no intention to
5 hide anything from plaintiff here. We disclosed this in our
6 filing, and, you know, if counsel had asked me what part
7 exactly of the transcript are you hoping to make use of,
8 I certainly would have answered that question.

9 THE COURT: Well, I know, but they are not used to
10 you. They are used to the people who preceded you.

11 And it's hard for you to say this is a new day, and
12 I suspect you didn't call them and say, look, we have got to
13 change the atmosphere in this case, I understand that it
14 hasn't gone well, we understand what your complaints are --
15 and I would hope that you would understand their
16 complaints -- but we want to get on a platform that allows
17 whoever hears this in whatever forum, that would facilitate
18 the communication and entry into the record of information
19 that would allow a thoughtful, just decision on a case that
20 I think needs a thoughtful, just decision.

21 And I think especially when lawyers change, that
22 it's the responsibility of the new lawyers to reach out and
23 say we are going to handle this in the way that, one,
24 advocates on behalf of our client, but at the same time, we
25 recognize we are the government and we do want to be fair,

1 and we want to go down to Atlanta on this hearing that has
2 been put off at our request, which I did because of people's
3 personal commitments, and while my schedule is not very fluid
4 or is not fluid at all anymore and it has very little
5 capacity, it made sense to do that, and I did.

6 MR. GORJI: Well, we appreciate that.

7 THE COURT: But I expected this to go a lot better
8 than it is.

9 MR. GORJI: Again, Your Honor, there was no
10 intention to hide anything. By bringing the fact that we
11 were going to use this transcript to counsel's attention,
12 I thought that we had taken care of our obligations to alert
13 them to the fact that we potentially --

14 THE COURT: Well, I don't know, because, one,
15 nobody has told me what the obligation is, nobody told me
16 that there was going to be a dispute about this.

17 And you didn't either, Mr. Raider. You were on
18 notice. You didn't say, by the way, we are going to have a
19 problem with that, let me give you a heads-up that that's
20 going to happen. But you haven't said that.

21 In fact, I think you are kind of shooting from the
22 hip to say, well, we don't want it to come in now, not even
23 really understanding what they want to come in, even though
24 there are four of you here today.

25 I hope you are not paying them all, because if you

1 are, no wonder you are going broke.

2 MR. RAIDER: Your Honor, the basic points, really,
3 have already been made without the use of the transcript
4 that --

5 THE COURT: Well, you know, this is -- you don't
6 get to try the case for them, as much as you would like to.

7 MR. RAIDER: No, I'm not -- I understand.

8 THE COURT: The question is what -- and I don't
9 want to waste any more time. We spent half an hour on
10 this.

11 Is there some way for you to draw to my attention
12 that would not disclose in this public forum information that
13 you all agree at the time it was taken was deemed to be
14 confidential or protected, that you could get whatever --
15 there can't be that much in this transcript that relates to
16 that, that you could highlight those for me? And you can
17 even do it today, and say here is what we would show him, and
18 I would determine whether or not it is or is not consistent,
19 and we can move on?

20 MR. GORJI: Your Honor, there really is only about
21 two pages of text, and we could confer with counsel to decide
22 if they are -- to come up with a proposal for Your Honor, if
23 that's --

24 THE COURT: Why don't we do that now? Because
25 I don't want this hanging over my head any longer than it has

1 been.

2 *(Counsel confer.)*

3 MR. RAIDER: Your Honor, we have no objection to
4 the pages pointed out to us.

5 MR. GORJI: Your Honor, if I may approach the
6 witness and provide him with this transcript?

7 THE COURT: You may.

8 BY MR. GORJI:

9 Q. Showing you your transcript from the FTC administrative
10 proceeding on February 10th, 2014, it has your name on
11 it. Do you recall giving testimony in that proceeding?

12 A. Yes, I do.

13 Q. And the attorney who asked the questions was
14 Alain Sheer?

15 A. Correct.

16 Can you point out what testimony we are talking about?

17 Q. Yes, I'm going to draw your attention to page 130, line
18 25.

19 A. Can I read -- can I read this first?

20 Q. Yes.

21 A. What is the two pages? Can you tell me the beginning
22 and the end, please?

23 Q. Yes, I am going to tell you. Starting on page 130, line
24 25, through 131, which is this page, line 12. If you would
25 take a look at that?

1 A. That is the whole part of the two pages are these two
2 things? Okay, so you don't mean pages of this; you mean
3 transcript pages, okay.

4 Okay. So you are ending -- I'm sorry, you are ending on
5 131, line what?

6 Q. Line twelve.

7 A. Line twelve, okay. I'm sorry, thanks.

8 Okay, I have read it. Thank you.

9 Q. Was it your testimony there that you were asked, How
10 does Obamacare fit into the decision to wind down LabMD?

11 Answer: It's creating huge anxiety, destruction,
12 consolidation to our customer base.

13 Question: What does that mean for LabMD?

14 Answer: That means our customers are in survival mode
15 and, therefore, are having to either sell their practices or
16 merge with others and send their specimens to where they are
17 told to send them, not where they want to send them.

18 Question: Is LabMD one of the laboratories to which
19 your clients are told to send their specimens?

20 Answer: No.

21 A. Okay.

22 Q. Is it that your testimony there?

23 A. That was my testimony, yes.

24 Q. Also I'm going to draw your attention to page 60.

25 THE WITNESS: Okay. So did you look at this

1 additional? Okay.

2 BY MR. GORJI:

3 Q. I'm going to draw your attention to page 60 --

4 THE WITNESS: And my lawyers were okay with that
5 other part?

6 MR. RUBINSTEIN: Yes.

7 THE WITNESS: Okay. Thank you.

8 MR. GORJI: I believe your lawyers do not object.

9 MR. RUBINSTEIN: No objection.

10 THE WITNESS: Okay.

11 BY MR. GORJI:

12 Q. I will point you to page 60, and if you start with line
13 nine and go through line eleven?

14 A. Uh-huh.

15 Q. Was that your testimony there?

16 A. At that moment, yes.

17 Q. When you say that moment, that was on February --

18 A. -- 10th, 2014.

19 I mean, this is like out of context here, so let me just
20 see what else is going on here.

21 Other than that, I don't know at the moment. It depends
22 on -- other than that I didn't know at the moment, I didn't
23 know the future plan -- I didn't know the factors of the
24 future plan pertaining to Obamacare, and other than that,
25 I didn't know other factors. I --

1 Q. So you agreed you were asked on line nine: What's your
2 future plan for LabMD?

3 Answer: It depends on Obamacare, and other than that,
4 I don't know.

5 A. And then, I didn't know what the future plan was. But
6 I didn't say it was the only Obamacare. Okay.

7 Q. You can hold on to that.

8 A. Okay, thanks. Are we done for now? No? All
9 right. Excuse me.

10 Q. Now, you mentioned that your VP of operations left the
11 company?

12 A. Correct.

13 Q. Did he indicate whether or not Obamacare impacted his
14 decision to leave?

15 A. No.

16 Q. And you haven't provided an affidavit from your vice
17 president of operations, have you?

18 A. Well, he's no longer the vice president of operations.

19 Q. You haven't provided an affidavit from your former vice
20 president of operations; is that correct?

21 A. You deposed him.

22 Q. You also claim that you have not been able to obtain
23 insurance as a result of the FTC investigation. Did you
24 inquire to the insurance providers whether or not it was the
25 fact that there was an investigation or the fact that

1 customers' personal information was found in places that it
2 shouldn't have been that gave them pause?

3 A. Well --

4 Q. Did you ask them that question?

5 A. I wouldn't have asked that question because that's an
6 allegation about customers' information found in places other
7 than it should have been. That's not a question I would have
8 asked.

9 And whether that's true or not, when things are found in
10 other places, that does not incite a government
11 investigation. There are breaches that are hundreds of times
12 greater than mine that have gone on, if mine had a breach,
13 which we don't think it did.

14 So, no, that is not a question I would have asked. And
15 because I was -- well, first of all, they won't speak to me
16 directly. They tend to go through my broker. These
17 insurance underwriters don't want to talk directly to the
18 customer. They are going to go through the broker.
19 So this is why the broker sent me the e-mail and conveyed
20 information to me.

21 But according to the broker, it was the FTC
22 investigation and the costs they are looking at. They are
23 looking at risks and dollars.

24 Q. Certainly one of the risks that they would probably be
25 interested in is whether or not your protected information is

1 adequately protected; is that correct?

2 A. No, because it's not a cyber security policy. They are
3 interested in -- well, I would say they are interested in
4 whatever can cost them, and whenever there is -- nothing
5 scares an underwriter greater than the unknown or nothing
6 scares a medical underwriter than a chronic disease.

7 And so I'm assuming since the only response that came
8 from them -- and I didn't have direct conversations with them
9 other than talking to my broker -- was that it was the
10 unknown of the FTC investigation.

11 Q. Did you get an affirmative statement from the insurance
12 company that they would cover you if the FTC investigation
13 was enjoined?

14 A. No, I didn't.

15 Q. How many insurance companies have you contacted to
16 obtain insurance coverage?

17 A. Well, I contacted brokers. They contacted insurance
18 companies.

19 Q. Do you know how many insurance companies?

20 A. Approximately -- I think approximately a dozen,
21 approximately. I am not quite sure. At least, at least
22 seven or eight. But, you know, the brokers don't want to
23 name names.

24 Q. And you don't have an affidavit from any of your brokers
25 explaining why you have been denied coverage?

1 A. No, I don't have an affidavit from them.

2 MR. GORJI: One moment, Your Honor.

3 Nothing else, Your Honor.

4 Thank you, Mr. Daugherty.

5 THE WITNESS: Did you want this back?

6 MR. GORJI: You can keep it.

7 THE WITNESS: Okay. Thank you.

8 THE COURT: Any redirect?

9 MR. RAIDER: Just one quickly on redirect,
10 Your Honor.

11 -- -- --

12 REDIRECT EXAMINATION

13 BY MR. RAIDER:

14 Q. Your deposition was February 10, 2014. What was the
15 status of LabMD's cancer detection testing services on that
16 date?

17 A. We were doing no more. That was about three and a half
18 weeks out from our last report out.

19 MR. RAIDER: Thank you. No further questions.

20 THE COURT: All right. Thank you. You may return
21 to counsel table.

22 THE WITNESS: Thank you.

23 THE COURT: Call your next witness, please?

24 THE WITNESS: Should I leave this here?

25 MR. RAIDER: Thank you, Your Honor. We call

1 Mr. Cliff Baker. And Mr. Meyer will handle that
2 examination.

3 -- -- --

4 CLIFF BAKER

5 being first duly sworn by the Courtroom Deputy Clerk,
6 testifies and says as follows:

7 -- -- --

8 DIRECT EXAMINATION

9 BY MR. MEYER:

10 Q. Mr. Baker, could you state your full name and address
11 for the record?

12 A. Cliff Baker, 4850 Topeka Court, Dunwoody, Georgia.

13 Q. And where are you employed?

14 A. A company called Meditology Services based in Atlanta.

15 Q. In what capacity?

16 A. I'm the CEO and founder of the company.

17 Q. And what exactly is your role as the CEO?

18 A. Obviously oversee the running of the company, but I also
19 lead a practice that focuses on privacy and security in
20 healthcare, consulting with companies around privacy and
21 security in healthcare.

22 Q. And when you say consulting about privacy and security,
23 what exactly do you mean?

24 A. My career has been focused on helping primarily
25 healthcare organizations adopt security practices that first

1 and foremost align with the security rule and then generally
2 good practices to have a place to protect information.

3 Q. What were you asked to do in this case?

4 A. I was asked by counsel to review Dr. Hill's report and
5 compare it to my understanding of the HIPAA obligations for
6 companies in the healthcare industry.

7 Q. And what additional experience do you have to make such
8 an analysis?

9 A. As I mentioned, I spent almost twenty years now helping
10 organizations in the healthcare industry implement security
11 controls to comply with HIPAA.

12 Prior to starting Meditology Services, I spent about
13 fourteen years at a company called PriceWaterhouseCoopers
14 primarily in the healthcare -- leading their healthcare
15 security practice and consulting with their clients around
16 implementing security practices.

17 After I left PriceWaterhouseCoopers in 2008, I was the
18 chief strategy officer and architect for a framework called
19 the High Trust Security Alliance, which essentially was a
20 number of organizations across the healthcare industry that
21 came together to try and define a reasonable and appropriate
22 standard for the industry so the industry could proactively
23 implement controls for the healthcare industry.

24 Q. And based on that experience, could you briefly state
25 any opinions you reached regarding the standards articulated

1 in Dr. Hill's report?

2 A. The most troubling aspect of the report is that Dr. Hill
3 doesn't take into consideration any aspects of scalability in
4 terms of what's reasonable and appropriate for an
5 organization of the size of LabMD to implement security to
6 comply with HIPAA security requirements, which has really
7 been the primary driver for security requirements for the
8 industry.

9 And so when I read Dr. Hill's report, it is out of line
10 with the expectations of organizations of the size of LabMD.

11 Q. Is it your understanding that LabMD is a HIPAA-covered
12 entity?

13 A. It is my understanding that they are a HIPAA-covered
14 entity.

15 Q. And based on your experience, do you have any reason to
16 believe that the standard articulated by Dr. Hill would
17 create confusion amongst HIPAA-covered companies?

18 A. Absolutely. The industry continuously is looking for
19 clarification and specificity from the regulators to make
20 sure that they understand what their obligations are, and
21 when a regulating body makes a judgment based on some
22 standard, the industry reacts and the industry tries to
23 understand what their obligations will be as a result of that
24 ruling.

25 So I think the position that Dr. Hill takes is

1 contradictory to the ten years of experience we have had with
2 HHS and understanding their expectation of the industry.

3 Q. And following up on that, I want to go through some
4 particular topics. What is scalability?

5 A. In the creation of the HIPAA rule, a key tenet of the
6 HIPAA rule was to implement controls that were reasonable and
7 practical for the resources, capacity, skills of an
8 organization.

9 HIPAA recognizes that the healthcare industry ranges
10 from large multinational companies to one-physician practices
11 with no IT resources -- probably no IT resources on staff,
12 maybe an office manager at best. And so HIPAA had to be able
13 to specify requirements that would be adopted for the largest
14 companies and the smallest companies.

15 Obviously specifying specific requirements for each of
16 those extremes is difficult, and so HIPAA created this
17 concept of a risk assessment which allowed organizations to
18 analyze their exposures and to make decisions that related to
19 the security controls that were appropriate and that they
20 could really have the resource, capacity and skills to
21 implement.

22 Q. And how does Dr. Hill address scalability?

23 A. Her primary considerations for scalability is the number
24 of records that LabMD holds. And, candidly, the number of
25 records at LabMD is minute compared to larger organizations

1 that offer similar services.

2 And then she doesn't really ever consider the type of
3 organization they are in the industry, the number of
4 employees that they have, the number of resources that they
5 have hired from an IT and security perspective. None of
6 those considerations come into her -- the basis of her
7 opinion in her report.

8 Q. How significant is the difference between the standard
9 Dr. Hill articulates and what HIPAA requires?

10 A. From my perspective, it's significant. Imposing
11 requirements on an industry that are not practical and
12 reasonable, you know, really have a contrary impact to what I
13 believe the regulators are trying to do, which is to make
14 sure that appropriate security controls are in place.

15 And so imposing requirements that don't address this
16 kind of scalability aspect will distract the industry in
17 large part because now they have to interpret and figure out
18 how they are going to implement requirements that are
19 misaligned with expectations that have been set for them for
20 the past ten years.

21 Q. How important is scalability for a company the size of
22 LabMD?

23 A. It's extremely important. Textbook security
24 requirements or controls, if you read textbook requirements
25 and you put the same requirements in front of a large

1 multinational company, you know, they have more security
2 resources than LabMD has employees. And so the skills and
3 investments that they will make around security would
4 probably exceed the total revenue that LabMD probably pulled
5 in its entire existence.

6 So it's incredibly important, because if the regulators
7 want real controls to be implemented, they have to make them
8 practical and they have to make them reasonable and they have
9 to impose expectations that small organizations can actually
10 achieve.

11 Q. What is integrity monitoring?

12 A. Dr. Hill refers to this concept called file integrity
13 monitoring, and it is essentially technology used to monitor
14 any change to files on an issue.

15 So it essentially looks for any change, whether you save
16 a file or you implement a new file or put a new file on a
17 computer, it will send off an alert to somebody. And
18 somebody will have to read that alert, investigate it and
19 respond to it.

20 Q. Does HIPAA require file integrity monitoring?

21 A. It doesn't specifically require file integrity
22 monitoring at all.

23 Q. And what does Dr. Hill say in her report?

24 A. This is one of the key controls that she says LabMD
25 should have had in place. And I think it's a classic example

1 of where her report is out of alignment with the expectations
2 that HHS sets for the industry.

3 As an example, Dr. Hill often in her report refers to
4 free software or inexpensive software that can be implemented
5 to achieve some of these controls. What she doesn't consider
6 is the resource requirements to follow up, investigate,
7 configure, implement those tools.

8 And file integrity monitoring particularly has a
9 significant resource impact on an organization because it's
10 constantly sending out alerts that need to be investigated.

11 Furthermore, Dr. Hill recommends that file integrity
12 monitoring be implemented on a workstation. So on occasion
13 for large organizations you will see it on servers.

14 The reason I'm making that distinction is when a user is
15 on a workstation, they are often changing files. You are
16 opening Word documents, you are opening Excel documents, you
17 are opening and closing files.

18 With that kind of software, there is a potential for an
19 alert to be sent out every time a file is changed, and you
20 can imagine the resource impact that that's going to have on
21 the resources of a particularly small organization.

22 Q. For a company the size of LabMD, what would you
23 recommend with respect to file integrity monitoring in order
24 to be in compliance with HIPAA?

25 A. HIPAA is based on a risk assessment first.

1 Fundamentally HIPAA requires risk assessment. And so
2 we'd work with a company the size of LabMD, understand their
3 exposures, and essentially put a measured program in place to
4 implement security over time.

5 We would start with some limited monitoring that would
6 be in place probably on the servers versus their workstations
7 and then evolve that over time.

8 The primary reason we would not start with file
9 integrity monitoring is we know that it would overwhelm their
10 resources and that the net impact would be that security
11 would not be implemented, information would not be well
12 protected because the resources would not have enough
13 capacity to actually focus on the things that matter.

14 Q. All right. What is encryption?

15 A. Encryption is a process of turning readable information
16 into unreadable information that is only accessible or
17 unlocked for the individuals that have keys to unlock that
18 information, in laymen's terms.

19 Q. Does HIPAA address encryption?

20 A. It does address encryption.

21 Q. How?

22 A. It's an addressable requirement.

23 And there is a distinction, an important distinction in
24 the rule. There are required items and addressable items in
25 the rule.

1 And HHS guidance for addressable items is that the
2 decision around how to achieve those requirements,
3 addressable requirements, should be based on the risk
4 assessment, and then HHS essentially provides options.

5 If the organization does a risk assessment and believes
6 that there is an exposure, believes that they have ways that
7 cost and impact from a resource capacity on the organization
8 in terms of implementing that control to mitigate the
9 exposure, they should go ahead and do it.

10 On the other hand, in evaluating the exposure against
11 the cost and resource capacity to achieve that control, if
12 that cost and resource capacity exceeds the capabilities,
13 they can explore alternate options.

14 If no alternate options exist, then they don't have to
15 implement that control.

16 Q. What is Dr. Hill's opinion with respect to encryption?

17 A. Dr. Hill's opinion is pretty black and white, that
18 encryption should be implemented.

19 Most troubling I think about her report is that she
20 makes reference to encryption and risk. What I mean by that
21 encryption stored in databases on servers.

22 And candidly, you know, across all industries, that is
23 not generally an adopted practice, primarily because it has
24 an impact on the processing speed and performance of
25 systems. We are starting to see more and more of that kind

1 of control implemented, but mostly for large organizations
2 that have the resource capacity to implement those kind of
3 controls.

4 It's very unusual -- I have never seen an organization
5 the size of LabMD implement encryption and risk.

6 Q. What would you recommend to an organization the size of
7 LabMD with respect to encryption in order to comply with
8 HIPAA?

9 A. Again, it would be based on the risk assessment, and
10 I would recommend implementing controls where I know they can
11 achieve the objectives required for encryption.

12 So for example, for any access to their website, if
13 there was particular health information exchanged, I would
14 expect that information is encrypted.

15 Q. You mentioned the risk assessment throughout your
16 testimony now. Does Dr. Hill have an opinion regarding risk
17 assessment?

18 A. She certainly does.

19 Q. And what is it?

20 A. You know, interestingly, we both refer to the same
21 standard reference for risk assessment, which is the NIST
22 Security Series Reference 800-30, which is a
23 government-published approach for performing a risk
24 assessment.

25 Where Dr. Hill and I have a departure in kind of

1 methodology, she immediately will go in her report to
2 suggesting that the organization implement technical tools to
3 achieve the risk assessment.

4 And again I think this is based on her experience in
5 kind of, you know, she seems to have a very technically kind
6 of focused career, technology focused career, and so her
7 immediate response in terms of this risk assessment is to
8 implement a number of technology solutions.

9 As I mentioned to you before, the license cost for those
10 solutions may not be high. The resource cost to actually
11 manage and implement those solutions is significant.

12 And when you look at the way HIPAA and HHS guides the
13 industry in terms of doing a risk assessment, it's certainly
14 not starting with implementing tools. It's with a process
15 and a mind-set and a methodology, candidly mostly relying on
16 manual methods to assess risk.

17 I think that kind of highlights the fundamental
18 distinction between Dr. Hill's report and generally where HHS
19 is guiding the industry.

20 Q. In offering those opinions, does Dr. Hill rely on any
21 published materials from FTC?

22 A. She doesn't, which I found interesting.

23 I would have thought that the expert -- the expert
24 witness for the FTC would have been referencing FTC guidance
25 for security requirements. She did not reference that in her

1 report, that I recall.

2 Q. Are you aware of the FTC publishing data security
3 standards for medical service providers other than what's in
4 Dr. Hill's report?

5 A. I am not aware. In my line of business, I don't rely on
6 FTC guidance for security requirements for my client base.

7 Q. And you have been in that line of business for almost
8 twenty years; right?

9 A. That's correct.

10 Q. And in that time, are you aware of any statements made
11 by the FTC expressing their authority to impose requirements
12 on protected health information in excess of HIPAA?

13 A. I am not aware of those requirements.

14 MR. MEYER: No further questions, Your Honor.

15 THE COURT: I want some clarification to make sure,
16 see if my understanding about this is correct. That -- and
17 I guess this is an allegation.

18 The allegation is that the security breach here was
19 the disclosure of certain patient records. And I don't know
20 the quantity of the patient records that are alleged to have
21 been disclosed, but apparently it was some patient
22 information; is that right?

23 MR. RUBINSTEIN: Your Honor, Reed Rubinstein. If
24 I might?

25 It's not clear. We have heard different things in

1 the course of the administrative hearing. Originally there
2 was a focus --

3 THE COURT: Well, what's your understanding about
4 what went from LabMD outside of the company to others, or are
5 you claiming that nothing did?

6 MR. RUBINSTEIN: There are allegations that --

7 THE COURT: No, what's your understanding? Have
8 you reached a conclusion that certain patient information was
9 disclosed outside the company?

10 MR. RUBINSTEIN: Our understanding, based on the
11 testimony that's been taken to date --

12 THE COURT: Well, you are the lawyers for the
13 company.

14 MR. RUBINSTEIN: That's correct, but --

15 THE COURT: Have you reached any conclusion that
16 information that was private for patients that was delivered
17 to you by these people that were hiring LabMD got disclosed
18 outside the company?

19 MR. RUBINSTEIN: We do not believe that
20 information -- patient PHI has been disclosed outside the
21 company based on what we have learned on discovery.

22 And the reason for that, among other things,
23 testimony of the FTC's experts with respect to the expected
24 rate of identity theft. In this case, there is no single
25 plaintiff, no single person who has alleged --

1 THE COURT: All right. My question was do you
2 know. You are saying there is not.

3 Second, did somebody load a file-sharing program on
4 any LabMD computer?

5 MR. RUBINSTEIN: Yes.

6 THE COURT: And did you do any investigation to see
7 whether or not any information was accessed through the use
8 of that file-sharing program from somebody outside the
9 company?

10 MR. RUBINSTEIN: I believe in approximately 2008,
11 LabMD was informed that file-sharing software was on the
12 computer. LimeWire, which is used primarily for audio
13 files.

14 There was an investigation done by the company.
15 This was contrary to the company's policies, and it was
16 removed.

17 The FTC investigation began two years --
18 approximately two years thereafter, and there are allegations
19 with respect to two specific alleged data breaches.

20 The first related to an insurance agent file, a
21 1718 file. A second related to certain day sheets, which
22 were actually printed forms. They had nothing to do with
23 data security in the sense that we are using it.

24 It is not clear to us still today and there is no
25 evidence in the record that demonstrates how exactly the 1718

1 file, if it did, got out. That's one of the things that's
2 still, frankly, developing.

3 But as I said, to our knowledge and as far as we
4 can tell to the government's knowledge, there is not a single
5 case of identity theft attributable to the alleged data
6 breach.

7 THE COURT: Well, what is it that the FTC claims
8 was the data security breach?

9 MR. GORJI: Your Honor, there are two instances,
10 one being that the Sacramento, California, Police Department
11 found information belonging to LabMD's customers in the hands
12 of identity thieves.

13 Now, that was reported to LabMD. My understanding
14 is LabMD actually informed customers that there had been
15 a --

16 THE COURT: And when was that?

17 MR. GORJI: That was October 2012. I don't know
18 when LabMD actually informed their customers or there was a
19 disclosure.

20 THE COURT: And how did the police department know
21 that it originated from LabMD, and in what form did they have
22 it?

23 MR. GORJI: Your Honor, there was documentation
24 that indicated it pertained to LabMD, I believe.

25 THE COURT: You mean papers?

1 MR. GORJI: Documents, papers.

2 THE COURT: All right. So -- and where did the
3 police department claim that the papers -- how were the
4 papers obtained?

5 By papers, you mean paper documents, that somehow
6 they got hold of some paper documents with some patient
7 information on it? Is that what the allegation is?

8 MR. GORJI: Yes, Your Honor. My understanding is
9 they were in possession of the individuals who pled no
10 contest to the state charges of identity theft.

11 THE COURT: Well, if they pled no contest, they
12 probably cooperated. Did they tell you where they got the
13 papers?

14 MR. GORJI: Your Honor, if I might inquire?

15 Your Honor, I don't have information as to how the
16 documents and the information was obtained by the identity
17 thieves.

18 THE COURT: Well, has anybody from the FTC gone out
19 and interviewed the people who pled *nolo* to that to find out
20 where it came from, to see whether or not there was indeed a
21 security breach?

22 Let me tell you something, these are the most
23 simple questions of this investigation. That you are
24 claiming that some police department prosecuted some people
25 for having possession of information which you are now

1 claiming wrongfully was not protected by LabMD, and you can't
2 even tell me whether or not you have interviewed the people
3 who had the data to find out where they got it to see whether
4 or not there was a security breach or not? And yet you have
5 implemented and instituted this investigation?

6 And this is your case. You are new -- I know you
7 might be new on it, but for heaven's sakes, you are arguing
8 to me that there is a hearing on May 20th and you don't even
9 know.

10 MS. FASCETT: Your Honor, if I may just explain,
11 just for clarity, not as an excuse. The FTC attorneys that
12 are handling the administrative proceeding in that hearing,
13 they I'm assuming definitely know these details. They are
14 not present. They are not here today.

15 We are just -- we were just brought in from DOJ to
16 represent this complaint in this action. So that's part of
17 why we don't have these facts. But we represent the FTC here
18 and we can get these facts for you.

19 MR. RUBINSTEIN: Your Honor, if I could?

20 THE COURT: I'm not --

21 MR. RUBINSTEIN: I --

22 THE COURT: Sit down.

23 MR. GORJI: Your Honor, my --

24 THE COURT: So where are those lawyers? Are they
25 too busy to come to Atlanta today?

1 MS. FASCETT: Well --

2 THE COURT: Is that one of them sitting back there
3 in the gallery?

4 MS. FASCETT: No, she's a U.S. Attorney here in
5 Atlanta, unrelated.

6 THE COURT: How about this other fellow back there,
7 is he an FTC lawyer too?

8 MR. MARCUS: Your Honor, we have a gentleman here
9 from the FTC.

10 THE COURT: Are you involved in this
11 investigation?

12 MR. MARCUS: I am personally not involved in the
13 investigation.

14 THE COURT: Okay. So you are off the hook.

15 So far I have got four lawyers here and none of
16 them are involved in the investigation. How about --

17 MR. MARCUS: We do have are a lawyer who is
18 involved in the investigation.

19 THE COURT: And what's your name?

20 MR. SCHOSHINSKI: Good morning, Your Honor.
21 Robert Schoshinski. I'm assistant director in the Division
22 of Privacy and Identity Protection.

23 THE COURT: All right. So in this case, what
24 investigation has been made as to the source of the documents
25 that the police department out in California found?

1 MR. SCHOSHINSKI: Your Honor, the complaint
2 counsel, so that is the FTC counsel who is litigating the
3 complaint in the administrative action, noticed the
4 depositions of the two individuals who pled no contest to
5 identity theft.

6 One they could not serve because she was just
7 simply not findable. The other one was in jail. We --

8 THE COURT: Did you try to find her?

9 MR. SCHOSHINSKI: Yes, we did, Your Honor. We
10 hired several process servers. They made many attempts to
11 try to find her but were unable to serve her.

12 THE COURT: And when did you first try to serve
13 her?

14 MR. SCHOSHINSKI: Your Honor, I don't have the
15 exact dates, but --

16 THE COURT: Well, give me an approximation.

17 MR. SCHOSHINSKI: Your Honor, I would say late
18 2013, early 2014.

19 THE COURT: So really late in the game, you finally
20 decided that it made sense to go and find out with respect to
21 one of the allegations that's the basis of your investigation
22 that's been ongoing for months, because the CID was something
23 I dealt with some months ago, that you finally decided -- or
24 not you, but your lawyers finally decided that maybe it would
25 be good to try to find the people who actually had the

1 information to determine where they got it?

2 MR. SCHOSHINSKI: Yes, Your Honor.

3 THE COURT: Does that strike you as odd?

4 MR. SCHOSHINSKI: Your Honor, it doesn't strike me
5 as odd. It's what --

6 THE COURT: Does it strike you as late?

7 MR. SCHOSHINSKI: Your Honor, it strikes me as the
8 normal course of the investigation.

9 THE COURT: Boy, that's a sad comment on your
10 agency, that you would wait until months before a hearing and
11 months after you instituted an investigation on a principal
12 claim that you are asserting, that you have not even taken
13 any effort to interview the people that you claim had the
14 documents that underlie the charge of a security
15 breach. That strikes me as almost being unconscionable.

16 And how much money -- how much activity was there
17 before you served those subpoenas trying to get the
18 information from LabMD with respect to a security breach that
19 you don't even know how it occurred? How much activity?

20 MR. SCHOSHINSKI: Your Honor, how would you like me
21 to estimate?

22 THE COURT: Let's start in months.

23 MR. SCHOSHINSKI: Well, Your Honor, I believe the
24 investigation began in January of 2010.

25 THE COURT: Okay. So three years before you tried

1 to subpoena them?

2 MR. SCHOSHINSKI: Your Honor --

3 THE COURT: I'm sorry, two and a half years.

4 MR. SCHOSHINSKI: Your Honor, the knowledge of this
5 incident didn't occur until after the CID enforcement hearing
6 up here in Atlanta. That's when we were notified that this
7 incident had occurred, in October of 2012.

8 THE COURT: So you found out about the -- the
9 incident you are talking about is the California police
10 incident?

11 MR. SCHOSHINSKI: That's correct, Your Honor.

12 THE COURT: All right. And how soon after you
13 found out about the incident did you try to contact the
14 police authorities in California to find out what they knew
15 about the source of the information?

16 MR. SCHOSHINSKI: Immediately.

17 THE COURT: And what did they tell you?

18 MR. SCHOSHINSKI: They told us that they did not
19 know.

20 THE COURT: And then what did you do next, and how
21 soon did you do it?

22 MR. SCHOSHINSKI: We shared the information with
23 LabMD concerning the -- what we found out once we were able
24 to confirm that it was LabMD's information, and we then
25 attempted to find out further from the California police

1 department what they knew about the source of this
2 information.

3 THE COURT: And what did they tell you they knew
4 about the source?

5 MR. SCHOSHINSKI: They told us they were not able
6 to get the source from the defendants in the case.

7 THE COURT: Did you talk to the prosecutor of the
8 case as well?

9 MR. SCHOSHINSKI: I don't believe so, Your Honor.

10 THE COURT: And so you tried to track down one of
11 the two defendants. Did you try to track down the second of
12 the two defendants?

13 MR. SCHOSHINSKI: Yes, Your Honor. We actually
14 obtained service on the second defendant, who was in
15 jail. We noticed his deposition in the action, went to take
16 his deposition, and he pleaded the Fifth Amendment and
17 refused to answer questions.

18 THE COURT: So sitting here today, you have no idea
19 where the documents came from, whether they came from LabMD
20 or some other source? Is that a fair thing to say?

21 MR. SCHOSHINSKI: No. We believe they were LabMD's
22 documents.

23 THE COURT: Well, they might have been LabMD's
24 documents, but you don't know how they got into the
25 possession of the two individuals that you tried to contact

1 that pled guilty to this offense?

2 MR. SCHOSHINSKI: That's correct, Your Honor.

3 THE COURT: So you have no information to establish
4 how those documents were obtained; is that right?

5 MR. SCHOSHINSKI: That's correct, Your Honor.

6 THE COURT: And you are still proceeding on this
7 claim?

8 MR. SCHOSHINSKI: Yes, Your Honor, because the
9 claim is not concerning that incident alone. It's
10 concerning --

11 THE COURT: All right. But are you still
12 proceeding on that claim?

13 MR. SCHOSHINSKI: We are proceeding on that
14 evidence, Your Honor.

15 THE COURT: And that evidence relates to other
16 claims, because you have other documents that were found in
17 other places?

18 MR. SCHOSHINSKI: That evidence relates to the
19 potential injury suffered by consumers as a result of
20 exposure of this information.

21 THE COURT: Are you serious about that last
22 response?

23 MR. SCHOSHINSKI: Yes, Your Honor, I am.

24 THE COURT: So you don't know where the documents
25 came from, you don't know how these people got the possession

1 of it, you don't know whether they originated from LabMD or
2 some other place, but you are going to use that to show that,
3 because they committed identity theft, that certain
4 individuals were damaged by documents, the source of which
5 you don't even know?

6 MR. SCHOSHINSKI: Yes, Your Honor.

7 THE COURT: Holy cow.

8 So what's the other incident that you are relying
9 on?

10 MR. SCHOSHINSKI: The other incident is the
11 exposure of the insurance agent file of several thousand
12 consumers.

13 THE COURT: And when was that?

14 MR. SCHOSHINSKI: That was in 2008, Your Honor.

15 THE COURT: And that was through the file-sharing
16 program?

17 MR. SCHOSHINSKI: That's correct, Your Honor.

18 THE COURT: And how do you know that they came
19 through the file-sharing program?

20 MR. SCHOSHINSKI: We know because third parties
21 found the file on file-sharing programs.

22 THE COURT: Well, I accept that. How do you know
23 that they came through the file-sharing program that was
24 loaded on a computer at LabMD?

25 MR. SCHOSHINSKI: Based on the evidence we obtained

1 about the file-sharing program, evidence provided by LabMD
2 that showed that certain files, including this file, were
3 shared on the file-sharing program, we believe that it was
4 exposed through the file-sharing program.

5 THE COURT: And how many records were shared?

6 MR. SCHOSHINSKI: Your Honor, I don't have the
7 exact number. I believe it was nine thousand, but I'm not
8 entirely sure.

9 THE COURT: So are you aware that nine thousand
10 files ended up in some somebody else's hands that were
11 LabMD's files?

12 MR. RUBINSTEIN: Your Honor, it would be nine
13 thousand individuals. It was one file.

14 THE COURT: Well --

15 MR. RUBINSTEIN: And we --

16 THE COURT: So are you going to dance on the head
17 of a pin now too?

18 MR. RUBINSTEIN: I'm not dancing on the head of a
19 pin, Your Honor. I appeared before the administrative law
20 judge and --

21 THE COURT: You can sit down until I'm ready for
22 you.

23 MR. SCHOSHINSKI: Thank you, Your Honor.

24 MR. RUBINSTEIN: -- I told him because the FTC said
25 that the files had been shared, our position was then and it

1 remains to date that the file was taken by this third party,
2 Tiversa.

3 As you may recall, there was quite a controversy
4 with respect to the government's ability to rely on that
5 file.

6 THE COURT: It was taken by use of an
7 improperly-loaded file-sharing program.

8 MR. RUBINSTEIN: It was taken by use of a patented
9 program that Tiversa uses as part of their business model to
10 go from company to company taking files and then coming to
11 the company and saying: Nice business you have here. It
12 would be a shame if anything happened to it. Why don't you
13 hire us to remediate?

14 In fact, that's what happened here. And part of
15 this was put before --

16 THE COURT: Was that enabled by the file-sharing
17 program that was loaded by an employee on the computers at
18 LabMD?

19 MR. RUBINSTEIN: For them to be able to gain
20 access, I don't know.

21 THE COURT: Why don't you know that?

22 MR. RUBINSTEIN: Because we don't fully understand
23 the nature and extent of Tiversa's technology.

24 We attempted to ask them in deposition, and we were
25 met with objections because this is a protected confidential

1 and highly proprietary piece of software. So we still don't
2 understand to this day.

3 THE COURT: Well, you can get a protective order in
4 order to access that. Have you asked for that?

5 MR. RUBINSTEIN: I don't recall. It would be easy
6 enough to check. I can get that for you. I just don't
7 recall whether we did that in the administrative hearing or
8 not. I am certain the question was asked, and I'm certain
9 objections were interposed.

10 And we had asked -- we actually -- it is very
11 possible that we did, because we filed a motion asking for
12 discovery into the circumstances under which there was a
13 sharing of this information between Tiversa and the FTC.

14 We discovered that the FTC had worked with
15 Tiversa. In fact, Tiversa gave LabMD's file to another third
16 party.

17 THE COURT: Well, look, I'm not trying this case,
18 although I am getting a lot of information about the
19 respective positions which also is troubling on both sides.

20 But I will say --

21 MR. RUBINSTEIN: The --

22 THE COURT: So their position, which I guess they
23 are going to present somebody under oath to say that they
24 have traced information through a file-sharing program that
25 allowed some outside source, whether it's Triversa or

1 somebody else, to wrongfully access information that was on
2 LabMD's computers?

3 MR. RUBINSTEIN: I don't believe they have done any
4 independent investigation to verify what type of --

5 THE COURT: I'm not saying that. I'm saying they
6 have got an obligation to present somebody under oath to
7 testify with respect to that, and that's what the deputy
8 director's position -- you are a deputy director; is that
9 right?

10 MR. SCHOSHINSKI: Your Honor, assistant director.

11 THE COURT: All right. I would love to promote you
12 if I could, but I can't, so you are still an assistant
13 director.

14 MR. SCHOSHINSKI: It's the lowest form.

15 THE COURT: I understand. I know titles are big in
16 agencies. I have been there and played that game for a
17 while.

18 But the assistant director has just said that there
19 will be evidence presented before a judicial officer, I guess
20 an administrative law judge, in which somebody will state
21 these nine thousand individuals -- information about
22 individuals in a single record was accessed by an outside
23 source through a file-sharing program that had been installed
24 on WebMD's computers.

25 You are going to say that there is no evidence of

1 that --

2 MR. RUBINSTEIN: That's correct.

3 THE COURT: -- that that ever happened, and you are
4 going to believe that you are right, and the FTC, although
5 sometimes I wonder if they are -- just how compelling their
6 evidence is, that they are going to claim that they are
7 right, and somebody will make a determination of whether
8 there has been a breach or not.

9 Then the question is -- and I do find this -- and
10 I think I know enough about this, and I learned a lot from
11 the CID hearing -- is that the FTC is going to go into the
12 business of monitoring and investigating and regulating
13 security breaches and that they have decided I think to do
14 that within what they believe is their administrative
15 authority, because I think they went to Congress and Congress
16 wouldn't authorize that for whatever reason, whether it's
17 politics or not.

18 But I think there has been no amendment to Section
19 5 to specifically allow that. But they are taking the
20 position that they have the authority to do that.

21 MR. RUBINSTEIN: That is correct.

22 THE COURT: I think that there is a significant
23 question about whether Section 5 allows that, but I'm not
24 sure I can decide that based upon my jurisdictional
25 limitations, perhaps.

1 But I think that's what's going on here is the FTC
2 has staked out a position of regulatory authority and that
3 they are going to advocate that and they are going to advance
4 it to the greatest extent that they can.

5 You are somebody who is the -- is somebody who has
6 fallen within that ambit of claimed authority, and you claim
7 that you didn't do it. They are going to claim that you did
8 do it.

9 So there is going to be a factual question of
10 whether or not you did or did not, and then there is going to
11 be a legal question of whether or not they have the authority
12 to do what they have done.

13 MR. RUBINSTEIN: That's correct. And we are not
14 asking you to decide factual questions today.

15 THE COURT: I know, but you are asking me to take
16 jurisdiction of this, and I'm not sure I can.

17 MR. RUBINSTEIN: Well, and I'm happy to do argument
18 with respect to that.

19 THE COURT: Look, I have spent more time looking at
20 cases than you have on this, so I don't need any more
21 argument on the jurisdictional issue.

22 MR. RUBINSTEIN: Fair enough.

23 THE COURT: I mean, I do think it's strange that a
24 judge in New Jersey gets to decide the jurisdictional issue
25 because the posture of the FTC was different in that case

1 than it is in this case, and then they are arguing that,
2 although I'm co-equal to the judge in New Jersey, that
3 because it came to me a different way, that I can't.

4 I suspect that they would love to travel forward on
5 the New Jersey decision because it favors them and that they
6 will try to deny the opportunity for another judge to weigh
7 in.

8 But I think it's a significant -- you ought to find
9 a way, unless you are so hell bent on expanding this
10 jurisdiction or advocating this jurisdiction, to find some
11 way to decide this legal issue.

12 And I understand why you are doing what you are
13 doing. I have been alive long enough to understand how
14 government and their agencies work. I have been a member of
15 an agency and I understand its impact on defendants or in
16 this case on parties that are under investigation. I
17 understand that too because I have done that as well.

18 But I think that there is a fundamental
19 jurisdictional legal issue, and there ought to be some way of
20 getting a more definitive ruling than what you have right
21 now.

22 Because I would hope that you would think that in
23 this current healthcare environment, that the more
24 competition and providers there are for medical detection
25 devices or processes like those offered by LabMD, that the

1 better off the consuming public is and the better off
2 patients will be. But by your conduct, you have taken one
3 out of the market it looks like.

4 And if I was an agency head, I would say there has
5 got to be some way of being satisfied that this doesn't
6 happen again, however it happened, and to make sure that we
7 have as many providers as possible out there determining
8 whether or not people do or do not have cancer.

9 And that that would mean a good faith, transparent,
10 authentic discussion about what your concerns are, and trying
11 to get those allayed by some process which would not be a
12 twenty-year monitoring.

13 You know, I have defended people that had
14 twenty-year monitoring responsibilities by an agency, big
15 companies, and it's very, very expensive, and it's really
16 intrusive, and in my personal opinion, having been on both
17 sides, they generally are not necessary.

18 But there is never a middle ground. There should
19 be.

20 But I would think that it would be in the benefit
21 of all the parties here to say whatever happened, it can't
22 happen again, but whatever you are doing ought to continue to
23 be done, because it benefits the consuming public, which I
24 think is who you are supposed to be protecting under
25 reasonable certainties, that the consuming public would be

1 treated fairly.

2 And it's interesting the two people that didn't
3 treat the consuming people fairly are two people in jail that
4 won't even cooperate with you and one of whom you can't even
5 find.

6 But I don't think that even the FTC thinks that
7 they intentionally wanted this information to get out,
8 because they are subject to HIPAA regulations.

9 And I will say I have gone into enough doctors'
10 offices and nobody has ever had me sign a statement saying
11 that whatever the obligations are, the rights that I have
12 under the FTC are rights that I have to acknowledge and in
13 some cases give up. It's always HIPAA.

14 And I think that's what happens when you try to
15 extend into an area where you might be allowed or be
16 permitted to extend, but that assumes, especially on behalf
17 of the government, that they act reasonably.

18 And here we are, having spent now about an hour and
19 a half, not getting to the fundamental issue here, which I
20 think is how can your interest be accommodated.

21 And, Mr. Gorji, if you submitted to them a consent
22 order -- and I'm not going to consider that; I don't think
23 it's important -- but it does tell me something about your
24 agency if you say we want twenty years' worth of monitoring
25 and even suggested that was reasonable concerning this

1 company. No wonder you can't get this resolved, because if
2 that's the opening salvo, even I would be outraged, or at
3 least I wouldn't be very receptive to it if that's the
4 opening bid.

5 I don't think you believe that this is a company
6 that willy-nilly allows information to be disclosed. I also
7 believe that you don't think, if you remove yourself from the
8 nits and gnats of this dispute, that you would say it was a
9 good idea to make this provider unavailable to patients.

10 There aren't that many people doing this work as it
11 is. I have another case involving cancer detection
12 processes, and so I know just a little bit about the
13 industry, and one of the regrets of the industry is that
14 there are so few people providing these services. And
15 I think in the current healthcare environment, there will be
16 fewer.

17 It doesn't serve any of us very well. Some day you
18 are going to need one of those services. I hope it's
19 available.

20 You have been completely unreasonable about
21 this. And even today you are not willing to accept any
22 responsibility that whatever needs to be done, even if you
23 can't confirm it, that your position is going to be a
24 litigating position, and you will drag four lawyers to a
25 hearing like this.

1 I mean, I was in a big firm, but on a hearing like
2 this, we wouldn't have four lawyers here. So I don't know
3 what you are trying to accomplish, but I will tell you this,
4 you haven't.

5 And I have a firm belief that it takes two
6 unreasonable people to create an unreasonable atmosphere that
7 prohibits a reasonable result, and that's where we are.

8 Your interest is protecting the American public.
9 That's your responsibility.

10 Your interest is to help a client who I think is
11 providing a good service survive.

12 And I am confident -- I haven't been in all these
13 depositions. I know this, it's always hard to deal with
14 somebody who is changing lawyers all the time. But to the
15 extent that any of that has irritated you, Mr. Daugherty, you
16 need to settle down. I know you are upset down this, but you
17 are poisoning the atmosphere personally.

18 And if I was a lawyer representing you, the first
19 thing I would say is you have got to stop the public
20 stuff. If you want to get this resolved and do something
21 well, no government agency is ever going to treat somebody
22 who's advocating publicly and criticizing publicly. They are
23 going to be less accommodating to them. And I have told that
24 to clients over and over and over when I was a lawyer. Now
25 I get to see it from the other end, and now I'm convinced

1 that's the case.

2 So to the extent that you have gotten some
3 therapeutic value out of all this, it ought to stop, because
4 your criticism hasn't gotten you to where you want to be, has
5 it? It's gotten you where you don't want to be.

6 So I understand the legal issues. I thought as
7 I enter my sixties, one of the values I can do is give you
8 some perspective.

9 Are you a Fiske Scholar? Did you go to the
10 University of Michigan? Did one of you go to Michigan and
11 are a Fiske Scholar?

12 MR. RUBINSTEIN: I did, Your Honor.

13 THE COURT: Yeah. Are you a Fiske Scholar?

14 MR. RUBINSTEIN: Not a Fiske Scholar. I was an
15 Angell Scholar.

16 THE COURT: All right. Well, never mind. Although
17 I will tell you that the story that if one of you had been
18 that I have is working with Bob Fiske, who I think is one of
19 the finest lawyers in America, that we were once granted
20 jurisdiction, and we always, whenever somebody brought a
21 claim to us to try to request us to expand our jurisdiction,
22 we would have a roundtable discussion to say where within the
23 grant of authority to us is our jurisdiction specifically,
24 and, if not, it needs to go back to the people who are
25 entitled to grant jurisdiction, which we believe was

1 Congress, and we turn things down.

2 I think good lawyers -- and he was an agency lawyer
3 for a long time and ran the Southern District for a long time
4 as United States Attorney -- that that lesson has always
5 stuck with me.

6 So where we are now is I have given you my insights
7 about this. I understand there is no more evidence to be
8 presented.

9 I don't need any more -- I guess you can
10 cross-examine him if you want. All I hear him saying is that
11 he doesn't like your expert's report and he would have done
12 something differently and he's claimed that HIPAA is what
13 should be, because there are specific standards there --
14 I think that you will admit that there are no security
15 standards from the FTC. You kind of take them as they come
16 and decide whether somebody's practices were or were not
17 within what's permissible from your eyes.

18 I too find how does any company in the
19 United States operate when they are trying to focus on what
20 HIPAA requires and to have some other agency parachute in and
21 say, well, I know that's what they require, but we require
22 something different, and some company says, well, tell me
23 exactly what we are supposed to do, and you say, well, all we
24 can say is you are not supposed to do what you did.

25 And if you want to conform and protect people, you

1 ought to give them some guidance as to what you do and do not
2 expect, what is or is not required. You are a regulatory
3 agency. I suspect you can do that.

4 But I think that's what happens when you jump too
5 quickly into something that you want to do, and whether
6 that's circumstances or whether that's agency motivation, I
7 don't know. But it seems to me that it's hard for a company
8 that wants to -- even a company who hires people from the
9 outside and says what do we have to do, and they say you have
10 to do this, but I can't tell you what the FTC rules are
11 because they have never told anybody.

12 Again, I think the public is served by guiding
13 people beforehand rather than beating them after they --
14 after-hand. But the assistant director doesn't have the
15 authority to do that. He reports to the deputy director, who
16 reports to the director, who reports to the commission. So
17 he's way down in the pecking order.

18 So I understand what this witness said.

19 I suspect that this witness will say that he never
20 consulted with LabMD before about their security
21 processes. He's just come in to opine on the opinions
22 offered by Ms. Hill. Is that correct?

23 THE WITNESS: Correct.

24 THE COURT: I kind of wish he had been there
25 before.

1 One thing I do know is agencies that say you pay
2 for somebody to come in to look at your security practices
3 and this is what an expert said we had to do and needed to
4 do, that they have a different approach, because that's a
5 defense.

6 But if you want to cross-examine him, now is your
7 time. I had my say.

8 MR. GORJI: Your Honor, the government has no
9 cross.

10 THE COURT: So nothing further from Mr. Baker?
11 We appreciate your testimony.

12 THE WITNESS: Thank you very much.

13 THE COURT: You may step down.

14 Do you have any other witnesses or evidence you
15 want to present?

16 MR. RAIDER: Not at this time, Your Honor, no.

17 THE COURT: Anything the FTC wants to present?

18 MS. FASCETT: Assuming that you are not asking for
19 any argument on the jurisdictional issues, no, nothing
20 further to present. Thank you.

21 THE COURT: Anything else that LabMD wants to say?

22 MR. RUBINSTEIN: Your Honor, it's been extensively
23 briefed. If you have any questions, we are glad to answer
24 them. Other than that, we have nothing further.

25 THE COURT: All right. I will take it under

1 advisement.

2 And if there is nothing else to cover today or to
3 present, we will be in recess.

4 MR. RAIDER: Your Honor, just one quick point
5 before we go to recess?

6 Was Exhibit 14 admitted into evidence? That's the
7 Monday, January 6th, 2014, letter? If so, we would like to
8 tender it into evidence.

9 THE COURT: Well, did you tender it?

10 MR. RAIDER: I thought I did.

11 THE COURT: Did you object to it?

12 MR. GORJI: We didn't object, Your Honor.

13 THE COURT: I guess it's in.

14 MR. RAIDER: Thank you, Your Honor.

15 THE COURT: Which is, by the way, what my records
16 reflect was that it was tendered and not objected to and it
17 had been admitted, so you didn't really need to do that. But
18 now it's clear to everybody.

19 MR. RAIDER: Thank you.

20 THE COURT: All right. Now we will be in
21 recess.

22 (Proceedings adjourn at 11:46 a.m.)

23

24

25

C E R T I F I C A T E

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2
3 UNITED STATES OF AMERICA :
4 NORTHERN DISTRICT OF GEORGIA :

5
6 I, Nicholas A. Marrone, RMR, CRR, Official Court
7 Reporter of the United States District Court for the Northern
8 District of Georgia, do hereby certify that the foregoing 98
9 pages constitute a true transcript of proceedings had before
10 the said Court, held in the city of Atlanta, Georgia, in the
11 matter therein stated.

12 In testimony whereof, I hereunto set my hand on
13 this, the 7th day of May, 2014.

14
15
16 /s/ Nicholas A. Marrone

17 _____
18 NICHOLAS A. MARRONE, RMR, CRR
19 Registered Merit Reporter
20 Certified Realtime Reporter
21 Official Court Reporter
22 Northern District of Georgia
23
24
25