

In the Matter of:

LabMD, Inc.

June 12, 2014

Trial - Public

Vol. 8

Condensed Transcript with Word Index



For The Record, Inc.
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1 FEDERAL TRADE COMMISSION
 2 I N D E X
 3 IN RE LABMD, INC.
 4 TRIAL VOLUME 8
 5 PUBLIC AND NONPUBLIC RECORD
 6 JUNE 12, 2014
 7
 8 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR
 9 WALLACE 1301
 10
 11
 12 EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED
 13 CX
 14 (none)
 15
 16 RX
 17 Number541 1307
 18
 19 JX
 20 (none)
 21
 22
 23
 24
 25

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1 UNITED STATES OF AMERICA
 2 FEDERAL TRADE COMMISSION
 3 In the Matter of)
 4 LabMD, Inc., a corporation,) Docket No. 9357
 5 Respondent.)
 6 -----)
 7 June 12, 2014
 8 9:36 a.m.
 9 TRIAL VOLUME 8
 10 PUBLIC AND NONPUBLIC RECORD
 11
 12 BEFORE THE HONORABLE D. MICHAEL CHAPPELL
 13 Chief Administrative Law Judge
 14 Federal Trade Commission
 15 600 Pennsylvania Avenue, N.W.
 16 Washington, D.C.
 17
 18
 19 Reported by: Josett F. Whalen, Court Reporter
 20
 21
 22
 23
 24
 25

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PROCEEDINGS

1
2
3 JUDGE CHAPPELL: Let me call to order or recall
4 Docket 9357. And actually we're reconvening after our
5 recess.
6 All right. Hit me with it. What have you got?
7 MR. SHERMAN: Good morning, Your Honor.
8 JUDGE CHAPPELL: Good morning.
9 MR. SHERMAN: When we were last here, the court
10 graciously granted a recess to let certain things
11 transpire.
12 I think the main issue was whether or not a
13 witness which respondent had called would receive
14 immunity for his testimony between now and the time of
15 break. He has not at this particular point,
16 Your Honor.
17 To that issue specifically, it would be our
18 position to ask the court for an additional week based
19 on information that we've received from the oversight
20 committee with regard to them further proceeding with
21 their investigation.
22 JUDGE CHAPPELL: Is that the same information
23 source that said it would only be two weeks?
24 MR. SHERMAN: That is the exact same source,
25 Your Honor. And I do recall your statement on the

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1 JUDGE CHAPPELL: Well, if all he's going to give
2 us is his name, that's a lot of inferencing.
3 MR. SHERMAN: I understand that, Your Honor.
4 Your Honor, while you consider that, it may be
5 appropriate for me to move on to the other issue which I
6 think the court should be advised of.
7 The court recalls that the issue of the
8 testimony of Mr. Robert Boback was raised the last time
9 we were before the court, and Mr. Boback was
10 unavailable to come back and give live testimony. At
11 least according to his attorney, his trip to Africa was
12 to begin on June 8 and end on June 24.
13 Given those factors, there was an agreement
14 amongst the parties, with the court's permission, to
15 take the deposition of Mr. Boback for what I believed to
16 be hearing testimony purposes.
17 We set that deposition for June 7, which was a
18 Saturday, in Pittsburgh. We traveled to Pittsburgh, and
19 we took testimony from Mr. Boback.
20 It was my position -- and I stated it on the
21 record -- that this deposition was taken for trial
22 testimony purposes only and that the rules that apply to
23 trial testimony or hearing testimony in this case should
24 apply to that particular deposition.
25 JUDGE CHAPPELL: If you have a motion, it

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1 record that oftentimes that source does not move as
2 quickly as they promise, and you've been proven right.
3 JUDGE CHAPPELL: Unfortunately.
4 So we have no witness today.
5 MR. SHERMAN: We do have a witness today,
6 Your Honor.
7 JUDGE CHAPPELL: Who is that?
8 MR. SHERMAN: Mr. Rick Wallace.
9 And we're prepared to proceed, should this court
10 deem it appropriate for us to proceed, to put him on the
11 stand. His attorney of course is here. It's my
12 understanding that he will invoke his Fifth Amendment
13 rights.
14 JUDGE CHAPPELL: For everything or certain
15 areas?
16 MR. SHERMAN: For everything other than I
17 believe his name, his previous place of employment.
18 JUDGE CHAPPELL: Do you intend to request that I
19 go through the attorney general, that we invoke our
20 process for immunity?
21 MR. SHERMAN: I do not, Judge. I believe that
22 if put on the stand and asked the questions in the
23 manner that I intend to ask, we would then request that
24 the court make whatever inferences the court may make
25 under these circumstances.

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1 should have been made in writing. You shouldn't have
2 waited until today if you're intending to make a motion
3 right now on the record, if that's where you're going.
4 It should have been done in writing because we're up to
5 June 12 now and you're referring to June 7.
6 MR. SHERMAN: I'm not making a motion,
7 Your Honor. I'm just bringing the court's attention to
8 several objections that were raised during that
9 testimony.
10 We intend to present that particular deposition
11 transcript as an exhibit, Exhibit CX 541, which would be
12 the next exhibit we would present, in lieu of Mr. Boback
13 coming in here and testifying live.
14 What I am making the court aware of is that
15 complaint counsel and counsel for Mr. Boback decided
16 that they were going to treat that deposition as a
17 discovery deposition, which I thought was outside the
18 scope of what the court had permitted us to do for
19 those purposes on that day. And in doing so,
20 Mr. Boback's attorney made objections on the record
21 which he obviously would not have been able to do in
22 this forum. Complaint counsel attempted to bring in
23 precisely the evidence which you and complaint counsel
24 discussed on the record, which you said was not going to
25 happen, and so --

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1 JUDGE CHAPPELL: I believe what I said was not
2 going to happen was I wasn't going to allow a deposition
3 for that purpose. However, if the man came here and
4 took the stand, he would be allowed to ask questions --
5 he's a fact witness. They would be allowed to ask him
6 certain things.

7 So my standard will be, was he asked something
8 at that deposition that he could not have been asked
9 under our rules had he taken the stand. That will be
10 the standard I apply.

11 MR. SHERMAN: I believe he was. I believe he
12 was asked questions that were outside of the scope of
13 the cross-examination that I conducted in that
14 particular deposition.

15 JUDGE CHAPPELL: Well, there you go. If you're
16 correct, then that testimony will not be considered.

17 MR. SHERMAN: I'm alerting the court to those
18 issues.

19 JUDGE CHAPPELL: And I can't make a prospective
20 ruling without seeing anything, but had he been here
21 and had an objection been made of outside the scope, I
22 would have dealt with that. And you know the rule in
23 this court. Everybody should know by now. You don't go
24 outside the scope of direct.

25 MR. SHERMAN: I understand, Your Honor. But

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1 I'm simply raising that so that when the exhibit comes
2 in, the court would be aware that these issues exist
3 there.

4 JUDGE CHAPPELL: Do you want to respond?

5 MS. VANDRUFF: I do, Your Honor. Thank you.

6 JUDGE CHAPPELL: I want to hear the government's
7 response to everything, the delay, the deposition
8 tactics, whatever. Let's go.

9 MS. VANDRUFF: Well, with respect to the delay,
10 Your Honor, we believe that it's appropriate, if
11 respondent intends to call Mr. Wallace as a witness,
12 that they invoke the commission's rules pursuant to
13 rule 3.39 because that relief has been available to
14 respondent since the first notice that they received
15 that Mr. Wallace would be invoking his constitutional
16 rights. I don't know when that was, but it was at some
17 point prior to our last appearance before Your Honor on
18 May 30.

19 And we think that certainly that at this time
20 there's no reason to not -- for respondent to not avail
21 itself of that provision of the commission's rules.

22 And any inference -- Mr. Sherman's suggestion
23 that the court --

24 JUDGE CHAPPELL: Wait, wait, wait.

25 So it's the government's position that on a

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1 representation that a witness will take the Fifth, you
2 expect the attorney calling the witness to invoke the
3 burdensome machinery to apply for immunity? And I do
4 mean burdensome.

5 We don't have a witness who's taken the stand
6 and asked for Fifth Amendment immunity. That's not
7 happened -- or Fifth Amendment protection or an immunity
8 request. We're not there yet.

9 MS. VANDRUFF: Your Honor, where we are, it's
10 my understanding anyway, is that counsel for
11 Mr. Wallace has advised both counsel for respondent and
12 complaint counsel that if he were to be called to the
13 stand that he would invoke his constitutional
14 privileges and would provide only testimony regarding
15 his name and his former place of employment.

16 JUDGE CHAPPELL: You said his attorney said
17 that. We don't know what Mr. Wallace is saying, do we?

18 MS. VANDRUFF: That's correct, Your Honor. I
19 have not received any testimony from Mr. Wallace.

20 JUDGE CHAPPELL: Go ahead.

21 MS. VANDRUFF: So with respect to our
22 proceeding today, to the extent that Mr. Sherman and I
23 are both correct that Mr. Wallace intends to invoke his
24 constitutional rights, we believe that it's appropriate
25 at this time for respondent to invoke the provision of

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1 rule 3.39.

2 And we would -- today is the first indication
3 that we've received of any sort that respondent is
4 asking this court to draw inferences from Mr. Wallace's
5 invocation of the Fifth Amendment. We would oppose
6 that and ask that we be given an opportunity to brief
7 it.

8 I think that that is contrary to the law with
9 respect to the circumstances under which any inference
10 could be drawn. He's not a party to this matter. He's
11 a third party, and his relationship to the parties --
12 well, I think that any inference would be
13 inappropriate.

14 But we would like the opportunity to understand
15 exactly what respondent is asking this court -- what
16 inferences the respondent is asking this court to draw
17 and to be provided with the opportunity to brief that.

18 JUDGE CHAPPELL: All right. First of all, I
19 understand a video depo was taken?

20 MR. SHERMAN: That's correct, Your Honor.

21 JUDGE CHAPPELL: Then the court is going to
22 require the video as well as the transcript if that's
23 offered into evidence --

24 MR. SHERMAN: Yes, sir.

25 JUDGE CHAPPELL: -- in case any credibility

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1 findings are needed to be supported on appeal.
 2 Let's talk about Mr. Wallace.
 3 Is his attorney here today?
 4 MS. DICKIE: Yes, Your Honor.
 5 JUDGE CHAPPELL: All right. Update me.
 6 MS. DICKIE: Good morning, Your Honor. I'm
 7 Lauren Dickie with Quinn Emanuel on behalf of
 8 Rick Wallace.
 9 The representations by both parties today are
 10 correct. If Mr. Wallace was called to the stand, he
 11 would indeed invoke his Fifth Amendment rights and
 12 assert his Fifth Amendment rights and stand on those
 13 grounds and not answer questions.
 14 JUDGE CHAPPELL: Did you attend the deposition
 15 of Mr. Boback?
 16 MS. DICKIE: I did not, Your Honor.
 17 JUDGE CHAPPELL: Are you aware of what happened
 18 that day?
 19 MS. DICKIE: Some of it.
 20 JUDGE CHAPPELL: Mr. Sherman, did anyone invoke
 21 the Fifth Amendment rights at that deposition of
 22 Mr. Boback?
 23 MR. SHERMAN: No, sir.
 24 JUDGE CHAPPELL: Are you intending to go into
 25 any areas with Mr. Wallace that were not covered with

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1 Mr. Boback?
 2 MR. SHERMAN: That were not covered?
 3 JUDGE CHAPPELL: Right.
 4 MR. SHERMAN: I do not believe so.
 5 JUDGE CHAPPELL: Is Mr. Wallace in the building?
 6 MS. DICKIE: He's not, Your Honor, but he's very
 7 close, within five minutes.
 8 JUDGE CHAPPELL: What's the status of his
 9 immunity deal?
 10 MS. DICKIE: Yes, Your Honor. There's some
 11 things I can represent publicly and there's others that
 12 if Your Honor requests more detail, we would request an
 13 in camera discussion.
 14 JUDGE CHAPPELL: All right. Let's have the
 15 public version first. We have a room full of
 16 spectators.
 17 MS. DICKIE: Congress is investigating Tiversa,
 18 and as part of that, they are interviewing individuals
 19 and considering immunity for one or more individuals.
 20 JUDGE CHAPPELL: Are you aware of whether they
 21 have requested Mr. Boback's -- his attendance at these
 22 hearings? Has Mr. Boback gotten a letter?
 23 MS. DICKIE: My understanding is yes. I have
 24 not had a direct discussion with Mr. Boback's attorney
 25 or Mr. Boback, but my understanding is yes and that he's

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1 had discussions -- he or his attorneys have had
 2 discussions with the committee.
 3 JUDGE CHAPPELL: But as far as we know,
 4 Mr. Boback, even having gotten the letter, did not
 5 invoke his Fifth Amendment rights.
 6 MS. DICKIE: I have not heard that he did, but
 7 again, I have not had direct conversations with him or
 8 his attorney about that.
 9 JUDGE CHAPPELL: I think we just heard that he
 10 did not. You heard that; correct?
 11 MS. DICKIE: I did.
 12 JUDGE CHAPPELL: What is Mr. Wallace's position
 13 with Tiversa?
 14 MS. DICKIE: He's not currently working at
 15 Tiversa. He's no longer employed there.
 16 JUDGE CHAPPELL: When did he work there and what
 17 was his title?
 18 MS. DICKIE: He worked there -- my understanding
 19 is, he worked there from about 2008 to 2014. He had
 20 various titles within that, but the most recent one was
 21 director of special operations.
 22 JUDGE CHAPPELL: Special ops?
 23 MS. DICKIE: Yes.
 24 JUDGE CHAPPELL: Interesting.
 25 MS. DICKIE: Your Honor, I can also represent

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1 that the committee of oversight sent a letter to the
 2 FTC yesterday, cc'g several parties here today, about
 3 the investigation and informing them that it was going
 4 on and the steps that were being taken.
 5 I can make additional in camera representations
 6 about specifically Mr. Wallace's participation and where
 7 we expect -- and what we expect to be doing in the next
 8 week and the coming weeks on this process.
 9 JUDGE CHAPPELL: Did not anyone think I would be
 10 interested in seeing this letter?
 11 I'm asking you (indicating). You're
 12 representing the government. I just heard that you got
 13 a letter regarding this witness. Why don't I see the
 14 letter?
 15 MS. VANDRUFF: I'm sorry, Your Honor. The
 16 witness about whom the letter relates is Mr. Boback. I
 17 received a copy from our Office of Congressional
 18 Relations and from Ms. Dickie last evening after 5:30.
 19 And I would be happy to hand up a copy. We think,
 20 though, that this is not admissible for any purpose in
 21 this matter.
 22 JUDGE CHAPPELL: Does it regard Mr. Wallace at
 23 all?
 24 MS. VANDRUFF: It does not regard Mr. Wallace,
 25 or I should say there is no reference to Mr. Wallace in

4 (Pages 1269 to 1272)

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1 this letter.
 2 JUDGE CHAPPELL: Did you not tell me it regarded
 3 Mr. Wallace?
 4 MS. DICKIE: I don't believe those were the
 5 words I used. I believe I said that the committee had
 6 sent a letter to the FTC.
 7 JUDGE CHAPPELL: Well, just forget whatever
 8 words you used. I can go back and read them, but I
 9 don't have time.
 10 So is it your position this letter has anything
 11 to do with Mr. Wallace?
 12 MS. DICKIE: The letter states that Tiversa is
 13 being investigated by the committee. And I can make
 14 ex parte representations about Mr. Wallace's
 15 participation in that, and that was what I was trying to
 16 convey to the court.
 17 But no, the letter does not specifically
 18 reference Mr. Wallace.
 19 MR. SHERMAN: Your Honor, if I may?
 20 The letter does specifically -- based on my
 21 knowledge of the case, I believe the letter does
 22 specifically reference interaction between Mr. Wallace
 23 and Mr. Boback to which Mr. Boback testified at a
 24 recorded statement that he gave to the oversight
 25 committee. There are some issues with the consistency

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1 of that information as it was testified to by
 2 Mr. Boback previously and as it was testified to or
 3 given to the committee when Mr. Boback appeared before
 4 the committee.
 5 JUDGE CHAPPELL: And the last time we were here,
 6 Mr. Wallace was supposed to testify on June 5.
 7 Did that occur?
 8 MS. DICKIE: It was not testimony, Your Honor,
 9 but he has had a meeting with the committee.
 10 JUDGE CHAPPELL: And has that occurred?
 11 MS. DICKIE: That meeting has occurred.
 12 JUDGE CHAPPELL: And to your knowledge, is
 13 anything pending with that committee regarding
 14 Mr. Wallace?
 15 MS. DICKIE: Yes. We are still in the process
 16 of working with the committee. We don't have any
 17 promises or letters stating that he is going to get
 18 immunity. We are working with them. We have
 19 additional participation planned that I can make
 20 additional representations to the court in camera if
 21 allowed, but this process is ongoing, and we're actively
 22 participating with the committee.
 23 JUDGE CHAPPELL: So he was not questioned under
 24 oath?
 25 MS. DICKIE: He has not been questioned under

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1 oath.
 2 JUDGE CHAPPELL: He didn't invoke his right to
 3 Fifth Amendment protection at this meeting?
 4 MS. DICKIE: All of the meetings have been
 5 protected by an attorney proffer.
 6 JUDGE CHAPPELL: And is there any indication
 7 Mr. Wallace is going to be recalled in front of this
 8 committee?
 9 MS. DICKIE: Yes.
 10 JUDGE CHAPPELL: Let me see the letter.
 11 MS. DICKIE: Yes, Your Honor. May I approach?
 12 JUDGE CHAPPELL: Yes.
 13 (Pause in the proceedings.)
 14 JUDGE CHAPPELL: Ms. VanDruff, what part of
 15 this letter do you think is not relevant to this
 16 proceeding?
 17 Stand up and address that question immediately.
 18 I just read paragraph 2. I want to hear from you.
 19 MS. VANDRUFF: Your Honor, I didn't say that it
 20 wasn't relevant, Your Honor. And Mr. Sherman was also
 21 copied on this letter, and it was Mr. Sherman who
 22 raised the issue of Mr. Wallace this morning. To the
 23 extent that Mr. Sherman believed that this letter was
 24 relevant to Your Honor's --
 25 JUDGE CHAPPELL: You would agree this letter

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1 refers to the 1718 File?
 2 MS. VANDRUFF: Absolutely, Your Honor.
 3 JUDGE CHAPPELL: In black and white, it's right
 4 there. You would agree it refers to testimony being
 5 accurate or not regarding this case.
 6 MS. VANDRUFF: Yes, Your Honor. I made no
 7 representation to the contrary.
 8 JUDGE CHAPPELL: Yet you didn't talk about the
 9 letter until I asked you; is that correct?
 10 MS. VANDRUFF: Your Honor --
 11 JUDGE CHAPPELL: Until this lady brought it up.
 12 MS. VANDRUFF: The issue that Your Honor --
 13 JUDGE CHAPPELL: Were you going to sit there
 14 and not tell me about this letter? Were you going to
 15 do that if I hadn't asked you? That's what I want to
 16 know.
 17 MS. VANDRUFF: Your Honor, I was prepared to
 18 address this letter today. Mr. Wallace is not our
 19 witness, nor is Mr. Boback, and so if it was in the
 20 interest of -- I don't know --
 21 JUDGE CHAPPELL: You don't think in the interest
 22 of truth this information should be disclosed to this
 23 court in this proceeding?
 24 MS. VANDRUFF: I was not withholding the
 25 information, Your Honor.

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1 JUDGE CHAPPELL: We're trying to get to the
2 truth here, are we not? Isn't that what we're all
3 trying to do?
4 MS. VANDRUFF: Of course we are, Your Honor.
5 JUDGE CHAPPELL: You don't think this letter
6 touches on that matter, on truth in this matter that
7 we're having a trial about right now. You were not
8 going to bring up this letter; is that correct?
9 MS. VANDRUFF: No. Your Honor, that is not what
10 I said. No. That is not the position of the
11 government, of course not.
12 JUDGE CHAPPELL: Then you have plans to offer
13 this letter because it's relevant? Is that what you're
14 doing?
15 MS. VANDRUFF: Excuse me, Your Honor?
16 JUDGE CHAPPELL: You have plans to offer this as
17 an exhibit?
18 MS. VANDRUFF: Your Honor, I don't think that
19 it is admissible for any purpose in this matter because
20 it is hearsay. Nonetheless, I think it's appropriate,
21 in the context of Ms. Dickie's representations to the
22 court regarding Mr. Wallace and the conduct of the
23 committee, for Your Honor to have been advised about the
24 current state of the committee's investigation.
25 JUDGE CHAPPELL: This is a letter to the head of

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1 the FTC --
2 MS. VANDRUFF: Correct.
3 JUDGE CHAPPELL: -- talking about fundamental
4 matters in this proceeding, about truth or veracity,
5 fundamental matters, of a source that's been very
6 helpful to the government I might add in its case based
7 on what I've heard.
8 I'm very disappointed this was not brought to my
9 attention by the government. Go ahead.
10 MS. VANDRUFF: I apologize, Your Honor.
11 Thank you.
12 MS. DICKIE: Yes, Your Honor. I believe that
13 we were talking about the status of the investigation
14 and where Mr. Wallace stood. And from the letter, you
15 can see that there's an active investigation going on.
16 And I can represent that Mr. Wallace is -- has
17 participated and will continue to participate. And I
18 can provide any further details the court might want
19 in camera.
20 JUDGE CHAPPELL: Mr. Sherman, what's your
21 position on this letter?
22 MR. SHERMAN: Your Honor, my position on this
23 letter is that it comports with the representations
24 that I made on very limited factual evidence the last
25 time we were before this court, that in fact there are

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1 some serious, serious misgivings about the quality of
2 the evidence which is central to the FTC's case.
3 What we now have is a letter from the oversight
4 committee --
5 JUDGE CHAPPELL: And remember, we are in public
6 session.
7 MR. SHERMAN: What we now have is a letter from
8 the oversight committee questioning just that.
9 And so my position on the letter, Your Honor, as
10 it relates to this proceeding, is that we are in a
11 position either to call Mr. Wallace today, put him on
12 the stand and let him invoke his Fifth Amendment
13 privileges. We have requested this court to stay or
14 continue the matter so that this committee can continue
15 its work and decide what we think would be in short
16 order to give Mr. Wallace the immunity necessary for him
17 to come here and in the public interest tell what he
18 knows.
19 We have no idea what the 3.39 procedures are
20 past making the application or requesting this court to
21 do so.
22 JUDGE CHAPPELL: Well, I can't imagine that
23 procedure or process is quicker than anything that's
24 going to happen with Congress.
25 MR. SHERMAN: That's the point I was getting

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1 ready to make, Your Honor.
2 MS. VANDRUFF: And if I may, Your Honor, the
3 statute under which Congress can seek immunity is
4 18 U.S.C. 6005, which is referenced in the letter that's
5 before Your Honor. By my read of the statute, the
6 Congress can only get a grant of use immunity, and I'm
7 not confident that it would extend to Mr. Wallace's
8 testimony before this tribunal.
9 To the extent that Mr. Wallace does seek
10 immunity in this tribunal, I believe that he must do
11 so -- excuse me -- that respondent must seek that
12 immunity through rule 3.39.
13 MR. SHERMAN: It's my understanding, however,
14 Your Honor, that part of the process with the oversight
15 committee is that once that vote is taken, it is
16 reviewed by the Department of Justice, such that if the
17 Department of Justice reviews and approves and if
18 Ms. VanDruff is correct, it seems to me that that would
19 speed up the process under 3.39 if they have already
20 approved the immunity through some other process.
21 JUDGE CHAPPELL: That would appear logical, sir,
22 but as we all know, sometimes logic doesn't dictate
23 things in these proceedings.
24 Regarding your request for immunity, are you
25 attempting to include this proceeding?

6 (Pages 1277 to 1280)

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1 MS. DICKIE: Your Honor, we are not that far in
2 the process to be able to speak to the scope of the
3 immunity that --
4 JUDGE CHAPPELL: After two weeks?
5 MS. DICKIE: No, Your Honor. It's quite
6 extensive the amount of work that we've had to do, and
7 the discussions have been quite comprehensive, but we
8 are not at a place where I can speak to the scope that
9 Congress would be willing or what under the law we
10 would be allowed to even ask for. We're not there yet.
11 JUDGE CHAPPELL: I would expect that this letter
12 would be a joint exhibit by the parties.
13 MR. SHERMAN: I have no objection.
14 JUDGE CHAPPELL: And I'll entertain whether or
15 not it should be in camera.
16 What's your position on that?
17 MS. VANDRUFF: Your Honor, we don't object to
18 the court receiving this document, but I don't believe
19 it's admissible for any permissible purpose. It is
20 hearsay. It is statements by the chair of --
21 JUDGE CHAPPELL: This is what we're going to
22 do.
23 Do I have an offer of this letter as an
24 exhibit?
25 MR. SHERMAN: Your Honor, I move that the

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1 exhibit be offered as an exhibit.
2 JUDGE CHAPPELL: And what's your legal basis?
3 MR. SHERMAN: My legal basis, Your Honor, is
4 that it is relevant to the heart of this matter and that
5 the court can give it whatever weight the court deems
6 necessary. It is relevant.
7 JUDGE CHAPPELL: Okay. And what's the exhibit
8 number, RX-what?
9 MR. SHERMAN: If it's going to be an
10 RX exhibit -- it would be a CX exhibit if we are
11 offering it, Your Honor.
12 MS. VANDRUFF: Your Honor, no. It would be an
13 RX exhibit.
14 MR. SHERMAN: Or it would be a joint exhibit,
15 Joint Exhibit --
16 JUDGE CHAPPELL: If she's not offering it,
17 you're offering it, it's an RX. It won't be a JX unless
18 both parties agree, and I don't hear that.
19 MR. SHERMAN: That's correct.
20 So it would be RX 542, Your Honor.
21 JUDGE CHAPPELL: All right. Here's what I'm
22 going to do. I have an offer of RX 542. I want that to
23 be in writing. I want to know your positions in
24 writing.
25 MS. VANDRUFF: Will we have an opportunity to

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1 respond, Your Honor?
2 JUDGE CHAPPELL: Of course.
3 MS. VANDRUFF: Thank you, Your Honor.
4 JUDGE CHAPPELL: In writing versus in writing.
5 That's the way we do things.
6 MS. VANDRUFF: Thank you, Your Honor.
7 JUDGE CHAPPELL: Is this my copy?
8 MS. DICKIE: Yes, Your Honor.
9 JUDGE CHAPPELL: Thank you.
10 Mr. Sherman, I want to make sure that you or
11 your staff, the ones that are doing all the work, have
12 adequate time to file a motion regarding admitting this
13 exhibit. How much time do you think you need? Do you
14 want to confer?
15 (Pause in the proceedings.)
16 MR. SHERMAN: Your Honor, if we could have until
17 Wednesday of next week?
18 JUDGE CHAPPELL: All right. Before I deal with
19 that, Ms. VanDruff, I have an offer of RX 542. State on
20 the record what your objection is.
21 MS. VANDRUFF: I'm sorry, Your Honor, I must
22 confess that I've gotten lost. RX 542 was the --
23 MR. SHERMAN: The letter.
24 MS. VANDRUFF: The letter.
25 Your Honor, it's complaint counsel's position

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1 and we object to the admission of RX 542 because it is
2 hearsay. The substance of Chairman Issa's comments to
3 the --
4 JUDGE CHAPPELL: That's all I need to know, your
5 basis is hearsay, and that's all I want briefed, why
6 it's not hearsay, why it is hearsay.
7 MS. VANDRUFF: Yes, Your Honor. And there's
8 also the issue of hearsay within hearsay, but thank you,
9 Your Honor.
10 JUDGE CHAPPELL: Well, that's covered by
11 hearsay.
12 MS. VANDRUFF: It is indeed. Thank you.
13 JUDGE CHAPPELL: That way, we can make it more
14 efficient. We deal with the objection that's pending.
15 MS. VANDRUFF: And Your Honor, if respondent is
16 going to file a motion on Wednesday, when would you like
17 complaint counsel's response?
18 JUDGE CHAPPELL: Do you need until Wednesday to
19 address the hearsay aspect only?
20 MR. SHERMAN: I think it can be done earlier if
21 the court would like it. We have -- tomorrow is Friday;
22 correct?
23 JUDGE CHAPPELL: I believe. Yes.
24 MR. SHERMAN: We could have it to the court by
25 end of business on Monday.

7 (Pages 1281 to 1284)

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1 JUDGE CHAPPELL: And how much time do you need
2 to respond? Keeping in mind you can be working on it
3 the whole time. We know what the issue is.

4 MS. VANDRUFF: Certainly, Your Honor. We will
5 be able to respond on Tuesday.

6 JUDGE CHAPPELL: Is Tuesday close of business
7 adequate?

8 MS. VANDRUFF: Close of business Tuesday we will
9 respond, yes, Your Honor.

10 JUDGE CHAPPELL: Then I will take this offer of
11 RX 542 under advisement.

12 MS. VANDRUFF: Thank you, Your Honor.

13 JUDGE CHAPPELL: Now what we have to deal with
14 is what to do about Mr. Wallace.

15 I'm not sure it's going to expedite anything to
16 have him take the stand and invoke the Fifth, but I
17 also don't like holding this proceeding open for one
18 witness.

19 It's your position, Mr. Sherman, his testimony
20 is crucial to your case?

21 MR. SHERMAN: We absolutely believe it is
22 crucial to our defense, Your Honor.

23 JUDGE CHAPPELL: What do you propose, we
24 reconvene once a week because of Mr. Wallace?

25 MR. SHERMAN: Given these circumstances,

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1 JUDGE CHAPPELL: Tiversa was responsible for the
2 1718 File; is that correct?

3 MR. SHERMAN: They were responsible for
4 providing it to the FTC. They in fact were the ones who
5 possessed it prior to giving it to the FTC.

6 JUDGE CHAPPELL: Ms. VanDruff?

7 MS. VANDRUFF: Yes, Your Honor.

8 JUDGE CHAPPELL: Your case is based on what
9 physical evidence other than the 1718 File?

10 MS. VANDRUFF: Physical evidence. I'm not sure
11 how to address that question, Your Honor.

12 JUDGE CHAPPELL: Documents?

13 MS. VANDRUFF: Pardon me?

14 JUDGE CHAPPELL: Documents.

15 MS. VANDRUFF: We have presented substantial
16 proofs on the state of LabMD's security.

17 JUDGE CHAPPELL: I'm not asking for a closing
18 argument.

19 MS. VANDRUFF: No.

20 JUDGE CHAPPELL: I'm asking what documents your
21 case is based on. We got the 1718 File. We all know
22 what that is, we do, among us.

23 What other documents regarding information of
24 the customers that was released?

25 MS. VANDRUFF: So if you're asking specifically

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1 Your Honor -- and I'm going to speak generally -- at
2 the beginning of the case, in my opening statement I
3 indicated that what I believe that the government would
4 fail to prove is likely to cause substantial consumer
5 injury.

6 If Mr. Wallace's testimony as I believe it to be
7 comes into evidence and he is allowed to state it, given
8 immunity, I believe that it will eliminate a core
9 section of the government's evidence.

10 JUDGE CHAPPELL: Well, based on the evidence
11 I've heard, what can he address other than how the
12 government got the information from Tiversa?

13 And am I correct, that's the issue he's supposed
14 to testify regarding?

15 MR. SHERMAN: That's correct, how he got the
16 information.

17 And I think he can also address the veracity of
18 that information, whether or not in fact that
19 information is what it purports to be.

20 And without that information and without that
21 piece of evidence, I would submit that the government
22 has a very slim chance of proving that LabMD
23 participated in an unfair practice, that being its data
24 security, and that the state of LabMD's data security
25 was likely to cause substantial consumer injury.

1288

1 about the unauthorized disclosure of information --

2 JUDGE CHAPPELL: That's right.

3 MS. VANDRUFF: -- is that Your Honor's question?

4 Because there certainly are many other documents that
5 are probative of the elements in our case.

6 But with respect to specific unauthorized
7 disclosures, there are two known specific unauthorized
8 disclosures.

9 The first is of the 1718 File, which Mr. Boback
10 testified at his deposition was found at four IP
11 locations and more recently provided --

12 JUDGE CHAPPELL: I don't need to know any of the
13 details.

14 MS. VANDRUFF: I understand. I know.

15 JUDGE CHAPPELL: Just give me the name of the
16 document.

17 MS. VANDRUFF: And that is the 1718 File.

18 And then the other unauthorized disclosure
19 about the -- that is known is the unauthorized
20 disclosure of the information that was found by the
21 Sacramento Police Department.

22 JUDGE CHAPPELL: And the Sacramento police
23 information we'll call that, was that information that
24 was included in the 1718 File?

25 MS. VANDRUFF: It was not coextensive,

8 (Pages 1285 to 1288)

1289

1 Your Honor, no.
 2 JUDGE CHAPPELL: All right.
 3 You may have told me this already, but do you
 4 think you'll know something in a week?
 5 MS. DICKIE: Your Honor, I believe that we will
 6 be able to make additional representations about the
 7 progress, and we hope that we will have a more final
 8 determination by next week.
 9 However, based on how things have gone and how
 10 Congress moves and the fact that immunity requires a
 11 two-thirds vote of the full committee, I think it would
 12 be prudent to give a little more time than a week, so
 13 that we are not back in this same position next week, or
 14 a process by which the parties could inform the court
 15 where we are next week.
 16 JUDGE CHAPPELL: We're going to take a short
 17 recess, and I'm going to ponder these issues. But I
 18 want you to consider this, a status update every
 19 Wednesday, so we don't have to have this whole dog and
 20 pony show going here with all these people expecting to
 21 hear a trial and there isn't one, so think about that.
 22 We're going to take a break. We're going to
 23 reconvene at 10:30.
 24 We're in recess.
 25 (Recess)

1290

1 JUDGE CHAPPELL: Let's go back on the record.
 2 Call your next witness, Mr. Sherman.
 3 MR. SHERMAN: Mr. Rick Wallace, please.
 4 MS. VANDRUFF: Your Honor, if I may inquire, I
 5 understand that Your Honor has asked that Mr. Wallace
 6 be prepared to take the stand. Are you -- are you
 7 planning to let Mr. Sherman conduct his full
 8 examination?
 9 JUDGE CHAPPELL: It's his witness.
 10 MS. VANDRUFF: Okay. And Your Honor, then in
 11 that respect, Mr. Sherman and I conferred prior to
 12 gaveling in. May we approach, Your Honor?
 13 There is an issue on which I think that the
 14 court would benefit from having some additional
 15 information.
 16 JUDGE CHAPPELL: All right.
 17 MS. VANDRUFF: Thank you, Your Honor.
 18 [REDACTED]

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1 to, based on Mr. Sherman's representations during the
 2 recess, ask similar questions of Mr. Wallace in open
 3 session today.
 4 Given that I understand Mr. Wallace is going to
 5 invoke the Fifth, we regard these questions, which do
 6 not have any basis in fact and which we dispute, to be
 7 ad hominem attacks on a lawyer and an employee of the
 8 commission who's served with distinction, and doing that
 9 in an open session we think is inappropriate if
 10 Mr. Wallace is invoking the Fifth Amendment.
 11 JUDGE CHAPPELL: I assumed, from what I heard
 12 from his attorney, Mr. Wallace was going to give us
 13 basically his name, rank and serial number --
 14 MS. VANDRUFF: Correct.
 15 JUDGE CHAPPELL: -- then invoke --
 16 MR. SHERMAN: That's my understanding.
 17 JUDGE CHAPPELL: -- which would mean we don't
 18 get into anything.
 19 MS. VANDRUFF: And that was the reason for
 20 my --
 21 JUDGE CHAPPELL: And I'm not going to instruct
 22 any attorney in this court not to go into any matter
 23 that he has a good-faith basis to believe is relevant
 24 to credibility or anything that touches on this
 25 proceeding.

1292

1 [REDACTED]

1293

[REDACTED]

[REDACTED]

1296

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

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[REDACTED]

23 (In open session.)
24 JUDGE CHAPPELL: The parties' attorneys and I
25 just had a discussion regarding the testimony of this

1300

1 MS. DICKIE: May I make two representations on
2 behalf of my client?
3 JUDGE CHAPPELL: Go ahead.
4 MS. DICKIE: First, that he does not hear that
5 well out of his right ear, so to the extent that the
6 parties could keep their voices up and just be aware of
7 that. And Mr. Wallace, if you can't hear, just let them
8 know.
9 And the second would be that his counsel has
10 provided him with a sheet of paper that just sets forth
11 his Fifth Amendment rights, teaching him in fact on what
12 to say and not respond, so to the extent he pulls that
13 piece of paper out and reads from it, we wanted the
14 court and the parties to know what that was.
15 JUDGE CHAPPELL: And based on the motion I just
16 granted, the joint motion, once he does invoke, if he
17 does, that will end the questioning for today.
18 MS. DICKIE: Understood, Your Honor.
19 JUDGE CHAPPELL: Josett, have you sworn the
20 witness?
21 - - - - -
22 Whereupon --
23 RICHARD WALLACE
24 a witness, called for examination, having been first
25 duly sworn, was examined and testified as follows:

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1 DIRECT EXAMINATION
 2 BY MR. SHERMAN:
 3 **Q. Good morning, Mr. Wallace.**
 4 A. Good morning.
 5 **Q. My name is William Sherman. I represent the**
 6 **respondent LabMD in this matter.**
 7 **For the record, could you state and spell your**
 8 **full name, please.**
 9 A. Sure. Richard Wallace. It's R-I-C-H-A-R-D
 10 W-A-L-L-A-C-E.
 11 **Q. Mr. Wallace, were you at one time employed by a**
 12 **company known as Tiversa?**
 13 A. Yes.
 14 **Q. What was the length of time, starting with your**
 15 **start date to your end date, of your employment with**
 16 **Tiversa?**
 17 A. I started with Tiversa in July of 2007 and was
 18 employed through February of this year.
 19 **Q. Mr. Wallace, what was your job title at**
 20 **Tiversa?**
 21 A. Per my counsel, I respectfully invoke the
 22 Fifth Amendment.
 23 JUDGE CHAPPELL: Sir, is it your intent not to
 24 answer any further questions, you're invoking your
 25 protection under the Fifth Amendment?

1302

1 THE WITNESS: I didn't hear. I'm sorry?
 2 JUDGE CHAPPELL: Josett, would you read the
 3 question.
 4 (The record was read as follows:)
 5 "QUESTION: Sir, is it your intent not to answer
 6 any further questions, you're invoking your protection
 7 under the Fifth Amendment?"
 8 THE WITNESS: Yes, ma'am.
 9 JUDGE CHAPPELL: All right. Thank you, sir.
 10 You're excused.
 11 Ms. Dickie, hold on, please.
 12 MS. DICKIE: Yes, Your Honor.
 13 MR. SHERMAN: She was going to walk her client
 14 out and come right back in, Judge.
 15 JUDGE CHAPPELL: All right.
 16 All right. Under commission rule 3.39, should
 17 respondent's counsel request an order requiring
 18 Mr. Wallace to testify and grant immunity, I will need a
 19 written motion from respondent demonstrating that the
 20 testimony sought from Mr. Wallace may be necessary to
 21 the public interest.
 22 Do you intend to make such a motion?
 23 MR. SHERMAN: I do, Your Honor. And we will
 24 make such motion at such time that it is in the best
 25 interest of our client and also in the best interest of

1303

1 justice in this case.
 2 JUDGE CHAPPELL: All right. And does the
 3 government oppose the motion? When it is filed, will
 4 the government oppose?
 5 MS. VANDRUFF: Your Honor, the government does
 6 not intend to oppose the motion. Complaint counsel
 7 believes, however, that the appropriate time to file
 8 that motion is at present.
 9 JUDGE CHAPPELL: All right. Thank you.
 10 MS. VANDRUFF: Thank you, Your Honor.
 11 JUDGE CHAPPELL: And when those filings are
 12 made, if and when they are, I'll consider those -- I'll
 13 consider the filings and whether to request through the
 14 commission's liaison officer approval by the
 15 United States Attorney General for the issuance of an
 16 order requiring Mr. Wallace to testify and granting
 17 Mr. Wallace immunity.
 18 And since the respondent has requested the
 19 testimony of Mr. Wallace and also requested that we
 20 recess or delay this proceeding so they can elicit that
 21 testimony, I have no idea what Mr. Wallace is going to
 22 say, but I believe in the interest of justice,
 23 respondent has the right to have his testimony
 24 presented and I believe in the interest of the truth,
 25 which we're all trying to get to the bottom of here,

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1 what is the truth, we need to hear this gentleman's
 2 testimony in the event he can get immunity and decides
 3 to testify.
 4 And regarding that, I'm going to ask the
 5 parties to give me a status report every Wednesday no
 6 later than 5:00 p.m.
 7 And Ms. Dickie, I'm going to ask you to
 8 coordinate with Ms. VanDruff and Mr. Sherman so that
 9 they will know, which is the main reason we want a
 10 status report, is I need to know what's going on with
 11 Mr. Wallace down the street, whether he has immunity
 12 through the committee and indeed whether that immunity
 13 extends to this proceeding.
 14 MS. DICKIE: Yes, Your Honor, that's fine.
 15 JUDGE CHAPPELL: What's the status of the Boback
 16 deposition? Has that been offered?
 17 MR. SHERMAN: Your Honor, I did want to address
 18 that. I believe that I might have labeled that CX 541,
 19 and it should be RX 541. And with that housekeeping
 20 matter, I would request that it be admitted into
 21 evidence.
 22 MS. VANDRUFF: And Your Honor, complaint counsel
 23 doesn't oppose the admission of Mr. Boback's deposition
 24 testimony. However, there is sensitive -- both
 25 sensitive personal information and sensitive health

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1 information addressed in the transcript.
 2 At the time of the deposition, I asked for
 3 Mr. Sherman's consent to file an in camera motion, and
 4 it wasn't clear what respondent's position would be with
 5 respect to that.
 6 And so prior to its admission, I would either
 7 ask again for respondent's consent or complaint counsel
 8 will move unilaterally that the testimony be treated
 9 in camera because of the sensitive nature of certain
 10 answers to questions.
 11 JUDGE CHAPPELL: You're saying that parts of the
 12 testimony should be in camera.
 13 MS. VANDRUFF: That's correct, Your Honor.
 14 JUDGE CHAPPELL: Then I will wait to get your
 15 motion for in camera treatment and then we'll --
 16 MS. VANDRUFF: Prior to admitting the document?
 17 JUDGE CHAPPELL: I'm going to admit the
 18 document.
 19 MS. VANDRUFF: Okay.
 20 JUDGE CHAPPELL: But it's not going to be made
 21 public. I'm giving a provisional grant of in camera
 22 treatment, which gives us 20 days.
 23 MS. VANDRUFF: Thank you, Your Honor.
 24 JUDGE CHAPPELL: And also regarding JX 3, which
 25 was the previous letter from the House committee, I gave

1306

1 that document provisional in camera treatment. Then I
 2 understand the party that offered it stated on the
 3 record he didn't care if it was public, so I want the
 4 parties to know that as of June 23, it will be made part
 5 of the public record unless I get a motion for in camera
 6 treatment. That's JX 3.
 7 MS. VANDRUFF: Your Honor, will there be an
 8 opportunity for complaint counsel to receive a copy of
 9 that document? I still don't have it. You permitted me
 10 to approach and read the document, but I don't have a
 11 copy of the document.
 12 JUDGE CHAPPELL: Do you have it, Mr. Sherman?
 13 Ms. Dickie, would you provide a copy of that
 14 letter to the parties' attorneys?
 15 MS. DICKIE: Yes.
 16 JUDGE CHAPPELL: Thank you.
 17 MS. VANDRUFF: Thank you, Your Honor. And I
 18 don't know that we have a motion, but we will evaluate
 19 it on the basis of receiving the document.
 20 JUDGE CHAPPELL: It is a joint exhibit. It's
 21 JX 3.
 22 MS. VANDRUFF: Yes, Your Honor. Thank you.
 23 JUDGE CHAPPELL: Anything further?
 24 MR. SHERMAN: Nothing further at this time,
 25 Your Honor.

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1 MS. VANDRUFF: Nothing further at this time,
 2 Your Honor.
 3 JUDGE CHAPPELL: All right. What was the
 4 exhibit number of the Boback depo?
 5 MR. SHERMAN: RX 541.
 6 JUDGE CHAPPELL: RX 541 is admitted and, again,
 7 at this time with provisional in camera treatment until
 8 I get a motion.
 9 (RX Exhibit Number 541 was admitted into
 10 evidence.)
 11 JUDGE CHAPPELL: All right. We will await the
 12 status report. And eventually I will need to make a
 13 determination when we will reconvene. I'm unaware at
 14 this time when that will be.
 15 The public has a right to take part in these
 16 proceedings. I haven't decided for sure, but I may well
 17 issue an order on the public record for the date and
 18 time we will reconvene this hearing.
 19 Anything further?
 20 MR. SHERMAN: Nothing further, Your Honor.
 21 MS. VANDRUFF: Nothing further, Your Honor.
 22 JUDGE CHAPPELL: Until we meet again we're in
 23 recess.
 24 (Whereupon, the foregoing hearing was adjourned
 25 at 11:22 a.m.)

1308

1 CERTIFICATION OF REPORTER
 2
 3 DOCKET/FILE NUMBER: 9357
 4 CASE TITLE: LabMD, Inc.
 5 HEARING DATE: June 12, 2014
 6
 7 I HEREBY CERTIFY that the transcript contained
 8 herein is a full and accurate transcript of the notes
 9 taken by me at the hearing on the above cause before the
 10 FEDERAL TRADE COMMISSION to the best of my knowledge and
 11 belief.
 12
 13 DATED: JUNE 15, 2014
 14
 15
 16 JOSETT F. WHALEN, RMR
 17
 18
 19 CERTIFICATION OF PROOFREADER
 20
 21 I HEREBY CERTIFY that I proofread the transcript
 22 for accuracy in spelling, hyphenation, punctuation and
 23 format.
 24
 25 ELIZABETH M. FARRELL

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