

In the Matter of:

LabMD, Inc.

May 22, 2014

Trial - Public

Volume 3

Condensed Transcript with Word Index



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1 FEDERAL TRADE COMMISSION
 2 I N D E X
 3 IN RE LABMD, INC.
 4 TRIAL VOLUME 3
 5 PUBLIC AND [REDACTED]
 6 MAY 22, 2014

8 WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS	VOIR
9 KAM	441	482	496		
10		500	503	504	
11		506	557	566	
12 VAN DYKE	574	633			

13
 14
 15 EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED
 16 CX
 17 (none)
 18
 19 RX
 20 Number528 484
 21
 22 JX
 23 (none)
 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 May 22, 2014
 8 9:39 a.m.
 9 TRIAL VOLUME 3
 10 PUBLIC AND [REDACTED]
 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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1 PROCEEDINGS
2 - - - - -
3 JUDGE CHAPPELL: Back on the record Docket 9357.
4 I have a few scheduling issues.
5 On the 28th -- I believe that is next
6 Wednesday -- I have a hearing in another matter in this
7 courtroom that should take an hour or so, so we will
8 plan to start no sooner than 10:30 on the 28th.
9 Obviously, if we're still in here, you'll know
10 we went long, but rather than have you hang around
11 outside, I think we'll just say 10:30 on the 28th.
12 And also I have, let's just say, a lot of planes
13 taxiing on the runway waiting to take off.
14 Now that we've been going for a few days, do you
15 have any better feel for how long we're going to be
16 here?
17 MS. VANDRUFF: Your Honor, with respect to
18 complaint counsel's case, we're hopeful that we'll be
19 able to complete our presentation of our case in chief
20 this week.
21 JUDGE CHAPPELL: Okay. And I have no idea --
22 you know, I think you told me nine witnesses, and I
23 don't know if that means all day, an hour. I don't
24 know what the plans are, what they're supposed to tell
25 us.

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1 MR. SHERMAN: Well, only one of our witnesses
2 may go half a day and then half a day for cross, and
3 that would be --
4 JUDGE CHAPPELL: The one who's not here right
5 now?
6 MR. SHERMAN: -- Mr. Daugherty. That's
7 correct.
8 And I anticipate that the nine number may have
9 been reduced and may continue to be reduced as we
10 assess our defense based on the presentation of their
11 case.
12 JUDGE CHAPPELL: So you don't believe there's
13 any way that the number increases.
14 MR. SHERMAN: That's exactly right, Your Honor.
15 And I don't think that any of those other
16 witnesses, with the exception of one, would require
17 more than two and a half hours, from our perspective.
18 MS. VANDRUFF: It's hard for me to address that
19 in the abstract, Your Honor. I don't know of course,
20 you know, to whom Mr. Sherman is referring.
21 JUDGE CHAPPELL: Have all of these witnesses
22 been deposed?
23 MR. SHERMAN: All except for maybe one.
24 JUDGE CHAPPELL: Do you have any lengthy cross
25 scheduled?

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1 MS. VANDRUFF: Well, Your Honor, with respect
2 to respondent's expert, we do expect that that
3 cross-examination will take some time. And with
4 respect to Mr. Daugherty, depending on his affirmative
5 examination, we do expect that will take some time.
6 I'm concerned about Mr. Sherman's
7 representation that one witness may not have been
8 deposed because I'm not aware of a witness on their
9 witness list who has not been deposed.
10 MR. SHERMAN: Rick Wallace is on our witness
11 list and he was not deposed.
12 MS. VANDRUFF: And I didn't -- okay. That is
13 true, Your Honor.
14 JUDGE CHAPPELL: So that's not a concern.
15 MS. VANDRUFF: To the extent --
16 JUDGE CHAPPELL: That was your choice not to
17 depose him. He was on the list.
18 MS. VANDRUFF: Your Honor, we're not concerned
19 about the fact that he hasn't been deposed, that's
20 correct.
21 JUDGE CHAPPELL: Okay.
22 All right. So it looks like, this week, next
23 week and the week after that, we should be wrapping up
24 the week after that. That's eight more days after this
25 week.

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1 MR. SHERMAN: Your Honor, I'm weary and I know
2 I'll be even more weary next week, and to the extent
3 that I can expedite our defense, I will.
4 JUDGE CHAPPELL: I don't want you to change
5 your game plan. That's not my intent. I'm just trying
6 to get a feel for how many weeks we're going to be
7 here. And based on this week, next week four days and
8 then four days after that, that's eight more days minus
9 one hour, but basically eight full days.
10 MR. SHERMAN: I expect things to move along
11 fairly quickly, except for the two witnesses that she
12 just named, that complaint counsel just named.
13 JUDGE CHAPPELL: That gives me a better idea.
14 All right. Thank you.
15 MS. VANDRUFF: Thank you, Your Honor.
16 MR. SHERMAN: Thank you, Your Honor.
17 JUDGE CHAPPELL: And we have a witness on the
18 stand; correct?
19 MR. MEHM: Yes, Your Honor.
20 Good morning. Ryan Mehm for complaint counsel.
21 And yes, we do.
22 With your permission, I would like to conclude
23 my examination of Mr. Kam.
24 JUDGE CHAPPELL: All right.
25 - - - - -

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1 Whereupon --
 2 RICHARD LAWRENCE KAM
 3 a witness, called for examination, having been
 4 previously duly sworn, was examined and testified as
 5 follows:
 6 DIRECT EXAMINATION (resumed)
 7 BY MR. MEHM:
 8 **Q. Thank you, Your Honor.**
 9 **Mr. Kam, you testified yesterday that consumers**
 10 **are likely to suffer financial harms, other harms and**
 11 **reputational harms from medical identity theft.**
 12 **There is another element of other harms that we**
 13 **did not have an opportunity to discuss yesterday, and if**
 14 **I could direct you to CX 0742, which should be in the**
 15 **binder next to your chair, and if you could please turn**
 16 **to page 15 of your expert report.**
 17 A. I'm there.
 18 **Q. And could you please take a look at the first**
 19 **sentence under the heading Other Harms From Medical**
 20 **Identity Theft.**
 21 **And can you please describe for Judge Chappell**
 22 **how much time medical identity theft victims may spend**
 23 **resolving the problems caused by medical identity**
 24 **theft.**
 25 A. Yes.

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1 People who fall victim to medical identity
 2 theft typically have to deal with a range of problems
 3 and a range of institutions, including all of the
 4 healthcare providers they perhaps visited as well as
 5 all of the labs, other things where their information
 6 had been sent, and also the information that the
 7 identity thief created with many of those same
 8 locations and potentially many other locations.
 9 And so, unfortunately, there's a significant
 10 amount of time involved in understanding first of all
 11 where those issues are and then working with those
 12 institutions and organizations to resolve those issues
 13 to expunge the negative records from those accounts.
 14 According to the Ponemon Institute, the medical
 15 identity theft study that we referred to yesterday,
 16 39 -- or 36 percent of respondents say it takes nearly
 17 a year of working with healthcare providers and
 18 insurers to resolve the crime, and as I finish stating
 19 in my report, 48 percent say the crime is still not
 20 resolved.
 21 **Q. And how does the amount of time it takes to**
 22 **resolve the medical identity theft issue discourage**
 23 **victims of medical identity theft from even trying to**
 24 **fix the problem?**
 25 A. You know, unfortunately, you know, because it's

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1 relatively difficult and more specifically because most
 2 consumers don't understand what the implications are for
 3 medical identity theft, they may not even try to resolve
 4 the problem.
 5 **Q. So, Mr. Kam, I'd like to turn back now**
 6 **specifically to your analysis of harm from medical**
 7 **identity theft relating to what you call the P2P**
 8 **disclosure in your report.**
 9 JUDGE CHAPPELL: I have a question, and I'm not
 10 asking for an opinion here, but do you know what it
 11 takes to change your Social Security number?
 12 THE WITNESS: Yes, sir.
 13 JUDGE CHAPPELL: And what is that?
 14 THE WITNESS: Well, there's a good description
 15 of it in the Social Security Administration's guide for
 16 consumers, and it talks about essentially working with
 17 the Social Security Administration to get another
 18 Social Security number replaced for that particular
 19 consumer.
 20 There is a problem with that, though, because it
 21 turns out, even though a consumer may change a
 22 Social Security number, many organizations, many
 23 businesses, still rely on the old Social Security number
 24 in order to identify that consumer, so even though the
 25 consumer may now have the new Social Security number,

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1 the problems of identity theft and in some cases medical
 2 identity theft continue to plague that particular
 3 victim.
 4 JUDGE CHAPPELL: And he might have been left
 5 \$10 million in a will and identified by that old
 6 Social Security number.
 7 THE WITNESS: I would love that to happen, but
 8 unfortunately, in my experience, that doesn't
 9 necessarily happen.
 10 JUDGE CHAPPELL: So as far as you know, it can
 11 be done, just a simple matter of going to the Web site
 12 and filling out a form?
 13 THE WITNESS: I don't know if it's as simple as
 14 just going to a Web site and filling out a form, but
 15 it's not a difficult process necessarily, but it's not
 16 necessarily an effective way to mitigate the risks from
 17 identity crimes.
 18 JUDGE CHAPPELL: But it sounds like it's easier
 19 than changing your name; you don't need a court order.
 20 THE WITNESS: I would agree with that.
 21 BY MR. MEHM:
 22 **Q. Turning back, Mr. Kam, to your analysis of the**
 23 **reputational harm related to the P2P incident, are**
 24 **consumers whose sensitive information was exposed in the**
 25 **1718 File at risk of reputational injury?**

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1 A. Yes.
 2 **Q. In what way?**
 3 A. Well, some of the information that was
 4 contained in the P2P disclosure in the 1718 File
 5 specifically included health information, medical
 6 information about the consumers, the 9300 consumers in
 7 that file. Specifically, it contained CPT codes,
 8 Current Procedural Terminology codes, that point to
 9 specific procedures, diagnostics or tests that that
 10 consumer received.
 11 **Q. Mr. Kam, what is a CPT code?**
 12 A. It's a code that is -- identifies a particular
 13 procedure or test. It is managed by the
 14 American Medical Association as a way to -- as a way to
 15 standardize a description of the various medical
 16 procedures and tests a provider does for a patient.
 17 **Q. And just to be clear for the record, the**
 18 **1718 File contains CPT codes?**
 19 A. It does.
 20 **Q. And are the CPT codes present in the 1718 File**
 21 **linked to individual consumers?**
 22 A. Yes. If you review this 1718 File, you will
 23 see next to each of the consumers' names not only their
 24 name and Social Security number, but you will see a
 25 listing of CPT codes that that particular consumer

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1 received in terms of tests from LabMD.
 2 **Q. How many CPT codes were exposed in the**
 3 **1718 File?**
 4 A. I counted 119 approximately.
 5 **Q. And what do you mean -- what do you mean by you**
 6 **counted?**
 7 A. I was looking for discrete CPT codes, unique CPT
 8 codes, and so I was -- as I paged through the 1718 File,
 9 I identified each unique code that existed there. And
 10 by my summation, there were approximately 119 different
 11 codes.
 12 **Q. And to be clear, I'm not asking you to walk**
 13 **through all 119, but what types generally of CPT codes**
 14 **were exposed via the -- through the P2P incident?**
 15 A. You know, there was a whole range of CPT codes.
 16 I have them listed in the appendix of my expert report,
 17 along with the descriptions of an English language
 18 variation of the meaning of that, those codes.
 19 But just to give you an example, it may be as
 20 simple as indicating a blood draw, a blood transfusion
 21 or, you know, a blood test to the more sensitive CPT
 22 codes that point towards prostate cancer, testosterone
 23 tests and sexually transmitted diseases.
 24 **Q. And how did you determine what the CPT codes**
 25 **mean?**

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1 A. I went on Google and I went through each of the
 2 codes to look at what was described.
 3 Actually, if you go on the
 4 American Medical Association's Web site, they provide a
 5 free resource to essentially interpret the CPT codes for
 6 the average individual, in which case that's what I
 7 used.
 8 **Q. So you went to the American Medical Association**
 9 **Web site; is that correct?**
 10 A. That's correct.
 11 **Q. And could anyone go on that Web site and look up**
 12 **a CPT code?**
 13 A. Yes. It's a free resource.
 14 It's actually intended, from what I observed,
 15 for consumers who may be trying to decipher information
 16 from their doctors that may be on an Explanation of
 17 Benefits or some other report in order to help them
 18 understand the procedures and the tests that they may
 19 have been given.
 20 **Q. In your opinion, Mr. Kam, would any of the**
 21 **exposed CPT codes in the 1718 File be considered**
 22 **sensitive?**
 23 A. Yes.
 24 **Q. Which ones?**
 25 A. The ones that specifically point, from my

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1 experience, to some form of sensitive health history,
 2 specifically dealing with in this case prostate cancer,
 3 low testosterone levels which might indicate, you know,
 4 issues with libido and fertility, CPT codes that
 5 indicate HIV, presence of herpes, presence of other
 6 sexually transmitted diseases. I think I have them
 7 listed in the report.
 8 **Q. And why would -- why would those codes be**
 9 **considered sensitive?**
 10 A. Well, to many consumers, disclosure of --
 11 whether it -- if they're in the process of trying to
 12 understand whether they have some form of cancer or not
 13 or some form of sexually transmitted disease or not,
 14 that information is sensitive to them.
 15 My personal experience with the situation is
 16 we've had, over the last year, a dozen or more clients
 17 who have disclosed, corporations that have disclosed
 18 sensitive health information, and I've had direct
 19 experience reviewing the issues that surfaced from
 20 those particular cases. And very specifically, people
 21 who had this type of information disclosed are
 22 concerned. They become upset, and it's difficult to
 23 deal with people whose information has been disclosed
 24 like this.
 25 MR. MEHM: Your Honor, I have a demonstrative

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1 that we've prepared that I'd like to show Mr. Kam at
 2 this time.
 3 BY MR. MEHM:
 4 **Q. And Mr. Kam, if we could please turn to the**
 5 **document in your binder that has been marked as CXD 05.**
 6 A. I'm there.
 7 **Q. Do you have the document in front of you?**
 8 A. Yes, I do.
 9 **Q. What is this document?**
 10 A. This document summarizes the -- some of the
 11 more sensitive CPT codes that I found in the 1718 File
 12 and specifically those pointing towards some of the
 13 sensitive conditions, health conditions, that I
 14 mentioned earlier.
 15 **Q. And is the information on CXD 05 contained**
 16 **within your expert report?**
 17 A. Yes, it is.
 18 **Q. And does CXD 05 accurately reflect the**
 19 **information on this issue in your expert report?**
 20 A. Yes, it does.
 21 **Q. Could you take a moment and just walk us through**
 22 **what is present here on CXD 05.**
 23 A. Yeah. Starting on the left-hand side of the
 24 chart, these five-digit codes are examples of CPT
 25 codes.

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1 As an example, 84153 is an example of a CPT
 2 code.
 3 What those codes indicate is in the next column
 4 headed with the heading of Testing for Sensitive Medical
 5 Condition.
 6 So, for example, CPT code 84153, 84154 and
 7 G0103 all indicate a test for prostate cancer.
 8 The third column at the very far right
 9 indicates the number of potential consumers who had
 10 some combination of these CPT codes linked to their
 11 name.
 12 So, for example, with the prostate cancer
 13 tests, approximately 3,000 or more consumers had this
 14 information directly linked to their names, their
 15 Social Security numbers, and other tests that they may
 16 have taken that LabMD performed on their behalf listed
 17 in plain view on the 1718 File.
 18 **Q. And approximately how many consumers whose**
 19 **information was contained in the 1718 File had a CPT**
 20 **code exposed that relates to testing for testosterone?**
 21 A. 400 or more consumers.
 22 **Q. And approximately how many consumers whose**
 23 **information was contained in the 1718 File had a CPT**
 24 **code exposed that relates to testing for the herpes**
 25 **virus?**

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1 A. Approximately 19.
 2 **Q. And approximately how many consumers whose**
 3 **information was exposed in the 1718 File had a CPT code**
 4 **exposed that relates to testing for hepatitis B or C?**
 5 A. Approximately six.
 6 **Q. And approximately how many consumers in the**
 7 **1718 File had a CPT code exposed that relates to an HIV**
 8 **test?**
 9 A. Approximately 13.
 10 **Q. And what type of reputational injury could**
 11 **result from the disclosure of this type of information?**
 12 JUDGE CHAPPELL: Hold on a second.
 13 So you're wanting some inference that the fact
 14 that someone even had an HIV test is a negative thing?
 15 THE WITNESS: You know --
 16 JUDGE CHAPPELL: You realize you're just -- if
 17 that's true, then you've just indicated there should be
 18 a negative inference about everyone who serves in the
 19 military in this country, because everyone in the
 20 military is tested.
 21 THE WITNESS: No. And in my report,
 22 Your Honor, I point to the fact that not everyone who's
 23 been tested for these various conditions has the
 24 condition. In some cases, though, even being tested
 25 for the condition may cause embarrassment to consumers.

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1 And if the information isn't provided with
 2 other context like you mentioned -- in the military, our
 3 veterans are tested for various diseases like this on a
 4 consistent basis -- if that information just happens to
 5 show up with without any context, it may create other
 6 forms of reputational damage.
 7 BY MR. MEHM:
 8 **Q. And on that point, Mr. Kam, why might a consumer**
 9 **not want it known that he or she had been tested for HIV**
 10 **or hepatitis, for example?**
 11 A. Well, it could be that they have not had the
 12 opportunity yet to share with their families or with
 13 their employer that they suspect that they might have an
 14 issue, in which case they may want the opportunity to do
 15 that in their own time on their own terms.
 16 **Q. In your opinion, would the disclosure of CPT**
 17 **codes relating to tests for sensitive medical**
 18 **conditions result in a likelihood of substantial**
 19 **consumer injury?**
 20 A. Yes. In my opinion, the disclosure, the
 21 unauthorized disclosure of CPT codes has the likely
 22 potential for substantial injury to consumers,
 23 specifically from the 1718 File being available.
 24 **Q. And why is that?**
 25 A. Because anyone who has access to a peer-to-peer

1 network can get access to this information.
 2 **Q. And once a consumer's sensitive medical**
 3 **information is exposed, is it possible to restore the**
 4 **consumer's privacy?**
 5 A. It's impossible once this information is
 6 disclosed for it to be withdrawn from people's memory.
 7 It's impossible.
 8 **Q. So I'd like to turn now, Mr. Kam, to your**
 9 **analysis of the Sacramento disclosure.**
 10 **What is the Sacramento disclosure?**
 11 A. It's the disclosure of approximately
 12 600 consumers' sensitive personal information.
 13 **Q. And where was this information discovered**
 14 **relating to the 600 consumers?**
 15 A. It was discovered by the Sacramento Police
 16 Department in the possession of two -- two individuals.
 17 **Q. And when did the Sacramento Police Department**
 18 **discover this information?**
 19 A. Based on Detective Jestes' deposition, my
 20 understanding is they were making an arrest at these two
 21 individual suspects' apartment and -- on October 5,
 22 2012, and that's where these documents and this
 23 information was found.
 24 **Q. And can you tell me -- you mentioned that they**
 25 **found information about 600 consumers.**

1 amounts on the day sheets.
 2 And on the nine checks, it included names,
 3 addresses, Social Security numbers, bank routing
 4 numbers, checking account numbers, consumers'
 5 signatures, and in some cases there were handwritten
 6 notes next to the checks that looked to me like in some
 7 cases a Social Security number, in some cases a check
 8 amount and a check number.
 9 **Q. You mentioned a few minutes ago that the**
 10 **documents were found by the Sacramento Police Department**
 11 **in the possession of two individuals.**
 12 **Can you tell us just a little bit more, based on**
 13 **your report, about those two individuals?**
 14 A. Yeah. Based on my recollection of Jestes' --
 15 Detective Jestes' deposition, these were two individuals
 16 who pled no contest to identity theft.
 17 MR. MEHM: Your Honor, court's indulgence for
 18 just one moment, please.
 19 JUDGE CHAPPELL: Go ahead.
 20 (Pause in the proceedings.)
 21 MR. MEHM: Thank you, Your Honor.
 22 BY MR. MEHM:
 23 **Q. So turning now, Mr. Kam, to your analysis of**
 24 **this disclosure, can you please briefly describe how you**
 25 **went about analyzing the Sacramento disclosure.**

1 **What does this have to do with LabMD?**
 2 A. At that specific location, Detective Jestes
 3 testified in her deposition that they also found
 4 40 LabMD day sheets that had information about --
 5 sensitive information about these 600 consumers, as well
 6 as nine personal checks made out to LabMD and one money
 7 order.
 8 I think they also found other items used for
 9 identity theft, including washed checks, software for
 10 printing checks, as well as utility bills in other
 11 consumers' names.
 12 **Q. And you talked about how -- a moment ago how**
 13 **the -- some of the information found in Sacramento was**
 14 **located on 40 pages of -- I believe you said sheets that**
 15 **the Sacramento Police Department found?**
 16 A. Specifically I said LabMD or paper-based records
 17 that had LabMD's name on the top along with the
 18 sensitive personal information of approximately
 19 600 consumers.
 20 **Q. And what information about consumers -- what**
 21 **sensitive information about consumers was on the day**
 22 **sheets, Mr. Kam?**
 23 A. Based on Detective Jestes' deposition and my
 24 review of the documents, there basically was name,
 25 nine-digit Social Security numbers, billing dates and

1 A. You know, like I mentioned yesterday, I used a
 2 two-step approach starting with a risk of harm analysis
 3 using the four-factor risk assessment that we talked
 4 about yesterday.
 5 And then I used an analysis specifically of a
 6 spreadsheet that was provided by the
 7 Federal Trade Commission. I think it was marked as
 8 Sacramento Results 7, which included a report based on a
 9 Thomson Reuters CLEAR database analysis or listing of
 10 Social Security numbers and consumers' names.
 11 MS. MORGAN: Your Honor, I object to any
 12 testimony based on the CLEAR database, which has been
 13 ruled inadmissible because it is unreliable.
 14 MR. MEHM: Your Honor, at the conclusion of
 15 Mr. Kam's testimony this morning, we intend to elicit
 16 for the record just a very, very brief amount of
 17 information about that document, which I understand -- I
 18 want to be clear -- I understand completely your ruling
 19 yesterday. We respect Your Honor's ruling. We are not
 20 seeking to question Your Honor's ruling.
 21 It is just at the very end of his testimony to
 22 ask a few questions about this to preserve this for any
 23 reviewing authority, and I'm going to save those limited
 24 questions for the very end of his exam.
 25 JUDGE CHAPPELL: Is that your roundabout and

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1 meandering way to ask me for an offer of proof?
 2 You might want to look at her. The answer is
 3 yes.
 4 MR. MEHM: Yes.
 5 JUDGE CHAPPELL: An offer of proof will be
 6 allowed.
 7 And based on what I'm hearing here, it's
 8 apparent that that document was used for this witness'
 9 opinion, and anyone in here can imagine how much weight
 10 that will be given when this case is analyzed and
 11 prepared for a decision.
 12 So with that, do you -- what about your
 13 objection?
 14 MS. MORGAN: Your Honor, we will not withdraw
 15 the objection, but we do understand your ruling.
 16 Thank you very much.
 17 JUDGE CHAPPELL: Well, the objection if not
 18 withdrawn is overruled, with the clarification I just
 19 made, that the opinions are already in the documents
 20 that are in evidence, but we now know that there are at
 21 least some underpinning documents.
 22 And let's face it. Experts rely on hearsay all
 23 the time for their opinions, but in this case it's been
 24 pointed out that one of those hearsay documents is
 25 unreliable and shouldn't have been included in the

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1 opinion.
 2 So with that in mind, I will allow them to make
 3 their offer of proof. But I'm going to ask you to let
 4 me know when you're going to make the offer of proof,
 5 and I want you to limit your questions in this area to
 6 that offer of proof.
 7 And it's my practice to allow the opposing
 8 party to also put questions in the record, if they
 9 choose, at the same time as the offer of proof so that
 10 a reviewing authority will have both sides if they need
 11 it.
 12 MS. MORGAN: Thank you, Your Honor.
 13 MR. MEHM: I will do that. I will do my best to
 14 do that, Your Honor. Thank you very much.
 15 BY MR. MEHM:
 16 **Q. So let's turn, Mr. Kam, to your -- the**
 17 **four-factor analysis that you used to analyze the P2P**
 18 **disclosure. And let's turn to factor 1.**
 19 **Excuse me. Let me strike that. I'm sorry. I**
 20 **want to go back and just ask you one question before**
 21 **that.**
 22 **What did you conclude, Mr. Kam, about the risk**
 23 **of harm to consumers from identity theft and medical**
 24 **identity theft regarding the Sacramento disclosure?**
 25 A. It's my opinion that there's the likelihood of

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1 substantial risk of harm, risk of injury to these
 2 600 consumers, based on the unauthorized disclosure of
 3 this information.
 4 **Q. Okay. Let's turn now to your four factors that**
 5 **you used to look at the disclosure.**
 6 **In applying the first factor, the nature and**
 7 **extent of the information disclosed, what type of**
 8 **information about consumers is contained in the day**
 9 **sheets?**
 10 A. The day sheets specifically had, in terms of
 11 sensitive information, names and Social Security
 12 numbers.
 13 **Q. And how did you know that the numbers on the day**
 14 **sheets were Social Security numbers?**
 15 A. You know, the -- I looked at the format for
 16 those numbers, and they're formatted like a
 17 Social Security number with three digits and a dash
 18 followed by two digits and a dash followed by four
 19 digits.
 20 **Q. I'm sorry. To clarify, did you say three digits**
 21 **followed by three digits?**
 22 A. I'm sorry. I said three digits followed by a
 23 dash with two digits followed by a dash followed by four
 24 digits.
 25 **Q. Thank you.**

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1 **And were the Social Security numbers on the day**
 2 **sheets associated with names?**
 3 A. Yes.
 4 **Q. And how would you characterize the sensitivity**
 5 **of the data on the day sheets?**
 6 A. I would characterize it as sensitive.
 7 Social Security numbers can be used by identity thieves
 8 to commit identity crimes.
 9 **Q. And what is the potential for ongoing harm from**
 10 **the exposure of Social Security numbers?**
 11 A. Unfortunately, a consumer who is being
 12 victimized by identity theft because of the misuse of
 13 their Social Security numbers continues or may continue
 14 to be victimized over a long period of time. Part of
 15 the reason for that is consumers, again, don't
 16 understand the necessary -- the associated risks to
 17 some of these identity crimes. And secondarily, many
 18 people don't change their Social Security numbers even
 19 after they've been notified of a disclosure of their
 20 sensitive information.
 21 **Q. You testified earlier about the types of**
 22 **consumer information contained in the checks found in**
 23 **the Sacramento disclosure.**
 24 **How would you characterize the sensitivity of**
 25 **the data in the checks?**

1 A. It is also very sensitive. The information
2 contained on the checks gives an identity thief
3 everything they need to essentially compromise that
4 consumer's checking account.

5 **Q. And why is it sensitive?**

6 A. Because the name, Social Security number, bank
7 routing number, checking account number and image of the
8 consumer's signature is on those checks.

9 **Q. So in assessing -- let's turn to factors -- the
10 second and third risk factors.**

11 **In assessing the second factor and the third
12 risk factors, that is, to whom the disclosure was made
13 and whether the information was acquired and viewed,
14 what information did you consider, Mr. Kam?**

15 A. You know, I considered again Detective Jestes'
16 deposition where she stated that these individuals were
17 in possession of the LabMD day sheets and the checks and
18 the money order and that these essentially had
19 information that could be used to commit identity theft,
20 including, you know, checks, washed checks,
21 check-writing software, and utility bills in other
22 consumers' names.

23 **Q. And let's turn now to the fourth factor, which
24 deals with, as you testified yesterday, risk
25 mitigation.**

1 three credit bureaus in the U.S. that offer credit
2 monitoring to consumers, there is no medical identity
3 bureau, if you will, that monitors healthcare
4 transactions for consumers so that they can detect when
5 someone is misusing their medical identity.

6 And therefore, based on the research, based on
7 other studies that I've seen and based on my personal
8 experience, I've seen consumers at elevated risk of harm
9 from identity theft, medical identity theft and identity
10 crimes even if they received appropriate or proper
11 consumer notification.

12 **Q. Let's turn now, Mr. Kam, to page 23 of your
13 report, which deals with the consumer harm from LabMD's
14 failure to provide reasonable and appropriate security
15 for the 750,000 consumers maintained on its computer
16 networks.**

17 **So my question for you, Mr. Kam, is, how does
18 LabMD's failure to provide reasonable and appropriate
19 security for the sensitive personal information of
20 750,000 consumers maintained on its computer networks
21 impact the potential risk of disclosure of this
22 information?**

23 A. You know, as I outlined in my report, LabMD's
24 failure to provide reasonable and adequate security
25 increases the risk of an unauthorized disclosure for

1 **To what extent could consumers have mitigated
2 the risk of identity theft or medical identity theft
3 created by the unauthorized disclosure of their personal
4 information in the day sheets and the checks and the
5 money order?**

6 A. You know, in this particular case, when I
7 reviewed Mr. Daugherty's deposition, he stated that
8 LabMD made the decision to notify the 600 --
9 approximately 600 more consumers of the unauthorized
10 disclosure of this information, which then gives those
11 consumers the opportunity to reduce the risk from
12 identity theft and medical identity theft.

13 **Q. Does the notice completely eliminate the risk of
14 identity theft or medical identity theft?**

15 A. You know, unfortunately not. I think as I
16 mentioned earlier, notice provides a consumer insight
17 into what information was disclosed, when the
18 disclosure was made, and provides resources.

19 LabMD, again from Mr. Daugherty's testimony, his
20 deposition, I believe they offered a hotline as well as
21 a credit monitoring, which is used to detect misuse of
22 one's financial accounts.

23 However, in the case of medical identity theft,
24 there are no tools or there are less tools to detect
25 medical identity theft. Unlike credit bureaus, the

1 the 750,000, roughly 750,000, consumers whose
2 information, sensitive personal information, is
3 contained on its networks.

4 **Q. And what is the relationship between this
5 elevated risk and the likely risk of harm to those
6 consumers?**

7 A. If there is an unauthorized disclosure like the
8 P2P disclosure or the Sacramento disclosure, there will
9 be similar harms to consumers, identity theft, medical
10 identity theft, specifically.

11 **Q. And could those harms encompass both economic
12 and noneconomic harms?**

13 A. They could encompass both -- potentially both
14 economic, financial harms, other harms as we described
15 earlier which include corruption of their medical
16 records, their electronic medical records, which could
17 cause misdiagnosis, delay in treatments, mistreatments,
18 as well as the wrong prescriptions prescribed, as well
19 as the potential to lose access to various forms of
20 insurance, including medical or healthcare insurance,
21 life and disability insurance.

22 **Q. So, Mr. Kam, in the materials provided to you
23 by complaint counsel about this case, did you identify
24 any instance where a consumer experienced identity
25 theft or medical identity theft as a result of the P2P**

[REDACTED]

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1 A. Can you clarify?
2 **Q. Are you aware -- you're not -- are you aware of**
3 **any actual victims of identity fraud caused by LabMD's**
4 **practices in 2007?**
5 A. Are you being specific about the P2P disclosure
6 or any of the disclosures?
7 **Q. If you know of any actual victim of identity**
8 **theft or identity fraud as a result of LabMD's**
9 **disclosures, I'd love to hear about that right now.**
10 A. I didn't confirm any specific victims of
11 identity theft from the LabMD disclosure because it was
12 not best practice for me to reach out to those
13 individuals, as I mentioned earlier, based on those
14 circumstances.
15 **Q. So I'm going to ask you again, do you know of**
16 **any actual victims of identity theft or fraud among**
17 **LabMD's -- among the names that were on the LabMD**
18 **day sheets in 2007?**
19 A. No.
20 **Q. In 2008?**
21 A. No.
22 **Q. In 2009?**
23 A. No.
24 **Q. In 2010?**
25 A. No.

1 JUDGE CHAPPELL: Okay. Go ahead.
2 - - - - -
3 CROSS-EXAMINATION (resumed)
4 BY MS. MORGAN:
5 **Q. Mr. Kam, I'd like to return to the day sheets**
6 **without discussing any in camera information. Please**
7 **let's be certain that confidential information does not**
8 **enter the public record.**
9 **But the day sheets were dated -- you established**
10 **the dates in which they were -- that appeared on the day**
11 **sheets; correct?**
12 A. We talked about that earlier. Yes.
13 **Q. And I believe you testified earlier that those**
14 **were between seven and five years old; correct?**
15 A. Yes.
16 **Q. I'd like to direct your attention to page 17 of**
17 **your expert report.**
18 **At the bottom of the last full paragraph on the**
19 **page, you said, "Javelin Research finds that almost one**
20 **in three data breach victims in 2013 fell victim to**
21 **identity fraud in the same year"; isn't that correct?**
22 A. That's what I have in my report. Yes.
23 **Q. You're not aware of any victims of identity**
24 **fraud in 2007, are you, the date of the first day**
25 **sheet?**

1 **Q. Mr. Kam, turning back to your testimony**
2 **yesterday, I'd just like to clarify a few things with**
3 **you.**
4 **Yesterday you testified that it was very**
5 **difficult for a consumer whose medical information was**
6 **disclosed in an unauthorized disclosure to detect that**
7 **he or she had become a victim of medical identity theft;**
8 **is that right?**
9 A. Yes.
10 **Q. Where in your report do you render that**
11 **opinion?**
12 A. If you look just a little above in paragraph 2,
13 I talk about --
14 **Q. Paragraph 2 of what page?**
15 A. I'm sorry. It's moving again.
16 So it was under the major heading Consumers'
17 Ability to Avoid Possible Harms. It's the last sentence
18 where I start -- where I refer to "Without notification,
19 consumers have no way of independently knowing about an
20 organization's unauthorized disclosure of their
21 sensitive information."
22 **Q. Mr. Kam, that refers to consumers' ability to**
23 **know about unauthorized disclosure. You testified**
24 **yesterday about the consumers' ability to detect that he**
25 **or she had become a victim of medical identity theft,**

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1 **and that's what I'm asking you to identify in your**
 2 **report.**
 3 A. Do you mind if I look at my report?
 4 **Q. Please. Absolutely. Take as much time as you**
 5 **need.**
 6 A. Thank you.
 7 JUDGE CHAPPELL: Was that when you objected
 8 yesterday regarding medical identity theft or was that a
 9 different part of the testimony?
 10 MS. MORGAN: I believe that was when I objected,
 11 Your Honor.
 12 Oh, no, that was not. That was a different
 13 part of the testimony I believe, Your Honor. I
 14 apologize.
 15 THE WITNESS: Counselor, so where I start to
 16 describe the frustrations a consumer or a victim of
 17 identity theft see starts on page 13.
 18 And I don't know, Jon, are you controlling this
 19 or -- oh, I'm sorry.
 20 BY MS. MORGAN:
 21 **Q. And what I'm going to ask you is, point to me**
 22 **specifically where you stated in your report that it**
 23 **was very difficult for a consumer whose medical**
 24 **information was disclosed in an unauthorized disclosure**
 25 **to detect that he or she had become a victim of medical**

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1 **identity theft.**
 2 A. So one example, that's actually on page 14,
 3 second paragraph.
 4 I talked about yesterday in my testimony the
 5 fact that a tool for consumers to identify if they've
 6 fallen victim to medical identity theft doesn't exist in
 7 the same way as one that exists for financial identity
 8 theft or standard identity theft.
 9 And so on page 14 in the second paragraph, I
 10 talked about -- I talk about the fact that there does
 11 not exist a similar medical identity bureau where a
 12 consumer can set up a fraud alert like a credit bureau.
 13 He or she has no way to notify healthcare providers or
 14 payers or receive consumer alerts which are part of
 15 credit monitoring services. As a result -- I'm sorry.
 16 **Q. Please.**
 17 A. As a result, identity thieves can continue to
 18 use a consumer's medical identity to commit identity
 19 crimes.
 20 **Q. Mr. Kam, that portion of your report goes to**
 21 **notification of healthcare providers, not the**
 22 **consumer's ability to detect that he or she became a**
 23 **victim of identity fraud in the first -- or of identity**
 24 **theft in the first place; isn't that right?**
 25 A. No. Specifically monitoring is used for

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1 consumers to help detect identity theft.
 2 **Q. That's not in your report, is it?**
 3 A. Well, I'm using similar words in my
 4 perspective.
 5 MS. MORGAN: Your Honor, I'm going to move to
 6 strike that testimony from yesterday.
 7 JUDGE CHAPPELL: Well, this is what we're going
 8 to do. The witness has indicated the part of his report
 9 he just referred to on the record covers that issue.
 10 What I will consider is what he's just indicated covers
 11 that issue. Anything else he said about it will be
 12 disregarded.
 13 The objection is sustained.
 14 MS. MORGAN: Thank you, Your Honor.
 15 JUDGE CHAPPELL: I didn't see you stand up. I
 16 didn't think you were opposed, but if you want to say
 17 something, go ahead.
 18 MR. MEHM: Yes, Your Honor. Excuse me,
 19 Your Honor.
 20 If I may, on redirect, I plan to ask Mr. Kam a
 21 few questions that will further elucidate this issue
 22 based on statements that are made in his report that are
 23 different from what Mr. Kam just referred to.
 24 MS. MORGAN: And as long as they elicit
 25 conclusions that are actually in his report, I will

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1 have no objection, but if they elicit conclusions that
 2 are not in his report, I will be objecting to those.
 3 JUDGE CHAPPELL: Well, as I just said, that
 4 doesn't change my ruling. My ruling stands for now.
 5 We'll see what comes out in the redirect.
 6 MR. MEHM: Yes. Thank you, Your Honor.
 7 MS. MORGAN: Thank you, Your Honor.
 8 JUDGE CHAPPELL: The witness was given an
 9 opportunity. This is what he pointed to. That's what
 10 I'll consider. At this time, that's what we have.
 11 MS. MORGAN: Thank you, Your Honor.
 12 BY MS. MORGAN:
 13 **Q. Mr. Kam, yesterday you testified that anywhere**
 14 **from 80 to 120 million dollars is being defrauded out of**
 15 **the Medicare and Medicaid systems today because of**
 16 **medical identity theft; right?**
 17 A. I think I referred to it in the form of
 18 billions, 80 to 120 billion.
 19 **Q. Mr. Kam, where in your report do you render that**
 20 **opinion?**
 21 A. If you go to the literature review, you'll find
 22 a document referred to as -- let's see. It's on
 23 page 35. It's the second document down. I'll wait
 24 until you get to that page if you like.
 25 **Q. Thank you.**

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1 A. There it is right there.
 2 That particular document produced in 2013 titled
 3 Cyber Crime and the Health Industry, published by RSA,
 4 the Security Division of EMC, has a reference to it in
 5 its content.
 6 **Q. Mr. Kam, I asked you where in your report you**
 7 **rendered that opinion.**
 8 A. No. It's not in the body of my report, no.
 9 MS. MORGAN: Your Honor, I move to strike that
 10 portion of Mr. Kam's testimony from yesterday.
 11 JUDGE CHAPPELL: I'm giving you more time if you
 12 want to oppose this.
 13 MR. MEHM: The court's indulgence.
 14 (Pause in the proceedings.)
 15 Your Honor, I'm going to oppose the objection.
 16 The statement that Mr. Kam made yesterday was not
 17 elicited in response to a -- I didn't ask that specific
 18 question of him about the amount. It was information
 19 that he offered in response to another question.
 20 JUDGE CHAPPELL: All right. Thank you.
 21 Here's my ruling.
 22 I care not where the opinion came from, whether
 23 it was as part of a question or whether it was
 24 volunteered by the witness. The rule is, a witness
 25 who's an expert is limited to opinions contained in the

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1 expert report that is vetted properly through discovery
 2 before we get in here.
 3 The witness has just indicated something he said
 4 was not in the report; therefore, it will not be
 5 considered.
 6 Sustained.
 7 MS. MORGAN: Thank you, Your Honor.
 8 BY MS. MORGAN:
 9 **Q. Mr. Kam, yesterday you testified that in your**
 10 **experience, identity thieves or medical identity thieves**
 11 **look for information on peer-to-peer networks; isn't**
 12 **that right?**
 13 A. Yes.
 14 **Q. Where in your report do you render that**
 15 **opinion?**
 16 A. I don't think I have it in my report --
 17 MS. MORGAN: Your Honor --
 18 THE WITNESS: -- specified that way.
 19 MS. MORGAN: Thank you. I apologize, Mr. Kam.
 20 Your Honor, I move to strike that portion of
 21 Mr. Kam's testimony from yesterday.
 22 MR. MEHM: We have no objection to that,
 23 Your Honor.
 24 JUDGE CHAPPELL: And just so it's clear, I don't
 25 really strike anything. It's all in there. But what I

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1 will do, what I can do, is the same thing. I will
 2 disregard it. It won't be considered.
 3 Sustained.
 4 MS. MORGAN: Thank you, Your Honor.
 5 BY MS. MORGAN:
 6 **Q. Mr. Kam, yesterday you testified that health**
 7 **information may be worth more -- excuse me -- may be**
 8 **worth \$50 or more on the black market; right?**
 9 A. Yes.
 10 **Q. Where in your report do you render that**
 11 **opinion?**
 12 A. It is not in the body of the report. It's in
 13 that EMC RSA document.
 14 MS. MORGAN: Your Honor, I would ask you to
 15 disregard his -- Mr. Kam's testimony from yesterday on
 16 that.
 17 JUDGE CHAPPELL: That being?
 18 MS. MORGAN: Excuse me. Regarding the worth of
 19 health information on the black market.
 20 JUDGE CHAPPELL: Response?
 21 MR. MEHM: In light of Your Honor's ruling, no
 22 objection.
 23 JUDGE CHAPPELL: In light of my ruling that
 24 follows the express wording of the rules, the FTC
 25 rules.

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1 MR. MEHM: Yes, Your Honor.
 2 JUDGE CHAPPELL: Sustained.
 3 MR. MEHM: Thank you.
 4 MS. MORGAN: Thank you, Your Honor.
 5 BY MS. MORGAN:
 6 **Q. Mr. Kam, I'd like to turn now to talk about your**
 7 **background.**
 8 **Your undergraduate degree was in management and**
 9 **marketing; isn't that right?**
 10 A. Yes.
 11 **Q. You don't have a higher degree than an**
 12 **undergraduate degree?**
 13 A. No.
 14 **Q. You don't have a degree in statistics?**
 15 A. No.
 16 **Q. You don't have a degree in mathematics?**
 17 A. No.
 18 **Q. You don't have a degree in medicine.**
 19 A. No.
 20 **Q. You don't have a degree in information**
 21 **technology.**
 22 A. No.
 23 **Q. Mr. Kam, yesterday you testified that you**
 24 **considered LabMD's failure to provide reasonable and**
 25 **appropriate security on its computer networks had put**

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1 the patients on LabMD's network at risk of disclosure;
 2 is that right? Is that what you testified?
 3 A. Yes. Roughly.
 4 Q. Mr. Kam, I'm going to show you your expert
 5 report again, CX 02 -- 72 (sic), page 5.
 6 At the bottom of the page.
 7 Mr. Kam, at the bottom of the page, you wrote,
 8 "I have assumed" -- sorry. I'm going to start again.
 9 Mr. Kam, at the bottom of the page, you wrote:
 10 I have assumed that LabMD failed to provide reasonable
 11 and adequate security for consumers' personal
 12 information maintained on its computer networks.
 13 Did I read that correctly?
 14 A. Yes, you did.
 15 MR. MEHM: Objection, Your Honor.
 16 I'd just like to note, I believe that Ms. Morgan
 17 used the word "adequate security" and the report says
 18 "appropriate security."
 19 BY MS. MORGAN:
 20 Q. I apologize. I will withdraw that question and
 21 ask you this question instead, Mr. Kam.
 22 At the bottom of page 5, you wrote, "For the
 23 purposes of my analysis, I have assumed that LabMD
 24 failed to provide reasonable and appropriate security
 25 for consumers' personal information maintained on its

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1 computer networks."
 2 Did I read that correctly?
 3 A. You did.
 4 Q. So in your expert opinion, in providing your
 5 expert opinion, you're not analyzing any of LabMD's
 6 specific practices with respect to its computer
 7 networks; correct?
 8 A. Correct.
 9 Q. And you're not an expert in computer network
 10 security; correct?
 11 A. Correct.
 12 Q. And you didn't perform any analysis of LabMD's
 13 computer network security.
 14 A. I did not.
 15 Q. You don't know the degree to which LabMD's data
 16 security practices were adequate or not, you just
 17 assumed they were inadequate; correct?
 18 A. That's correct.
 19 Q. Wouldn't a consumer be at more or less risk of
 20 having his information disclosed depending on whether
 21 the network security was stronger or weaker?
 22 A. I didn't render an opinion on that in my
 23 report.
 24 Q. So you didn't take that into account in your
 25 risk analysis; correct?

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1 A. Correct.
 2 Q. Didn't you also assume that LabMD's data
 3 security practices caused the day sheets and the
 4 1718 File to escape LabMD's possession?
 5 A. I guess you could say that. Yes.
 6 Q. I'd like to turn to page 23 of your expert
 7 report.
 8 At the bottom of the page, the last paragraph,
 9 you rely on a report published by the SANS Institute for
 10 your assumption or your proposition that healthcare
 11 systems are the target of cyber security thieves,
 12 increasing the risk of data theft and fraud; correct?
 13 A. Yes.
 14 Q. Mr. Kam, the SANS Health Care Cyberthreat Report
 15 was published in February of 2014, wasn't it?
 16 A. I believe so. Yes.
 17 Q. And you relied on that report to show elevated
 18 risk from identity thieves for practices that stretch
 19 back through the entire relevant time period of this
 20 trial; correct?
 21 A. Based on the most recent disclosures being 2013,
 22 the discovery of the P2P file was discovered by LabMD in
 23 that time frame, as well as the Sacramento file being
 24 October 2012, I did use that report, which was within a
 25 reasonable time span, to make an assessment of overall

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1 risk. Yes.
 2 Q. And in your assessment of overall risk, you
 3 didn't cite any other reports that were published
 4 earlier than 2014, did you?
 5 A. Not in the body of my report, no.
 6 Q. So, Mr. Kam, you testified earlier that
 7 complaint counsel asked you to evaluate the risk of
 8 harm to consumers from LabMD's alleged data breaches;
 9 right?
 10 A. Yes.
 11 Q. Mr. Kam, you would agree that if LabMD's data
 12 security is found to be adequate, then your report is
 13 based on an invalid assumption; isn't that right?
 14 A. Can you rephrase that just to make sure I
 15 understand what you're suggesting?
 16 Q. Certainly.
 17 In light of your assumption that LabMD provided
 18 inadequate data security, you would agree that if
 19 LabMD's data security is found to be adequate, then your
 20 report is based on an invalid assumption.
 21 A. No. The main assumption that I made besides
 22 the fact of LabMD's failure to provide reasonable and
 23 adequate security was that this information was found at
 24 multiple locations, I mean, in both the P2P as well as
 25 the Sacramento disclosure. And given that this

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1 information was available to other -- to identity
 2 thieves to misuse, that's what I based my risk
 3 assessments on.
 4 **Q. So, Mr. Kam, your testimony is that even if it**
 5 **were found that LabMD had executed exemplary levels of**
 6 **data security practices, your report would still be**
 7 **valid in full.**
 8 A. Given what I just said earlier, yes.
 9 **Q. Mr. Kam, I'd like to turn to page 11 of your**
 10 **expert report.**
 11 **On page 11, just above the title heading, around**
 12 **the middle of the page, you wrote, "According to the**
 13 **2014 Identity Fraud Report by Javelin Strategy and**
 14 **Research, nearly one in three data breach victims**
 15 **(30.5 percent) also fell victim to identity fraud in**
 16 **2013."**
 17 **Did I read that correctly?**
 18 A. Yes.
 19 **Q. You testified, earlier today and yesterday as**
 20 **well, that you have no information that any specific --**
 21 **no knowledge that any specific consumer has actually**
 22 **been harmed by the alleged LabMD breaches; right?**
 23 A. Yes, I did testify to that.
 24 JUDGE CHAPPELL: Well, I have a question.
 25 THE WITNESS: Yes, sir.

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1 JUDGE CHAPPELL: Based on that 30 percent
 2 number?
 3 THE WITNESS: Uh-huh.
 4 JUDGE CHAPPELL: Is that the same thing as
 5 saying, if Target disclosed 40 million credit card
 6 numbers, 30 percent of those 40 million are going to be
 7 victims of identity theft? Is that what that means?
 8 THE WITNESS: No. Based on the research that
 9 Javelin performed in that particular study, there were
 10 looking at the disclosure of Social Security numbers
 11 specifically, and I believe the Target breach included
 12 payment card information.
 13 JUDGE CHAPPELL: So it wouldn't be 30 percent
 14 under that?
 15 THE WITNESS: You know, I didn't look at the
 16 payment card information because it wasn't relevant to
 17 this case.
 18 JUDGE CHAPPELL: Not as a matter of professional
 19 interest?
 20 Go ahead.
 21 BY MS. MORGAN:
 22 **Q. Mr. Kam, 30.5 percent of 10,000 is 3,050 victims**
 23 **you might expect to see if your statistics are correct.**
 24 A. What are you referring to, please?
 25 **Q. I'm referring to the 30.5 percent rate that you**

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1 **give on page 11 of data breach victims who also fell**
 2 **victim -- 30.5 percent also fell victim to identity**
 3 **fraud.**
 4 **So based on your statistics -- and you have**
 5 **testified previously -- or excuse me -- that there were**
 6 **approximately 10,000 patients affected by the P2P**
 7 **incident and the LimeWire incident combined; is that a**
 8 **fair characterization of your testimony?**
 9 A. In two separate incidents, yes.
 10 **Q. Yes. Okay.**
 11 **So 30.5 percent of 10,000 is 3,050 victims you**
 12 **might expect to see if your statistics are correct;**
 13 **right?**
 14 A. Well, these are not my statistics.
 15 **Q. If the statistics you cite in your report are**
 16 **correct.**
 17 A. Not necessarily.
 18 **Q. You're not aware of even one victim of identity**
 19 **fraud due to LabMD's alleged breaches.**
 20 A. I believe you asked me that before.
 21 **Q. I believe I asked you about identity theft, but**
 22 **you're not aware of even one victim of identity fraud;**
 23 **correct?**
 24 A. The same answer as I gave before, yes.
 25 **Q. I'd like to --**

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1 A. I would like to clarify, if I can, this use of
 2 the 30.5 percent. Is that okay, Your Honor?
 3 JUDGE CHAPPELL: Go ahead.
 4 THE WITNESS: You know, the specific number of
 5 30.5 percent from Javelin Research was based on their
 6 finding that Social Security numbers in the context of
 7 identity theft indicated the number of victims, so it
 8 was very specific to identity theft, not medical
 9 identity theft, so it wasn't a number that I applied in
 10 my particular approach to determining how many potential
 11 victims there were of identity theft or -- I'm sorry --
 12 medical identity theft in the case of the P2P
 13 disclosure. And in the case of the Sacramento
 14 disclosure, I used, as we talked about earlier, the FTC
 15 CLEAR report.
 16 JUDGE CHAPPELL: About that 30.5, are you aware
 17 of whether that is a number that's been validated or is
 18 that some estimate based on a model?
 19 THE WITNESS: No. You know, it's based on --
 20 it's based on Javelin Research looking at that
 21 particular issue over the last I believe nine years or
 22 so, maybe eleven years.
 23 And so Javelin is one of the respected research
 24 houses in the United States that looks at this type of
 25 data.

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1 JUDGE CHAPPELL: When you say "research," does
 2 that mean contacting people?
 3 THE WITNESS: In this case I believe -- let me
 4 think for a minute. I want to give you the right
 5 answer.
 6 JUDGE CHAPPELL: If you don't know, that's
 7 fine.
 8 THE WITNESS: Yeah. You know, I think --
 9 Your Honor, I don't want to guess. I'm sorry. Yeah.
 10 BY MS. MORGAN:
 11 **Q. So, Mr. Kam, if you don't know the methodology**
 12 **by which the 30.5 percent number was reached, then you**
 13 **haven't validated that methodology in any way, have**
 14 **you?**
 15 A. No. And I didn't use the number in my
 16 analysis.
 17 **Q. So you're announcing that it's not relevant to**
 18 **your analysis.**
 19 A. No. I said I considered it, but I found other
 20 more relevant data points to use.
 21 **Q. Mr. Kam, I'd like to -- I'd like to turn now to**
 22 **page 19 of your expert report, at the bottom of the**
 23 **page.**
 24 **I'm going to ask you about your calculation of**
 25 **financial harm from the P2P incident.**

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1 **Mr. Kam, you estimated there were approximately**
 2 **9,300 patients in the 1718 File.**
 3 A. That was -- that came out of the 1718 File in
 4 terms of how many records were disclosed.
 5 **Q. So that's the number of patients on the file**
 6 **that you --**
 7 A. Yes. In that particular file.
 8 **Q. And then you calculated that out of those**
 9 **9,300 patients, you estimated there were 76 victims of**
 10 **medical identity theft; right?**
 11 A. Using, yes, that factor that you see here on the
 12 screen.
 13 **Q. So you calculated this using the base rate**
 14 **provided in the Ponemon 2013 survey on medical identity**
 15 **theft; is that what you're saying?**
 16 A. Yes. I used that to establish an objective
 17 measure to determine an at least number of potential
 18 medical identity theft victims.
 19 **Q. So you used the base rate of medical identity**
 20 **theft among adult consumers in the United States in**
 21 **2013; right?**
 22 A. That is correct.
 23 **Q. And the base rate is simply a way to estimate**
 24 **the number of medical identity theft victims in the**
 25 **general United States population in 2013. That's all**

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1 **that is; right?**
 2 A. Yes, that's what it is.
 3 **Q. So 76 is actually the number of the**
 4 **9,300 patients that you would expect to become victims**
 5 **of medical identity theft regardless of any alleged**
 6 **breach by LabMD.**
 7 A. Yes. It's an estimated number based on the
 8 likelihood the -- a person who is in the U.S. will fall
 9 victim to medical identity theft in 2013.
 10 **Q. Regardless of any alleged breach, just the**
 11 **general population.**
 12 A. Regardless of any -- yes, you're right.
 13 **Q. And you've testified that the number you**
 14 **calculated, 76, that was just a floor; right?**
 15 A. Yes.
 16 **Q. Where in your expert opinion do you render the**
 17 **opinion that is just a floor?**
 18 A. Can I point you to it in the report?
 19 **Q. Certainly.**
 20 **(Pause in the proceedings.)**
 21 A. If you turn to page 17, the first paragraph
 22 under the major heading -- I'll wait until you get
 23 there. Further down. Right there.
 24 Under the major heading Analysis of Risk of Harm
 25 From LabMD's Failure to Protect Consumer Data, I make

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1 that statement in the last sentence.
 2 In the last sentence of the first paragraph, I
 3 stated, these estimates should be viewed as a floor
 4 versus the potential -- the universe of potential harms
 5 that could befall the 10,000 affected consumers.
 6 **Q. And that is the first paragraph in the section**
 7 **titled VI. Analysis of Risk of Harm From LabMD's Failure**
 8 **to Protect Consumer Data; is that right?**
 9 A. Yes. That's correct.
 10 **Q. And so that is the paragraph introducing the**
 11 **entire section of the report that analyzes the risk of**
 12 **harm to consumers; right?**
 13 A. Yes. That's correct.
 14 **Q. And that paragraph does not specifically refer**
 15 **to the calculations on page 19 estimating 76 consumers**
 16 **were victims of medical identity theft; right?**
 17 A. I think I testified yesterday that it does
 18 apply to the estimates that I use specific to the
 19 Ponemon Institute because of the fact that it is a base
 20 number that talks to relative risk as opposed to a
 21 specific risk from a breach.
 22 **Q. So the only number you provided in your report**
 23 **is the base rate among the general U.S. population.**
 24 **Nowhere in your report do you provide a higher number**
 25 **than 76 estimated victims from the 1718 File; isn't that**

1 **right?**
2 A. Specific to medical identity theft, yes.
3 **Q. Can you show me where?**
4 A. That's on this page 19, the last --
5 JUDGE CHAPPELL: Did I misunderstand? I thought
6 he agreed with you.
7 MS. MORGAN: Oh, I apologize. If he agreed with
8 me, then my line of questioning is --
9 JUDGE CHAPPELL: He did say "yes," so you can --
10 MS. MORGAN: I apologize if he --
11 JUDGE CHAPPELL: -- check the transcript if
12 you'd like.
13 MS. MORGAN: Certainly.
14 BY MS. MORGAN:
15 **Q. Mr. Kam, did you agree with me?**
16 A. I did agree with you, yes.
17 **Q. Okay. So in that case, I'm going to turn to --**
18 **I'm going to turn to the Ponemon survey where you drew**
19 **the base rate from.**
20 **That survey provided the base rate for 2013;**
21 **isn't that correct?**
22 A. Yes, that's correct.
23 **Q. But that survey also said that the base rate has**
24 **increased between 2012 and 2013, didn't it?**
25 A. I believe so. Yes.

1 **Q. But you didn't compensate for the fact that the**
2 **risk was lower in 2012, did you?**
3 A. No.
4 **Q. Or in 2011, did you?**
5 A. No.
6 **Q. Or in 2010, did you?**
7 A. No.
8 **Q. Or in 2009.**
9 A. No.
10 **Q. Or in 2008.**
11 A. No.
12 **Q. Or in any year relevant to the time period.**
13 A. Well, let me answer it this way if I could.
14 Based on my approach of looking at when the
15 information was last available, in the case of the P2P
16 disclosure, I testified yesterday that based on
17 Robert Boback's deposition on November 21, 2013, he
18 stated that he had found that information several times,
19 starting with the first disclosure on February 5, 2008.
20 That is true.
21 However, he also stated at the very beginning of
22 his testimony that he went to find, determine whether
23 that file was still available on the peer-to-peer
24 networks, and it was found, the insurance aging file,
25 the 1718 File file, again just before he testified on

1 November 21, 2013. Therefore, I decided to base my
2 opinion on the most current information relative to
3 2013.
4 **Q. Mr. Kam, when did you say that your**
5 **understanding is of the first date Mr. Boback provided?**
6 A. The first date he provided was February 5, 2008.
7 **Q. 2008.**
8 **So according to your assumptions, your**
9 **assumptions in this case, the data would have been**
10 **potentially compromised as of 2008?**
11 A. It was compromised several times actually.
12 **Q. But the potential -- the first potential date**
13 **would have been 2008.**
14 A. Yes. The first --
15 **Q. But you're applying a 2013 --**
16 JUDGE CHAPPELL: Hold on, hold on, hold on.
17 MS. MORGAN: I apologize, Your Honor.
18 JUDGE CHAPPELL: Let him finish.
19 THE WITNESS: The first date that it was
20 disclosed was February 5, 2008, based on my
21 understanding. But in order to assess the current
22 risk of the unauthorized disclosure of this
23 information, I felt it appropriate to use the
24 2013 numbers because that information was available in
25 2013 and beyond.

1 BY MS. MORGAN:
2 **Q. And you didn't take into account then the fact**
3 **that there's no known actual victim that has come**
4 **forward in between 2008 and 2013, did you?**
5 A. I was asked to assess the likely risk of injury,
6 specifically around medical identity theft.
7 **Q. Mr. Kam, in your testimony earlier today, you**
8 **said that in your experience, in every data breach,**
9 **someone has come forward and raised their hand; is that**
10 **correct?**
11 A. Yes, that's what I said.
12 **Q. That's not the case here, is it?**
13 A. No.
14 You know, but I would like to add, if it would
15 help with the clarification.
16 **Q. Mr. Kam, I'm going to ask you to respond to the**
17 **question, only the question that was asked. If you have**
18 **a clarification of your answer that changes your answer,**
19 **you may provide that now.**
20 A. No, I'm not going to change my answer. I did
21 not reach out to individuals to validate, as I stated
22 earlier, you were correct.
23 However, with the P2P incident, there was no
24 consumer notification, which meant that the consumers
25 had no way of knowing that their information was

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1 actually disclosed.
 2 **Q. Mr. Kam, my question was whether you know of**
 3 **anyone who has raised their hand, in your words, about**
 4 **the LabMD data breach.**
 5 A. In the case of the LabMD situation, no.
 6 **Q. Mr. Kam, you testified earlier today about CPT**
 7 **codes in the 1718 File.**
 8 A. Yes.
 9 **Q. Do you know whether health insurance companies**
 10 **routinely search P2P networks?**
 11 A. No.
 12 **Q. And if they did, they would find no indication**
 13 **from the 1718 File what the outcome of any test that may**
 14 **have been run would have been; isn't that right?**
 15 A. Can you ask the question one more time. I
 16 missed some of it.
 17 **Q. Certainly.**
 18 **Anyone searching P2P networks would find no**
 19 **indication of outcomes of medical tests from the**
 20 **1718 File. I believe --**
 21 A. When you say no one would find, if I'm
 22 understanding you question correctly, you said no one
 23 would find CPT codes if they searched --
 24 **Q. No, that's not what I asked, Mr. Kam.**
 25 A. I'm sorry.

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1 **Q. What I asked was essentially whether the face**
 2 **of the 1718 File reveals the outcome of medical**
 3 **testing.**
 4 A. No. The -- my understanding is the 1718 File
 5 contains CPT codes that don't contain the outcome of the
 6 test but the fact that the test was run.
 7 JUDGE CHAPPELL: Is it the test was run or that
 8 the customer was billed for the test?
 9 THE WITNESS: Well, you make a great point
 10 there, Your Honor. The customer was billed for the
 11 test.
 12 JUDGE CHAPPELL: Thank you.
 13 BY MS. MORGAN:
 14 **Q. Mr. Kam, I'm going to ask you about your**
 15 **calculation of other harms from the P2P incident.**
 16 **But first I'm going to ask you, the Ponemon**
 17 **survey, that relies on self-reporting from people taking**
 18 **the survey, doesn't it?**
 19 A. Yes.
 20 **Q. All right. I'm going to show you now your**
 21 **expert report, page 20.**
 22 **And the chart on page 20 is the same as**
 23 **the chart you testified about yesterday,**
 24 **Demonstrative Exhibit CXD 04; is that right?**
 25 A. That's correct.

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1 **Q. And this chart is your projection of the number**
 2 **of victims of these other types of harm from the P2P**
 3 **incident; right?**
 4 A. That's correct.
 5 **Q. And the categories of other types of harm you**
 6 **consider are misdiagnosis of illness, delay in receiving**
 7 **medical treatment, mistreatment of illness, wrong**
 8 **pharmaceuticals prescribed, and loss of health insurance**
 9 **coverage; right?**
 10 A. That's correct.
 11 **Q. You are not a medical doctor, are you?**
 12 A. I am not.
 13 **Q. Do you know if the person conducting this survey**
 14 **is a medical doctor?**
 15 A. I don't believe Dr. Ponemon is.
 16 **Q. For this chart you cite the Ponemon study for**
 17 **the percentages at which --**
 18 **(Admonition from the court reporter.)**
 19 BY MS. MORGAN:
 20 **Q. For this chart, you cite the Ponemon study for**
 21 **the percentages at which victims of medical identity**
 22 **theft experience these other types of harms; right?**
 23 A. Yes.
 24 **Q. And so you used the Ponemon report's percentages**
 25 **to calculate the projected number of victims of each**

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1 **type of harm; right?**
 2 A. I did, yes.
 3 **Q. Well, given that you just agreed that the**
 4 **Ponemon report's percentages are taken from --**
 5 **(Admonition from the court reporter.)**
 6 BY MS. MORGAN:
 7 **Q. Given that you just agreed that the Ponemon**
 8 **report's percentages are taken from self-reported data,**
 9 **I am going to ask you whether you know if the people**
 10 **answering the survey were medical doctors.**
 11 A. I have no way to base that opinion on that.
 12 **Q. If you want to know whether a patient has been**
 13 **misdiagnosed with the wrong illness, would you ask a**
 14 **patient or a doctor?**
 15 A. It would depend.
 16 **Q. If you wanted to know whether a patient has been**
 17 **mistreated for a health illness, you would ask a doctor;**
 18 **right?**
 19 A. It would depend.
 20 **Q. To determine treatment -- whether treatment for**
 21 **an illness was proper, you would not ask a doctor?**
 22 A. Well, one of the sources could be the patient.
 23 **Q. The patient knows whether the treatment for his**
 24 **illness was proper or improper; is that what you're**
 25 **saying?**

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1 A. Whether it solved their problem or not.
 2 **Q. But not whether it was the appropriate medical**
 3 **treatment.**
 4 A. I would -- I would make the same statement.
 5 Patients do know if their treatment may have helped
 6 their situation or not.
 7 **Q. And that is the data that the Ponemon survey has**
 8 **collected, self-reported data from patients, not from**
 9 **doctors; right?**
 10 A. That is true. To the best of my knowledge,
 11 that's true. But there may be out of the 5,000 people
 12 they surveyed a doctor or two in there.
 13 **Q. There may be -- well -- I'm sorry. I withdraw**
 14 **that.**
 15 **If -- if there -- I'm going to move on to the**
 16 **reliability of the Ponemon survey which you rely on for**
 17 **your opinion -- you do rely on that for your opinion;**
 18 **right?**
 19 A. For the P2P disclosure --
 20 **Q. For the P2P disclosures.**
 21 A. -- Yes.
 22 **Q. You agree that peer review is important in**
 23 **statistics?**
 24 A. I'm not -- you're going to have to ask the
 25 question so I can understand it.

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1 **Q. Is P -- is peer review important --**
 2 **(Admonition from the court reporter.)**
 3 JUDGE CHAPPELL: That's the last warning.
 4 MS. MORGAN: Certainly.
 5 JUDGE CHAPPELL: We're going to have to take
 6 evasive action if you don't heed her warning this time,
 7 which nobody wants to do.
 8 MS. MORGAN: Certainly, Your Honor.
 9 BY MS. MORGAN:
 10 **Q. Mr. Kam, do you agree that peer review is**
 11 **important in statistics?**
 12 A. You know, I guess I would say I don't know if
 13 it's important in statistics. My understanding of peer
 14 review is that it applies to academic research.
 15 **Q. The Ponemon survey has not been peer-reviewed,**
 16 **has it?**
 17 A. My understanding is the Ponemon survey has been
 18 reviewed by many people who are peers of Dr. Ponemon, so
 19 if the definition of "peer" is data privacy professional
 20 who -- or data security professional, many, many people
 21 who are in the data privacy and data security industry
 22 review Dr. Ponemon's work and use it in their
 23 understanding, to improve their understanding of the
 24 situation.
 25 **Q. Are you testifying that they reviewed the work**

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1 **as a condition of accepting it for publication?**
 2 A. The information has been published, so what
 3 happens is, the general industry reviews Dr. Ponemon's
 4 data.
 5 And Dr. Ponemon has been doing this particular
 6 study for four years. And there's -- and it continues
 7 to be used as a source in many, many presentations
 8 around data security and data privacy and data breach,
 9 specifically because it's the only reliable objective
 10 research that looks at the impact of medical identity
 11 theft at the level of a victim.
 12 MS. MORGAN: Your Honor, I'm going to move to
 13 strike that answer as nonresponsive.
 14 JUDGE CHAPPELL: I don't think you answered the
 15 question, sir, so I'm going to sustain that.
 16 BY MS. MORGAN:
 17 **Q. Mr. Kam, what I'd like to know is whether a**
 18 **peer review process was part of approving the Ponemon**
 19 **survey for publication.**
 20 A. You know, I don't believe it was, but I don't
 21 know.
 22 **Q. Mr. Kam, you don't have any background in**
 23 **statistics; right?**
 24 A. I testified to that.
 25 **Q. So you don't have any way to validate this**

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1 **survey.**
 2 A. Other than using my own experience with working
 3 with many, many breaches and seeing anecdotal data that
 4 resembles some of this, no.
 5 **Q. Mr. Kam, do you know what a regression analysis**
 6 **is?**
 7 A. I'm not a statistician. I wouldn't be able to
 8 give you an accurate definition.
 9 **Q. So then you didn't conduct a regression analysis**
 10 **on the Ponemon survey, did you?**
 11 A. No.
 12 **Q. Do you -- excuse me.**
 13 **The response rate to the Ponemon survey, it was**
 14 **only 1.8 percent, wasn't it?**
 15 A. I believe that's the case. Yes.
 16 **Q. Do you know what a nonresponse bias is?**
 17 A. I believe so.
 18 **Q. What is it?**
 19 A. It's if people who were not -- who were surveyed
 20 did not respond might have a different answer to the
 21 question.
 22 **Q. Under your understanding of a nonresponse bias,**
 23 **the Ponemon survey has a nonresponse bias, doesn't it?**
 24 A. Yes, it does.
 25 **Q. And the Ponemon survey says -- it says in the**

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1 **survey that there is a nonresponse bias, doesn't it?**
 2 A. It does. But if you look at many research
 3 surveys, they also have similar caveats listed in order
 4 to highlight those.
 5 **Q. Do those surveys have a nonresponse rate -- or**
 6 **sorry. Excuse me.**
 7 **Do those surveys have a response rate of**
 8 **1.8 percent?**
 9 A. I don't know. There's lots of surveys out
 10 there, so I don't know what you're referring to.
 11 **Q. The Ponemon survey collected its results using a**
 12 **Web-based collection method, didn't it?**
 13 A. I believe that to be the case. Yes.
 14 **Q. The Ponemon survey compensated respondents,**
 15 **didn't it?**
 16 A. They did, yes.
 17 **Q. Do you know what a sampling frame bias is?**
 18 A. I believe it has something to do with the
 19 sample and who was actually -- who actually took the
 20 survey.
 21 **Q. The Ponemon survey has a sampling frame bias,**
 22 **doesn't it?**
 23 A. It does. As many surveys do.
 24 **Q. Mr. Kam, are you familiar with the term**
 25 **"garbage in, garbage out"?**

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1 A. Yes.
 2 **Q. Mr. Kam, I'd like to turn to your estimation of**
 3 **the risk of harm from the P2P incident.**
 4 A. Okay.
 5 **Q. You testified yesterday that when analyzing the**
 6 **risk of harm from the P2P incident, you relied on**
 7 **Mr. Boback's testimony for your first three factors of**
 8 **your four-factor test; correct?**
 9 A. I believe that's the case. Yes.
 10 **Q. And when you estimated the risk of harm from the**
 11 **P2P incident, you took it as true that law enforcement**
 12 **had apprehended someone suspected of identity theft or**
 13 **fraud using one of the IP addresses where the 1718 File**
 14 **was found; isn't that right?**
 15 A. That's my understanding from his testimony.
 16 Yes.
 17 **Q. So you based that on Robert Boback's testimony.**
 18 A. I did.
 19 **Q. I'm going to show you the deposition testimony**
 20 **of Robert Boback, Exhibit CX 0703.**
 21 **Mr. Kam, you relied on pages -- I'm going to**
 22 **show you page 64 and 65.**
 23 MR. MEHM: Your Honor, I'm going to object to
 24 use of this document. I'm not aware of what all this
 25 highlighting is, and perhaps respondent's counsel can

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1 explain.
 2 MS. MORGAN: This is a CX exhibit, so whatever
 3 the highlighting is perhaps you could explain.
 4 MR. MEHM: My understanding is that the court
 5 requested copies of deposition transcripts that had no
 6 highlighting on them.
 7 JUDGE CHAPPELL: The highlighting offends you,
 8 sir?
 9 MR. MEHM: It does not offend me.
 10 JUDGE CHAPPELL: I'm not sure that -- are you
 11 asking about the highlighted portion?
 12 MS. MORGAN: Some portions of what I ask about
 13 may be highlighted, but my questioning is not pertinent
 14 to the highlighting.
 15 JUDGE CHAPPELL: So the highlighting has nothing
 16 to do with your examination.
 17 MS. MORGAN: No, Your Honor.
 18 JUDGE CHAPPELL: I'm going to allow that.
 19 The document is in evidence; correct?
 20 MS. MORGAN: Yes, Your Honor.
 21 JUDGE CHAPPELL: Overruled.
 22 BY MS. MORGAN:
 23 **Q. Mr. Kam, you relied on pages 64 and 65 of the**
 24 **Boback deposition for your assumption that law**
 25 **enforcement had apprehended someone suspected of**

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1 **identity theft or fraud using one of the IP addresses;**
 2 **correct?**
 3 A. That is correct.
 4 **Q. You didn't rely on any other portion of the**
 5 **transcript for that assumption; right?**
 6 A. No.
 7 **Q. And you didn't rely on any other evidence for**
 8 **that assumption besides the transcript.**
 9 A. No.
 10 **Q. On page 64 --**
 11 JUDGE CHAPPELL: But with the instruction to
 12 ignore the highlighting.
 13 THE WITNESS: I'm trying.
 14 BY MS. MORGAN:
 15 **Q. On page 64 line 17, Mr. Boback says, of one of**
 16 **the IP addresses, "I believe that the 173.16.83.112 had**
 17 **law enforcement, federal law enforcement after that**
 18 **individual for identity theft or fraud of some sort.**
 19 **Tiversa wasn't involved in that, though.**
 20 **"QUESTION: How do you know this?**
 21 **"ANSWER: We heard this through federal law**
 22 **enforcement, you know, surreptitiously through federal**
 23 **law enforcement. But we don't know specifically."**
 24 **Did I read that correctly?**
 25 A. Yes.

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1 **Q. Mr. Boback says "I believe" instead of "I know."**
 2 A. I'm sorry. I missed your statement.
 3 **Q. Mr. Boback says "I believe" instead of "I know,"**
 4 **doesn't he?**
 5 A. He does say that in his testimony.
 6 **Q. He uses the word "surreptitiously"?**
 7 A. Yes.
 8 **Q. He says he doesn't know specifically about the**
 9 **incident.**
 10 A. I agree.
 11 **Q. When asked, on page 64, "Do you know what**
 12 **action was taken?" Mr. Boback answered, on page 65,**
 13 **"I had heard that the individual at 173.16.83.112 was**
 14 **either detained or arrested in an Arizona Best Buy**
 15 **buying multiple computers. I don't know the outcome of**
 16 **this case. I'm not privileged to any of that**
 17 **information."**
 18 **Did I read that correctly?**
 19 A. You did.
 20 **Q. Mr. Boback says he heard the individual was**
 21 **detained or arrested instead of he knew; isn't that**
 22 **right?**
 23 A. Yes.
 24 **Q. He doesn't say who he heard it from?**
 25 A. No.

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1 **Q. He does not say who was arrested?**
 2 A. No.
 3 **Q. He does not say what law enforcement body**
 4 **carried out the arrest?**
 5 A. I thought he referred to federal law enforcement
 6 in the --
 7 **Q. Did he name a specific law enforcement body?**
 8 A. Other than federal law enforcement, no.
 9 **Q. He says he doesn't know the outcome of the case**
 10 **pertaining to identity theft in Arizona; right?**
 11 A. Yes.
 12 **Q. And you used this information as the factual**
 13 **underpinning for your assessment of the risk of harm;**
 14 **right?**
 15 A. For some of it, yes.
 16 **Q. Mr. Kam, yesterday you testified that a number**
 17 **of states have put in place data breach notification**
 18 **laws; right?**
 19 A. Yes.
 20 **Q. Are you aware of what LabMD's legal obligations**
 21 **were to notify patients when it learned of the P2P**
 22 **incident?**
 23 MR. MEHM: Objection. Calls for a legal
 24 conclusion.
 25 MS. MORGAN: I'm asking if he is aware.

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1 JUDGE CHAPPELL: Hang on a second.
 2 You're not asking for a legal opinion, are you?
 3 MS. MORGAN: No, Your Honor.
 4 JUDGE CHAPPELL: See, the wording is "are you
 5 aware" rather than what they were. I'll allow that.
 6 Overruled.
 7 Would you like Josett to read the question
 8 again?
 9 THE WITNESS: Yeah, that would be great,
 10 Josett.
 11 JUDGE CHAPPELL: I was actually asking her, but
 12 that's okay.
 13 MS. MORGAN: That's fine with me, too,
 14 Your Honor. Thank you.
 15 (The record was read as follows:)
 16 "QUESTION: Are you aware of what LabMD's legal
 17 obligations were to notify patients when it learned of
 18 the P2P incident?"
 19 THE WITNESS: I wasn't asked to assess that.
 20 BY MS. MORGAN:
 21 **Q. Mr. Kam, I'm going to ask you now about the**
 22 **Sacramento incident.**
 23 A. Uh-huh.
 24 **Q. Yesterday you testified that it doesn't**
 25 **eliminate the risk to notify people that their**

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1 **information may have been compromised; right?**
 2 A. Yes.
 3 **Q. Which is better, notifying or not notifying?**
 4 A. Notifying is better than not notifying.
 5 **Q. Because people can take steps like monitoring**
 6 **their credit or changing their Social Security numbers;**
 7 **right?**
 8 A. Yes.
 9 **Q. With respect to the day sheets found in**
 10 **Sacramento, do you know whether LabMD notified**
 11 **consumers that their information may have been**
 12 **compromised?**
 13 A. According to Michael Daugherty's deposition, my
 14 understanding is LabMD did notify consumers of that
 15 particular instance, yes.
 16 **Q. When did complaint counsel give you the day**
 17 **sheets to review?**
 18 A. It might have been in November -- I don't recall
 19 the exact date -- 2013.
 20 **Q. When they gave them to you, did they tell you**
 21 **how complaint counsel obtained them?**
 22 A. No.
 23 **Q. Were you aware that the FTC knew that the**
 24 **day sheets were found in Sacramento as of October of**
 25 **2012 and the FTC waited until 2013 to notify people who**

1 **might have been affected?**
 2 A. It wasn't the FTC's responsibility to notify the
 3 consumers.
 4 JUDGE CHAPPELL: Sir, I believe that was a
 5 yes-or-no question.
 6 THE WITNESS: I'm sorry.
 7 No, I was not aware.
 8 BY MS. MORGAN:
 9 **Q. Mr. Kam, I'd like to ask you about the**
 10 **four-factor test that you used in forming your expert**
 11 **opinion.**
 12 **You developed this four-factor method yourself;**
 13 **is that right?**
 14 A. Yeah. I think I explained that this method was
 15 developed through my experience working with our
 16 clients, other privacy professionals, as well as
 17 attending various Webinars, seminars on the topic of
 18 risk of harm.
 19 **Q. All of your work with your clients is subject to**
 20 **confidentiality agreements; right?**
 21 A. Yes.
 22 **Q. You didn't use any other data to develop your**
 23 **four factors other than work with clients of your**
 24 **company, did you?**
 25 A. Can you rephrase so I --

1 **Q. Did you discuss which criteria should go into**
 2 **which of the four factors?**
 3 A. You know, the way I would describe it is,
 4 there -- if you look back to the very first law
 5 around -- state law around data breach notification,
 6 which happened to be a California law, Senate Bill 1386,
 7 if you Wiki that particular law, you will see it has
 8 five questions that pertain to what information was
 9 disclosed, who was it disclosed to, was it encrypted. I
 10 mean, there's a whole host of these types of questions
 11 all over the Internet specific to the risk of harm
 12 analysis, and so no, I didn't try to figure out whether
 13 one should fit in one category versus the other. It --
 14 over the years it evolved.
 15 **Q. Mr. Kam, I asked whether you discussed with**
 16 **these other people that you surveyed which criteria**
 17 **should go into which of the four factors.**
 18 A. You know, I may have, but I couldn't say
 19 specifically how they evolved.
 20 **Q. Were any of your discussions written down?**
 21 A. You know, I don't know. Most of them were
 22 discussions, so I don't -- I don't remember.
 23 **Q. Mr. Kam, you've never previously applied your**
 24 **four factors to any matters that are not subject to**
 25 **confidentiality agreements, have you?**

1 **Q. You didn't use any other data of actual**
 2 **identity theft or fraud other than your work with your**
 3 **clients of your company to develop your four factors,**
 4 **did you?**
 5 A. I don't understand what you mean by "other
 6 data." Can you be more specific?
 7 **Q. Well, did you consult statistical analysis to**
 8 **develop your four factors?**
 9 A. I don't believe I used statistical analysis to
 10 develop that.
 11 **Q. Did you conduct a survey to develop your four**
 12 **factors?**
 13 A. If surveying means talking to other people,
 14 interviewing, discussing it, having in-depth discussions
 15 on what the risks of harm are from various incidents,
 16 yes.
 17 **Q. What other people did you speak to?**
 18 A. I mentioned -- in fact, you mentioned it. It
 19 was my clients, other privacy professionals. I
 20 consulted other guides that looked at risk of harm
 21 assessment.
 22 **Q. Did you discuss with these other privacy**
 23 **professionals how many factors to include in the test?**
 24 A. You know, I don't recall asking -- thinking
 25 about it in that context. No.

1 A. That's one way to express it. Yes.
 2 **Q. You didn't publish any scholarly articles on**
 3 **your four factors?**
 4 A. No.
 5 **Q. In fact, you didn't publish any public reports**
 6 **on your four factors.**
 7 A. No.
 8 **Q. Your four factors have never been subject to a**
 9 **peer review publication process?**
 10 A. No. They've never been published.
 11 **Q. I'm going to ask you about your experience at**
 12 **ID Experts now.**
 13 **You testified that the head of the**
 14 **Ponemon Institute, Dr. Ponemon --**
 15 JUDGE CHAPPELL: This -- let me interrupt you
 16 just a second.
 17 Ironsides?
 18 (Discussion off the record.)
 19 BY MS. MORGAN:
 20 **Q. Mr. Kam, you testified that the head of the**
 21 **Ponemon Institute, Dr. Ponemon, was on the advisory**
 22 **board of ID Experts; right?**
 23 A. Yes.
 24 **Q. You're aware that Dr. Ponemon is also on the**
 25 **advisory board of Tiversa, Robert Boback's company?**

1 A. I've heard that. Yes.
 2 **Q. You testified that your company, ID Experts,**
 3 **funded two of the Ponemon Institute reports, didn't**
 4 **you?**
 5 A. Yes, I did.
 6 **Q. One of which you cite in your expert report.**
 7 A. Yes.
 8 **Q. Citing a study increases its credibility,**
 9 **doesn't it?**
 10 A. I'm sorry. Say it -- repeat, please.
 11 **Q. Certainly.**
 12 **Citing a study increases its credibility,**
 13 **doesn't it?**
 14 A. Citing a study.
 15 I don't know if that's the case. Just citing it
 16 increases its credibility, I'm not sure that's always
 17 the case.
 18 **Q. Well, a few moments ago, when I asked you about**
 19 **the Ponemon survey, you referred to people in the**
 20 **industry, in your terms, reviewing it --**
 21 A. Uh-huh.
 22 **Q. -- as your support for that study, didn't you?**
 23 A. Yes.
 24 **Q. So citing a study increases its credibility,**
 25 **doesn't it?**

1 A. Yeah, when you put it that way, I would agree
 2 with you. Yes.
 3 **Q. And you cited a study that you paid for in your**
 4 **report.**
 5 A. We were one of the sponsors of that report.
 6 Yes.
 7 **Q. Mr. Kam, your company paid approximately**
 8 **\$12,500 to fund one of these Ponemon Institute reports,**
 9 **didn't it?**
 10 A. That's correct.
 11 **Q. And your company paid approximately \$50,000 to**
 12 **fund the other report.**
 13 A. The other report being?
 14 **Q. The other report that ID Experts funded of the**
 15 **Ponemon Institute's reports.**
 16 A. Being the data privacy and security report,
 17 yes.
 18 **Q. So your testimony is yes, \$50,000.**
 19 A. Yeah, 50,000.
 20 MS. MORGAN: Your Honor, may I have the court's
 21 indulgence for one moment?
 22 JUDGE CHAPPELL: Sure.
 23 MS. MORGAN: Thank you.
 24 (Pause in the proceedings.)
 25 Your Honor, if I may, I would like to correct

1 something that I said in a question.
 2 JUDGE CHAPPELL: By all means.
 3 MS. MORGAN: Beg your pardon?
 4 JUDGE CHAPPELL: By all means. We want it
 5 correct. Go ahead.
 6 MS. MORGAN: Thank you, Your Honor.
 7 I said the FTC notified people that the day
 8 sheets were found in Sacramento. I should have said
 9 notified LabMD in that question.
 10 BY MS. MORGAN:
 11 **Q. Mr. Kam, if you mainly rely for your analysis of**
 12 **risk of harm from the finding that these documents, the**
 13 **day sheets and the 1718 File, were in the possession of**
 14 **others -- which I believe you testified to earlier;**
 15 **correct?**
 16 A. That's correct.
 17 **Q. -- then LabMD's data security practices are not**
 18 **significant in your consideration, are they?**
 19 A. I think I stated that I assumed LabMD's failure
 20 to provide reasonable and appropriate security caused
 21 this risk.
 22 **Q. Mr. Kam, I'm going to ask you to respond yes or**
 23 **no to the question.**
 24 **Would the court reporter please read it back to**
 25 **Mr. Kam.**

1 JUDGE CHAPPELL: I think you're going to need
 2 the last two for it to make sense.
 3 MS. MORGAN: Certainly.
 4 If you would, please.
 5 (The record was read as follows:)
 6 "QUESTION: Mr. Kam, if you mainly rely for your
 7 analysis of risk of harm from the finding that these
 8 documents, the day sheets and the 1718 File, were in the
 9 possession of others -- which I believe you testified to
 10 earlier; correct?
 11 "ANSWER: That's correct.
 12 "QUESTION: -- then LabMD's data security
 13 practices are not significant in your consideration, are
 14 they?"
 15 THE WITNESS: Yes.
 16 BY MS. MORGAN:
 17 **Q. Yes, they -- yes, you agree with me.**
 18 A. I agree with your statement. It is one of the
 19 components of my analysis.
 20 MS. MORGAN: Thank you, Mr. Kam.
 21 Your Honor, I have no further questions for the
 22 witness at this time. But at this time, Your Honor,
 23 keeping in mind your province to evaluate the experts,
 24 but for the record --
 25 JUDGE CHAPPELL: Do you want to hold that until

1 we see if there's redirect?
 2 MS. MORGAN: Certainly, Your Honor.
 3 JUDGE CHAPPELL: Any redirect?
 4 MR. MEHM: Yes, Your Honor.
 5 JUDGE CHAPPELL: Go ahead.
 6 If you're wondering about lunch, we'll break
 7 after this witness is excused. I find that moves things
 8 along a little bit if we wait.

9 - - - - -
10 REDIRECT EXAMINATION

11 BY MR. MEHM:

12 **Q. Mr. Kam, I'd like to direct you to page 23 of**
13 **your expert report, CX 0742.**

14 **Are you there?**

15 A. Yes.

16 **Q. So respondent's counsel asked you some questions**
17 **a few minutes ago about your citation to the SANS report**
18 **that is listed in footnote 20 under the heading Consumer**
19 **Harm From Failing to Provide Reasonable and Appropriate**
20 **Security?**

21 A. Uh-huh. Yes.

22 **Q. So when assessing LabMD's failure to provide**
23 **reasonable and appropriate security for the**
24 **750,000 consumers whose personal information was**
25 **maintained on its network, was the SANS study the only**

1 **Q. Can you please read that out for the court.**
 2 A. "Changing a Social Security number can be a
 3 cumbersome process and doesn't necessarily solve all
 4 problems. For example, government agencies and private
 5 businesses maintain records under consumers' 'old'
 6 Social Security numbers, and credit reporting companies
 7 may use 'old' Social Security numbers to identify credit
 8 records."

9 **Q. So what do you mean when you say changing an SSN**
10 **can be a cumbersome process?**

11 A. Because even though a consumer may accomplish
12 getting another Social Security number, now both
13 Social Security numbers are associated with that
14 particular individual, which does not mitigate the risk
15 of identity theft and identity fraud.

16 **Q. And can the very fact of changing it itself be**
17 **cumbersome?**

18 A. Yes.

19 **Q. So respondent's counsel asked -- strike that.**

20 **If you could please turn, Mr. Kam, to page 17 of**
21 **your expert report and look under the heading for Roman**
22 **numeral VI, the Analysis of Risk of Harm From LabMD's**
23 **Failure to Protect Consumer Data.**

24 A. Yes.

25 **Q. Respondent's counsel asked you some questions**

1 **thing that you considered?**

2 A. No. I also considered, based on my experience
3 working with other clients, a combination of my
4 experience plus the fact that I've seen that this
5 information has value to cyber criminals, which, when
6 taken together with research like that from the SANS
7 report, was the basis of my opinion that essentially
8 there's an increased risk to the unauthorized disclosure
9 of LabMD's sensitive information due to the failure to
10 provide reasonable and appropriate security.

11 **Q. I also want to make clear for the record, you**
12 **were not asked to assess the adequacy of LabMD's data**
13 **security, were you?**

14 A. I was not asked to assess that.

15 **Q. I'd like to turn your attention to page 22 of**
16 **your report --**

17 A. Okay.

18 **Q. -- and have you look at the last full paragraph**
19 **on page 22 that begins with "The fourth risk factor**
20 **considers."**

21 A. Okay.

22 **Q. And if you could please focus on the -- please**
23 **look at the second to last sentence, which talks about**
24 **changing a Social Security number.**

25 A. Yes.

1 **earlier about whether your estimated financial**
2 **out-of-pocket costs and estimate of other harms from the**
3 **P2P disclosure were a floor. Do you remember that?**

4 A. Yes, I do.

5 **Q. The last sentence of this paragraph here, can**
6 **you please read that out for the court.**

7 **Starting with "Given the specific circumstances**
8 **of this case"?**

9 A. "Given the specific circumstances of this case,
10 in which LabMD's sensitive consumer data was found in
11 the hands of known identity thieves and the fact that
12 this sensitive consumer information (sic) was found on
13 P2P networks as recently as November 2013 -- and may
14 still exist on these networks -- these estimates should
15 be viewed as a floor versus universe of potential harms
16 that could befall the 10,000 affected consumers."

17 **Q. What estimates are you talking about in that**
18 **sentence?**

19 A. The estimates of the number of people who would
20 potentially fall victim to identity theft, medical
21 identity theft and the associated harms that include
22 financial, reputational and other harms.

23 **Q. And would those estimates also apply to the**
24 **calculations that you performed and that are detailed on**
25 **the subsequent pages of your report dealing with the**

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1 out-of-pocket costs for medical identity theft from the
 2 P2P disclosure as well as the other harms?
 3 A. Yes.
 4 Q. From the P2P disclosure?
 5 A. Yes.
 6 Q. Respondent's counsel asked you earlier about
 7 the Ponemon survey's methodology and in particular
 8 asked you some questions about the 1.8 percent response
 9 rate.
 10 Isn't it the case, Mr. Kam, that to arrive at
 11 that rate, Ponemon surveyed over 40,000 consumers?
 12 A. You know, what I remember -- and I believe the
 13 methodology is spelled out in the Ponemon report on one
 14 of the pages. I think it's 27, but unless I have the
 15 document, I can't point to it specifically.
 16 But I believe there was two surveys that were
 17 done, one to look at the specific impacts based on
 18 victims describing the types of medical identity theft
 19 issues they were experiencing. And I believe there were
 20 several thousand. It might have been 40,000. We can
 21 check that. We should check that.
 22 MR. MEHM: The court's indulgence.
 23 (Pause in the proceedings.)
 24 THE WITNESS: Oh, here we go. Yeah.
 25 Up on the chart, now that we have it in front

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1 of us, the number 43,778 adult-aged individuals was
 2 part of the sampling frame as described by the Ponemon
 3 study.
 4 BY MR. MEHM:
 5 Q. Thank you.
 6 You're referring to page 28 of RX -- I believe
 7 it is 528.
 8 A. Yes.
 9 Q. And that resulted, as that same paragraph
 10 showed, in a final sample of over -- of 790 responses?
 11 A. Yes.
 12 Q. Respondent's counsel also asked you some
 13 questions about your analysis of the P2P disclosure
 14 using your four-factor method.
 15 And if you could turn to page 19, please, of
 16 your expert report, Mr. Kam, and look at the paragraph
 17 at the top of the page.
 18 And specifically, respondent's counsel asked
 19 you some questions regarding your statement at the end
 20 of that paragraph that he, meaning Mr. Boback, also
 21 stated that law enforcement had apprehended someone
 22 suspected of identity theft or fraud using one of the IP
 23 addresses.
 24 A. Yes.
 25 Q. Do you recall respondent counsel's questions

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1 about that?
 2 A. Yes, I do.
 3 Q. Was that the only thing that you considered in
 4 assessing the second and third risk factors regarding
 5 the P2P incident?
 6 A. No. No. There were other IP addresses that
 7 this information was found at. Specifically, I believe
 8 Robert Boback testified that at those other three IP
 9 addresses he also found information that could be used
 10 for identity theft, specifically passwords,
 11 Social Security numbers, tax returns, and the like.
 12 Q. Respondent's counsel also asked you some
 13 questions a few minutes ago about the benefits of
 14 consumer notice regarding an unauthorized disclosure.
 15 Do you remember that?
 16 A. Yes.
 17 Q. Did LabMD provide, to your knowledge, any
 18 consumer notice to the consumers whose sensitive
 19 personal information was contained in the 1718 File?
 20 A. It's my understanding, according to
 21 Michael Daugherty's testimony, that they made the
 22 decision not to do consumer notification, so no.
 23 Q. Respondent's counsel also asked you some
 24 questions about the risk of harm analysis that you
 25 applied and focused on the four factors that you used.

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1 Have you applied this analysis previously?
 2 A. To other cases that I've worked on, specific
 3 clients' cases, yes.
 4 Q. Respondent's counsel also asked some questions
 5 about ID Experts' support of two Ponemon studies,
 6 including the 2013 Ponemon study -- survey -- excuse
 7 me -- on medical identity theft.
 8 Did ID Experts' sponsorship affect the
 9 methodology or conclusions of that report in any way?
 10 A. No.
 11 Q. And why did you conclude that the 2013 Ponemon
 12 survey was the most appropriate study to apply in
 13 assessing the likely harms from medical identity theft?
 14 A. Specific to the P2P incident?
 15 Q. Yes. Thank you. Specific to the P2P incident.
 16 A. Because the most relevant information and fact
 17 was that that information was found by Robert Boback,
 18 Tiversa, on November -- before his testimony on
 19 November 21, 2013.
 20 Essentially a discovery of another data breach.
 21 Q. Can you also talk about your survey of other
 22 works that you looked at and why you came to focus in on
 23 the Ponemon study.
 24 A. Yes. You know, I did a literature review that
 25 went back to 2005, which you'll see in my expert report,

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1 that starts with a Bureau of Justice Statistics report
 2 prepared by two authors, Newman and McNally, on identity
 3 theft.
 4 And I started to zero in on medical identity
 5 theft, finding that Pam Dixon, the CEO/executive
 6 director of the World Privacy Forum, had done an
 7 extensive scan of the issue in a white paper that she
 8 published in 2006.
 9 There were other literature reviews that I
 10 looked at, including one by Booz Allen that was based on
 11 a focus around medical identity theft.
 12 And most recently, the California State AG also
 13 did a couple of white papers on the particular topic of
 14 medical identity theft and medical fraud.
 15 But the only objective document I could find
 16 that would give me enough information to create an
 17 estimate of the financial and other harms was the
 18 Ponemon Institute documents that were, by the way,
 19 first sponsored by Experian and then sponsored by
 20 ID Experts and other -- and other members of the
 21 Medical Identity Fraud Alliance in 2013.
 22 **Q. Respondent's counsel also asked you some**
 23 **questions about whether citing to a study or a survey in**
 24 **your report increases its legitimacy. Do you remember**
 25 **that?**

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1 A. I do.
 2 **Q. In this case, would citing a study in an**
 3 **unpublished expert report, in your opinion, improve the**
 4 **legitimacy of the cited study?**
 5 A. No. Because it wouldn't be available for others
 6 to refer to.
 7 MR. MEHM: The court's indulgence just one
 8 moment, Your Honor.
 9 JUDGE CHAPPELL: Go ahead.
 10 (Pause in the proceedings.)
 11 MR. MEHM: Your Honor, subject to any recross, I
 12 have nothing further.
 13 JUDGE CHAPPELL: Okay. Is there any recross?
 14 MS. MORGAN: Briefly, yes, Your Honor.
 15 JUDGE CHAPPELL: Go ahead.
 16 MS. MORGAN: Thank you, Your Honor.
 17 - - - - -
 18 RECROSS-EXAMINATION
 19 BY MS. MORGAN:
 20 **Q. Mr. Kam, upon redirect, you mentioned a**
 21 **Bureau of Justice Statistics report.**
 22 **Can you point to me where that is cited or**
 23 **where -- excuse me -- can you point to me where you rely**
 24 **on that?**
 25 A. You know, I think I mentioned I referred to it.

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1 I didn't actually use the statistics in my report.
 2 **Q. So it's not cited in the body of your opinion?**
 3 **You didn't use it in your report?**
 4 A. I didn't actually use any numbers as part of the
 5 formulas drawn.
 6 MS. MORGAN: Your Honor, I move to strike
 7 Mr. Kam's testimony that pertains to the
 8 Bureau of Justice Statistics report.
 9 JUDGE CHAPPELL: Are you opposed to that?
 10 MR. MEHM: I'm just quickly looking,
 11 Your Honor, I'm looking back at Mr. Kam's testimony,
 12 and it's my recollection that there is a reference to
 13 that report in his study, which I am just trying to
 14 find.
 15 JUDGE CHAPPELL: The witness said he didn't use
 16 it in the report.
 17 MR. MEHM: I believe the witness, Your Honor,
 18 testified that he did not use it in his calculations,
 19 but I believe that he may have cited to the study in his
 20 report and I'm just trying for the court to find that
 21 reference.
 22 MS. MORGAN: Your Honor, of course, the record
 23 will reflect, but I believe Mr. Kam said that he did not
 24 use the report in forming his opinion.
 25 JUDGE CHAPPELL: Is that correct?

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1 THE WITNESS: I believe this to be the case,
 2 sir.
 3 JUDGE CHAPPELL: If he didn't use it in his
 4 report, the objection is sustained and the testimony
 5 will be disregarded.
 6 MS. MORGAN: Thank you, Your Honor.
 7 BY MS. MORGAN:
 8 **Q. Mr. Kam, on redirect, complaint counsel asked**
 9 **you about your use of the SANS study and other studies**
 10 **in assessing LabMD's data security practices; right?**
 11 A. In assessing the risk of another unauthorized
 12 disclosure.
 13 **Q. So you -- just to clarify, you're not changing**
 14 **your previous testimony. You didn't assess LabMD's**
 15 **security practices. You assumed -- you made assumptions**
 16 **about LabMD's security practices.**
 17 A. You're right. Exactly.
 18 MS. MORGAN: Thank you, Mr. Kam.
 19 Nothing further at this time for this witness.
 20 MR. MEHM: Your Honor, I have nothing further
 21 for Mr. Kam.
 22 JUDGE CHAPPELL: Thank you. You're excused,
 23 sir.
 24 MS. MORGAN: Your Honor, at this time -- if
 25 you'll give me one moment. Sorry.

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1 MR. MEHM: Your Honor, may the witness be
 2 excused?
 3 JUDGE CHAPPELL: Yes. That's why I told him
 4 he's excused.
 5 MS. MORGAN: Your Honor, actually would you
 6 prefer to hear my objection now or after lunch?
 7 JUDGE CHAPPELL: Go for it.
 8 MS. MORGAN: Okay.
 9 You know, bearing in mind what Your Honor has
 10 said about your consideration of expert witnesses, for
 11 the record, I would like to object at this time to the
 12 use of Mr. Kam's expert opinion in this case.
 13 He -- we filed a motion in limine, which
 14 Your Honor denied, saying that you would reevaluate
 15 after we had an opportunity to cross-examine Mr. Kam.
 16 And now that we have, we believe that we have
 17 demonstrated that his conclusions are unreliable and do
 18 not meet Daubert standards and therefore should be
 19 excluded.
 20 JUDGE CHAPPELL: Okay.
 21 Response?
 22 MR. MEHM: Your Honor, as Your Honor explained
 23 yesterday, given that there is no jury here,
 24 respondent's arguments go to weight, to the weight, not
 25 the admissibility of Mr. Kam's testimony.

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1 And in your May 5, 2014 order denying the
 2 motions in limine to exclude the proffered experts, you
 3 noted that "Rather than excluding expert testimony, the
 4 better approach under Daubert in a bench trial is to
 5 permit the expert testimony and allow 'vigorous
 6 cross-examination, presentation of contrary evidence,'
 7 and careful weighing of the burden of proof to test
 8 'shaky but admissible evidence.'"
 9 Mr. Kam is qualified to give opinion --
 10 JUDGE CHAPPELL: It's kind of tough there when
 11 you cite my own words against me, but go ahead.
 12 MR. MEHM: Mr. Kam is qualified to give
 13 opinions about the likelihood of consumer harm
 14 resulting from identity theft and medical identity
 15 theft in this case.
 16 He testified extensively about his experience
 17 in the field of identity theft and medical identity
 18 theft, the consequences of identity theft and medical
 19 identity theft, the work that he personally and his
 20 company performs assisting victims of identity theft and
 21 medical identity theft.
 22 Mr. Kam has published numerous articles
 23 regarding these subjects and is frequently invited to
 24 speak on them.
 25 His specialized knowledge in the fields of

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1 identity theft and medical identity theft in particular
 2 will assist the court in deciding issues related to the
 3 likelihood of consumer injury in this case.
 4 In terms of Mr. Kam's methodology, his
 5 four-factor analysis of the risk of consumer injury is
 6 reliable. He testified that it's based on his
 7 extensive experience working in the field of identity
 8 theft and medical identity theft. It is based on
 9 several different -- those four factors are based on
 10 several different things, including his work, work with
 11 other privacy professionals, literature that he
 12 surveyed, conferences that he attends. And Mr. Kam
 13 sufficiently applied those factors to the facts of this
 14 case.
 15 In addition, Mr. Kam noted that part of the
 16 reason why he chose that methodology in his testimony
 17 yesterday was that it's so it could be tested.
 18 JUDGE CHAPPELL: All right. Thank you.
 19 And as everyone knows, as I said yesterday, I
 20 will make a determination when I'm reviewing the entire
 21 record, and I'll have the CV of the expert, I'll have
 22 the testimony of the expert, and I'll make a
 23 determination at that time whether any of the opinions
 24 offered by the expert will be utilized in support of
 25 the decision in this case. I won't use any opinions

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1 that I don't think meet the proper legal standards.
 2 But I'm not at a point today to say I will or
 3 will not use any of the opinions I've heard. However,
 4 you will be able to tell from my ruling my reasoning and
 5 my basis for using any opinions I do decide to use.
 6 And with that clarification then, the objection
 7 is overruled.
 8 MS. MORGAN: Thank you, Your Honor.
 9 In the alternative, I move to strike the
 10 portion -- again for the record, I move to strike the
 11 portion of Mr. Kam's expert opinion that relies on the
 12 CLEAR database.
 13 JUDGE CHAPPELL: I think that was an offer of
 14 proof only, if I'm not mistaken.
 15 MS. MORGAN: Thank you, Your Honor.
 16 MR. MEHM: That's correct, Your Honor.
 17 JUDGE CHAPPELL: So you don't object to that.
 18 It's clear I'm not going to -- you're not opposed to
 19 that. I'm not going to consider the information in the
 20 offer of proof in support of the decision in this case.
 21 MR. MEHM: Yes, Your Honor.
 22 MS. MORGAN: Thank you, Your Honor.
 23 JUDGE CHAPPELL: That was for the record only.
 24 Okay?
 25 And so if that was an objection, I suppose it's

1 sustained with the clarification I just gave.
 2 And with that, finally, we will take our lunch
 3 break. We will reconvene at 2:30.
 4 (Pause in the proceedings.)
 5 Was your objection to strike the testimony?
 6 MS. MORGAN: Yes, Your Honor.
 7 JUDGE CHAPPELL: Or not to use it in support of
 8 the decision, to disregard it?
 9 MS. MORGAN: Both, Your Honor.
 10 JUDGE CHAPPELL: Well, since I'm not going to
 11 consider it, then in effect it's sustained.
 12 MS. MORGAN: Thank you, Your Honor.
 13 JUDGE CHAPPELL: Any questions on that?
 14 MR. MEHM: No, Your Honor.
 15 JUDGE CHAPPELL: All right. We will return at
 16 2:35.
 17 We're in recess.
 18 (Whereupon, at 1:25 p.m., a lunch recess was
 19 taken.)
 20
 21
 22
 23
 24
 25

1 AFTERNOON SESSION
 2 (2:38 p.m.)
 3 JUDGE CHAPPELL: We're back on the record.
 4 Next witness.
 5 MS. VANDRUFF: Good afternoon, Your Honor.
 6 JUDGE CHAPPELL: Good afternoon.
 7 Remember, we are finishing no later than
 8 5:00 p.m. today.
 9 MS. VANDRUFF: Yes, Your Honor.
 10 Your Honor, complaint counsel calls
 11 Jim Van Dyke.
 12 - - - - -
 13 Whereupon --
 14 JIM VAN DYKE
 15 a witness, called for examination, having been first
 16 duly sworn, was examined and testified as follows:
 17 DIRECT EXAMINATION
 18 BY MS. VANDRUFF:
 19 **Q. Good afternoon, Mr. Van Dyke.**
 20 A. Good afternoon.
 21 **Q. Please introduce yourself to the court.**
 22 A. Hi. My name is Jim Van Dyke.
 23 **Q. What is your occupation?**
 24 A. I'm the CEO and founder of Javelin Strategy and
 25 Research.

1 **Q. And Mr. Van Dyke, if you would raise the mike**
 2 **just a bit, I think that may assist.**
 3 A. Sure.
 4 **Q. Thank you.**
 5 **Mr. Van Dyke, you said that you were the founder**
 6 **and chief executive officer of Javelin Research and**
 7 **Strategy.**
 8 **What is Javelin?**
 9 A. We are a research company that focuses on
 10 changes created when you bring electronic methods into
 11 how people trade with banks, commerce companies, and
 12 other organizations.
 13 **Q. When did you found Javelin?**
 14 A. July 1, 2002.
 15 **Q. Why did you found Javelin?**
 16 A. I felt there was a gap in the market and a lack
 17 of quality, rigorous research data and understanding how
 18 to improve on commerce methods.
 19 **Q. Is Javelin a part of another entity or**
 20 **organization?**
 21 A. It now is.
 22 **Q. And what organization is that?**
 23 A. That is Greenwich Associates.
 24 **Q. Do you have a title with Greenwich Associates?**
 25 A. My internal title there is managing director.

1 **Q. Please describe for the court your past work**
 2 **experience prior to founding Javelin.**
 3 A. I was in a similar capacity with an organization
 4 that has since been acquired by Forrester Research,
 5 essentially running their financial services, security
 6 and fraud and commerce marketing research.
 7 **Q. And since founding Javelin, what has your work**
 8 **involved?**
 9 A. My work at Javelin is initially creating and
 10 now overseeing all processes for conducting primary
 11 research on electronic commerce methods and transaction
 12 methods.
 13 **Q. Have you developed any specialized knowledge**
 14 **through your work at Javelin?**
 15 A. Yes. We have, particularly in the area of
 16 security and fraud, developed a number of methodologies
 17 about how to understand the changing pattern of fraud
 18 and how that relates to security and other changing
 19 consumer transaction methods.
 20 **Q. You have mentioned fraud.**
 21 **Does the primary research that you conduct**
 22 **relate to identity fraud?**
 23 A. Within our fraud and security practice area,
 24 yes, it does.
 25 **Q. Describe briefly how your research relates to**

1 **identity fraud.**
 2 A. So we poll what we call a nationally
 3 representative group. We survey this group of people
 4 of 5,000-plus each year in order to understand both the
 5 size of people who have been victimized by fraud and
 6 the changing pattern of their victimization, especially
 7 with regard to changing technologies and security
 8 exposures.
 9 **Q. Is there a distinction between identity fraud**
 10 **and identity theft for the purposes of your research?**
 11 A. For the purposes of research I've presented
 12 today, no, there is not.
 13 **Q. Have you published reports regarding identity**
 14 **theft?**
 15 A. Yes.
 16 **Q. Identify for the court a few of the key reports**
 17 **you've contributed to the field of identity theft.**
 18 A. We have published our annual identity fraud
 19 survey report, what's called our annual identity theft
 20 survey report.
 21 We published in the last year both a Credit Card
 22 Issuer's Safety Scorecard where we conduct mystery
 23 shopping research on issuers of credit cards, a similar
 24 report called the bank safety scorecard where we score
 25 banks on their customer-enabling safety capabilities.

1 conduct a transaction.
 2 **Q. And you've studied identity theft.**
 3 A. I did. Yes.
 4 **Q. For how long have you studied identity theft?**
 5 A. Since at least 15 years I've studied it, yes.
 6 **Q. And are there other professionals who work in**
 7 **the field of identity theft?**
 8 A. Yes, there are.
 9 **Q. Can you give us some examples of other**
 10 **professionals who work in the field of identity theft,**
 11 **generally?**
 12 A. Sure. There are a number of organizations that
 13 work in that field, such as Gartner Research,
 14 Forrester Research, consulting firms such as McKinsey
 15 and Bain, a number of other areas.
 16 **Q. Have you worked on any identity theft cases as**
 17 **an expert?**
 18 A. I have.
 19 **Q. Can you provide the court with an example of a**
 20 **case in which you've worked as an expert witness**
 21 **regarding identity theft.**
 22 A. Yes. Several years ago, I was an expert witness
 23 on a case brought against The Gap, which was about
 24 identity theft risk stemming from data breaches.
 25 **Q. Now, you've described generally the kinds of**

1 Another would be our identity protective
 2 services scorecard.
 3 **Q. Mr. Van Dyke, have you spoken at conferences on**
 4 **the issue of identity theft?**
 5 A. Yes.
 6 **Q. Can you provide the court with examples of**
 7 **conferences at which you've addressed the topic of**
 8 **identity theft.**
 9 A. Certainly.
 10 A few that I can mention are the one, the
 11 RSA Security Summit, which is the largest security
 12 conference in the world. I've spoken there on -- off
 13 and on more years than not since about either 1997 or
 14 1998.
 15 And most -- most recently, I presented at the
 16 Information Services Media Group's conference in
 17 San Francisco on pattern of identity theft.
 18 And I've presented before the FDIC in a
 19 conference chaired by their chairperson.
 20 **Q. Do you give interviews to the news media**
 21 **regarding identity theft?**
 22 A. Yes, I do.
 23 **Q. What is identity theft?**
 24 A. Identity theft is the unauthorized misuse of a
 25 person's personal identifying information essentially to

1 **research that your company Javelin performs.**
 2 **Can you describe how Javelin performs its**
 3 **research in broad strokes.**
 4 A. Certainly. The processes I put in place are
 5 the -- we poll consumers through at least really no less
 6 than a dozen major surveys a year. In the case of the
 7 identity theft survey, that is 5,000 individuals or more
 8 representative of everyone in the U.S.
 9 We also do our own mystery shopping research of
 10 banks, credit card issuers and other organizations to
 11 test their safety practices since these are the places
 12 that identity criminals normally go to convert PII into
 13 cash.
 14 And we also interview leading executives and
 15 others in the field.
 16 **Q. So you've mentioned this afternoon the annual**
 17 **identity fraud survey.**
 18 **What is the identity fraud survey that you**
 19 **administer through Javelin?**
 20 A. Yes. We -- we poll now a minimum of
 21 5,000 people, as many as 6,500 people, who are
 22 representative of all U.S. adults by several factors,
 23 such as age, gender, ethnicity, and so forth. And we
 24 are asking them a series of questions which are
 25 designed to be repeatable and that have produced

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1 repeated patterns, that is, showing little change, on
 2 things like the rate of identity fraud, the connection
 3 to other incidents like security incidents, dollar
 4 volume, hours required to resolve the crime, and so
 5 forth.
 6 **Q. How long have you been administering the**
 7 **identity fraud survey?**
 8 A. We just completed our tenth year for that
 9 particular survey.
 10 **Q. Is there any other survey that has spanned the**
 11 **decade that Javelin has been fielding an**
 12 **identity fraud survey?**
 13 A. Are you asking -- you're asking for surveys not
 14 necessarily limited to those on the subject of fraud?
 15 **Q. I'm sorry.**
 16 **With respect to -- with respect to identity**
 17 **theft, is there anyone else who has fielded a study for**
 18 **ten years, collected ten years worth of data with**
 19 **respect to identity theft?**
 20 A. Oh, no, there's not.
 21 **Q. Do you receive financial support for Javelin's**
 22 **identity fraud survey?**
 23 A. Yes, we do.
 24 **Q. From whom?**
 25 A. The most recent years there was a sponsorship

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1 done for a few years running by an organization called
 2 Intersections, Inc. At various times over the years,
 3 Visa, Inc. has also been a sponsor as has
 4 Wells Fargo Bank.
 5 Those are the only three.
 6 **Q. Has the government sponsored this research?**
 7 A. No.
 8 **Q. Has Tiversa sponsored this research?**
 9 A. No.
 10 **Q. Mr. Van Dyke, I'm going to ask you to turn your**
 11 **attention to the document that has been premarked as**
 12 **CX 0741, which is in the binder to your right.**
 13 **Do you recognize this document?**
 14 A. I do.
 15 **Q. What is it?**
 16 A. This is my expert report.
 17 **Q. And who prepared the report?**
 18 A. I did.
 19 **Q. When did you prepare the report?**
 20 A. This was prepared in -- I believe I completed
 21 this in March of this year.
 22 Let me confirm that.
 23 Yes, March 17, 2014.
 24 **Q. And who asked you to prepare it?**
 25 A. The Federal Trade Commission did.

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1 **Q. Does the 2013 identity fraud survey appear at**
 2 **attachment 1 to your expert report in this matter?**
 3 A. Yes, it does.
 4 **Q. With respect to the identity fraud survey, who**
 5 **approves the survey before it's fielded?**
 6 A. I do.
 7 **Q. Describe for the court, if you would, how the**
 8 **identity fraud survey is fielded.**
 9 A. So we -- the survey -- this report was really
 10 based on the survey, which has a few carefully chosen
 11 changes from year to year designed to allow it to be
 12 comparable over each year's period. And we are in
 13 particular designing this survey to represent the U.S.
 14 adult population in order to understand the latest
 15 trends in fraud that we eventually want to report on.
 16 And by "trends" we're primarily looking at two
 17 types, one, the latest criminal methods that we believe
 18 exist or we've heard or we're seeing anecdotal or other
 19 evidence of. And second, we're building heavily on our
 20 expertise in the area of emerging commerce and
 21 technology methods, such as mobile, social media, online
 22 and other technologies.
 23 **Q. When it was fielded most recently, how many**
 24 **people completed the survey?**
 25 A. 5,634.

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1 **Q. And what does the 2013 identity fraud survey**
 2 **measure?**
 3 A. It measures several things. Most significantly
 4 it measures the incidence rate or, that is, how -- the
 5 likelihood or how common identity fraud is among the
 6 U.S. population.
 7 It also measures the pattern of identity fraud,
 8 how that is changing, in order to allow people that --
 9 that -- leaders that use the identity fraud survey
 10 report to make changes to protect people from harm.
 11 **Q. Who utilizes the survey?**
 12 A. This survey is normally utilized by leaders in
 13 government, payment networks, financial institutions,
 14 technology organizations, identity protection services
 15 firms, and a variety of other organizations.
 16 **Q. Has the survey changed over time?**
 17 A. Certainly.
 18 **Q. How has it changed over time?**
 19 A. We make carefully planned changes to the
 20 wording of particular questions which are what we call
 21 longitudinal. That is, they're designed to maintain
 22 their year-over-year comparability.
 23 We also will periodically add in new sections to
 24 the survey when a -- when there's a new method that
 25 could be a new what we call vector or avenue that could

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1 lead to fraud, such as social media or mobile or
 2 something like that.
 3 **Q. Did you make any changes to the survey in 2013?**
 4 A. Yes. Certainly.
 5 **Q. Can you give me an example.**
 6 A. Yes. We made slight changes to the overall
 7 structure of the wording of the question that asks
 8 people if they've been notified of a data breach, and
 9 then we -- that was in order to add for this most
 10 particular recent year follow-on questions, which a
 11 researcher would call branching method, that allow us to
 12 get into the specific date that the person had been
 13 notified of a breach or the type of information that the
 14 individual had known to have been breached.
 15 But we also changed particular elements of the
 16 type of fraud that the respondent may have gone on to
 17 experience in their name.
 18 **Q. The changes in the 2013 survey that you've just**
 19 **described, did those change -- did they affect the**
 20 **quality of the longitudinal data?**
 21 A. No, they did not.
 22 **Q. And what is longitudinal data?**
 23 A. The word is used a few different ways. The way
 24 that firms like ours widely use it is to -- is to mean
 25 comparability.

1 So we're looking for correlations to --
 2 especially in the case of fraud, since it's all about
 3 minimizing risk or minimizing harm, to identify how --
 4 how there may be increased likelihood of some -- of
 5 fraud overall or in a particular type, by particular
 6 type of fraud, based on somebody having experienced
 7 something else or done something else.
 8 **Q. Do you use cross-tabulation?**
 9 A. Yes. Yeah. I might have -- it might be easier
 10 if I just said the method I was describing a moment ago
 11 was cross-tabulation.
 12 **Q. And what is cross-tabulation?**
 13 A. So that's a -- within the research circle,
 14 that's a term that's widely used to describe
 15 statistical -- you know, comparison of statistical
 16 data.
 17 So an example might be, you might ask somebody
 18 a battery of questions: Did you visit Washington, D.C.
 19 on Wednesday of last week? And did you have apple pie
 20 when you were on a visit somewhere on Wednesday of last
 21 week? And if a person answered yes to those, you could
 22 do a cross-tabulation to say X percent of people who
 23 were in Washington, D.C. last week had apple pie while
 24 they were in Washington, D.C.
 25 **Q. Mr. Van Dyke, I'd like to direct your attention**

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1 So you've designed two particular surveys or
 2 research methods, data collection methods, so that the
 3 results are comparable whether or not you made minor
 4 changes or changes at all to the wording and the
 5 methodology.
 6 **Q. So notwithstanding the changes to the survey,**
 7 **the year-to-year comparisons of the data remain valid;**
 8 **is that correct?**
 9 A. That is correct.
 10 **Q. In your deposition, you were asked about the**
 11 **survey questions that were fielded that informed your**
 12 **report in this matter; is that correct?**
 13 A. Yes, that's correct.
 14 **Q. And did you provide those questions to counsel**
 15 **in this litigation?**
 16 A. I did.
 17 **Q. In reaching conclusions from the**
 18 **identity fraud survey, do you evaluate the responses to**
 19 **multiple questions together?**
 20 A. Yes, we do.
 21 **Q. And why do you do that?**
 22 A. It's important for comparability to -- and
 23 that's one of the reasons we uniquely do a large-sample
 24 survey, in this case 5,634 nationally representative
 25 people.

1 **to your expert report which has been marked as**
 2 **CX 741 and specifically to figure 1 which appears on**
 3 **page 8.**
 4 **What trends, if any, does figure 1 show that the**
 5 **identity fraud survey identified?**
 6 A. This overall -- this data is what we would call
 7 longitudinal. And it's -- so it's showing trends over
 8 four consecutive measurement periods, 2010, '11, '12 and
 9 '13.
 10 And first of all what it shows in the gold bar
 11 is how common identity fraud, that is, these
 12 unauthorized transactions committed in somebody else's
 13 name, in the gold bar, how common they are among the
 14 overall U.S. adult population, so that's the
 15 5.4 percent. You can -- that is the 5.4 percent, is
 16 the number of the percent of U.S. adults that were
 17 victims of identity fraud, that is, unauthorized
 18 transactions conducted in their name, in the most
 19 recent year.
 20 So this figure first of all shows the rate of
 21 identity fraud for all U.S. adults.
 22 Second of all, with the cross-tabulation method
 23 in place -- that's where we're looking at the light red
 24 bar and the dark red bar -- this shows how that
 25 identity fraud rate changes as a result of a

1 cross-tabulation based on whether those same
2 individuals within the same twelve-month measurement
3 period had or had not been notified that their
4 information had been breached.

5 **Q. If a consumer is notified that his or her**
6 **information was breached, what does your survey conclude**
7 **regarding the likelihood of fraud? And I direct your**
8 **attention, sir, to page 7 of your report where you**
9 **address exactly this question.**

10 A. Right. I think I left that out in the last
11 part.

12 So data breach notifications are becoming
13 increasingly accurate precursors to identity fraud. And
14 if I may, on figure 1, the rising height of the dark red
15 bar shows how the correlation between incidence of data
16 reach and incidence of fraud is growing stronger by the
17 year.

18 **Q. Before we go any further, Mr. Van Dyke, for the**
19 **purposes of your research, what is a data breach?**

20 A. So a data breach is the unauthorized exposure of
21 personal identifying information, otherwise known as
22 PII.

23 **Q. Now, with respect to figure 1, which is**
24 **displayed for the court and for the gallery, does it**
25 **illustrate correlation or causation?**

1 really becomes impossible to prove causation simply
2 because we're dealing with a matter, crime, identity
3 fraud being the crime, in which the perpetrator has the
4 strongest motive to conceal their method.

5 As a result of that motive for concealment, the
6 victim of identity fraud has a significantly reduced
7 likelihood of knowing how their PII was compromised.

8 **Q. Mr. Van Dyke, I'd like to ask you to turn your**
9 **attention to page 8 of your report and describe for the**
10 **court the overall types of frauds evaluated in the**
11 **identity fraud survey and discussed in your expert**
12 **report in this matter.**

13 A. So we, as a result of our survey methodology,
14 divide identity fraud into three overall categories.
15 They are existing card fraud, a card being perhaps a
16 credit card, prepaid card, debit card, and so forth;
17 existing non-card fraud, which is a bank account, loan,
18 perhaps even a utility bill or a telephone account; and
19 then new account fraud, referring to all new account
20 fraud types or categories.

21 **Q. Do you have an opinion regarding whether**
22 **consumers who become victims of identity theft bear**
23 **out-of-pocket costs?**

24 A. Yes.

25 **Q. What is that opinion?**

1 A. This demonstrates correlation.

2 **Q. And what's the difference between correlation**
3 **and causation?**

4 A. Well, correlation, as -- which is what this --
5 again, this figure is representative of, shows that,
6 statistically speaking, within the population this
7 graph represents, which is the overall U.S. population,
8 there's an inarguable correlation, meaning if you have
9 your information exposed in a data breach, you are more
10 likely to become a victim of identity fraud. For the
11 population at large it clearly shows that.

12 What it does not allow in the case of the
13 difference between this correlation and causation, it
14 does not allow us to say on any one individual basis or
15 as applied to any one individual that we can be certain
16 that that individual's notification of a data breach
17 letter or exposure to a data breach makes it certain
18 that that one individual is going to be a victim of
19 identity fraud.

20 **Q. Have you performed quantitative research**
21 **regarding causation of identity theft?**

22 A. No, we have not.

23 **Q. Why not?**

24 A. It's -- specific to the field of identity
25 fraud, amongst the various things we research, it

1 A. They absolutely do bear out-of-pocket costs.

2 **Q. And what types of costs do consumers bear out of**
3 **pocket?**

4 A. There are -- there's a number of them, of costs
5 for out-of-pocket costs, what we also call consumer
6 costs. Those certainly include but are not limited to
7 unreimbursed losses, that is, the amount -- the face
8 value or the amount the criminal got away with
9 initially that was in the finality of attempting to
10 settle the matter were not reimbursed to the identity
11 holder.

12 There are also other costs such as -- there can
13 be actual lost wages, notary services, identity
14 protection services and other such related costs.

15 **Q. And on what is your opinion based with respect**
16 **to those costs? How do you know that those are the**
17 **costs that consumers bear?**

18 A. We have -- we now ask these 5,634 people in the
19 most recent year, the subset of those individuals who
20 have told us they are victims of fraud, we directly ask
21 these people what their costs add up to and what -- and
22 we have learned through qualitative research to give
23 them examples of types of fraud that are likely to be
24 included.

25 **Q. Now, directing your attention to page 9 of your**

1 report, Mr. Van Dyke, did the 2013 identity fraud survey
2 determine the average out-of-pocket costs for consumers
3 experiencing the kinds of frauds that you've described
4 today, new account fraud, existing non-card fraud and
5 existing card fraud?

6 A. Yes.

7 Q. And what are the average out-of-pocket costs for
8 each?

9 A. The average costs which we're referring to in
10 both consumer costs or out-of-pocket, the first line of
11 page 9.

12 So for victims of new account fraud, each --
13 each victim, on average, the mean average, will incur
14 \$449 out of pocket.

15 And -- I'm sorry. Did you ask me about just new
16 account fraud or all fraud types?

17 Q. So let's move on then to existing non-card
18 fraud.

19 What is the average out-of-pocket costs for a
20 consumer experiencing existing non-card fraud as
21 determined by your 2013 identity fraud survey?

22 A. Existing non-card fraud is \$207.

23 Q. And how about with respect to existing card
24 fraud?

25 A. That is \$106.

1 Q. Mr. Van Dyke, why do the out-of-pocket costs
2 vary depending on the type of fraud?

3 A. There are a number of reasons with -- I'll
4 mention two most significant ones.

5 With respect to card fraud, there are
6 regulations in place that are commonly referred to as
7 zero liability policies or actually, in actuality, about
8 \$50 by statute, so that where an individual has their
9 losses limited, it doesn't bring it to zero, but it
10 brings it down quite significantly.

11 And in the case of new account frauds, this is
12 where the criminal actually established the account, not
13 the legitimate identity holder, before going on to
14 conduct actual transactions in the identity holder's
15 name. And the very nature of that -- of these new
16 account frauds is such that the identity holder is
17 unlikely to be receiving statements. Few criminals want
18 the identity holder to receive statements, so they'll
19 either intercept statements and other ongoing notices or
20 they will use a bogus address. And as a result, the
21 losses through unauthorized transactions will add up to
22 more dollars before the crimes can be detected and
23 stopped.

24 Q. Do you have an opinion regarding whether
25 consumers who become victims of identity theft must

1 invest nonmonetary resources in resolving identity
2 fraud?

3 A. Yes.

4 Q. What is your opinion?

5 A. They certainly must invest nonmonetary
6 resources, and the most significant of that is simply
7 time. It takes a lot of time to resolve these crimes.

8 Q. And directing your attention to
9 pages 9 through 11 of your expert report, did the
10 2013 identity fraud survey determine the average time
11 that consumers spend resolving identity fraud?

12 A. Yes.

13 Q. And for new account fraud, how much time does an
14 average consumer spend resolving the fraud?

15 A. The average new account fraud victim in the most
16 recent year we measured yet spent 26 hours of their own
17 time resolving the fraud.

18 Q. What about for a consumer who experiences
19 existing non-card fraud? What was the average time that
20 such a consumer would spend resolving the identity
21 fraud?

22 A. Existing non-card fraud victims on average spend
23 16 hours resolving the fraud.

24 Q. And finally, how about existing card fraud? How
25 long does it take the average consumer to resolve

1 existing card fraud?

2 A. For existing card fraud victims, they spend an
3 average of nine hours resolving the crime.

4 Q. And I asked you earlier about why the costs vary
5 by fraud.

6 Why do -- does the amount of time required to
7 resolve the fraud vary depending on the type of fraud?

8 A. The reasons are similar to what I stated on the
9 financial amounts I responded to earlier.

10 With the cases of -- so the biggest distinction
11 is with card fraud cases as compared to existing card
12 fraud cases versus new account fraud cases.

13 Card fraud cases typically are lower in dollar
14 amount, and they're designed to -- they're designed to
15 be more easily resolved because you have fewer networks,
16 Visa, MasterCard, et cetera, that span a wide variety of
17 banks and they work in more standardized fashion.

18 In the case of new account fraud, you -- these
19 crimes tend to be much larger in dollar volume, and the
20 company at which the fraud occurred, the bank or other
21 company, will push back much more stringently to require
22 stronger proof that the person who is claiming they were
23 a fraud victim was in fact a fraud victim.

24 JUDGE CHAPPELL: I'm hearing a lot about card
25 fraud.

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1 Is there a card fraud allegation in this case?
 2 MS. VANDRUFF: There is not, Your Honor.
 3 Mr. Van Dyke -- I think that this is the
 4 foundation for his opinions later with respect to the
 5 consumer costs that consumers can expect to face given
 6 the unauthorized disclosure of their Social Security
 7 numbers. And one of the forms of fraud that I believe
 8 Mr. Van Dyke will explain for Your Honor that a consumer
 9 could experience is card fraud because of the
 10 unauthorized disclosure of the Social Security number.
 11 JUDGE CHAPPELL: So you're going to present
 12 testimony to make it relevant; is that what you're
 13 telling me?
 14 MS. VANDRUFF: Yes, Your Honor. I intend to tie
 15 it up.
 16 JUDGE CHAPPELL: All right. Go ahead.
 17 MS. VANDRUFF: Thank you, Your Honor.
 18 BY MS. VANDRUFF:
 19 **Q. Mr. Van Dyke, do you have an opinion regarding**
 20 **whether identity thieves who succeed in committing**
 21 **identity theft cause losses to businesses, organizations**
 22 **and the consumer? I believe in your report you call**
 23 **this the fraud amount and discuss it at page 9 of your**
 24 **report.**
 25 A. Yes.

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1 **Q. And what is your opinion?**
 2 A. My opinion is that businesses absolutely do
 3 experience financial losses as a result of fraud.
 4 **Q. I'd like to direct your attention, Mr. Van Dyke,**
 5 **to the facts of this case now.**
 6 **Were you asked to offer an opinion in the LabMD**
 7 **matter?**
 8 A. Yes.
 9 **Q. Directing your attention to page 2 of your**
 10 **expert report, describe for the court what complaint**
 11 **counsel asked you to assess.**
 12 A. We were asked to assess the risk of injury to
 13 consumers whose PII has been disclosed by LabMD without
 14 authorization and to consumers whose PII was not
 15 adequately protected from unauthorized disclosure.
 16 **Q. You used the term "PII." What does that mean,**
 17 **sir?**
 18 A. So personal -- personally identifiable
 19 information, so that is, in today's world, it's certain
 20 identifying records, Social Security number, and other
 21 pieces of sensitive data that are used to identify
 22 people and therefore authorize transactions.
 23 **Q. Were you asked to offer any opinions regarding**
 24 **LabMD's data security practices?**
 25 A. No.

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1 **Q. Do you plan to offer any opinions regarding**
 2 **LabMD's data security practices?**
 3 A. No.
 4 **Q. Did you reach a conclusion regarding the risk of**
 5 **injury to consumers whose personally identifiable**
 6 **information was disclosed by LabMD without authorization**
 7 **and to consumers whose personally identifiable**
 8 **information was not adequately protected from**
 9 **unauthorized disclosure?**
 10 A. Yes.
 11 **Q. What was your conclusion?**
 12 A. Our conclusion is that there is significant harm
 13 to consumers and businesses as a result of the data
 14 breach at LabMD.
 15 **Q. I'd like to talk about those opinions,**
 16 **Mr. Van Dyke.**
 17 **First, as a preliminary matter, have you**
 18 **considered evidence in this case in forming your**
 19 **opinion?**
 20 A. Yes.
 21 **Q. Directing your attention to page 4 of your**
 22 **expert report, what evidence from this case have you**
 23 **examined and considered in rendering your expert**
 24 **opinion?**
 25 A. Things I looked at include the complaint against

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1 LabMD, the deposition transcripts of Robert Boback in
 2 November of last year, Detective Jestes on December of
 3 last year, the statement of Michael Daugherty March of
 4 this year, the data breach notification letter of March
 5 of last year, LabMD's written discovery responses, and
 6 on the documents containing PII that were compromised
 7 from the systems of LabMD. These are the day sheets and
 8 the 718 insurance aging report -- 1718. Pardon me.
 9 **Q. What other information or materials did you**
 10 **consider in forming your opinions regarding the**
 11 **likelihood of injury to consumers whose personally**
 12 **identifiable information was disclosed by LabMD without**
 13 **authorization and to consumers whose personally**
 14 **identifiable information was not adequately protected**
 15 **from unauthorized disclosure?**
 16 A. I also relied on our annual identity fraud
 17 survey report.
 18 **Q. Anything else?**
 19 A. Also my professional experience in the field of
 20 commerce and identity fraud.
 21 **Q. And does that include the resources listed in**
 22 **your bibliography at pages 15 through 21 of your report?**
 23 A. It does.
 24 **Q. Directing your attention to page 2 of your**
 25 **expert report, did you make any assumptions in forming**

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1 **your opinion in this case?**
 2 A. Yes. I have assumed that LabMD failed to
 3 provide reasonable -- reasonable -- pardon me -- and
 4 appropriate security for the PII maintained on its
 5 computer networks.
 6 **Q. And why did you make that assumption?**
 7 A. Because I was asked to do so.
 8 **Q. Earlier this afternoon you testified that**
 9 **consumers who had experienced a data breach are at**
 10 **significantly higher risk of becoming a victim of**
 11 **identity theft. Do you remember that testimony?**
 12 A. I do.
 13 **Q. And I believe it was your testimony also that**
 14 **the consumers whose personally identifiable information**
 15 **is maintained by LabMD are at a significantly higher**
 16 **risk of becoming victims of identity theft. Do you**
 17 **remember that testimony?**
 18 A. I do.
 19 **Q. How did you reach your conclusions regarding the**
 20 **risk of injury to consumers whose personally**
 21 **identifiable information was disclosed by LabMD without**
 22 **authorization? And I direct your attention to page 4 of**
 23 **your expert report.**
 24 A. So I specifically looked at the portion of
 25 people who had had their Social Security number exposed

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1 in our study and compared that to the total quantity of
 2 people in the LabMD case who had had their PII,
 3 including a Social Security number, exposed.
 4 **Q. Did you make any calculations in support of your**
 5 **opinion that consumers whose personally identifiable**
 6 **information was disclosed by LabMD without authorization**
 7 **are at significantly higher risk of becoming a victim of**
 8 **identity theft?**
 9 A. Yes.
 10 **Q. In making your calculations, what were you**
 11 **attempting to quantify?**
 12 A. I was attempting to quantify both the incidence
 13 rate, that is, you know, the sheer size and probability,
 14 as well as impact measured in dollars and resolution
 15 hours of identity fraud that would happen as a direct
 16 result of exposure of PII at LabMD.
 17 **Q. And is this what your expert report**
 18 **characterizes as the expected fraud impact?**
 19 A. Yes.
 20 **Q. Directing your attention to page 7 of your**
 21 **expert report, why did you apply the data from the**
 22 **2013 identity fraud survey to calculate the anticipated**
 23 **fraud impact from the unauthorized disclosure of the**
 24 **1718 File and the day sheets?**
 25 A. We chose our most recent year of all the annual

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1 years that we've deployed the study for the last ten
 2 because we deployed our survey in October of last year
 3 and were specifically making calculations on the
 4 period -- the twelve-month period that preceded October
 5 of last year, and this most closely matched to the day
 6 sheet information in which consumers were notified of
 7 the exposure of that.
 8 Sorry. I didn't explain that very well.
 9 In March 2013, they received that notification,
 10 so that matched up to the period, the twelve-month
 11 period that we asked about in our identity fraud survey
 12 report.
 13 And also, in November 2013, Mr. Boback testified
 14 the insurance aging report could be found in multiple
 15 locations. That most closely matched up with our survey
 16 that asked about the twelve-month period in which people
 17 had been notified of a breach.
 18 **Q. So let me just unpack that a little bit,**
 19 **Mr. Van Dyke.**
 20 **You said that your survey most closely matched**
 21 **the circumstances of the Sacramento day sheet**
 22 **disclosure.**
 23 **Why is that?**
 24 A. It is because there's -- we have a twelve-month
 25 window that we asked consumers about in October of last

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1 year. We asked them if their information -- if they had
 2 been notified of a breach in the twelve-month window
 3 essentially from November of 2012 through October of
 4 2013. That matched up to when consumers in the LabMD
 5 case had been notified that their information had been
 6 exposed through the day sheets.
 7 And similarly, Mr. Boback testified that the
 8 insurance aging files could be found as recently as at
 9 the time that he testified, which very -- which most
 10 closely matched to the timing of our particular question
 11 used in our recent survey.
 12 **Q. Okay. So I think I asked you about the day**
 13 **sheets, but you provided information for the court about**
 14 **why you applied the survey results to both the day**
 15 **sheets and the 1718 File; is that correct?**
 16 A. That's correct.
 17 **Q. Okay.**
 18 A. Yes, it is.
 19 **Q. Terrific.**
 20 **How did the findings of the 2013 identity fraud**
 21 **survey inform -- I'm sorry. Withdrawn.**
 22 **How did the findings of the fraud survey from**
 23 **2013 with respect to frauds inform your opinion**
 24 **regarding the quantifiable harm that's likely to result**
 25 **from the unauthorized disclosures in this case?**

605

1 A. We are able to -- let me state that
 2 differently.
 3 I could apply a specific calculation to the
 4 results of the 2013 survey that is cross-tabulation I
 5 referred to earlier, more finely tuning the overall
 6 results to just those individuals who had had their
 7 Social Security number exposed, so that includes two
 8 things really, one, individuals who had been notified
 9 that their information had been breached and, number
 10 two, just including individuals that had had the SSN,
 11 Social Security number, included within that breach, to
 12 get more precise in our calculation of fraud loss and
 13 resolution hours.
 14 **Q. Mr. Van Dyke, were you able to determine the**
 15 **number of consumers who will become victims of**
 16 **identity -- well, withdrawn.**
 17 **Were you able to quantify the harms that you**
 18 **expect consumers will experience as a result of the**
 19 **unauthorized disclosures by LabMD in the Sacramento**
 20 **incident and the 1718 incident?**
 21 A. Yes.
 22 **Q. And what incidence rates did you apply in order**
 23 **to achieve those calculations?**
 24 A. For the LabMD case, when I looked at just those
 25 individuals from our study, the Javelin study, who had

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1 had their Social Security numbers exposed and measured
 2 the rate of identity fraud within that population in
 3 order to apply the results of that to the -- those
 4 individuals, as you just described, who had had their
 5 day sheets and I believe you also mentioned insurance
 6 aging report -- did you mention both or did I jump
 7 ahead?
 8 **Q. You didn't jump ahead. Thank you, sir.**
 9 A. Okay. Great. The insurance aging report as
 10 well we applied to both of those populations.
 11 What I found in the calculation was, for
 12 existing card fraud, 7.1 percent of all individuals who
 13 had been notified that their Social Security number had
 14 been breached went on to experience fraud.
 15 **Q. Mr. Van Dyke, if I may interrupt, I think it**
 16 **might be useful if we turn to pages 11 and 12 of your**
 17 **report, where you describe how you quantified the harms**
 18 **that you expect consumers to experience.**
 19 A. Uh-huh.
 20 **Q. Are you with me?**
 21 A. I am.
 22 **Q. Okay. And with respect to existing card fraud,**
 23 **which you were just speaking about --**
 24 A. Right.
 25 **Q. -- what incidence rate did you determine was**

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1 **applicable on the basis of the 2013 identity fraud**
 2 **survey?**
 3 A. That was 7.1 percent.
 4 I'm sorry. I misstated that.
 5 I believe you asked about existing card fraud?
 6 **Q. I did ask about existing card fraud.**
 7 A. That was my mistake. I apologize.
 8 The correct answer for that is 13.1 percent.
 9 **Q. And where is that number derived from,**
 10 **Mr. Van Dyke?**
 11 A. That is a calculation again. That is a
 12 cross-tabulation where we are -- in our most recent
 13 survey, the 5,634 people, we are first looking at the
 14 subset of that 5,634 people who said they were notified
 15 of a data breach. Then we limit that to just those
 16 people who said there was an SSN exposed within that
 17 data breach and then further limiting it to those people
 18 who went on to experience existing card fraud. That
 19 percentage of individuals out of the 5,634 is equal to
 20 13.1 percent.
 21 **Q. And just so that it's clear, your opinion with**
 22 **respect to the incidence rate of existing card fraud for**
 23 **consumers whose Social Security numbers have been**
 24 **exposed in a data breach in the twelve months preceding**
 25 **October of 2013 is reflected on page 11 of your report,**

608

1 **and that number is what, sir?**
 2 A. 13.1 percent.
 3 **Q. Okay. With respect to the incidence rate of**
 4 **existing non-card fraud, what did the 2013 survey**
 5 **demonstrate, and what is reflected in your expert report**
 6 **at page 11?**
 7 A. On page 11, what I concluded from the
 8 calculation was that for existing non-card fraud,
 9 7.1 percent of individuals will go on to be victims of
 10 existing non-card fraud.
 11 **Q. 7.1 percent of whom?**
 12 A. Of LabMD -- of individuals whose records were
 13 breached at LabMD through the day sheets or the
 14 insurance aging report exposure.
 15 **Q. And what were your conclusions with respect to**
 16 **non- -- excuse me -- new account fraud?**
 17 A. For new account fraud, the calculation I reached
 18 by looking at our identity fraud survey report was that
 19 with the LabMD exposure of the day sheets and the
 20 insurance aging report, 7.1 percent of all the
 21 individuals who had their records exposed through the
 22 day sheets and the insurance aging report will go on to
 23 suffer new account fraud.
 24 MS. VANDRUFF: The court's indulgence,
 25 Your Honor.

609

1 (Pause in the proceedings.)
 2 BY MS. VANDRUFF:
 3 **Q. Mr. Van Dyke, if Social Security numbers had not**
 4 **been disclosed in the 1718 File incident or the**
 5 **Sacramento day sheet incident, would your analysis in**
 6 **this case have been different?**
 7 A. It would have been different, yes.
 8 **Q. Why?**
 9 A. Well, if -- there is a direct relationship to
 10 the severity and the amount of fraud based on the type
 11 of record that's compromised. And that's the general
 12 reason.
 13 The specific reason is, we're able to do an
 14 exact calculation from our data based on individuals who
 15 told us their SSN was calculated. That would have
 16 changed the facts in the case.
 17 **Q. And the calculation that you said you're able to**
 18 **do, that's what's reflected in your expert report; is**
 19 **that correct?**
 20 A. Absolutely. That is correct.
 21 **Q. So turning back to the calculations that you**
 22 **performed in this case, I'd like to direct your**
 23 **attention -- well, before we move on to the**
 24 **calculations, let me just direct your attention to**
 25 **page 14 of your expert report and ask whether there are**

610

1 **any other findings from your research that are reflected**
 2 **in your opinions in this case.**
 3 A. On page 14, we -- our position is that for --
 4 that all individuals whose records were stored on the
 5 LabMD servers are at increased risk of fraud, but we did
 6 not quantify that.
 7 **Q. Terrific. And I'm going to ask you about that**
 8 **in just a moment.**
 9 **But with respect to medical identity fraud, did**
 10 **you reach any conclusions from data that you've**
 11 **collected at Javelin with respect to medical identity**
 12 **fraud?**
 13 A. Yes. Our -- we did not -- I'm sorry -- on
 14 that.
 15 **Q. So, Mr. Van Dyke, just to help orient you here,**
 16 **I think at figure 4 on page 14 of your expert report you**
 17 **have described for the court the incidence of medical**
 18 **identity fraud.**
 19 A. That's correct.
 20 **Q. Okay. Can you describe for the court what that**
 21 **figure 4 represents.**
 22 A. Certainly. These are individual -- this
 23 represents the average number -- I'm sorry -- the total
 24 amount of consumers who were victims of medical
 25 identity fraud, and we're describing that as people who

611

1 received medical services in somebody else's name.
 2 And what you'll see there on the right of that,
 3 for example, in 2012, it shows that three hundred
 4 fifty-five thousand four hundred twenty-five thousand
 5 individuals -- 2012, 355,425 individuals were victims of
 6 medical identity fraud in the 2012 year.
 7 **Q. Did you reach an opinion regarding the risk of**
 8 **medical identity theft in this case? And I direct your**
 9 **attention to page 13 of your report.**
 10 A. We did not reach a specific quantification of
 11 medical risk in this particular case.
 12 **Q. Did you reach a qualitative opinion regarding**
 13 **the risk of medical identity theft in this case?**
 14 A. Yeah. Our -- my qualitative view is that
 15 individuals are at a high risk of medical identity fraud
 16 and certainly in this case as well.
 17 **Q. I'd like to direct your attention, Mr. Van Dyke,**
 18 **specifically to the 1718 File incident.**
 19 **Did you reach an opinion regarding the likely**
 20 **consumer harm resulting from the unauthorized disclosure**
 21 **of the 1718 File? I believe this is captured in**
 22 **figure 3 of your report at page 12.**
 23 A. Yes.
 24 **Q. Describe for the court your conclusions with**
 25 **respect to the likely consumer harm resulting from the**

612

1 **unauthorized disclosure of the 1718 File.**
 2 A. So overall, the method I used was a calculation,
 3 as I described earlier, where I could make our most
 4 recent annual identity fraud survey comparable to the
 5 facts of the LabMD case by looking at a common factor,
 6 which is just focusing on individuals who had their
 7 Social Security number exposed.
 8 So in figure 3, we have through that table --
 9 through the calculations within that table, I've taken,
 10 first of all, on the set of numbers on the left side,
 11 the number of cases that I believe are going to result
 12 from exposure of the insurance aging report from LabMD,
 13 the number of cases for each type of fraud. Those are
 14 described in the far left side, existing card fraud --
 15 and I earlier said that was 13.1 percent and that --
 16 just for recollection, I'll just describe one. I won't
 17 describe them all -- that's the percent of people we
 18 found in our study who had their Social Security number
 19 exposed and went on to experience existing card fraud.
 20 **Q. So, Mr. Van Dyke, if I may interrupt, His Honor**
 21 **had a question about the relevance of card fraud in a**
 22 **case where no card data is -- has been otherwise**
 23 **addressed by the expert witnesses, and so explain to**
 24 **Judge Chappell why it is that card fraud is part of your**
 25 **conclusions in figures 2 and 3 on page 11 -- excuse**

613

1 **me -- 12 of your report.**
 2 A. Certainly.
 3 Yes, Your Honor, that's a very important
 4 question because identity criminals really piece
 5 together all relevant elements of an identity record
 6 that are required to pull off their fraud.
 7 And oftentimes it -- one -- possession in
 8 criminal -- in the criminal's hands of one high-value
 9 record, such as a Social Security number or other types
 10 of records, allow you then almost to leapfrog to gain
 11 possession of another record. And that's how these
 12 crimes are often perpetrated, or generally perpetrated I
 13 should say.
 14 **Q. So returning your attention to figure 3 on**
 15 **page 12 of your report, did you reach a conclusion**
 16 **regarding the total out-of-pocket costs that consumers**
 17 **will experience as a result of the 1718 File**
 18 **disclosure?**
 19 A. I did.
 20 **Q. And what is your opinion?**
 21 A. My opinion is that the total out-of-pocket
 22 costs, which we label there Consumer Cost, same thing,
 23 for the 1718 File or insurance aging report file will
 24 sum up to \$562,297.
 25 **Q. And describe briefly for the court how you**

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1 **reached that conclusion.**
 2 A. So, briefly, this is by taking those three
 3 incidence rates, the -- this is derived -- those three
 4 figures under the heading of Consumer Cost are derived
 5 by taking the individual incidence rates for each type
 6 of fraud to arrive at the number of cases shown.
 7 **Q. And that's in -- excuse me for interrupting,**
 8 **Mr. Van Dyke.**
 9 **That is in the first column that appears to the**
 10 **right of the fraud types in figure 3; is that correct?**
 11 A. Correct.
 12 **Q. Okay. And then when you have calculated the**
 13 **number of cases, what more do you do to reach the**
 14 **out-of-pocket or consumer cost experienced by consumers**
 15 **on the basis of the 2013 identity fraud survey?**
 16 A. So once I have that number of cases total for
 17 each type of the three frauds, I then multiply each of
 18 those three numbers by the average consumer cost from
 19 our survey. And once I multiply that, I get each of
 20 those three figures shown under the heading of
 21 Consumer Cost, and then I sum the three figures to
 22 arrive at the 562,000.
 23 **Q. Did you reach an opinion regarding the total**
 24 **number of resolution hours it would take for consumers**
 25 **to resolve the frauds that result from the unauthorized**

615

1 **disclosure of the 1718 File?**
 2 A. I did.
 3 **Q. And what was your conclusion?**
 4 A. My conclusion is that the total resolution hours
 5 required as a result of the 1718 insurance aging report
 6 file will be 38,697 hours.
 7 **Q. And how did you reach that conclusion?**
 8 A. The process was overall the same as that which
 9 I've previously described with the -- for consumer
 10 cost, with the only difference being that I took the
 11 average resolution hours for each of the three types of
 12 frauds as listed in our annual identity fraud survey
 13 report and used that rather than the average consumer
 14 cost figure.
 15 **Q. With respect to the 1718 File disclosure, did**
 16 **you reach a conclusion regarding the total fraud amount**
 17 **that would result from the unauthorized disclosure of**
 18 **the 1718 File?**
 19 A. Yes, I did.
 20 **Q. And what was your conclusion?**
 21 A. My conclusion is that exposure of the 1718 File,
 22 the insurance aging report, will total \$4,824,338.
 23 **Q. And please describe for the court how you**
 24 **reached that conclusion.**
 25 A. The same process as used for -- as I described

616

1 with consumer cost and resolution hours, except I used
 2 the average fraud amount figure from my 2013 identity
 3 fraud survey as the final multiplier to arrive at the
 4 average -- total fraud amount for each of the listed
 5 fraud types.
 6 **Q. Who suffers the economic impact that is a**
 7 **consequence of identity theft?**
 8 A. It's both consumers and commercial entities at
 9 which the transaction happens, banks, card issuers,
 10 merchants and others, as well as law enforcement
 11 agencies.
 12 **Q. With respect, though, to the consumer cost**
 13 **calculations, are those costs often borne exclusively by**
 14 **consumers?**
 15 A. Yes. Those are borne 100 percent by consumers.
 16 MS. VANDRUFF: The court's indulgence,
 17 Your Honor.
 18 (Pause in the proceedings.)
 19 JUDGE CHAPPELL: How much more time do you think
 20 you'll need?
 21 MS. VANDRUFF: Thank you, Your Honor. Twenty or
 22 thirty minutes would be my estimate.
 23 JUDGE CHAPPELL: All right. We're going to take
 24 a quick break now.
 25 MS. VANDRUFF: Thank you, Your Honor.

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1 JUDGE CHAPPELL: And we'll reconvene at 3:55.
 2 We're in recess.
 3 (Recess)
 4 JUDGE CHAPPELL: We're back on the record.
 5 Before you start your questions, I want to note
 6 for the record, this is Ironsides, also known as
 7 Chris Mitchell. He's been bailiff. He served with
 8 honor and distinction for many years here as bailiff of
 9 this court. This is his last official day, and he will
 10 be missed.
 11 MR. SHERMAN: Did he know that, Judge, before?
 12 JUDGE CHAPPELL: Grasshopper has moved on, and
 13 Officer Proctor is our new bailiff. He has huge shoes
 14 to fill, so...
 15 Go ahead.
 16 MS. VANDRUFF: Thank you, Your Honor.
 17 Congratulations, Officer Proctor.
 18 BY MS. VANDRUFF:
 19 **Q. Mr. Van Dyke, I'd like to direct your attention**
 20 **now to the disclosure of the day sheets that were**
 21 **founded by the Sacramento Police Department, and**
 22 **specifically I direct your attention to figure 2 on**
 23 **page 12.**
 24 **Did you reach an opinion regarding the likely**
 25 **consumer harm resulting from the unauthorized disclosure**

618

1 **of the Sacramento day sheets?**
 2 A. Yes.
 3 **Q. Is that reflected in figure 2 of your expert**
 4 **report on page 12?**
 5 A. Yes, it is.
 6 **Q. I'd like to talk about the calculations that are**
 7 **reflected in figure 2 on page 12 of your expert report**
 8 **that appears at CX 0741.**
 9 **Specifically, how did you determine the number**
 10 **of consumers that would experience each of the types of**
 11 **fraud described in figure 2, specifically, existing**
 12 **card fraud, existing non-card fraud and new account**
 13 **fraud?**
 14 A. Well, similar to the process I described a few
 15 moments ago for the 1718 insurance aging report, took
 16 those, those individual incidence rates, which I
 17 mentioned to be 13.1 percent for existing card fraud,
 18 7.1 percent for existing non-card fraud, and also
 19 coincidentally 7.1 percent for new account fraud, and
 20 multiplied that by the 600 individuals who had had their
 21 PII exposed through the day sheets.
 22 And the way I arrived at that individual
 23 incidence rate again was by taking that commonality
 24 that -- from our annual identity fraud survey, using a
 25 cross-tabulation method to determine the quantity of

619

1 people who had been notified of a data breach in the
 2 last year specifically related to their Social Security
 3 number and had gone on to experience fraud.
 4 **Q. And so that calculation is reflected in the**
 5 **first column to the right of the headers in figure 2; is**
 6 **that correct?**
 7 A. That is correct, yeah.
 8 **Q. And what -- how many consumers do you calculate**
 9 **will experience identity fraud as a result of the**
 10 **unauthorized disclosure of the Sacramento day sheets?**
 11 A. So my calculation is that as a result of the
 12 Sacramento-based exposure of day sheets, the 600 day
 13 sheets, that 164 people will go on, in total, to
 14 experience fraud broken out in the three individual
 15 numbers by type of fraud shown in figure 2.
 16 **Q. And for the benefit of the record, Mr. Van Dyke,**
 17 **you just said there were 600 day sheets.**
 18 **Is it that there are 600 day sheets or does**
 19 **600 reflect a different number? And I direct your**
 20 **attention of course to the top of that page 12.**
 21 A. Oh, okay. Right.
 22 So 600 individuals had their PII exposed
 23 through the day sheets in the Sacramento case. That
 24 number -- we multiplied our individual incidence rates
 25 of the 13.1 times 600 SSNs equals 79 cases of projected

620

1 existing card fraud, the same logic goes for existing
 2 non-card fraud at 7.1 percent times 600 exposed records
 3 in the Sacramento day sheets incident equals 43, and
 4 then the same goes for new account fraud, 600 times
 5 7.1 equals 43.
 6 **Q. Did you calculate the out-of-pocket costs that**
 7 **will be experienced by consumers as a consequence of**
 8 **the unauthorized disclosure of the Sacramento day**
 9 **sheets?**
 10 A. Yes, I did.
 11 **Q. And what was your conclusion?**
 12 A. My conclusion was that the out-of-pocket costs,
 13 which we've put under the heading of Consumer Cost --
 14 it's synonymous there -- will total for all three of the
 15 individual types of fraud and individual figures listed
 16 underneath the heading Consumer Cost, they will sum up
 17 to \$36,277 as a result of the Sacramento day sheets
 18 exposure.
 19 **Q. How did you reach that conclusion?**
 20 A. The same process as before but instead using an
 21 average consumer cost figure from my 2013 identity fraud
 22 survey, where I took the percentage of individuals in my
 23 nationally representative survey who had had been -- who
 24 had been informed that their information had been
 25 breached in the last twelve months and the breached

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1 information included a Social Security number.
2 A cross-tabulation of that information produced
3 a fraud -- I'm sorry -- an average consumer cost. And I
4 took that average consumer cost figure for each of the
5 types of fraud listed, existing card fraud, existing
6 non-card fraud and new account fraud, multiplied it by
7 the number of cases I described earlier, and that
8 resulted in each of the three figures listed.

9 **Q. When you talk about the average consumer cost,**
10 **just for the benefit of the record, is that the average**
11 **costs that are reflected on page 9 of your expert**
12 **report, Mr. Van Dyke?**

13 A. I'm sorry. Could you repeat that question,
14 please.

15 **Q. Certainly.**

16 **You were describing for the court how you**
17 **reached the calculation of consumer costs that appear in**
18 **figure 2 on page 12 of your report, and you described**
19 **applying, as a part of the calculation, the average**
20 **consumer cost for each of existing card fraud, existing**
21 **non-card fraud and new account fraud.**

22 **And I just wanted to confirm that when you say**
23 **"the average consumer cost" that those are the figures**
24 **that are reflected on page 9 of your expert report.**

25 A. Yes. That's exactly right.

622

1 **Q. Okay. With respect to the Sacramento day**
2 **sheets, did you calculate the total resolution hours**
3 **that would follow for consumers to resolve the frauds**
4 **that result from the unauthorized disclosure of the**
5 **Sacramento day sheets?**

6 A. Yes.

7 **Q. And what was your conclusion?**

8 A. So my conclusion of resolution hours for the
9 Sacramento day sheets exposure was that the total
10 resolution hours for those -- the -- the, well,
11 164 individuals that I project to -- project would
12 become victims of fraud among the 600 who had records
13 exposed will result in a total of 2,497 resolution
14 hours.

15 **Q. And how did you reach that conclusion?**

16 A. Again, the same process where I'm taking the
17 incidence rate multiplied by 600 records exposed to
18 arrive at the number of cases for each individual fraud
19 type and then multiplying that by the average resolution
20 hours shown in my most recent identity fraud survey
21 report, and the result of that multiplication produces
22 the numbers shown on the right side underneath
23 Resolution Hours.

24 **Q. And again, when you describe the average**
25 **resolution hours, those are detailed on pages 9 through**

623

1 **11 of your report; is that correct?**

2 A. That is correct.

3 **Q. Mr. Van Dyke, did you reach a conclusion**
4 **regarding the total fraud amount that would result from**
5 **the unauthorized disclosure of the Sacramento day**
6 **sheets?**

7 A. Yes, I did.

8 **Q. What was your conclusion?**

9 A. So my conclusion was that the total fraud amount
10 across all victims that I project will materialize from
11 exposure to the Sacramento day sheets will, again in
12 total, be \$311,248.

13 **Q. How did you reach that conclusion?**

14 A. So again the same process where I use the
15 projected incidence rates resulting from Social Security
16 numbers from Javelin's identity fraud survey report for
17 each of the fraud types listed, but instead of
18 multiplying those resulting number of cases shown under
19 the Number of Cases heading by previous average amounts,
20 I multiplied it by the average fraud amounts -- sorry
21 for not stating that as clear as I could -- the average
22 fraud amount from our annual identity fraud survey
23 report to come up with the figures shown under the
24 Fraud Amount heading.

25 **Q. And again, the consumer cost and the resolution**

624

1 **hours detailed in figure 2, are those both borne**
2 **exclusively by consumers?**

3 A. Yes, they are.

4 **Q. And how about the fraud amount? Who bears the**
5 **cost of the fraud amount?**

6 A. The fraud amount is the face value of the crime.
7 That is, the best way to think about that is the amount
8 that the criminal at least initially got away with,
9 you know, again on the face of it.

10 **Q. Does that include some consumer costs or costs**
11 **that will be borne by consumers?**

12 A. Yes. Yes, it is.

13 **Q. But it also includes costs that may be borne by**
14 **businesses; is that correct?**

15 A. Yeah. The majority of that, of the fraud
16 amount, the great majority of that is borne by
17 businesses and -- yes.

18 **Q. Mr. Van Dyke, I'd like to turn your attention**
19 **back to page 8 of your report and figure 1.**

20 **You described generally for the court what**
21 **figure 1 represents. But for 2013, please describe for**
22 **His Honor what Javelin's findings were with respect to**
23 **the incidence rate of fraud experienced by individuals**
24 **who in the last twelve months received a notification**
25 **that their personal information had been compromised in**

1 a data breach.

2 A. Yes.

3 Your Honor, we found in the most recent year,
4 2013 year, that of all individuals who had been
5 notified of any type of a data breach, who received a
6 data breach notification letter, that is, 30.5 percent
7 of those individuals had also been a victim of identity
8 fraud.

9 Q. How does that rate compare with prior years?

10 A. As shown in figure 1 in the dark red bars, that
11 figure has been rising steadily over each successive
12 year.

13 Q. And can you draw any conclusions regarding the
14 strength of the correlation between the unauthorized
15 disclosure of Social Security numbers and the incidence
16 of identity fraud?

17 A. I'm sorry. Could you repeat that question,
18 please.

19 Q. Certainly.

20 Can you draw any conclusions regarding the
21 strength of the correlation between the unauthorized
22 disclosure of Social Security numbers and the incidence
23 of identity fraud?

24 MR. SHERMAN: Objection. Is that
25 Social Security numbers in general?

1 shown quite dramatically in the rise of those red bars
2 over time -- that exposure of PII is significantly more
3 likely, dramatically more likely, year over year over
4 the last several years shown, to lead to individuals
5 experiencing identity fraud.

6 MS. VANDRUFF: The court's indulgence,
7 Your Honor.

8 BY MS. VANDRUFF:

9 Q. So, Mr. Van Dyke, just to be more precise then,
10 with respect to figure 1, have you been able to draw a
11 conclusion regarding the strength of the correlation
12 between the unauthorized disclosure of personal or
13 financial information that's compromised in a data
14 breach and the incidence of identity fraud?

15 A. Yes, we have.

16 Q. And what is your conclusion?

17 A. My conclusion is that there is a -- number one,
18 there's a very clear correlation between exposure of
19 PII and identity fraud and, number two, that that
20 correlation is growing very rapidly over the last
21 several years.

22 Q. Mr. Van Dyke, I'd like to turn your attention,
23 please, to pages 12 and 13 of your expert report and
24 ask you whether you reached an opinion regarding the
25 likely consumer harm resulting from LabMD's failure to

1 If you -- well, I object to the question. I
2 object to the form of the question.

3 JUDGE CHAPPELL: Do you want to rephrase?

4 MS. VANDRUFF: I'd be happy to give it a shot,
5 Your Honor.

6 BY MS. VANDRUFF:

7 Q. Mr. Van Dyke, this morning in characterizing
8 figure 1, you talked about the correlation --

9 JUDGE CHAPPELL: I'm not sure we have to go that
10 far afield. If I understand the objection, it was so
11 broad to encompass disclosure anywhere anyhow.

12 Did you want to tether it to this case?

13 MS. VANDRUFF: Thank you, Your Honor.

14 BY MS. VANDRUFF:

15 Q. Mr. Van Dyke, based on figure 1 and the data
16 that has been collected by Javelin, have you been able
17 to reach a conclusion regarding the strength of the
18 correlation between the unauthorized disclosure of
19 Social Security numbers in a data breach and the
20 incidence of identity fraud?

21 A. Well, through figure 1, I've been able to draw
22 a conclusion regarding the correlation of the exposure
23 of PII, sensitive information, information sensitive
24 enough to require a data breach notification letter.

25 And my conclusion in that -- and it's really

1 have provided reasonable and appropriate security for
2 the personally identifiable information maintained on
3 its computer networks.

4 A. Yes.

5 Q. And what was that conclusion?

6 A. The conclusion about the extent of the harm
7 is -- which in -- excuse me. I believe that's what
8 you're asking. Right?

9 Q. Well, let me direct your attention specifically,
10 sir, to paragraph 5 that appears on page 12.

11 And with respect to the consumers whose
12 personal -- personally identifiable information was
13 maintained by LabMD, did you reach an opinion regarding
14 the likely consumer harms resulting from LabMD's
15 failure to have provided reasonable and appropriate
16 security?

17 A. Yes, I did.

18 Q. And what was that conclusion?

19 A. So my conclusion is that all of this information
20 is of value in the commission of a fraud, and I've
21 quantified it as shown in figures 2 and 3 on that
22 page 12.

23 Q. So figures 2 and 3 quantify the harm as it
24 relates to the Sacramento day sheets and the 1718 File;
25 is that correct?

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1 A. That is correct.

2 **Q. Have you reached a qualitative opinion regarding**

3 **the likelihood of consumer harm resulting from LabMD's**

4 **failure to provide reasonable and appropriate security**

5 **for the personally identifiable information on their**

6 **network?**

7 A. Yes. My conclusion is that consumers are at

8 greater risk of fraud.

9 **Q. And that -- the consumers who are at a greater**

10 **risk of fraud are the 750,000 consumers for whom LabMD**

11 **maintains personally identifiable information?**

12 A. That is correct, yes.

13 MR. SHERMAN: Your Honor, I object to that

14 testimony because I don't believe that's anywhere in his

15 report.

16 Specifically with regard to the

17 750,000 individuals whose information is maintained on

18 LabMD's network.

19 MS. VANDRUFF: And Your Honor, if I could ask

20 for your indulgence for just one moment, I'd be happy to

21 demonstrate and lay that foundation.

22 BY MS. VANDRUFF:

23 **Q. Mr. Van Dyke -- do I have permission to proceed,**

24 **Your Honor?**

25 JUDGE CHAPPELL: Go ahead.

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1 BY MS. VANDRUFF:

2 **Q. Mr. Van Dyke, I direct your attention to**

3 **paragraph 5 that appears on pages 12 and 13 of your**

4 **expert report.**

5 **Mr. Owens, if we could pair those up on the**

6 **screen, please. And get 13 -- yeah. Thank you.**

7 **Mr. Van Dyke, in your report, do you offer an**

8 **opinion regarding the consequence of LabMD's failure to**

9 **provide reasonable and appropriate security for the**

10 **personally identifiable information it maintains on its**

11 **computer networks as it relates to the 750,000 consumers**

12 **for whom it maintains personally identifiable**

13 **information?**

14 A. Yes, I do.

15 **Q. Where does that opinion appear?**

16 A. That is on the top of page 13. It's the part

17 that starts after the comma on what's shown here.

18 JUDGE CHAPPELL: Unless he's doing that

19 telepathically, let's not guide the witness. Let him

20 find it. Thank you.

21 I just saw it was being highlighted before he

22 answered the question.

23 MS. VANDRUFF: Certainly, Your Honor. No.

24 Understood.

25 And Your Honor, I think there's a pending

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1 objection, so I don't know...

2 JUDGE CHAPPELL: Are you satisfied,

3 Mr. Sherman?

4 MR. SHERMAN: I am. I withdraw the objection.

5 JUDGE CHAPPELL: Thank you.

6 MS. VANDRUFF: Thank you, Counsel.

7 BY MS. VANDRUFF:

8 **Q. Mr. Van Dyke, you've provided the court with**

9 **data regarding other harms, specifically the harms that**

10 **result, in your opinion, from the unauthorized**

11 **disclosure of the 1718 File and the Sacramento day**

12 **sheets.**

13 **Are you able to provide a quantification of the**

14 **risk that LabMD's failure to have provided reasonable**

15 **and appropriate security for the personally identifiable**

16 **information maintained on its computer networks risked**

17 **exposing 750,000 consumers to a likelihood of a wide**

18 **variety of identity frauds?**

19 A. No. I have not quantified that risk.

20 **Q. Are you able to quantify that risk?**

21 A. I am not.

22 **Q. Why not?**

23 A. Because I do not have -- so far I do not have

24 evidence of a data exposure, notification of a data

25 breach, for individuals beyond those whose information

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1 was exposed in the 600 day sheets or the

2 9300 individuals whose records exposed in the

3 1718 File.

4 **Q. On page 12 of your report, at paragraph 5, you**

5 **say that consumers' personally identifiable information**

6 **is a target of data thieves.**

7 **On what do you base that opinion?**

8 A. There are really two factors that drive my

9 conclusion on that.

10 One is that we see, simply by doing the largest

11 survey in the nation on this for ten years running now,

12 the -- this correlation, this rising correlation and

13 this connection between these two incidents, one,

14 exposure of data and, two, fraud. You can't conduct

15 identity fraud without both of those things happening.

16 And the second is my experience within -- my

17 professional experience for 30 years in -- which has me

18 working with business leaders, of implementing systems

19 that make transactions, new account fraud -- new

20 account transactions and existing account transactions

21 possible.

22 MS. VANDRUFF: The court's indulgence,

23 Your Honor.

24 JUDGE CHAPPELL: Go ahead.

25 (Pause in the proceedings.)

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1 MS. VANDRUFF: I tender the witness,
 2 Your Honor.
 3 JUDGE CHAPPELL: All right.
 4 Cross?
 5 MR. SHERMAN: Yes, sir.
 6 - - - - -
 7 CROSS-EXAMINATION
 8 BY MR. SHERMAN:
 9 **Q. Good afternoon, Mr. Van Dyke.**
 10 A. Hello, Mr. Sherman.
 11 **Q. Mr. Van Dyke, I want to talk about the survey**
 12 **and how it was actually conducted.**
 13 **I believe when we spoke before, you indicated**
 14 **that the questions were formulated by Javelin; correct?**
 15 A. That is correct.
 16 **Q. There was some input from another organization.**
 17 **What organization was that?**
 18 A. We had some input from an organization called
 19 Knowledge Networks.
 20 **Q. That's right.**
 21 **And Knowledge Networks actually -- and correct**
 22 **me if I'm wrong -- Knowledge Networks actually conducted**
 23 **the survey; is that right?**
 24 A. They do what's called fielding of the survey. I
 25 think "conducting" is too broad of a term there.

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1 **Q. And they field the survey to groups that they**
 2 **have some prior relationship with; is that correct?**
 3 A. There was a -- there are panels. Yes.
 4 **Q. Right.**
 5 **Are those -- are they called study panels?**
 6 A. Typically just panels.
 7 **Q. Just panels?**
 8 **And these panels, what's your understanding with**
 9 **regard to the relationship between the panels and**
 10 **Knowledge Networks?**
 11 A. Could you rephrase that question, please.
 12 **Q. I'll try.**
 13 **Are you aware of whether or not**
 14 **Knowledge Networks reaches out to the individuals and**
 15 **gets their consent or agreement to participate in**
 16 **studies that Knowledge Networks will from time to time**
 17 **field?**
 18 A. Certainly there would -- they would always get
 19 their agreement in advance. Yes.
 20 **Q. Okay. And so Knowledge Networks is not like**
 21 **some studies that just will send out an e-mail blast and**
 22 **say, Hey, take my survey.**
 23 A. If -- if what you mean is they are -- they are
 24 much more selective, that would absolutely be the case.
 25 **Q. What I mean is that a panel is not like an**

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1 **e-mail blast in that a panel is a group of individuals**
 2 **who have agreed to participate in surveys from time to**
 3 **time.**
 4 A. That is correct.
 5 **Q. Okay. And that is how Knowledge Networks fields**
 6 **these surveys that they assist you in doing.**
 7 A. Correct.
 8 **Q. Is that how Knowledge Networks assisted you in**
 9 **doing the study or the survey -- I'm sorry -- that**
 10 **occurred in 2013?**
 11 A. That is among the areas. Yes.
 12 **Q. And when I say "the study," I am -- just for**
 13 **clarification sake, I am talking about the -- and I**
 14 **shouldn't say "study." I should say "survey."**
 15 **So that we can be clear, when I say "survey," I**
 16 **am talking about the survey that Javelin conducted, that**
 17 **Knowledge Networks fielded, upon which you rely for your**
 18 **conclusions in your report for this case.**
 19 **Can we have that as an understanding when I say**
 20 **"survey"?**
 21 A. I -- if you could just restate the question
 22 there so I make sure I know what I'm responding to.
 23 **Q. I can't.**
 24 **Could the court reporter read that back,**
 25 **please.**

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1 (The record was read as follows:)
 2 "QUESTION: So that we can be clear, when I say
 3 'survey,' I am talking about the survey that Javelin
 4 conducted, that Knowledge Networks fielded, upon which
 5 you rely for your conclusions in your report for this
 6 case.
 7 "Can we have that as an understanding when I say
 8 'survey'?"
 9 THE WITNESS: Yes.
 10 BY MR. SHERMAN:
 11 **Q. And the survey was conducted in 2013; is that**
 12 **correct?**
 13 A. That is correct.
 14 **Q. And the survey was fielded by Knowledge Networks**
 15 **in October of 2013?**
 16 A. Correct.
 17 **Q. Do you know how long from the time the survey**
 18 **was first fielded or sent to the panel that the survey**
 19 **was completed?**
 20 A. To the best of my recollection, that fielding
 21 began on October 9, 2013 and concluded on October 23,
 22 2013.
 23 **Q. And so is it fair to say that the results of the**
 24 **survey were in on or about October 23, 2013?**
 25 A. Are you asking if they concluded on the 23rd

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1 or --
2 **Q. Well, I may have misstated the date. I might**
3 **have forgotten what you just said when the survey ended.**
4 **I'm not sure. But you said from October 13th I thought**
5 **through the 23rd.**
6 A. I believe I said October -- to the best of my
7 recollection -- I'm going off memory here --
8 October 9th through the 23rd was the beginning and the
9 ending of the fielding period.
10 **Q. Okay. And so after the 23rd, how long did it**
11 **take Javelin to analyze the figures and come up with the**
12 **survey report?**
13 A. So analyze the figures and come up with our
14 survey report, so that -- we came up with -- and if
15 you'll allow me to take just a minute here, I'll refer
16 to our final publication date. That's the most accurate
17 way for me to answer your question.
18 We published the study on February of 2014, so
19 the correct answer to your question -- and I don't have
20 an exact date here -- I believe that was early February,
21 so that period would be -- and I can't recall if you
22 asked about -- I think you asked about the conclusion of
23 our fielding?
24 **Q. When you came up with your report. And the**
25 **publication date is fine, so if it's February 2014, I'll**

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1 **accept that.**
2 A. Okay.
3 **Q. So February 2014 is the publication date?**
4 A. The publication date, correct.
5 **Q. Fantastic.**
6 **When were you contacted by the FTC to -- when**
7 **did they ask if you would be willing to render an**
8 **opinion in this case?**
9 A. Oh, I could not answer with precision on that.
10 That was sometime in the first half of 2013.
11 **Q. Okay. So it was prior to the survey being**
12 **fielded; correct?**
13 A. That is correct.
14 JUDGE CHAPPELL: Let's mark your spot there.
15 Could you put up on the screen the witness'
16 expert report page 13, please.
17 MS. VANDRUFF: Would you like complaint counsel
18 to do that, Your Honor?
19 JUDGE CHAPPELL: Yes. Whoever did it earlier
20 and highlighted it. That's what I want to see.
21 MS. VANDRUFF: Page 13.
22 JUDGE CHAPPELL: The part that was getting magic
23 highlighting done.
24 MS. VANDRUFF: I missed the magic highlighting,
25 Your Honor. I'm sorry about that.

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1 JUDGE CHAPPELL: I want to see that point.
2 I think it was page 13, according to the
3 record.
4 It's wherever you directed him to after the
5 objection, about greater risk of harm for the
6 750,000 consumers.
7 MS. VANDRUFF: Oh, certainly, Your Honor.
8 MR. SHERMAN: That is page --
9 MS. VANDRUFF: Yeah.
10 MR. SHERMAN: -- 13.
11 MS. VANDRUFF: Pardon me, Counsel.
12 That begins on page 12 and continues to
13 page 13.
14 (Pause in the proceedings.)
15 JUDGE CHAPPELL: All right. We have an
16 objection there. The question was, to this witness,
17 whether they were exposed to a greater risk of harm.
18 His opinion says they were exposed -- they were exposed
19 to a likelihood of a wide variety of identity frauds,
20 et cetera, et cetera. It does not say exposed to a
21 greater risk of harm.
22 Do you want to renew your objection?
23 MR. SHERMAN: I do, Your Honor.
24 JUDGE CHAPPELL: It is sustained.
25 MR. SHERMAN: Thank you, Your Honor.

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1 JUDGE CHAPPELL: What he says in the report is
2 the opinion that will be considered.
3 MS. VANDRUFF: Thank you, Your Honor.
4 BY MR. SHERMAN:
5 **Q. Mr. Van Dyke --**
6 JUDGE CHAPPELL: You were just talking about --
7 MR. SHERMAN: I know where I was, Judge.
8 Thank you.
9 JUDGE CHAPPELL: -- when he was contacted.
10 MR. SHERMAN: Yes.
11 JUDGE CHAPPELL: I threw you off track, so I'm
12 trying to get you back on track.
13 MR. SHERMAN: I appreciate that, Judge. I'm
14 there now.
15 BY MR. SHERMAN:
16 **Q. And you said you were contacted in the first**
17 **half of 2013, which was prior to when the survey was**
18 **fielded; correct?**
19 A. Correct.
20 **Q. Did the fact that you were contacted by the FTC**
21 **to render an opinion in this case play any role in the**
22 **formulation of any of the questions on the survey?**
23 A. Oh, no.
24 **Q. And I think it's your testimony that you've been**
25 **doing this survey for approximately ten years.**

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1 A. That is correct.
 2 **Q. And that from time to time, year to year, the**
 3 **questions are changed slightly?**
 4 A. Yes.
 5 **Q. And what's the reason for changing the**
 6 **questions?**
 7 A. There are two reasons that we change questions
 8 slightly while maintaining longitudinal value.
 9 And the first reason, in no particular order,
 10 is that through the nature of our work in fraud related
 11 to security we want to ask -- we want to conduct
 12 research on new types of frauds or security methods that
 13 are emerging. You know, fraud and security issues are
 14 constantly change. We will change the survey based on
 15 that.
 16 Secondly, there are new types of transaction
 17 methods, technologies generally, such as those related
 18 to mobile, social media, and so forth, and those often
 19 lead to different patterns of fraud eventually, and
 20 we'll want to include those in our survey.
 21 And I should mention one more. Pardon me. And
 22 that is that sometimes we will identify or seek a new
 23 way of phrasing a question because we identify just
 24 simply a new research methodology opportunity.
 25 **Q. Mr. Van Dyke, were you asked to assume certain**

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1 **facts in formulating your opinion?**
 2 A. Yes.
 3 **Q. And -- I'm sorry. Could you put page 2 -- I**
 4 **don't know if you want to do that.**
 5 MS. VANDRUFF: I think it makes sense for your
 6 folks to control that.
 7 (Pause in the proceedings.)
 8 BY MR. SHERMAN:
 9 **Q. Yes, page 2.**
 10 **Do you see there on page 2 where it says**
 11 **"Assumptions and Considerations Affecting**
 12 **Determination," Mr. Van Dyke?**
 13 A. Yes, I do.
 14 **Q. In there, you indicate that "I have assumed that**
 15 **LabMD failed to provide reasonable and appropriate**
 16 **security for the personally identifiable information**
 17 **maintained on its computer networks."**
 18 **Did I read that correctly?**
 19 A. Yes.
 20 **Q. Were there any other assumptions that you made**
 21 **with regard to LabMD's security for the personal**
 22 **identifying information maintained on its computer**
 23 **networks?**
 24 A. No, there were not.
 25 **Q. Did you assume that as a result of your**

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1 **assumption that LabMD failed to provide reasonable and**
 2 **appropriate security for the personally identifiable**
 3 **information maintained on its computer networks that the**
 4 **1718 File and the day sheets escaped LabMD's possession**
 5 **as a result of that failure?**
 6 A. Yes.
 7 **Q. Is it accurate to say that you were not asked to**
 8 **make that assumption?**
 9 A. I don't believe that is accurate to say that.
 10 No.
 11 **Q. Okay. So you were asked not only to assume**
 12 **that LabMD failed to provide reasonable and appropriate**
 13 **security for the personally identifiable information**
 14 **maintained on its computer networks, but you were also**
 15 **asked to assume that the 1718 File and the day sheets**
 16 **escaped LabMD's possession as a result of that failure.**
 17 A. I don't believe it's accurate to state that I
 18 was asked to make that assumption.
 19 **Q. But you did make that assumption; is that**
 20 **correct?**
 21 A. No, that's not correct.
 22 **Q. Okay. So you changed your answer or you didn't**
 23 **understand the question?**
 24 JUDGE CHAPPELL: Can we make it clear what
 25 "that assumption" is? That was a pretty long question.

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1 BY MR. SHERMAN:
 2 **Q. It was.**
 3 **But once again if we look at page 2 of your**
 4 **report, under Assumptions and Considerations Affecting**
 5 **Determination, the second sentence says, "In rendering**
 6 **my expert opinions in this case, I have assumed that**
 7 **LabMD failed to provide reasonable and appropriate**
 8 **security for the personally identifiable information**
 9 **maintained on its computer networks."**
 10 **And you indicated that you did make that**
 11 **assumption; correct?**
 12 A. That is correct.
 13 **Q. Okay. My next question was whether or not you**
 14 **made a further assumption that based on LabMD's failure**
 15 **to provide reasonable and appropriate security for the**
 16 **personally identifiable information maintained on its**
 17 **computer networks that the 1718 File and the day sheets**
 18 **escaped LabMD's possession.**
 19 **Did you make that assumption as well?**
 20 A. I did not make that assumption, no.
 21 **Q. And the fact that the 1718 File and the day**
 22 **sheets were outside of LabMD's possession, did that play**
 23 **a role in your conclusions, your opinion?**
 24 A. The fact that they were outside LabMD's
 25 possession, yes, that played a role in my conclusion.

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1 **Q. And you concluded that they were outside of**
2 **LabMD's possession based on other evidence that you**
3 **reviewed in the case; correct?**

4 A. I can't agree to that in the way that you've
5 stated that.

6 **Q. Okay. Let me move on then.**

7 **In terms of arriving at your conclusions and**
8 **your opinions, does it matter to you how the 1718 File**
9 **and the day sheets escaped LabMD's possession?**

10 A. No, it does not matter to me.

11 **Q. In arriving at your conclusions and your**
12 **opinions, does it matter to you in whose possession the**
13 **1718 File and the day sheets are in?**

14 A. Yes. In the sense that they're in the hands of
15 unauthorized parties, otherwise known as -- otherwise
16 classified as a data breach.

17 **Q. Would it matter if the 1718 File and the**
18 **day sheets were in the hands of governmental entities?**

19 A. If that was an authorized party, in other words,
20 not a data breach, then that would matter because the
21 calculations wouldn't apply here. But that was not the
22 case in this instance.

23 **Q. How do you know it wasn't the case in this**
24 **instance?**

25 A. Because, according to the testimony that I've

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1 read, the 600 day sheets were found in the possession
2 of individuals that have pleaded no contest to identity
3 theft.

4 And in reading through Mr. Boback's testimony as
5 of late 2013, the 9300 PII records were found in as many
6 as four locations, four IP locations, so that's what I'm
7 relying on, is his statement.

8 **Q. Are you aware of who owned those IP locations**
9 **where the 1718 File was found?**

10 A. No. I'm relying on his testimony.

11 **Q. Would it matter then, in terms of your opinions**
12 **and conclusions, if those IP addresses belonged to,**
13 **let's say, government entities in Great Britain, a**
14 **government entity in Costa Rica, a government entity**
15 **here in the United States, and a government entity in**
16 **Mexico?**

17 A. No. All I would be concerned about is whether
18 those entities were authorized or unauthorized to be in
19 possession of that data.

20 **Q. So it appears then that you have assumed --**
21 **well, let me back up.**

22 **You gave a definition of a data breach;**
23 **correct?**

24 A. I did.

25 **Q. And what is that definition?**

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1 A. My definition is exposure of PII to unauthorized
2 parties.

3 **Q. And it doesn't matter who that unauthorized**
4 **party is, just what matters in your analysis is whether**
5 **or not the party was unauthorized; correct?**

6 A. Yeah. The who is defined by whether or not
7 they are authorized or not, so I'm looking for whether
8 or not that party who had exposure to the data was
9 authorized or unauthorized to be in possession of it.

10 JUDGE CHAPPELL: So you don't care if it's
11 Al Qaeda or Mickey Mouse.

12 THE WITNESS: I'm sorry?

13 JUDGE CHAPPELL: You don't care if it's Al Qaeda
14 or Mickey Mouse. It doesn't matter.

15 THE WITNESS: That is correct, sir.

16 JUDGE CHAPPELL: All right. Thank you.

17 BY MR. SHERMAN:

18 **Q. And so in terms of your calculations with**
19 **regard to the rate or incidence of identity fraud that**
20 **would occur, you do not take into consideration whether**
21 **the entity who possesses the unauthorized information**
22 **would have intent to do harm or not.**

23 A. No. That would be irresponsible for me to
24 measure something which could not be measured, that is,
25 their intent.

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1 **Q. Okay. And so really your figures, the rates of**
2 **and incidences of identity fraud, assume that those who**
3 **would be in possession of the information would have the**
4 **intent to do harm.**

5 A. No, that's not -- that's actually not correct.

6 **Q. Okay. So is it correct then that in looking at**
7 **your rate of identity fraud that it does not take into**
8 **consideration -- that rate of return that you have in**
9 **your report does not take into consideration who is in**
10 **possession of the information?**

11 A. Could I ask you to restate that, please.

12 **Q. The rate of identity fraud based on your report**
13 **does not take into consideration who is in possession**
14 **of the unauthorized personally identifiable**
15 **information.**

16 A. I'll say yes, it does, based on the sole fact
17 that it considers only that the party who is in
18 possession of it was either authorized or unauthorized,
19 so to that I have to answer yes, it does take that into
20 account on that single factor, a yes or no answer to was
21 the possessing party authorized or unauthorized, and
22 that's it.

23 **Q. So I think you also testified that you did not**
24 **do any independent analysis of LabMD's data security**
25 **practices, policies or procedures; correct?**

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1 A. That is correct.
 2 **Q. And that you assumed that LabMD's practices,**
 3 **policies and procedures as it relates to their data**
 4 **security was inadequate; correct?**
 5 A. I'd like to state that more precisely just
 6 because it's -- I believe it's an important point.
 7 I have assumed that LabMD failed to provide
 8 reasonable and appropriate security for the PII
 9 maintained on its computer network.
 10 **Q. Okay. If it is found that LabMD did not fail,**
 11 **in other words, provided reasonable and appropriate**
 12 **security for the personally identifiable information**
 13 **maintained on its computer network, is it your**
 14 **assumption then that the 1718 File and the day sheets**
 15 **would not have left the possession of LabMD?**
 16 A. I didn't render an opinion and I'm not
 17 rendering an opinion on what would result from LabMD's
 18 having adequate security or not.
 19 And the reason for that is very important.
 20 Thus having studied fraud, my work in fraud has caused
 21 me to be very careful about security, where I don't
 22 want to opine on what would be adequate security or not
 23 but rather to say, when information is exposed, in this
 24 case found in the hands of people who have pleaded no
 25 contest to identity theft, what the likelihood of harm

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1 is.
 2 **Q. Mr. Van Dyke, what is cross-tabulation? How**
 3 **would you define that?**
 4 A. Yeah. Cross-tabulation is -- I used the kind of
 5 simplistic example earlier just to put something that
 6 sounds complex in everyday terms -- when we ask
 7 individuals a wide variety of questions, as our surveys
 8 often do, comparing the results of individuals who
 9 responded in a particular way to one question to those
 10 individuals -- it might be the same individuals or
 11 different individuals -- who answered in a particular
 12 way to another set of questions.
 13 So the example I gave earlier was individuals
 14 who said they were in Washington, D.C. last Wednesday
 15 and individuals who said, I had apple pie last
 16 Wednesday. And we compare one to the other and say,
 17 well, there's almost like an overlapping circle, so many
 18 people had apple pie in Washington, D.C. last Wednesday
 19 because of the overlap or the comparison.
 20 **Q. And in terms of utilizing cross-tabulation, do**
 21 **you do that to arrive at conclusions on the same survey**
 22 **or do you take information over a period of years and**
 23 **cross-tabulate it to come to conclusions?**
 24 A. Oh. We would never -- if I'm understanding
 25 your question, we would never compare the results of

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1 individuals who respond in a particular way to --
 2 within one survey -- and I need to be very careful
 3 about the way I'm communicating this -- with a set of
 4 respondents from another survey.
 5 In other words, we wouldn't mash the data
 6 together, so to speak.
 7 We would compare the results of a cross-tab,
 8 though -- this is where it might get slightly confusing.
 9 We would do a cross-tabulation within one survey, as we
 10 did -- as I did in figure 1, we did a cross-tabulation,
 11 for example, within that survey, as we do in almost
 12 every survey. Cross-tabulations were done within that
 13 survey, and we compared the results of that
 14 cross-tabulation to the results of a cross-tabulation in
 15 another survey.
 16 **Q. So another survey of the same kind for a**
 17 **different year.**
 18 A. Yes.
 19 **Q. Because if you look at figure 1, it appears that**
 20 **there's years 2010, 2011, 2012 and 2013 listed there;**
 21 **correct?**
 22 A. That's correct.
 23 **Q. So are you saying that these numbers for each**
 24 **year are the result of a cross-tabulation?**
 25 A. Within each year.

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1 **Q. Okay.**
 2 A. Yes. Within the data set for each year.
 3 **Q. What was cross-tabulated?**
 4 A. So for figure 1 --
 5 **Q. And let me make it a little more simple.**
 6 A. Sure.
 7 **Q. What was cross-tabulated in year 2013?**
 8 A. So in 2013 we were comparing the results of
 9 questions about -- about two types of occurrences that
 10 respondents, individual survey respondents, had -- had
 11 encountered. Those -- so I'm -- those experiences
 12 would be related to both data breaches and actual cases
 13 of fraud. And we're comparing the results of a
 14 question -- a series of questions about each one of
 15 those occurrences, breach and fraud, to one another, and
 16 that is the cross-tabulation.
 17 **Q. So is it fair to say that there is a question in**
 18 **the survey in 2013 that concerns itself with data breach**
 19 **and there's also a question in the survey for 2013 that**
 20 **concerns itself with an instance of fraud?**
 21 A. Yes. There's several in each -- actually in
 22 each one of those years, but yes to 2013, several
 23 questions.
 24 **Q. All right. And so when we look at figure 1,**
 25 **just below that it says, "Q2: In the last 12 months,**

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1 **have you been notified by a business or other**
 2 **institution that your personal or financial information**
 3 **has been lost, stolen, or compromised in a data breach?"**
 4 **Did I read that correctly?**
 5 A. Yes.
 6 **Q. Did you cross-tabulate those three incidences,**
 7 **lost, stolen, and or compromised in a data breach?**
 8 A. No. That wasn't the way we calculated it.
 9 **Q. Okay. So for question 2, if a survey**
 10 **participant answered yes to that question, could that**
 11 **survey participant have had his -- well, could that**
 12 **survey participant have been notified by a business or**
 13 **other institution that his personal or financial**
 14 **information had simply been lost?**
 15 A. Could have been, yes.
 16 **Q. And he could have responded yes to that**
 17 **question; correct?**
 18 A. To our question. Yes.
 19 **Q. And so, likewise, a survey participant answering**
 20 **question 2 who merely had been notified by a business or**
 21 **other institution that his personal or financial**
 22 **information had been stolen, he could answer yes to**
 23 **question 2 as well; correct?**
 24 A. That is correct.
 25 **Q. And finally, a survey participant reads**

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1 **question 2. He only had been notified that his**
 2 **personal identifying information had been compromised**
 3 **due to a data breach, so he checks "yes" as well;**
 4 **correct?**
 5 A. That's correct.
 6 **Q. And so all participants then who answered yes to**
 7 **question 2 as it's stated beneath figure 1 could have**
 8 **had any one or the other of those instances occur within**
 9 **the last twelve months; correct? Or at least be**
 10 **notified that the incident had occurred within the last**
 11 **twelve months?**
 12 A. Yes. Especially the last part of what you
 13 asked. It's the notification that's critical.
 14 And the respondents have -- we have found
 15 through years of research that respondents, survey
 16 respondents, have -- respond best to particular words
 17 "such as lost, stolen or compromised," but we're
 18 referring to the same thing. And the critical trigger
 19 here is the notification by a business or institution
 20 because that falls under actual legal guidelines,
 21 notification requirements.
 22 **Q. And so this number 30.5 percent represents what**
 23 **again?**
 24 A. So my research finds that among people who
 25 answered yes to the general question listed in the lower

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1 left there --
 2 **Q. Question 2.**
 3 A. Question 2 -- among people that answered yes to
 4 that, when we run a cross-tab, we find that 30.5 percent
 5 of that population, those people that answered yes to
 6 that, the general form of that question shown in
 7 question 2, 30.5 percent or roughly one in three have
 8 also experienced identity fraud or identity theft in the
 9 same twelve-month period.
 10 **Q. So we've got two time periods going on in that**
 11 **question; correct? One, been notified within the past**
 12 **twelve months; correct?**
 13 A. Yes.
 14 **Q. And it's the past twelve months of responding to**
 15 **the survey.**
 16 A. That's correct.
 17 **Q. So the time period runs from the day the**
 18 **respondent responds to the survey twelve months back**
 19 **from that day; correct?**
 20 A. That's right.
 21 **Q. Okay. And I think you just testified that**
 22 **through cross-tabulation you determined that those**
 23 **individuals also had experienced some type of identity**
 24 **theft within that same twelve-month period prior to**
 25 **answering the question on the survey; correct?**

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1 A. Correct.
 2 And if I may add just for clarity, when we refer
 3 to identity theft there, we're talking about actual
 4 transaction. Yes.
 5 **Q. What do you mean by "actual transaction"?**
 6 A. So just for clarity -- and you didn't state it,
 7 Mr. Sherman, but sometimes folks we found in our
 8 experience mistakenly arrive at this conclusion, equate
 9 identity theft to a data breach.
 10 So pardon me. I just thought it might -- would
 11 be helpful for me to add in, by identity theft and in
 12 that fraud incidence rate we're looking at, 30.5 percent
 13 of data breach victims who have experienced fraud or
 14 identity theft, as you characterized it, those are
 15 people who have actually had a fraudulent transaction
 16 occur in their name.
 17 I just wanted to distinguish that from any other
 18 event that -- because that often happens.
 19 **Q. And I'm -- I have no experience in surveys or**
 20 **analyzing this data, but I'm going to try.**
 21 A. Okay.
 22 **Q. You can also glean from this subset of people**
 23 **that answered yes to question 2, based on your**
 24 **cross-tabulation, that these people also were aware that**
 25 **they were the victims of some identity fraud.**

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1 A. "These people" meaning fraud victims?
 2 **Q. No.**
 3 **These people who answered yes to**
 4 **question 2 and by way of your cross-tabulation which you**
 5 **testified also meant there was some type of identity**
 6 **fraud or transaction occurred, can you extrapolate from**
 7 **that that these people were aware that they were in fact**
 8 **victims of identity fraud?**
 9 A. Yes. They -- they had to have known -- I hope
 10 I'm answering your question. They had to have known,
 11 those individuals, that they were a victim of identity
 12 fraud because they told us they were by definition.
 13 **Q. So then is it fair to conclude that people who**
 14 **have been notified by a business or other institution**
 15 **that their personal or financial information had been**
 16 **lost, stolen, or compromised in a data breach became**
 17 **aware that they were victims of some type of identity**
 18 **fraud within the prior twelve months of answering your**
 19 **survey question?**
 20 A. Yes. If you're asking if, case of the tall red
 21 bars, were those individuals represented by that tall
 22 red bar through that cross-tabulation, were they victims
 23 of a data breach and were they victims of identity fraud
 24 in the last twelve months, the answer is yes.
 25 **Q. And so as that applies to certain assumptions**

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1 **made about the LabMD case here, which is that the day**
 2 **sheets were not in the possession of LabMD and the**
 3 **assumption that they were in the possession of someone**
 4 **unauthorized to have them, they were notified that that**
 5 **information was out there, then shouldn't there be a**
 6 **rate of knowledge that these people have that they are**
 7 **victims of identity fraud as well as a similar rate of**
 8 **actual identity fraud occurring amongst the people whose**
 9 **names appear on the day sheet?**
 10 A. I'm sorry. I'm not sure I'm --
 11 **Q. That's a long question.**
 12 A. I wasn't able to follow it.
 13 JUDGE CHAPPELL: We're past 5:00. Is this a
 14 good break point?
 15 You might want to rework that question
 16 overnight.
 17 MR. SHERMAN: Rework the question overnight,
 18 Judge. I'll take your advice, Your Honor. This is a
 19 good place to break.
 20 JUDGE CHAPPELL: So we'll reconvene at
 21 0930 tomorrow morning.
 22 We're in recess.
 23 (Whereupon, the foregoing hearing was adjourned
 24 at 5:01 p.m.)
 25

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1 CERTIFICATION OF REPORTER
 2
 3 DOCKET/FILE NUMBER: 9357
 4 CASE TITLE: LabMD, Inc.
 5 HEARING DATE: May 22, 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: MAY 28, 2014
 14
 15 JOSETT F. WHALEN, RMR
 16
 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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