

**In the Matter of:**

LabMD, Inc.

*May 27, 2014*

*Trial - Public*

*Volume 5*

**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 5  
 5 PUBLIC AND NONPUBLIC RECORD  
 6 MAY 27, 2014  
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 8 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR  
 9 DAUGHERTY 936 1038 1096  
 10 KAUFMAN 1100  
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 13 EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED  
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 18 Number532 1116  
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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 27, 2014  
 8 9:34 a.m.  
 9 TRIAL VOLUME 5  
 10 PUBLIC AND NONPUBLIC RECORD  
 11  
 12 BEFORE THE HONORABLE D. MICHAEL CHAPPELL  
 13 Chief Administrative Law Judge  
 14 Federal Trade Commission  
 15 600 Pennsylvania Avenue, N.W.  
 16 Washington, D.C.  
 17  
 18  
 19 Reported by: Josett F. Whalen, Court Reporter  
 20  
 21  
 22  
 23  
 24  
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1 APPEARANCES:  
 2  
 3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:  
 4 LAURA RIPOSO VANDRUFF, ESQ.  
 5 ALAIN SHEER, ESQ.  
 6 MARGARET LASSACK, ESQ.  
 7 Federal Trade Commission  
 8 Bureau of Consumer Protection  
 9 Division of Privacy and Identity Protection  
 10 600 Pennsylvania Avenue, N.W.  
 11 Washington, D.C. 20580  
 12 (202) 326-2999  
 13 lvandruff@ftc.gov  
 14  
 15 ON BEHALF OF THE RESPONDENT:  
 16 WILLIAM A. SHERMAN, II, ESQ.  
 17 REED D. RUBINSTEIN, ESQ.  
 18 Dinsmore & Shohl LLP  
 19 801 Pennsylvania Avenue, N.W.  
 20 Suite 610  
 21 Washington, D.C. 20004  
 22 (202) 372-9100  
 23 william.sherman@dinsmore.com  
 24  
 25

933

1 APPEARANCES: (continued)  
 2  
 3 ON BEHALF OF THE RESPONDENT:  
 4 KENT G. HUNTINGTON, ESQ.  
 5 Cause of Action  
 6 1919 Pennsylvania Avenue, N.W.  
 7 Suite 650  
 8 Washington, D.C. 20006  
 9 (202) 499-2426  
 10 kent.huntington@causeofaction.org  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
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PROCEEDINGS

1 PROCEEDINGS  
 2 - - - - -  
 3 JUDGE CHAPPELL: We're back on the record  
 4 Docket 9357.  
 5 I have pending a joint motion for in camera  
 6 treatment related to a LabMD former employee. I'm going  
 7 to grant that. The order will issue sometime today or  
 8 tomorrow.  
 9 Anything else before we have our next witness?  
 10 MR. SHERMAN: Yes, Your Honor. Just a couple of  
 11 I would say housekeeping matters.  
 12 Based on the presentation of complaint counsel's  
 13 evidence, we have boiled down our defense.  
 14 That being the case, we are going to call  
 15 Mr. Daugherty this morning. Mr. Kaufman we think we  
 16 can call this afternoon. On Tuesday, we plan to call  
 17 our --  
 18 JUDGE CHAPPELL: You mean Wednesday.  
 19 MR. SHERMAN: I'm sorry. On Wednesday, we plan  
 20 to call our expert, Mr. Adam Fisk.  
 21 Due to scheduling and -- we don't have anyone  
 22 available to make it on Thursday, Judge. But on Friday  
 23 it's our intent to call Mr. Boback and Mr. Wallace and  
 24 on Monday to call Allen Truett.  
 25 JUDGE CHAPPELL: We're not here Monday.

1 witness box. May I?  
 2 JUDGE CHAPPELL: Go ahead.  
 3 (Pause in the proceedings.)  
 4 - - - - -  
 5 Whereupon --  
 6 MICHAEL J. DAUGHERTY  
 7 a witness, called for examination, having been first  
 8 duly sworn, was examined and testified as follows:  
 9 DIRECT EXAMINATION  
 10 BY MR. SHERMAN:  
 11 **Q. Sir, please state your name and your occupation**  
 12 **for the record, please.**  
 13 A. Michael J. Daugherty. I'm the founder and CEO  
 14 of LabMD.  
 15 **Q. Mr. Daugherty, what is your educational**  
 16 **background?**  
 17 A. After finishing high school, I went to the  
 18 University of Michigan.  
 19 Both my parents were police officers when they  
 20 met. My mother was eventually a teacher, and so I went  
 21 to Michigan on a scholarship, and I was the first in my  
 22 family to go to school, graduated there from an -- in  
 23 '82 with a bachelor's degree in economics.  
 24 **Q. Following your graduation from the**  
 25 **University of Michigan, what did you do?**

1 MR. SHERMAN: I mean Tuesday, the following  
 2 court session.  
 3 JUDGE CHAPPELL: So you can't round any of these  
 4 people up on Thursday.  
 5 MR. SHERMAN: I've tried, Your Honor.  
 6 JUDGE CHAPPELL: So that would mean finishing  
 7 next Tuesday?  
 8 MR. SHERMAN: Yes, sir. I would present my last  
 9 witness, which would be Mr. Truett, which I don't expect  
 10 to be any longer than a two-hour direct, if that. And  
 11 that would -- we would rest after that.  
 12 JUDGE CHAPPELL: Okay. All right then. If  
 13 anything changes and some of those people are available  
 14 Thursday, get them in here and let me know.  
 15 MR. SHERMAN: Yes, sir.  
 16 JUDGE CHAPPELL: Anything else?  
 17 MR. SHERMAN: Nothing further, Your Honor.  
 18 (Pause in the proceedings.)  
 19 JUDGE CHAPPELL: Next witness.  
 20 MR. SHERMAN: Your Honor, we would call  
 21 Michael Daugherty.  
 22 (Pause in the proceedings.)  
 23 MR. SHERMAN: Your Honor, I've got hard copies  
 24 of the exhibits we're going to discuss with him and I  
 25 forgot to give them to him before he approached the

1 A. I examined my career choices and I spent a year  
 2 really traveling and deciding what I wanted to do,  
 3 doing a lot of research, and it became really clear to  
 4 me that it was important I be in a career that was  
 5 lifelong learning, gave back to humanity, still in the  
 6 business world, so I pursued a career in surgical sales  
 7 and technical sales, and I was hired by  
 8 United States Surgical and then Mentor Corporation.  
 9 **Q. And what did they do?**  
 10 A. Both companies make medical devices.  
 11 United States Surgical made primarily staplers  
 12 for -- skin staplers for burns and wound closure in the  
 13 surgical setting and also internal staplers for  
 14 thoracic surgery, general surgery, OB, plastic surgery,  
 15 neuro, thoracic, everything that would speed up the  
 16 surgical process and still increase quality by taking  
 17 sutures away and putting staples in so there would be  
 18 faster recovery time.  
 19 **Q. So what was your role on a day-to-day basis in**  
 20 **your capacity with those companies?**  
 21 A. My job was to work in the operating room after  
 22 I had consulted with the surgeon on using the staplers  
 23 or the implants that Mentor -- Mentor Corporation was  
 24 implantable devices, so that was noses, cheeks, chins,  
 25 tissue, expanders, breast reconstruction, penile

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1 implants, testicular implants, everything in neurology,  
2 stints, ultrasound equipment.

3 All that was a consultative sale career in the  
4 operating room, primarily, to make sure that the staff  
5 was educated correctly, the hospital staff correctly,  
6 the surgeon understood what to do with that actual  
7 device. I was like I'm not a surgeon, I don't cut, but  
8 I teach the best usage of the product within the  
9 surgical suite.

10 **Q. Did that require you to actually be in the**  
11 **operating room while surgeries were being performed?**

12 A. Yeah. I was trained at US Surgical in  
13 Connecticut over a two-month period on aseptic  
14 technique, patient privacy, confidentiality, surgical  
15 technique. I performed surgical techniques. I was  
16 scrubbed in.

17 And all that allowed me to essentially teach  
18 and ensure that our products were correctly and  
19 optimally used. And I was scrubbed in with the  
20 surgeon.

21 **Q. So when you say you performed surgical**  
22 **techniques, was that on a live person or --**

23 A. No. That was cadaver and occasionally animal  
24 labs early on. And we would teach residents and also we  
25 trained ourselves. And that's how we would learn,

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1 really learn the whole procedure that was involved.

2 **Q. And so how long did you pursue that career? How**  
3 **long were you in that capacity?**

4 A. I was in -- from 1984 until 1998 Christmas Eve  
5 day, but I also did work with Mentor after that for a  
6 couple of years on a consulting basis for a few  
7 hospitals that, quite frankly, would only work with  
8 Mentor if I was the sales rep, so they asked me to come  
9 back a little bit after that. And that was probably --  
10 I think that was about 2002, 2001. I can't remember  
11 exactly.

12 **Q. And so what was going on in 2002, 2001 that led**  
13 **you to pursue a different career path?**

14 A. Well, there was overlap with that time with  
15 Mentor and my starting LabMD.

16 Initially, LabMD was incorporated in 1996, and  
17 we were -- the market space that we were in was men's  
18 health. And in the men's health market space, that was  
19 pre-Viagra. We were in incontinence and erectile  
20 dysfunction for men's health.

21 And I created a clinic because at that time,  
22 unlike today, the largest marketplace was the patient  
23 that was too embarrassed to go seek treatment, and so  
24 by -- and the options for treatment were limited. It  
25 was surgical and/or noninvasive treatments that weren't

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1 that effective.

2 So by bringing patients in in a nonsurgical  
3 setting, we opened a men's health clinic, and that's  
4 how the company originally started in 1996, as a men's  
5 health clinic to educate patients and test them and  
6 sort of ease the transition into a treatment should they  
7 so choose and -- but mostly education and noninvasive  
8 treatment. And those people were much more likely to  
9 transition into the most effective option.

10 The irony at that time was that the highest  
11 patient satisfaction was with a surgical treatment, but  
12 getting patients to accept that was a really  
13 educational process, so that was the main role of the  
14 company.

15 And then, you know, Viagra came and everything  
16 turned upside down. Suddenly it was drive-through  
17 whatever you want.

18 And my career at Mentor, you know, I was there a  
19 long time, and it was -- I was just itching to do  
20 something more entrepreneurial and creative, and I was  
21 there a long time, so it just seemed like a good time to  
22 transition.

23 And the transition was easy because I had,  
24 you know, been in the OR with all these urologists for  
25 years. And when you're that close working with these

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1 physicians, you -- you know, you're with them all the  
2 time, so you learn about other processes, other disease  
3 treatments, socialize. You learn about markets. You  
4 hear the struggles they have in their offices.

5 I mean, I'm enmeshed in the world of urologic  
6 medicine.

7 **Q. Was there anything in particular that the**  
8 **urologists, the surgeons doing that type of work, were**  
9 **complaining about or any process which they thought**  
10 **could be improved?**

11 A. All right. So I have to take back a little bit  
12 here.

13 What was -- in the business we did, we started  
14 testing our own patients' blood in the men's health  
15 center, so I had patient testing set up. But within  
16 the regulatory world, you can't test patients' blood  
17 outside of your own practice unless you had a different  
18 type of license. And a lot of these physicians were  
19 wanting me to test their blood, and I couldn't do it.

20 Viagra made the -- our business model at the  
21 time seem like a very short life, and so it was time to  
22 shift, and there it was right in front of me. Here's  
23 all these urologists. I know them all. I've got great  
24 relationships. They are giving me unfiltered market  
25 research of what's bothering them, and so what was

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1 clearly bothering them was that they were having  
2 trouble with their laboratories because -- and I do --  
3 if you could -- I'm going to step back a second and  
4 explain this so that His Honor understands why this is  
5 relevant, if I may.

6 In the late '80s, prostate biopsies were a  
7 primarily -- that was the end of them being primarily a  
8 hospital-based procedure because the technology had  
9 advanced so that ultrasound machines could be mobile.

10 This created a situation where a urologist could  
11 now, instead of taking his patients into the hospital to  
12 have this procedure done, he could bring them into his  
13 office. And that was less expense, less time in the  
14 hospital. It was just better for everybody because it  
15 wasn't really that huge a procedure.

16 This suddenly created the situation where the  
17 doctor could actually choose who read his tissue. He  
18 wasn't locked in to the hospital pathology team.

19 Now, with all due respect to pathology --  
20 hospital pathology teams -- let me grab water here.  
21 Excuse me -- those are generalists. And if you have  
22 cancer, and the person diagnosing your cells is a  
23 pathologist, logically you would like to have someone  
24 that just reads that type of cell because practice  
25 makes perfect and cancer isn't cancer. All sorts of

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1 different types of cancers are different types of cells,  
2 formations, genetics, everything.

3 So this whole industry was born so physicians  
4 could send tissue elsewhere. And back then, the biggest  
5 challenge was convincing a physician that putting  
6 tissue in a Federal Express box and sending it across  
7 country was okay.

8 But the benefit they got was pathologists that  
9 just were practicing that niche of prostate cancer or  
10 bladder cancer.

11 And so that was -- that really did quite well.  
12 That happened in many aspects of medicine.

13 The problem then with the --

14 MS. VANDRUFF: Objection, Your Honor.

15 I'm not certain how this is responsive to  
16 Mr. Sherman's question. And this is a narrative, and  
17 I'd just ask that this be conducted as an examination.

18 MR. SHERMAN: I can break up the narrative with  
19 questions if Your Honor would like.

20 The question was --

21 JUDGE CHAPPELL: I'm looking at it.

22 I don't see it as nonresponsive. It's a pretty  
23 broad question.

24 However, if you could conduct in a more  
25 question-and-answer routine, that would be better.

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1 MS. VANDRUFF: Thank you, Your Honor.

2 MR. SHERMAN: Thank you, Your Honor.

3 JUDGE CHAPPELL: So the objection is sustained.

4 MR. SHERMAN: I'll direct the witness.

5 THE WITNESS: So am I not supposed to finish  
6 that because I'm right --

7 BY MR. SHERMAN:

8 **Q. No. Let me ask you some questions.**

9 **You said that pathologists -- hospital  
10 pathologists were generalists.**

11 **What did you mean by that?**

12 A. That means that they would read lots of  
13 different type of cancers. And there's only so much  
14 time in the day, so many of them -- most of them are not  
15 expert in prostate.

16 **Q. Okay. And so part of your idea was to do what?**

17 A. Part of my idea was to solve the next problem,  
18 which I was just about to say, which is, there became a  
19 secondary problem with that because managed care  
20 exploded in the '90s, and suddenly these physicians had  
21 all these specimens in their office, and they were being  
22 told where they had to go based on a managed care  
23 contract.

24 And instead of the tissue being in the  
25 hospital, now the tissue is in the office. And at the

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1 end of the day, you have a nurse that's got twenty  
2 tubes of blood, ten tubes of urine, two to three  
3 biopsies, and she now has to send them to each  
4 laboratory. And if she --

5 **Q. Now, how was it determined which laboratory the  
6 samples would be sent to?**

7 A. The office staff would have to compile a list  
8 and at times call insurance proactively to find out  
9 what laboratory their insurance carrier required if  
10 there was a requirement. And if they didn't do that,  
11 then the insurance carrier was going to deny the claim  
12 or reduce the benefit, the patient is going to get a big  
13 bill, and the patient is going to be very mad at the  
14 physician.

15 So what happened was you had these back,  
16 you know, clinical areas of offices that had lists taped  
17 on cupboard doors and staff that would have to call if  
18 there was insurance policy that wasn't on there so that  
19 they would know where to -- so they were having to just  
20 organize all of it.

21 **Q. Are you talking about doctors' offices and their  
22 staff having to organize this?**

23 A. Yes, I am.

24 **Q. And how did you set out to help or resolve that  
25 problem?**

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1 A. Well, because I knew these guys so well, so I  
2 had such repetitive and clear complaints, I realized if  
3 I could solve that problem, I would have a unique  
4 solution.

5 And the competitors in that marketplace are  
6 either massive corporations that are hundreds of  
7 billions of dollars like Quest or LabCorp, or they're  
8 the hospital or they're -- there were a few other  
9 uropathology labs in the country. But nobody had that  
10 solution, and so if I could crack that, I would solve  
11 it.

12 **Q. One other thing that may need some**  
13 **clarification, you mentioned a managed care contract.**

14 A. Yes.

15 **Q. Who would the managed care contract be**  
16 **between --**

17 A. Managed care --

18 **Q. -- as it relates to your niche of pathology?**

19 A. The managed care contract is between the  
20 ancillary service provider, which would be the medical  
21 laboratory, or the urologist and the insurance carrier.  
22 And again, unfortunately, with the confusion of the  
23 insurance industry, that can be different on different  
24 policies.

25 I mean, Blue Cross has 400 policies just in

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1 Georgia, and each one could have different rules. And  
2 it was just a bureaucratic drain.

3 But those contracts are managed care contracts.

4 **Q. What happens if a sample is taken from a**  
5 **patient --**

6 JUDGE CHAPPELL: Let me ask a question.

7 Did managed care mean, if you were part of  
8 Blue Cross, the sample had to come to you or insurance  
9 wouldn't reimburse the doctor office?

10 THE WITNESS: Well, no, the insurance doesn't  
11 reimburse the doctor office. The insurance reimburses  
12 the laboratory.

13 But the physician would want it to come -- the  
14 physician would want it to go to who had the most expert  
15 pathologists.

16 JUDGE CHAPPELL: What makes it managed care?  
17 What's the difference in managed care, in your business,  
18 versus an HMO versus Blue Cross where I could go  
19 anywhere?

20 THE WITNESS: Well, that's -- that was the  
21 point. That just started really becoming an impact in  
22 the '90s. That was managed care, but some HMOs have  
23 open access.

24 JUDGE CHAPPELL: I'm looking at it from your  
25 perspective as the lab. That would be what you would

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1 know about for sure.

2 THE WITNESS: I'm sorry. I don't understand  
3 your question, sir.

4 JUDGE CHAPPELL: What I'm saying is from your  
5 perspective at the lab. I'm not -- I'm expecting you to  
6 tell me all about --

7 THE WITNESS: Oh, from our perspective of the  
8 lab, it's important because we're not going to get the  
9 tissue if we're not going to get paid or we're not going  
10 to get paid if we get tissue and it was sent by mistake,  
11 and so we also want to make sure that the tissue doesn't  
12 come to us in error that we're not going to get paid  
13 for.

14 We still -- we're required to bill the patient  
15 anyway, and then you're going to have a bunch of very  
16 upset people, including -- and no one was worrying  
17 about that issue. No one was -- you know, the  
18 physicians were getting frustrated because they  
19 couldn't control where they sent things for a clinical  
20 reason, and insurance was just saying, Well, you went to  
21 the wrong lab, so your benefit doesn't kick in.

22 So no one saw -- and the patient was --

23 JUDGE CHAPPELL: So from your perspective, it  
24 didn't matter whether it was an HMO, managed care or  
25 what else. You just wanted to make sure that if you got

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1 a sample from patient X, patient X had insurance that  
2 was going to pay your lab?

3 THE WITNESS: That was part of it. We had -- we  
4 were customer focused. We wanted our customer happy,  
5 and so I -- I was trying to build a system that would be  
6 a solution for their office, not just make sure we got  
7 paid.

8 JUDGE CHAPPELL: Was insurance from the  
9 perspective then of a doctor's office like a group of  
10 associates or was it from the patient's perspective?

11 THE WITNESS: No. The physician -- no. It's  
12 from patient perspective. It's the physician's  
13 insurance -- it's the patient's insurance that covers  
14 the analysis of the tissue to make a diagnosis.

15 JUDGE CHAPPELL: So when you talked about they  
16 had instructions up on cupboard doors, it was the  
17 office of the doctor or the lab taking the sample that  
18 had to know what insurance covered that patient.

19 THE WITNESS: Yes. And so you would see these  
20 lists that would say Blue Cross PPO, anywhere;  
21 Blue Cross HMO, Quest; Coventry, anywhere; you know,  
22 MetLife PPO here, HMO has to go to LabCorp. And they'd  
23 have to coordinate all this, even though they weren't  
24 billing for it, because they're the person that directs  
25 it.

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1 I mean, the patient doesn't come to us. The  
2 patient doesn't come in the laboratory. You know, the  
3 procedure and the serum and the blood and the tissue is  
4 taken from the urologist's office, and the only thing  
5 that enters our building is the human specimen, not the  
6 human being.

7 Does that make sense?

8 JUDGE CHAPPELL: Yes.

9 BY MR. SHERMAN:

10 **Q. And just to follow up on that then, as LabMD**  
11 **developed -- I'll ask it this way -- did the list come**  
12 **off of the physician's door and go to LabMD's door?**

13 A. That was the solution. That was the -- what I  
14 wanted to create is -- laboratories all have  
15 information systems. They're called LISs. It's called  
16 laboratory information system.

17 And laboratories -- what you had at the time  
18 was offices that would have to take triplicate  
19 8-1/2" x 11" order forms, and they'd have to have one  
20 for every lab they were going to use, and they'd have to  
21 hand-fill it out. And all this is an option for human  
22 error, a potential for human error that compromises  
23 patient quality.

24 I mean patient diagnostic quality.

25 Clinical quality.

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1 And so what I was -- and that became more and  
2 more time -- as managed care impacted the marketplace  
3 more, suddenly, instead of the office being able to use  
4 whoever they wanted to use, whether it be the hospital  
5 or a big lab or a small lab, they were turning into a  
6 hub-and-spoke system.

7 And they weren't getting paid for this, but they  
8 did obviously have a self-interest in having happy  
9 patients.

10 But the physician wanted to have, obviously,  
11 the best diagnostic team, so most of the urologists  
12 wanted to have uropathologists. And there's very few  
13 uropathologists in the country. And that's where these  
14 niches started.

15 But then obviously, in the insurance world,  
16 Quest and LabCorp have much huge -- much larger volume,  
17 so they could give the insurance carriers a lower  
18 price.

19 So you have the insurance carrier saying, I  
20 want it to go here for money reasons, and you've got  
21 the doctor saying, I want it to go here for quality  
22 reasons.

23 And some of those carriers had gray areas, and  
24 I wanted to technologically solve that problem. I  
25 wanted only what had to go to where the insurance

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1 carrier wanted it to then go and what could go  
2 elsewhere to go. And by making that a programmed  
3 response of technology instead of a labor-intensive  
4 work solution that took nurses away from patient care,  
5 everybody was better off.

6 **Q. Did you consider LabMD to have a niche**  
7 **practice?**

8 A. Yes. Because we were only -- especially as a  
9 small company, you don't have -- I mean, the big, big  
10 insurance carriers, their customer -- I mean, the big,  
11 big lab's customer is really the insurance carrier.

12 A small niche player, which is why we call it  
13 LabMD, is the medical doctor. We're trying to --  
14 you know, what we're focused on is the physician.

15 **Q. What was LabMD's niche?**

16 A. Urology. Prostate cancer, bladder cancer,  
17 every -- almost every test in the urology office space.

18 **Q. So is it fair to say that you focused on**  
19 **urology, you focused on cancer detection, from**  
20 **urologists?**

21 A. Correct.

22 MS. VANDRUFF: Objection, Your Honor. Leading.

23 MR. SHERMAN: I'm just trying to sum up what he  
24 said, Your Honor.

25 JUDGE CHAPPELL: I'll allow it. Overruled.

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1 MS. VANDRUFF: Thank you, Your Honor.

2 BY MR. SHERMAN:

3 **Q. You began to talk about a program, and what was**  
4 **the purpose of the program?**

5 A. Well, we -- our slogan everywhere was what our  
6 purpose was, which is "to make your life easier." We  
7 were trying to make the office operations easier, the  
8 patient's life easier, so --

9 **Q. Whose office?**

10 A. The urologist's office.

11 So the overall plan was to streamline the  
12 process from the moment the receptionist in the  
13 urologist's office enters the patient information to  
14 the moment, you know, the tissue arrives, goes to the  
15 lab, the doctor, the pathologist at LabMD, renders a  
16 diagnosis, and that result then is immediately  
17 available.

18 That removed so many potential human errors that  
19 would slow down or compromise the medical result and the  
20 clinical process.

21 **Q. Can you compare the result -- I'm sorry.**

22 **Can you compare the process that was in place**  
23 **and the process that you put in place in terms of from**  
24 **the time the patient walks in to the time that the test**  
25 **result is available?**

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1 MS. VANDRUFF: Objection, Your Honor. To the  
2 extent that Mr. Sherman is calling for fact testimony, I  
3 believe that may be permissible, but I think this walks  
4 a fine line of opinion testimony.  
5 JUDGE CHAPPELL: Is this disputed?  
6 MS. VANDRUFF: I'm sorry, Your Honor?  
7 JUDGE CHAPPELL: Are you saying, what he just  
8 asked, this information is disputed by the government?  
9 MS. VANDRUFF: I'm not certain exactly what he  
10 is eliciting. I think he is to compare what the  
11 services LabMD offered to what services other companies  
12 offered. It's not a material fact in this case,  
13 Your Honor.  
14 JUDGE CHAPPELL: Based on what I've heard, the  
15 witness knows enough to answer the question.  
16 Overruled.  
17 MS. VANDRUFF: Thank you, Your Honor.  
18 THE WITNESS: It's easier to draw it, sir, if I  
19 can draw it.  
20 BY MR. SHERMAN:  
21 **Q. You might want to pull the easel out so -- I**  
22 **think the court wants everyone to be able to see it.**  
23 **(Pause in the proceedings.)**  
24 **So, Mr. Daugherty, if you could, define or**  
25 **sketch out the process that you thought was the**

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1 **problem, and after doing so, kind of scale or draw out**  
2 **the process that you believe was the solution.**  
3 A. Okay. Prior, the receptionist in a urologist's  
4 office would have to give the -- by handwritten  
5 information --  
6 (Discussion off the record initiated by the  
7 court reporter.)  
8 THE WITNESS: Everything before is manual. The  
9 receptionist --  
10 (Discussion off the record initiated by the  
11 court reporter.)  
12 JUDGE CHAPPELL: Does he really need the chart?  
13 I can understand what he's saying without the chart.  
14 That will make it simpler.  
15 MR. SHERMAN: That's fine, Your Honor. It kind  
16 of helps him, but we'll push through.  
17 (Pause in the proceedings.)  
18 BY MR. SHERMAN:  
19 **Q. So, Mr. Daugherty, you were saying that in the**  
20 **process, everything was done by hand.**  
21 A. The -- the receptionist has to hand the  
22 information to the nurse. The nurse has to pull the  
23 information from the chart. Then she has to manually  
24 fill out the form.  
25 Or if they have one lab, they have to type it

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1 into a workstation. They still have to fill out the  
2 form, put it on the specimen, hold that copy for them to  
3 make sure the -- the requisition, they'd hold a copy of  
4 the requisition for them, they'd hold a copy of the  
5 requisition in the patient chart, and they'd put a copy  
6 of the requisition with the lab.  
7 And they have to have a central chart, a central  
8 record of what specimen went where.  
9 **Q. And in filling out the record --**  
10 A. The requisition.  
11 **Q. -- the requisition that they would keep for**  
12 **themselves, keep for the patient chart and then send to**  
13 **LabMD, they would fill that out by hand as well?**  
14 A. Correct.  
15 **Q. And after, after they fill out the requisition,**  
16 **what would happen?**  
17 A. Okay. Then a courier would pick the specimen  
18 up. The laboratory would have to manually enter the  
19 information into their system for whatever lab was  
20 there.  
21 **Q. Once they received the specimen and the**  
22 **requisition?**  
23 A. There was one requisition with the specimen  
24 that would arrive with whatever laboratory the doctor  
25 chose to use for that specimen. And that staff in that

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1 laboratory would have to start that process over of  
2 entering the data into their system.  
3 And then, depending on the lab, that type of --  
4 that chain of custody through the process of the lab  
5 would -- it grew into some barcoded issues, but that was  
6 still very early where things were written. And then  
7 the -- and then when the result is finished, a  
8 transcriptionist would have to enter everything into the  
9 laboratory's information system.  
10 Then that would have to be approved by the  
11 physician, the pathologist that works inside the  
12 laboratory, and then that result would be released and  
13 printed off.  
14 At that point, it was a client preference in  
15 the industry that the result would either be faxed to  
16 the physician's office, which, quite frankly, wasn't  
17 that legible, or sent Federal Express or mailed.  
18 And every step along the way had issues that we  
19 tried to eliminate from incorrect diagnoses codes that  
20 would make you have to call them back to can't read  
21 things to missing information to FedEx getting caught in  
22 a storm.  
23 **Q. So when you say incorrectly inputted diagnosis**  
24 **codes that would make you have to call them back, are**  
25 **you saying that these requisitions would arrive at the**

7 (Pages 954 to 957)



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1 **lab, there was -- from time to time there would be an**  
 2 **incorrect diagnosis code, the staff of the lab would**  
 3 **then have to call back to the doctor's office and get**  
 4 **the correct diagnosis code?**  
 5 A. Correct.  
 6 And it was more -- Medicare required that if a  
 7 test was being performed on a patient with a diagnosis  
 8 the physician had given that was not approved by  
 9 Medicare for payment, the doctor would have to pay that  
 10 bill unless -- unless he notified the patient and the  
 11 patient signed off that it was okay. Just that alone  
 12 could kill the specimen stability time.  
 13 So you've got a day later usually the specimen  
 14 arrives. You have to chase down a nurse, who's going to  
 15 be way less than happy that she's made an error, and  
 16 then she would chase a doctor and then -- and usually it  
 17 was just the fact that they made an error that everyone  
 18 knew in urology, you know, what usually would be  
 19 covered.  
 20 **Q. Do some specimens have a shelf life that --**  
 21 A. Yes. They almost all have shelf lives, and it  
 22 varies, I mean, from CBC with diff can be two to four  
 23 hours and CBC without diff can be 24 hours.  
 24 **Q. And so the type of mistake that you just said**  
 25 **could affect the shelf life of a specimen and maybe**

1 patients that were in the physician's office, so that  
 2 saved all this time.  
 3 And the doctor didn't know who he was going to  
 4 place an order on that day. But everything was in the  
 5 database so that it could look and see, well, that has  
 6 to go to LabCorp, this has to go to Quest. And they  
 7 don't have to worry about it anymore, so all those  
 8 papers went away.  
 9 And then also the software would go, okay, you  
 10 just tried to place an order with a nonpayable code.  
 11 The computer won't place the order. Nurse, you must  
 12 stop and make your correction or you have to print off  
 13 the disclosure form for your physician and patient to  
 14 sign.  
 15 This is proactivity to increase patient result  
 16 speed because people want to know if they do or don't  
 17 have cancer as soon as possible, reduce any pitfalls of  
 18 error. It's just a win-win everywhere.  
 19 **Q. And so I think we're at the first stage here --**  
 20 A. Okay.  
 21 **Q. -- where the nurse --**  
 22 A. The first stage is when -- because we're -- the  
 23 less -- the less data entry you have, the less error  
 24 you have.  
 25 So by having the receptionist in the

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1 **require the patient to come back and get another one.**  
 2 A. Correct. And then you have to restick the  
 3 patient and -- so the potentials were numerous, and it  
 4 became a large -- well, it was a large bureaucratic  
 5 problem because when you have to deal with five labs  
 6 instead of one, it's just it added -- it just compounded  
 7 the issues.  
 8 **Q. So what process did you put in place?**  
 9 A. Okay. So I took an existing laboratory  
 10 information system and -- and the idea was to just  
 11 streamline the process by hiring people to put  
 12 additional features and benefits in the software so  
 13 that what we did was we would go into a account, a  
 14 physician's office. We would get their entire  
 15 insurance database, and we would give it a primary  
 16 additional code so that we would know, for example,  
 17 that Blue Cross HMO from that state for that doctor  
 18 would have to go to LabCorp versus Blue Cross HMO from  
 19 another state for a client in Arizona would have to go  
 20 to Quest.  
 21 If all that was programmed in the system ahead  
 22 of time, what happened was, the second the nurse placed  
 23 the order, the -- and I'm jumping over something I have  
 24 to go back to -- but the second the nurse placed the  
 25 order, we had the database populated with all the

1 urologist's office put the data from the urologist's  
 2 office in their system, which they're going to do  
 3 anyway because they're getting paid for services as  
 4 well, for the visit, et cetera, and the procedure, that  
 5 would be sent over to the -- to LabMD technologically.  
 6 And that would be sent over, and then it would  
 7 be there ahead of time for -- in the lab database. And  
 8 then -- and it -- and when it came over was dependent on  
 9 the physician's office because this is very early  
 10 adapter, very ahead of time, and everyone had different  
 11 software and all of this software is dependent on how  
 12 they did it, how we got it.  
 13 By and large, that was what happened.  
 14 Then, whether it be 30 minutes or at the end of  
 15 the day or the next day, depending on the specimen, the  
 16 data would be in there. The nurse could just pull up  
 17 the patient and everything is populated. Everything is  
 18 there (indicating).  
 19 And it's legible and it's clear, and if there's  
 20 missing fields, you're prompted to fill them up. And  
 21 when you put a diagnosis code in, it's going to tell  
 22 you if it's payable and correct or if you're going to  
 23 have to work with the patient and you can't move on.  
 24 And then a barcode would come off, and then the  
 25 specimen is barcoded with identifiers that are legible

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1 and clean and almost always correct. And then that  
2 saved time.

3 And then also at the end of the day, the staff  
4 would print off everything that they had ordered. And  
5 it would give a list and it would say what lab it went  
6 to.

7 And in our marketplace, typically approximately  
8 85 percent of all the specimens were allowed to come to  
9 LabMD. But that 15 percent that weren't allowed to  
10 come to LabMD, by removing all the pitfalls of having to  
11 manage that was a huge time savings and a huge removal  
12 of bureaucracy from physicians' offices.

13 Then when the specimen got to the laboratory,  
14 everything also was -- I mean, the amount of errors just  
15 fell through the floor. The time that they got  
16 processed went quicker. And the -- the -- we even knew  
17 ahead of time what was coming so that we could be  
18 prepared.

19 **Q. So when the nurse at the physician's office**  
20 **would enter the -- well, put in the requisition for a**  
21 **test, that information would be communicated**  
22 **immediately to LabMD when the requisition was**  
23 **completed?**

24 A. When the -- when the button -- when the "send"  
25 button or "order" button was pressed, that immediately

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1 electronically was sent to LabMD.

2 **Q. And upon receipt of that information, you were**  
3 **indicating that LabMD could then be prepared?**

4 A. Well, before then you wouldn't know what was  
5 going to come until it showed up. I mean, you just  
6 didn't know, so you didn't know if anything was missing  
7 either.

8 But we had -- we knew ahead of time so we could  
9 know what was supposed to be coming. We could prep. We  
10 could have the proper staffing. We could have the  
11 cartridges ready ahead of time. We could have  
12 everything ready, which also sped things up, also  
13 increased accuracy.

14 We also then knew if something didn't arrive  
15 that should have. And that was new. It was like we  
16 were expecting it. That actually created a lot of  
17 issues, because if the nurse just threw it in the  
18 refrigerator and forgot, where is it, we got it, no  
19 worry.

20 **Q. So by being able to anticipate what samples are**  
21 **coming to the lab, what could you do ahead of time which**  
22 **would affect a quicker test result?**

23 A. Prep the slides, have the proper staffing, let  
24 the physician know what his day is going to look like,  
25 prioritize what's coming in, know what's coming in from

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1 which part of the country and, I mean, the list goes on  
2 and just -- and then also have the ability to do an  
3 inventory at the beginning of the day when the specimens  
4 do arrive to see if anyone screwed up and something  
5 didn't show up.

6 **Q. So you know what's coming. You have the staff**  
7 **prepared for the next day's samples. They do their job.**

8 **Then how -- how are the test results then -- how**  
9 **are the test results then gotten or --**

10 A. Received by the physician; is that what you  
11 mean?

12 **Q. No. No.**

13 A. Oh, gotten by --

14 **Q. How do you do what you do in order to get the**  
15 **test result?**

16 A. Oh, okay.

17 Depending on the test, only the physician or a  
18 physician-supervised technologist can release test  
19 results. That's not anything that anyone like I or an  
20 officer of the company could do. And so -- yeah?

21 **Q. Would the photographs kind of help walk us**  
22 **through this process?**

23 A. Yes.

24 **Q. Okay.**

25 A. Sorry.

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1 **Q. So let's show the outside of LabMD.**

2 A. Okay.

3 **Q. So what is that a picture of?**

4 A. Okay. This is the entrance to the LabMD  
5 facility that was there from 2008 -- April 2008 to when  
6 we closed.

7 **Q. Either speak up or pull that closer to you.**

8 A. Okay. Sorry.

9 So this is the accessioning entrance to LabMD at  
10 our location where we were operating from.

11 **Q. What happens at that particular entrance?**

12 A. That is the accessioning entrance where either  
13 Federal Express -- no. I'm sorry -- our courier or  
14 employee brings the specimens in. We would go to  
15 Federal Express and get them.

16 **Q. You used the term "accessioning" and I -- I'm**  
17 **sorry. I don't know what that means.**

18 A. Accessioning is the organizing and accepting of  
19 the specimens into the laboratory and the distribution  
20 to the appropriate testing department.

21 **Q. Okay.**

22 A. So this is typically how each specimen would  
23 arrive. It was ironic that we didn't really need  
24 requisitions and paper, but the physicians just  
25 couldn't let go of it, so -- so we turned it into our

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1 processing sheet, so that's a -- that's a specimen with  
2 that.

3 And that -- that's the -- the customer perceives  
4 that to be a requisition, that paper in there, but  
5 that's our -- that's our processing sheet that goes to  
6 the lab.

7 **Q. Okay.**

8 A. So this is, as you see, the organization, and  
9 you'll see how the barcodes along the tubes, which makes  
10 things very quick because everything is in.

11 So instead of having to type all this  
12 information in, really it's just a quick scan, beep,  
13 beep, beep, beep, and everything is in quickly and  
14 distributed quickly.

15 **Q. And so the barcode was produced at the  
16 physician's office?**

17 A. At the physician's office. It's applied by the  
18 nurse in the physician's office.

19 JUDGE CHAPPELL: You understand that if these  
20 aren't marked for identification, the record is not  
21 going to show any of this except what he's saying.

22 MR. SHERMAN: Well, Your Honor, they are just  
23 demonstrative exhibits. We could mark them for  
24 identification, but it was for the trier of fact's  
25 visual perception and to break up the monotony actually,

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1 but to give the trier of fact a visual as to what he was  
2 explaining.

3 If His Honor would like for us to mark them and  
4 would like to take them back when there's  
5 consideration, they were not introduced as potential  
6 exhibits. I did disclose them to complaint counsel  
7 yesterday as demonstratives. But it's the court's  
8 pleasure.

9 JUDGE CHAPPELL: Well, I'm not saying they're  
10 going to be evidence, but if they're marked as  
11 demonstrative, they'll be part of the record, so anyone  
12 reviewing the record will have access to them.

13 MR. SHERMAN: Okay. Then if we could, just for  
14 the record, go back to the first and if we can mark  
15 that -- where did you say we were starting again? 5?

16 (Pause in the proceedings.)

17 BY MR. SHERMAN:

18 **Q. So for the record, RXD 1 is a photograph of the  
19 outside entrance of LabMD at the Powers Ferry Road  
20 location; is that correct, Mr. Daugherty?**

21 A. Yes.

22 **Q. The next photograph is RXD 2, which?**

23 A. Is an example of a specimen being received.

24 **Q. Okay.**

25 A. Into the laboratory.

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1 **Q. The next photograph is RXD 3, which,  
2 Mr. Daugherty, is what?**

3 A. That is an example of a rack of tubes to show  
4 that they're barcoded and very quick to review and lots  
5 of work is eliminated.

6 **Q. The next photograph, RXD 4, what does that  
7 depict?**

8 A. This starts the pathology department, where a  
9 histotechnologist is putting each tissue -- each tissue  
10 jar in its proper gland -- in the proper cartridge.  
11 And each cartridge indicates an area of the gland so  
12 that when a diagnosis is rendered, the urologist  
13 understands the location within the gland of each  
14 diagnosed tissue.

15 **Q. The next would be RXD 5, and what do we see  
16 there, Mr. Daugherty?**

17 A. That is the microwave processing, and that is  
18 the histotech placing the tissue after it's been  
19 prepped and organized from the photo you saw before.

20 And what we're doing at this stage is we're  
21 really dehydrating and removing all the liquid from the  
22 tissue so it can be cut at one-cell thick. And we use  
23 microwaves because we have -- we're a niche, so we only  
24 have one type of tissue. That allows us to -- since all  
25 the tissue is the same going in there, that allows us to

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1 microwave it, so that takes about thirty minutes instead  
2 of twelve hours.

3 **Q. Okay. And RXD 6, could you describe what that  
4 is.**

5 A. After the -- that is an embedding center.  
6 After the tissue is completely dehydrated, it's taken  
7 into those cartridges, and hot wax is poured over it.  
8 And then it's taken to the left side of that center, and  
9 a frozen table solidifies the wax around the tissue, so  
10 the tissue is embedded in and can be held in position  
11 firmly for cutting.

12 **Q. RXD 6 I believe we're at?**

13 A. This is a histotech operating a microtome. As  
14 you might see there on the left right by her left index  
15 finger and thumb, the block with the tissues embedded in  
16 wax and the back of the cartridge is fixed in by the  
17 blade.

18 And what we're doing there is we're then  
19 having -- that's almost like a glorified meat cutter. I  
20 mean, it's a very, very, very expensive meat cutter and  
21 because we're going to cut the tissue one cell thick,  
22 and that's what she's doing.

23 **Q. Okay. RXD 7?**

24 A. 7 --

25 **Q. No. Is this 8?**

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1 A. I'm sorry. This is 8?  
 2 **Q. The last slide was 7 -- I'm sorry -- which was**  
 3 **the -- you called it the micro-something?**  
 4 A. The microtome.  
 5 **Q. The microtome.**  
 6 **And then this is RX 8.**  
 7 A. This is the wax -- this is the tissue in a wax  
 8 ribbon that is now one cell thick along the ribbon, and  
 9 it's put in a water bath to rehydrate the tissue.  
 10 **Q. So the tissue is actually on the ribbon?**  
 11 A. Yes. It's one cell thick. You cannot walk by  
 12 this. You can't talk too loud. That is one cell thick  
 13 of wax and that is extremely delicate.  
 14 **Q. RX 9?**  
 15 A. This is just the histotechs working actually on  
 16 different stations. That's just a workstation photo.  
 17 These are the --  
 18 **Q. I'm sorry. That's RX 10. Could you describe**  
 19 **that for us, please.**  
 20 A. These are the slides. And if you note on each  
 21 slide, they're going to have numbers. And the last two  
 22 digits are going to show the exact location within the  
 23 gland. The top number in the center is the case number  
 24 that is assigned electronically by the software back in  
 25 the urologist's office when the nurse places the order.

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1 So at this point all these slides have had the  
 2 proper, very legible information put on each one, so the  
 3 correct tissue ribbon is put on each slide and they're  
 4 ready to go to be stained.  
 5 **Q. Okay.**  
 6 A. This is the stainer.  
 7 **Q. I'm sorry. This is RXD 11. Could you describe**  
 8 **what that is, please.**  
 9 A. This is the stainer. This is the Sakura stainer  
 10 slides. And Sakura is S-A-K-U-R-A.  
 11 Different types of cancer cells need different  
 12 types of stains. And not only is the type of stain  
 13 relevant, but the amount of time immersed in the stain  
 14 and the time immersed and the order of immersion is  
 15 relevant to making the cancer cells pop out so it's easy  
 16 to diagnose for the physician.  
 17 This is an automated system. This is also tied  
 18 in so that the number is populated.  
 19 And this is a technician that's placing slides  
 20 into the stainer so that -- basically it's a robot, and  
 21 so this can be all done -- and the beauty of this  
 22 stainer -- this is a phenomenal machine because it  
 23 is -- it makes sure that every single tissue slide  
 24 location is stained properly, recorded. It's -- it's  
 25 fantastic.

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1 **Q. This is RX 12. Could you describe what that is,**  
 2 **please.**  
 3 A. I'm sorry.  
 4 **Q. This is RX 12. Could you describe what that is,**  
 5 **please.**  
 6 A. These are the slides that have come out of the  
 7 stainer and will be started to be prepped for the  
 8 physician's diagnosis to start.  
 9 **Q. And let's go back to RX 12, please.**  
 10 **And again, the numbers at the top are those**  
 11 **numbers that assist in identification --**  
 12 A. Correct.  
 13 **Q. -- location of the --**  
 14 A. We have, for example, in the far right one,  
 15 you'll see -- you know, the center number is the  
 16 accession number. The LM is the location of the gland.  
 17 The number below L2 is the level, because we'll keep  
 18 several levels of the tissue because we need to keep  
 19 this for years to come in case a second opinion is  
 20 wanted, there's litigation, there's clinical questions  
 21 years down the road, so we take several levels of the  
 22 tissue and hold them.  
 23 **Q. And so LabMD actually still has these types of**  
 24 **slides in its possession; is that correct?**  
 25 A. Correct.

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1 This is --  
 2 **Q. And RXD 13, could you describe what that is,**  
 3 **please.**  
 4 A. This is the final placing into the folder for  
 5 the physician. And everything is placed in order and  
 6 in a folder so that he or she can start the process of  
 7 rendering their diagnosis on each location in the  
 8 gland.  
 9 This is --  
 10 **Q. And this is RX RXD 14. Can you describe what**  
 11 **that is, please.**  
 12 A. This is our medical director and chief  
 13 pathologist, Dr. Usha Vasa, U-S-H-A V-A-S-A, is her last  
 14 name. And at this time she is reading each slide  
 15 location, making her diagnosis.  
 16 She'd be writing things down on her right, and  
 17 to the left outside the screen shot would be her  
 18 workstation where she can bring the slide up as well  
 19 and look at the actual -- we blow the cell big.  
 20 I mean, we multiply it thousands of times so that the  
 21 most -- usually the most severe, the most  
 22 disease-advanced tissue is put on the report for the  
 23 physician, so that she is entering her diagnosis and  
 24 typing it in and she's uploading the photo and she's  
 25 releasing the test.

11 (Pages 970 to 973)

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1 **Q. And so the process that we just -- you just**  
 2 **walked us through, all of that occurred at LabMD on its**  
 3 **premises?**  
 4 A. Correct.  
 5 **Q. And the physician was an employee of LabMD?**  
 6 A. She -- one physician was an employee. She was  
 7 an -- had her own corporation. She used to be an  
 8 employee.  
 9 **Q. But you would obviously hire and pay physicians**  
 10 **to come in and --**  
 11 A. Correct.  
 12 **Q. -- read the slides and render diagnoses?**  
 13 A. Correct.  
 14 She was the medical director and the  
 15 pathologist. She had two positions at the company.  
 16 **Q. And so on average, how long would it take from**  
 17 **the time a slide entered the accessioning door before a**  
 18 **diagnosis was made available to your physician clients?**  
 19 A. That was entirely dependent on the test  
 20 requested and the cell being analyzed, so prostate was  
 21 almost always that day. But bladder cancer, we did  
 22 molecular testing, and that could take five days to ten  
 23 days because we had to -- there's a much longer process  
 24 in cellular development so it can be read.  
 25 So it just depends.

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1 **Q. And so really where the time was saved as**  
 2 **compared to the old process was the data entry, the**  
 3 **labor time on the doctor's staff, the labor time on the**  
 4 **lab's staff calling the doctors for mistakes and things**  
 5 **of that nature, and so is it accurate to say that that's**  
 6 **where the time was saved?**  
 7 MS. VANDRUFF: Objection, Your Honor. Leading.  
 8 JUDGE CHAPPELL: You need to rephrase.  
 9 Sustained.  
 10 MS. VANDRUFF: Thank you, Your Honor.  
 11 BY MR. SHERMAN:  
 12 **Q. So the time saving, how would you describe how**  
 13 **time was saved using your process versus the other**  
 14 **process?**  
 15 A. It was proactive saving. What was removed was  
 16 all the work that had to be done throughout the  
 17 urologist's office, the receptionist's area and inside  
 18 the laboratory, and that saved time there. The other  
 19 side was after the clinical diagnosis.  
 20 By having the diagnosis in part of the database  
 21 that the physician had access to 7/24 for as long as  
 22 they had access to the system, as well as having access  
 23 to it the moment it was released, not when FedEx  
 24 arrived or the fax went through, what we had was just a  
 25 more efficient, faster, more accurate,

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1 less-likely-to-have-error process in the medical  
 2 diagnostic process.  
 3 **Q. And so once the diagnosis was entered into**  
 4 **LabMD's system, the doctor had immediate access to it;**  
 5 **is that correct?**  
 6 A. That's correct.  
 7 MS. VANDRUFF: Objection, Your Honor. Leading.  
 8 JUDGE CHAPPELL: Response?  
 9 MR. SHERMAN: I can rephrase the question,  
 10 Your Honor. It was a summary of what he had just said,  
 11 but I can rephrase the question.  
 12 JUDGE CHAPPELL: Well, if it was a summary, you  
 13 don't need to restate what's already in the record.  
 14 MR. SHERMAN: That's fine, but I just didn't  
 15 think that it was clear --  
 16 JUDGE CHAPPELL: Okay. But --  
 17 MR. SHERMAN: -- about the availability.  
 18 JUDGE CHAPPELL: -- the objection is leading, so  
 19 you need to let the witness make it clearer.  
 20 MR. SHERMAN: Thank you, Your Honor.  
 21 MS. VANDRUFF: Thank you, Your Honor.  
 22 BY MR. SHERMAN:  
 23 **Q. So in terms of the availability to the doctors,**  
 24 **when did it become available, the result, the diagnoses,**  
 25 **become available for the doctor?**

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1 A. The result was available to the physician and  
 2 his staff that he assigned to look -- to manage the  
 3 process.  
 4 **Q. When?**  
 5 A. The moment the physician or the technologist  
 6 accepted the result and released the test.  
 7 **Q. And how often or what was the availability to**  
 8 **the physician after the test was released?**  
 9 A. Indefinitely. Because what we did, the -- the  
 10 difference was that we -- we didn't let our entire  
 11 network become available to the staff or the outside.  
 12 We did let the data that belonged to them always be  
 13 available and the results that resulted to them.  
 14 So when a physician's staff member or the  
 15 physician himself had a password and an ID, that only  
 16 gave them access to the -- to place an order or to look  
 17 at results. Results would be isolated in a part of the  
 18 server that was -- and the only way to get to them was  
 19 to have authorization, and that would be through the  
 20 physician's ID.  
 21 **Q. Were the results available to that physician**  
 22 **only during LabMD's office hours?**  
 23 A. No. They were available 7/24, as long as  
 24 nothing -- as long as no electrical problem or  
 25 thunderstorm had brought the servers down. It was

1 available all the time and repetitively.  
 2 **Q. Was the process that you put in place**  
 3 **effective?**  
 4 A. Very much so.  
 5 **Q. Did it attract new customers to your business?**  
 6 A. Yes, it did.  
 7 **Q. Did it cause your business to grow?**  
 8 A. Yes, it did.  
 9 **Q. At its height, how many employees did LabMD**  
 10 **employ in the greater Atlanta area?**  
 11 A. By saying "greater Atlanta area," we had sales  
 12 reps around the country.  
 13 **Q. I'm not talking about the sales reps. I'm**  
 14 **talking about how many people came to work every day.**  
 15 A. Approximately -- at the height, approximately  
 16 32-33.  
 17 **Q. And did they work in different departments**  
 18 **within LabMD?**  
 19 A. Yes.  
 20 **Q. What were the departments within LabMD?**  
 21 A. Administration, accessioning, IT, billing, and  
 22 the medical laboratory.  
 23 **Q. You mentioned the sales representatives.**  
 24 **How many sales representatives did you have?**  
 25 A. It ranged from zero to ten.

1 THE WITNESS: So Mr. -- I was --  
 2 BY MR. SHERMAN:  
 3 **Q. What happened as a result of that conversation?**  
 4 A. I was in my office. And Mr. Boyle came in  
 5 ashen-faced, quite baffled, and told me that  
 6 information. And I said, Who is Tiversa? He said,  
 7 Well, they say they do, you know -- that they're a data  
 8 security firm or something to that effect and they've  
 9 got our file. Well, how did they get it, I asked.  
 10 MS. VANDRUFF: Objection, Your Honor. I will  
 11 renew my hearsay objection to the extent that  
 12 Mr. Daugherty is going to repeat a conversation for the  
 13 truth of what happened.  
 14 BY MR. SHERMAN:  
 15 **Q. Let me ask you a couple of questions a different**  
 16 **way.**  
 17 JUDGE CHAPPELL: Is he telling us this for state  
 18 of mind because it was acted on or because it's true?  
 19 MR. SHERMAN: He's telling it for the state of  
 20 mind. I asked him --  
 21 JUDGE CHAPPELL: Overruled.  
 22 MR. SHERMAN: -- what happened and he's  
 23 explaining what happened, Your Honor.  
 24 BY MR. SHERMAN:  
 25 **Q. It's your understanding that your company was**

1 **Q. So at its height, it was approximately ten; is**  
 2 **that --**  
 3 A. Approximately ten.  
 4 JUDGE CHAPPELL: Are you finished with this  
 5 photo that's on the screen?  
 6 MR. SHERMAN: I am.  
 7 You can take that down. Thank you.  
 8 BY MR. SHERMAN:  
 9 **Q. In 2008, what out of the ordinary, if anything,**  
 10 **occurred?**  
 11 A. In May 2008, we were contacted by a company  
 12 called Tiversa, T-I-V-E-R-S-A, and by their CEO,  
 13 Robert Boback, B-O-B-A-C-K. And he had contacted an  
 14 employee who contacted my vice president of operations  
 15 and general manager, John Boyle, B-O-Y-L-E. And he  
 16 said to John, We have -- we are in possession of your  
 17 file --  
 18 MS. VANDRUFF: Objection, Your Honor. This is  
 19 hearsay.  
 20 JUDGE CHAPPELL: Response?  
 21 MR. SHERMAN: It most certainly is.  
 22 JUDGE CHAPPELL: Is it offered for the truth?  
 23 MR. SHERMAN: No, it is not.  
 24 JUDGE CHAPPELL: Overruled.  
 25 MS. VANDRUFF: Thank you, Your Honor.

1 **contacted by Tiversa; is that correct?**  
 2 A. Yes.  
 3 **Q. What did you learn as a result of that initial**  
 4 **contact?**  
 5 A. I learned that Tiversa had told us they had our  
 6 file and I learned, after my order to Mr. Boyle to find  
 7 out about this company and have him prove he had  
 8 possession, that they sent the file over.  
 9 **Q. And do you know what the 1718 File is that we've**  
 10 **been calling the 1718 File in this case?**  
 11 A. The file -- we looked at the file. And the file  
 12 was -- immediately we knew what it was. This is not a  
 13 big company. This is a small company with five or six  
 14 people in the billing department. And it was clearly a  
 15 billing accounts receivable file of all the patients  
 16 that owed LabMD balances due after their insurance had  
 17 been processed.  
 18 **Q. And what was that file used for within LabMD's**  
 19 **business?**  
 20 A. Well, it was run by the billing manager, and it  
 21 was used to analyze how much money was out there, how  
 22 much work had we done in the billing department, what  
 23 insurance companies were paying and not paying in  
 24 comparison to the programming of the physician software  
 25 because occasionally, you know, insurance carrier -- I

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1 mean, when I say "the physician software," I mean the  
2 physician's insurance database information that we  
3 receive about what insurance carriers they use, because  
4 insurance companies can change what their benefits  
5 are -- and assigning work to the billing staff.

6 **Q. Was the 1718 File the type of file that LabMD  
7 would save?**

8 A. Yes.

9 **Q. And where would LabMD generally save these  
10 files?**

11 A. Well, it would be on the billing manager's  
12 workstation.

13 **Q. And were there a limited number of people who  
14 could even create this type of file?**

15 A. I believe so. Yes.

16 **Q. And who would those persons be?**

17 A. As far as I know, the billing manager.

18 **Q. And so after learning that Tiversa was in  
19 possession of this file, what steps did LabMD take?**

20 A. We were completely shocked and baffled, so we  
21 were -- like I say, we were jumping on a fumbled  
22 football. And the first thing we wanted to protect was  
23 our patients.

24 We believed he had the file, but we didn't know  
25 anything else about it. And we didn't know if that's

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1 said it was peer-to-peer -- Mr. Boback had said they got  
2 it through peer-to-peer, and so we looked for  
3 peer-to-peer software, and that was also on there.

4 We interviewed her, and she acknowledged that  
5 she was listening to music when she shouldn't be doing  
6 that.

7 **Q. Why is it that she should not have been  
8 listening to music?**

9 A. It's against company policy. It's against  
10 company written policy. You don't listen to music when  
11 you're working in a medical facility.

12 **Q. What did LabMD do with regard to all of its  
13 other workstations upon learning --**

14 A. So then we -- once we knew that that was gone  
15 from there, we --

16 **Q. Well, what was gone from where?**

17 A. The 1718 File was deleted from the workstation.

18 **Q. Okay.**

19 A. Then we just did a systemic analysis inside  
20 every workstation and server within the company. And we  
21 found it nowhere.

22 **Q. What were you looking for that you didn't find?**

23 A. LimeWire or anything else of its ilk and the  
24 1718 File.

25 I shouldn't -- the 1718 File actually was just

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1 how he got it and then we didn't know if that's where it  
2 came from, but we knew that we -- if what he's saying is  
3 true, we just want to get rid of it, so we just deleted  
4 it.

5 **Q. How did you discover where the file was?**

6 A. Well, it took about five seconds because we knew  
7 exactly what it -- where it came from, and we walked up  
8 there and there it was.

9 **Q. How did you know where it came from?**

10 A. Because it's logically a billing manager's  
11 file, we have one billing manager, and it's run off the  
12 Lytec software, which is billing software. That  
13 software is not available to any employees outside the  
14 billing department unless you're an IT person that  
15 manages it, but they didn't even know how to operate the  
16 software.

17 **Q. And so you said you went to the workstation, and  
18 the file was deleted; is that correct?**

19 A. Correct.

20 **Q. Okay. What other steps did LabMD take with  
21 regard to that particular workstation?**

22 A. Well, as far as that workstation goes?

23 **Q. Yes.**

24 A. We asked Ros what she was doing because we also  
25 discovered LimeWire on the workstation because he had

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1 looked at on workstations.

2 **Q. Did it exist on workstations --**

3 A. No.

4 **Q. -- other than Ros Woodson's workstation?**

5 A. No.

6 **Q. E-mail RX 52.**

7 **Mr. Daugherty, do you recognize what that is up  
8 on the screen?**

9 A. Yes.

10 **Q. Okay. Was there further interaction between  
11 Tiversa and LabMD?**

12 A. Yes.

13 **Q. What did that interaction consist of?**

14 A. I had directed John, after conversations with  
15 my attorney, that this was highly suspect behavior,  
16 especially since there was no voluntary release of  
17 further information, so it was ordered that if there's  
18 any communication with Mr. Boback or Tiversa, it was to  
19 be in a written form.

20 **Q. And is this one of the written communications  
21 between Tiversa and LabMD?**

22 A. Yes.

23 **Q. Do you know whether LabMD requested services  
24 from Tiversa?**

25 A. Yes, I know if we requested them.

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1 **Q. Did you?**  
 2 A. No.  
 3 **Q. Okay. Did Tiversa offer services to --**  
 4 A. Yes. As a condition of giving information.  
 5 **Q. What type of services did Tiversa offer to**  
 6 **LabMD?**  
 7 A. Well, they didn't specify until we would ask  
 8 specific questions, because verifying that you have it  
 9 is not the complete picture, and I wanted to know how  
 10 they got it and --  
 11 **Q. And when you say "it," are you referring --**  
 12 A. The 1718 File. That's the only LabMD property  
 13 that Mr. Tiversa -- Mr. Boback had and kept.  
 14 **Q. And did they suggest to you how you could get**  
 15 **additional information about how they had it?**  
 16 A. As we asked questions, he would say that this  
 17 would require more work and a services agreement.  
 18 **Q. Did -- was LabMD offered remediation services?**  
 19 A. In the sense of this is what would have to  
 20 happen if you want an answer. And if you call that an  
 21 offer, yes, we were offered remediation services.  
 22 **Q. Did LabMD receive a scope of work or contract**  
 23 **for services from Tiversa?**  
 24 A. I would call it a scope of work.  
 25 **Q. Or a statement of work from Tiversa?**

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1 A. SOW we received.  
 2 MR. SHERMAN: It's the document -- it's  
 3 Tiversa's services agreement 006889.  
 4 (Pause in the proceedings.)  
 5 For identification purposes, Your Honor, we  
 6 would reference what is up on the screen as RX 530.  
 7 MS. VANDRUFF: And just for the benefit of the  
 8 record, Your Honor, this document is not a document that  
 9 is contained in the JX 2. It is not among the  
 10 documents that the parties have stipulated as  
 11 admissible in this proceeding, but I understand that  
 12 Mr. Sherman is marking it for identification purposes  
 13 only.  
 14 MR. SHERMAN: It is a document that has been  
 15 disclosed and exchanged between the parties,  
 16 Your Honor.  
 17 JUDGE CHAPPELL: All right.  
 18 BY MR. SHERMAN:  
 19 **Q. Mr. Daugherty, do you recognize what that is?**  
 20 A. Yes.  
 21 **Q. What is that?**  
 22 A. That's the services agreement that Mr. Boback  
 23 alluded to in his prior communications.  
 24 **Q. Okay. And if we turn to the second page of the**  
 25 **document, please, do you recognize what this is?**

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1 A. Yes. It's an additional page of the same.  
 2 **Q. What does it say across the top?**  
 3 A. Statement of Work.  
 4 **Q. Did you evaluate this, did you look at this and**  
 5 **determine or make an attempt to determine whether or not**  
 6 **LabMD would purchase services from Tiversa?**  
 7 A. That was not the point of my request, although I  
 8 did review it.  
 9 **Q. I didn't hear you. I'm sorry.**  
 10 A. That was not the point of my request, although I  
 11 did review the document.  
 12 **Q. You did review the document.**  
 13 **And in reviewing the document, did you**  
 14 **determine how much Tiversa was charging for its**  
 15 **services?**  
 16 A. Yes.  
 17 **Q. And what were they charging?**  
 18 A. They were charging hourly. It was about -- I  
 19 believe if you scroll down, it was about four hundred  
 20 and seventy -- there we go -- it was \$475 an hour.  
 21 And as you look at the terms they threw out and  
 22 I believe the estimate they had given to us was at least  
 23 40 hours that we were looking at -- I'm sorry -- at  
 24 least four weeks of work, 160 hours, we were looking at  
 25 about 40,000-plus in fees for an entity that would tell

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1 us nothing and an agreement that guaranteed nothing.  
 2 And with advice of counsel, honestly, I just had  
 3 to see what these people were like because never in my  
 4 career had I ever been approached like this about  
 5 something so sensitive as medical data and I -- we  
 6 really needed to just see this to see what these people  
 7 were about.  
 8 **Q. You said that your request for this information**  
 9 **from Tiversa was not for the purpose of evaluating**  
 10 **whether or not they would provide services.**  
 11 A. Correct.  
 12 **Q. Why did you request the information?**  
 13 A. Because I wanted to see what these people had  
 14 the nerve to propose based on nothing but fear and  
 15 manipulation other than proving to us they had our  
 16 property and the medical information of over  
 17 9,000 people.  
 18 **Q. What do you mean by fear and intimidation?**  
 19 A. There's nothing more important than patient  
 20 safety and patient medical -- I mean, we have HIPAA, but  
 21 there's nothing more important than that type of  
 22 respect. And to have someone not give you any  
 23 information other than they have possession and yet at  
 24 the same time want to enter into a relationship of  
 25 trust, it was beyond our comprehension. There was --



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1 there wasn't any further verification. We're just  
 2 supposed to trust them.  
 3 JUDGE CHAPPELL: You said earlier that you  
 4 looked on Ros' workstation. Who's Ros?  
 5 THE WITNESS: Ros Woodson is the billing  
 6 manager that the Federal Trade Commission can't seem to  
 7 find.  
 8 JUDGE CHAPPELL: Is the billing manager or was?  
 9 THE WITNESS: Oh, she was. I'm sorry. She was.  
 10 Excuse me. At the time, she was.  
 11 MS. VANDRUFF: Your Honor, for the benefit of  
 12 the record, while it is true that we have not been able  
 13 to serve a subpoena on Ms. Woodson, I object to the  
 14 characterization by Mr. Daugherty. I don't think that  
 15 it was responsive to your question, Your Honor.  
 16 JUDGE CHAPPELL: Well, for what it's worth,  
 17 that's sustained. I will ignore the part of his answer  
 18 that says "that the Federal Trade Commission can't seem  
 19 to find."  
 20 MS. VANDRUFF: Thank you, Your Honor.  
 21 BY MR. SHERMAN:  
 22 **Q. Mr. Daugherty, did LabMD communicate to Tiversa**  
 23 **that it would not be using its services?**  
 24 A. No. Not in that specific way, no.  
 25 **Q. Did LabMD refer Tiversa to its attorney?**

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1 A. That's correct.  
 2 **Q. And was there any further communication between**  
 3 **Tiversa and LabMD's attorney?**  
 4 A. Yes.  
 5 **Q. Was there any result of that, of those**  
 6 **communications?**  
 7 A. Result in -- can you define "result"?  
 8 **Q. Did anything happen as a result of those**  
 9 **communications?**  
 10 A. Yes.  
 11 **Q. What happened?**  
 12 A. I received a phone call from my lawyer in  
 13 November of 2008, approximately. And my main counsel  
 14 had been out. I believe she had a trial. She'd been  
 15 gone, so this was an assistant lawyer that I often also  
 16 worked with. And he was very baffled by what he said  
 17 was an aggressively toned -- aggressive voice --  
 18 aggressive tone from a lawyer representing Tiversa in  
 19 Pennsylvania who said, We're turning --  
 20 MS. VANDRUFF: Objection. Your Honor, I think  
 21 this is multiple levels of hearsay, and I'm not clear  
 22 what it's being offered for if it's not being offered  
 23 for the truth.  
 24 MR. SHERMAN: It's not being offered for the  
 25 truth but for the result basically. He is about to tell

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1 you what happened as a result of the conversation, which  
 2 I think was the original question.  
 3 JUDGE CHAPPELL: State of mind.  
 4 MR. SHERMAN: State of mind.  
 5 JUDGE CHAPPELL: Overruled.  
 6 MS. VANDRUFF: Thank you, Your Honor.  
 7 THE WITNESS: Can you read back my answer? I'm  
 8 sorry.  
 9 (The record was read as follows:)  
 10 "ANSWER: I received a phone call from my lawyer  
 11 in November of 2008, approximately. And my main counsel  
 12 had been out. I believe she had a trial. She'd been  
 13 gone, so this was an assistant lawyer that I often also  
 14 worked with. And he was very baffled by what he said  
 15 was an aggressively toned -- aggressive voice --  
 16 aggressive tone from a lawyer representing Tiversa in  
 17 Pennsylvania who said, We're turning -- "  
 18 THE WITNESS: Okay. He accused us of having bad  
 19 data security practices and they are turning this  
 20 over -- the file, the 1718 File, over to the  
 21 Federal Trade Commission because they don't want to get  
 22 in trouble having medical -- medical data and they don't  
 23 want to get sued.  
 24 BY MR. SHERMAN:  
 25 **Q. And what year was this? I'm sorry.**

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1 A. 2008.  
 2 **Q. And did you subsequently hear from the**  
 3 **Federal Trade Commission?**  
 4 A. Yes. We heard from the Federal Trade Commission  
 5 in January 2010.  
 6 **Q. And what was the communication? What was the**  
 7 **effect of the communication between LabMD and the**  
 8 **Federal Trade Commission?**  
 9 A. The effect of the communication?  
 10 **Q. What -- what happened as a result of that**  
 11 **communication?**  
 12 A. That individual communication of that January  
 13 call from Alain Sheer and then the subsequent letter or  
 14 the whole banana?  
 15 **Q. Well, let's start with the January call from**  
 16 **Mr. Sheer and the subsequent letter.**  
 17 A. So Mr. Sheer called and spoke to my  
 18 vice president, John Boyle. And as it was relayed to me  
 19 by John, it was a very brief call saying, We're in  
 20 possession of a file and we're starting a nonpublic  
 21 inquiry, and you'll be receiving a letter tomorrow. And  
 22 John came back to my office.  
 23 **Q. And did you in fact receive that letter?**  
 24 A. Yes, we did.  
 25 **Q. And how long was that letter?**

1 A. It was 11 pages single-spaced.  
 2 **Q. And what did that letter contain?**  
 3 A. It contained -- let me see exactly what it  
 4 contained. It contained questions, directions,  
 5 hyperbole, confusing requests, broad-brushed strokes of  
 6 definitions. It included -- it was -- it was  
 7 astounding. And it was large, broad and wide, and so we  
 8 complied.  
 9 **Q. Well, you said it contained requests.**  
 10 **What type of requests?**  
 11 A. They asked questions about our data security  
 12 practices. They wanted documentation about our,  
 13 I mean, policies, procedures -- you know, this is to  
 14 the best of my recollection here because this is six  
 15 years ago.  
 16 But, you know, they wanted to know everything  
 17 there was to know about our data security practice from  
 18 workstation layout, communication layout, protections,  
 19 firewalls, policies, training, timeline, employees.  
 20 I mean, it was -- it was -- I don't know how it  
 21 could have been broader. I actually can't think of how  
 22 it could have possibly been broader.  
 23 **Q. And as a result of receiving that letter, what**  
 24 **did you do, what did LabMD do?**  
 25 A. Well, at the time, we -- I mean, we really

1 thought, well, obviously we just have to let them know  
 2 everything we're doing. We -- we felt we were early  
 3 adapters, and we just answered -- I contacted my lawyer  
 4 again, and you know, the financial drain started to  
 5 open, and we answered as best we could and as much as  
 6 we could in complying with the letter and their  
 7 request.  
 8 MS. VANDRUFF: Your Honor, with respect to this  
 9 line of inquiry, I don't know that it's material to any  
 10 fact, any claim, defense or relief in this case.  
 11 And while I've permitted some latitude for  
 12 Mr. Sherman to examine Mr. Daugherty about the  
 13 initiation of the investigation, again, Your Honor has  
 14 ruled in a number of respects and -- excuse me -- in a  
 15 number of orders that the commission's conduct in  
 16 proceeding with its investigation is not relevant in  
 17 this case and not a material fact to be considered by  
 18 Your Honor, and so I would object to this continued line  
 19 of questioning.  
 20 JUDGE CHAPPELL: This gentleman's company has  
 21 been sued by the U.S. government, the FTC.  
 22 MS. VANDRUFF: Yes, Your Honor.  
 23 JUDGE CHAPPELL: His perspective is relevant.  
 24 Overruled.  
 25 MS. VANDRUFF: Thank you, Your Honor.

1 BY MR. SHERMAN:  
 2 **Q. Mr. Daugherty, at that point in time, what was**  
 3 **your attitude, what was your hope in terms of what you**  
 4 **thought would happen?**  
 5 A. Well, you know, I've been involved with the  
 6 government my entire life. My parents are police  
 7 officers. I was -- my parents were police officers  
 8 when they met, and I'd been involved with the  
 9 government my entire life from the perspective of  
 10 judges and lawyers and police officers and starting a  
 11 medical facility. And our -- and my mother even worked  
 12 for the Internal Revenue Service.  
 13 And so I was respectful. And I was expecting  
 14 professionalism, transparency, information, and at  
 15 least what they think we might have done wrong. But at  
 16 that stage of the game, I was just going to give them  
 17 everything they wanted because we'd worked also with the  
 18 medical -- the CLIA and HHS, and we had nothing but a  
 19 positive relationship back and forth on what we were to  
 20 achieve and do.  
 21 So really I was like this letter is just so  
 22 huge, so we're just going to have to give them  
 23 everything, so give them everything, answer the  
 24 questions, give them everything.  
 25 **Q. And that was your order to the people that were**

1 **working for you --**  
 2 A. Yes.  
 3 **Q. -- correct, give them --**  
 4 A. Correct. Give them everything that answer the  
 5 questions --  
 6 **Q. And --**  
 7 A. -- that they asked for.  
 8 **Q. -- is it fair to say that you attempted to**  
 9 **answer the questions by giving them everything you**  
 10 **thought was relevant to the questions?**  
 11 A. According to my lawyer, yes.  
 12 **Q. And upon giving them everything, what happened?**  
 13 A. Well, a couple months went by, and we had a  
 14 phone call with Mr. Sheer, so I drove down to my  
 15 lawyer's office and we had a call.  
 16 **Q. And what happened as a result of that call?**  
 17 A. Well, that call was very frustrating to us  
 18 because the result of the call was: Well, you've -- you  
 19 haven't answered our questions. That was -- that was  
 20 just -- jaws hit the ground. And it seemed like they  
 21 were upset with us. And the tone was curt and not  
 22 clear.  
 23 And I -- just as I had done with Mr. Boback, I  
 24 had told my lawyer, this isn't a trustworthy behavior.  
 25 And I don't want anything verbal in their requirements.

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1 Get it in writing. Because what I'm seeing is a  
2 bouncing ball of circle and confuse, and although if I  
3 give a lawyer a request for writing, I know I'm going to  
4 get a broader request, but at least it's nonnegotiable  
5 and it can't be spun later, so whatever we do in this  
6 call, get it in writing.

7 **Q. In terms of what happened next, did you receive  
8 another written request?**

9 A. Well, of course we did get a summary of  
10 additional requests, and my lawyer was responsive and so  
11 were we.

12 **Q. Was your attitude still give them everything?**

13 A. Well, sure. I mean, it's the federal  
14 government. We're going to -- we're going to give them  
15 what they request and cooperate, but that doesn't mean  
16 we're having a lot of faith in this team.

17 **Q. And you made a second submission; is that  
18 correct?**

19 A. That's correct.

20 **Q. And was there further communication as a result  
21 of the second submission?**

22 A. I believe there were -- I believe there were  
23 additional questions between Mr. Sheer and my lawyer.

24 **Q. Did you make a trip to Washington, D.C.?**

25 A. Yeah. After that time when we were asked to

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1 come to Washington, D.C.

2 **Q. And what happened --**

3 A. And we also at that point asked the  
4 Federal Trade Commission if they want to come -- I  
5 believe it was this time -- if they wanted to come to  
6 Atlanta and just see it.

7 **Q. What was the purpose of inviting them to  
8 Atlanta?**

9 A. Because we wanted them to see it. It was like  
10 let's get this over with. Come on down. What's the  
11 problem? Let's work on it. Let's solve it. Come on  
12 down. That's what everyone else did with every other  
13 aspect that we dealt with. You want to see it? Come on  
14 in. But we had to go up there.

15 **Q. Did the FTC ever accept your invitation to come  
16 and see LabMD?**

17 A. My lawyer said that they turned us down and  
18 wouldn't come.

19 **Q. What happened at your meeting in D.C.?**

20 A. It was my lawyer, myself and Mr. Boyle and -- on  
21 one side of the table, and it was Mr. Sheer and  
22 Ms. Yodaiken on the other.

23 **Q. Who is Mr. Boyle?**

24 A. Mr. Boyle is my -- was the vice president of  
25 operations and general manager of LabMD.

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1 **Q. And what happened at that meeting?**

2 A. At that meeting, you know, my lawyer handled  
3 most of it. I was in an observational role. And there  
4 was -- I mean, it might have lasted an hour, an hour and  
5 a half I guess.

6 And it was a review of what they still wanted  
7 to know, what questions they had, and also an  
8 observation that I -- just by some of the questions, we  
9 were incredulous thinking -- we thought to ourselves,  
10 these answers are in what we submitted. What is going  
11 on? But we didn't want to say that to them because it's  
12 the Federal Trade Commission, so you don't want to upset  
13 them, you want to be cooperative and get along.

14 So we just tried to do that, but we were very  
15 surprised because we felt like we're -- it was like  
16 okay, how many times are you going to ask the same  
17 question. We weren't going to say you've got that  
18 information, but we left feeling like we were being --  
19 we were under an inquisition, that we were being  
20 repetitive -- we were suspicious they would be asking  
21 the same question because they wanted to see  
22 inconsistency in the answer. We felt very under the  
23 microscope.

24 We felt that they didn't -- either they were --  
25 either they hadn't read what we sent or they were acting

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1 like they did or they just didn't seem like they had a  
2 mastery of everything we submitted, and so we were very  
3 put off. And at that point, trust in the  
4 Federal Trade Commission's behavior nearly -- it just  
5 exploded. It was gone.

6 **Q. Did you at some point receive an offer to enter  
7 into a settlement?**

8 A. Not at that -- I mean later -- no. It was --  
9 they had submissions that kept going, and I mean, it  
10 went on for another -- that was the summer of 2010.  
11 They didn't say that they were interested in moving  
12 into a consent decree until I believe August or  
13 September 2011, so we still had a year-plus of  
14 submissions and questions and lawyer fees and  
15 divergence.

16 **Q. And so at what point then was there a settlement  
17 offer put on the table?**

18 A. Well, it was a request to -- it was a request  
19 to enter into settlements, and I wasn't interested in a  
20 consent decree until I knew what we had done wrong.

21 **Q. Is it your testimony that even at that point you  
22 did not know what you had done wrong?**

23 A. That's correct.

24 When we would try to ask that kind of question,  
25 we'd be pointed towards consent decrees of companies

18 (Pages 998 to 1001)

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1 that really had lost data.  
 2 And by that time I'd also learned that Tiversa  
 3 had procured this file in assistance with Dartmouth in a  
 4 study that had been funded by Homeland Security  
 5 partially to the tune of \$24 million, and I had seen  
 6 Tiversa sitting in a 2007 oversight hearing with the  
 7 Federal Trade Commission and Dartmouth and  
 8 U.S. Patent and Trade and Wesley Clark.  
 9 And so I had paid -- because I still wanted to  
 10 know what I did wrong, what I did wrong, what I did  
 11 wrong. It's really easy, easy, what I did wrong. And  
 12 all I was getting was section 5 says we're responsible  
 13 for unfairness and deception, and this is -- this may be  
 14 considered unfair. How? I was like what, what's  
 15 unfair? I didn't get an answer.  
 16 Like what are the standards? What are the  
 17 rules? Where -- and so what I saw was consent decrees.  
 18 And when I hired a guy, Ben Wright from the  
 19 SANS Institute, and he came in and analyzed and he  
 20 said --  
 21 MS. VANDRUFF: Objection, Your Honor.  
 22 Objection, Your Honor. This -- I believe that  
 23 Mr. Daugherty is about to testify about hearsay from a  
 24 witness that has not been disclosed to the commission  
 25 as having information that's relevant to a claim or

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1 defense in this case. I'd object to its admission.  
 2 MR. SHERMAN: Your Honor, I believe what the  
 3 witness is about to say is what they did, what steps  
 4 LabMD took to find out what they did wrong, since the  
 5 commission would not tell them.  
 6 And I think the testimony he's about to give is  
 7 relevant to an issue that was brought up by one of  
 8 complaint counsel's experts with regard to looking for  
 9 information on hard drives and investigating if and how  
 10 the 1718 File escaped LabMD's possession, so I believe  
 11 it's very relevant in terms of how this respondent  
 12 proceeded in its defense.  
 13 MS. VANDRUFF: And Your Honor, the actions that  
 14 LabMD took may well be relevant, but the findings of  
 15 Mr. Wright, to whom Mr. Daugherty just referred, are  
 16 both inadmissible and -- well, they are inadmissible for  
 17 several reasons, first that they're hearsay.  
 18 Secondly, Your Honor, counsel for respondent has  
 19 never disclosed Mr. Wright, who is an attorney and who  
 20 we understood his relationship with LabMD to be a  
 21 privileged one, to --  
 22 JUDGE CHAPPELL: Are you saying that whatever  
 23 Mr. Wright did was within a discovery request you served  
 24 on respondent?  
 25 MS. VANDRUFF: Well, it may have been,

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1 Your Honor, but also LabMD, in serving their initial  
 2 disclosures, identified only a handful of witnesses who  
 3 had information that was relevant to a claim, defense or  
 4 relief --  
 5 JUDGE CHAPPELL: And was this man disclosed at  
 6 that time?  
 7 MS. VANDRUFF: No, Your Honor, it was not.  
 8 JUDGE CHAPPELL: The objection is sustained to  
 9 the point that the witness is instructed not to tell  
 10 the court what Mr. Wright did. He can tell us who he  
 11 hired, what he did, that's what he perceived, but not  
 12 what Mr. Wright did based on what I've just heard.  
 13 So to that extent, the objection is sustained.  
 14 MR. SHERMAN: Thank you, Your Honor.  
 15 MS. VANDRUFF: Thank you, Your Honor.  
 16 JUDGE CHAPPELL: You also need to rephrase your  
 17 question because he's getting into a part that's  
 18 nonresponsive to the pending question.  
 19 MR. SHERMAN: Yes, sir.  
 20 MS. VANDRUFF: Thank you, Your Honor.  
 21 BY MR. SHERMAN:  
 22 **Q. So, Mr. Daugherty, you had testified that you**  
 23 **were curious as to what you did wrong; correct?**  
 24 A. Correct.  
 25 **Q. And LabMD certainly took steps to try and find**

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1 **out what it did wrong; is that correct?**  
 2 A. Correct.  
 3 **Q. And one of those steps was looking at the hard**  
 4 **drive; is that right?**  
 5 MS. VANDRUFF: Objection. Vague as to  
 6 "hard drive."  
 7 MR. SHERMAN: I can rephrase the question.  
 8 JUDGE CHAPPELL: Okay.  
 9 BY MR. SHERMAN:  
 10 **Q. Looking at the hard drive on the workstation of**  
 11 **Ros Woodson, who was the billing manager, where Lab --**  
 12 **where the 1718 File was found.**  
 13 A. That's correct.  
 14 **Q. And why did LabMD have tests done on that**  
 15 **hard drive?**  
 16 A. When -- you know, in 2008, when this all  
 17 started, if you told me or I told anyone else I'd be  
 18 sitting here today, that the Federal Trade Commission  
 19 would come after a small cancer detection center for  
 20 this, they would have thought I was crazy, and they  
 21 actually told me so. This isn't going to happen. Too  
 22 small. Medical. Tests for cancer. They've got bigger  
 23 fish to fry.  
 24 Then WikiLeaks happened. This ain't going to  
 25 happen. Too small. Bigger fish to fry.

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1 Well, now, they ain't going away, and I want to  
2 know what we've done wrong. But in 2008 we deleted the  
3 file.

4 So now it's very clear that this crowd isn't  
5 leaving. And they're not very transparent, that's for  
6 sure. They want to say that they're based on unfairness  
7 that they get to make up on a case-by-case basis as we  
8 go along. That's a little tough to know what you did,  
9 what was wrong or what you do.

10 So they certainly weren't coming to our rescue,  
11 so I had to come to my own. And I hired professionals,  
12 because in the state of Georgia, to surveil, you have to  
13 have a PI license, and so I hired a private investigator  
14 forensic specialist -- or I didn't hire them. Excuse  
15 me. My lawyer did.

16 **Q. And that person conducted tests?**

17 A. Correct.

18 **Q. On the hard drive.**

19 A. On the hard drive.

20 **Q. From Ros Woodson's computer.**

21 A. To try to find the missing -- we were trying --  
22 because in the course of analysis we learned that none  
23 of, not one of the files that -- in that My Documents  
24 folder that LimeWire had access to, there are  
25 approximately 950 files. And we learned that like the

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1 remaining 949 or 950, approximately, because the only  
2 file we deleted was that one, was that --

3 MS. VANDRUFF: Objection, Your Honor. I  
4 believe that Mr. Daugherty -- and I apologize for  
5 interrupting, Mr. Daugherty -- is speaking about  
6 information that he learned from Mr. Moulton, who was  
7 the subject of a discovery motion before Your Honor  
8 early in this case.

9 And at that time, respondent's counsel took the  
10 position that complaint counsel could not take any  
11 discovery from Mr. Moulton because he served exclusively  
12 as a consulting expert and would not be used in this  
13 litigation.

14 I may misunderstand Mr. Daugherty's testimony,  
15 but before that cat is out of the bag I wanted to be  
16 sure to raise the objection.

17 JUDGE CHAPPELL: You're to instruct your client  
18 not to testify to any information that hasn't been  
19 disclosed to complaint counsel.

20 I don't care who the source is, but if he has  
21 told you something in discovery, he has a right to tell  
22 us now.

23 MS. VANDRUFF: Understood, Your Honor. I  
24 believe that we were about to violate Your Honor's  
25 instruction to Mr. Sherman and Mr. Daugherty.

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1 JUDGE CHAPPELL: Well, if that's what he's  
2 doing, violating a previous order, that's sustained.

3 MS. VANDRUFF: Thank you, Your Honor.

4 BY MR. SHERMAN:

5 **Q. As a result of that testing --**

6 A. Yes.

7 **Q. -- in your zeal to find out what you did wrong,  
8 what happened to the hard drive?**

9 A. They were destroyed. Forensically. I don't  
10 think they melted, but they were destroyed.

11 **Q. And the reason you did that testing was  
12 because?**

13 A. I wanted answers and I wanted proof because I  
14 wanted these guys to go away.

15 **Q. Mr. Daugherty, there are also a different set of  
16 documents at issue in this case, would you agree?**

17 A. I assume you're referring to the Sacramento  
18 documents?

19 **Q. I am.**

20 A. Yes, I would agree.

21 **Q. Those documents have been referred to as  
22 day sheets.**

23 **What is a day sheet?**

24 A. In the billing department of LabMD, LabMD used  
25 software called Lytec. There was a template formed

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1 within Lytec that would be run -- after checks and  
2 pay -- checks would come in and they'd be posted to the  
3 Lytec software. And as a security measure and accuracy,  
4 there would be checks and balances to make sure the bank  
5 deposit was the same as what was entered into the  
6 station, workstation.

7 So the day sheets were a template that at the  
8 end of the day would be populated with all the checks  
9 that had been posted in Lytec. And it was just a  
10 checks-and-balance system, so it wasn't -- it wasn't  
11 saved to the workstations. My understanding, it wasn't  
12 even savable.

13 It was more like a blank template that was  
14 populated when you printed it off. And once it was  
15 printed off, they made sure that matched the deposit  
16 that they filled out to go to the bank.

17 And then that was -- that's what the day sheets  
18 were. And they were saved. We had a -- you know, we  
19 tried to have as little paper as possible because the  
20 government had spent no shortage amount of time telling  
21 medicine that they wanted us to go electronic and we --  
22 but we had to have that hard document of that day sheet  
23 deposit to balance -- so we saved those in a monthly  
24 accordion folder with dates 1 through 31, and so that's  
25 where they were saved, because we had patients call and

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1 say, you know, I paid that bill, you've got that check.  
 2 You know, they might not realize we had four tests going  
 3 on over five months. There would be confusion.  
 4 And while patients wouldn't call the medical  
 5 side directly, patients did call the billing side  
 6 directly, so we had to have that for, you know, future  
 7 reference.  
 8 **Q. And so that's what a day sheet is and what --**  
 9 A. Sorry. That's what a day sheet is.  
 10 **Q. -- it was used for; right?**  
 11 A. Correct, that's what a day sheet is and that's  
 12 what it's used for.  
 13 **Q. And so how did you find out that the day sheets**  
 14 **would become an issue in this case?**  
 15 A. We had had a long confrontation and legal  
 16 proceedings with the Federal Trade Commission over their  
 17 jurisdiction and ability to have me and John Boyle sit  
 18 for a CID. And we lost that battle and arranged with  
 19 the Federal Trade Commission to sit for CIDs very early  
 20 in February of 2013.  
 21 I believe approximately 48 to 96 hours prior,  
 22 LabMD received communication from Mr. Sheer that they  
 23 were -- would be asking us questions about these  
 24 documents that they received from the  
 25 Sacramento Police Department.

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1 And that's when I was made aware that they had  
 2 allegedly left LabMD, were out in California, that the  
 3 FTC had them, and they came redacted so that we couldn't  
 4 tell much except the transaction number.  
 5 **Q. Well, I want to show RX 1.**  
 6 **What's on the screen at this point,**  
 7 **Mr. Daugherty, is RX 1.**  
 8 **Do you recognize what that is?**  
 9 A. That is a day sheet. Yes.  
 10 **Q. And the information that's redacted out of the**  
 11 **day sheet is what?**  
 12 A. Well, I -- my memory is this is not the  
 13 redaction that we received. We received much more  
 14 redaction than this.  
 15 But what's redacted on what's here on the  
 16 screen appears to be -- I have to look closer.  
 17 Excuse me.  
 18 On this page it looks like the chart number is  
 19 fully redacted and the patient last name is redacted.  
 20 **Q. Let's go to the second page.**  
 21 JUDGE CHAPPELL: Before you do that, you  
 22 referred to a document earlier that he looked at and it  
 23 had to do with Tiversa. There were billing rates,  
 24 et cetera.  
 25 MR. SHERMAN: Yes, sir.

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1 JUDGE CHAPPELL: I don't recall what that  
 2 document was called, but --  
 3 MR. SHERMAN: It was RX 530.  
 4 JUDGE CHAPPELL: And that document has come into  
 5 evidence? If not, then it needs to be marked for  
 6 identification or as a demonstrative at least.  
 7 MR. SHERMAN: I think I did say on the record  
 8 that it was marked for identification purposes.  
 9 JUDGE CHAPPELL: So it would have a "D"  
 10 designator at the end of the number. Can someone verify  
 11 what number the document is?  
 12 MR. SHERMAN: I -- it's -- the number?  
 13 JUDGE CHAPPELL: The RX number.  
 14 MR. SHERMAN: RX 530, so it would be RXD 530?  
 15 Is that the court's request?  
 16 JUDGE CHAPPELL: Right. So it's clear in the  
 17 record.  
 18 And before you put up another document, you can  
 19 clear the screen. We're going to take our morning  
 20 break.  
 21 MR. SHERMAN: Yes, sir.  
 22 JUDGE CHAPPELL: And Mr. Sherman, how much more  
 23 time do you think you need?  
 24 MR. SHERMAN: I would say maybe an hour.  
 25 JUDGE CHAPPELL: Okay. We're going to reconvene

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1 at 11:45.  
 2 We're in recess.  
 3 (Recess)  
 4 JUDGE CHAPPELL: Back on the record Docket 9357.  
 5 Continue your direct exam.  
 6 MR. SHERMAN: Thank you, Your Honor.  
 7 JUDGE CHAPPELL: I reviewed my previous order  
 8 regarding the witness -- I think it's Moulton?  
 9 MS. VANDRUFF: Yes. Yes, Mr. Moulton.  
 10 JUDGE CHAPPELL: Getting back to the previous  
 11 objection I ruled on, I'm not changing my ruling. I'm  
 12 just making sure that your client is well aware of what  
 13 he's not to talk about in court.  
 14 MR. SHERMAN: He is aware, Your Honor. We've  
 15 discussed it.  
 16 JUDGE CHAPPELL: All right. Thank you.  
 17 MS. VANDRUFF: Thank you, Your Honor.  
 18 BY MR. SHERMAN:  
 19 **Q. Mr. Daugherty, when we broke, we were talking**  
 20 **about the day sheets and how you first learned that the**  
 21 **FTC was in possession of them.**  
 22 **Could you tell us how you first learned that the**  
 23 **FTC was in possession of the day sheets.**  
 24 A. My lawyer told me that Mr. Sheer had told him  
 25 that he was going to be reviewing those documents and

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1 send them over in the CID that was coming up in a day or  
2 two.

3 **Q. And we were looking at redacted copies of the**  
4 **day sheets before we left.**

5 A. Correct.

6 **Q. And when were those -- when were copies of the**  
7 **day sheets -- well, let me stop.**

8 **Do you recall when you were notified that the**  
9 **FTC was in position of the day sheets?**

10 A. It was when Mr. Sheer called. It's either  
11 January 30th or 31st, approximately around that time,  
12 2013.

13 **Q. And once learning that the FTC was in possession**  
14 **of the day sheets, did LabMD request them?**

15 A. I believe we didn't have -- well, we received  
16 them not redacted -- I mean -- sorry -- we received them  
17 redacted, so as I recall, the only thing that was  
18 available on the sheet was a one column of what we saw  
19 as if they were the day sheets from LabMD, they were the  
20 transaction numbers. That's my recollection.

21 And then can you repeat your question? Sorry.

22 So I believe they came with it so that we didn't  
23 have to request those. And then, you know, our lawyer  
24 advised us that he would investigate and we would have  
25 the CIDs. And then we asked for the CI- -- the

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1 requires recollection. He was asked if he knew why the  
2 request wasn't honored and his answer was no.

3 JUDGE CHAPPELL: What's the purpose of the  
4 document?

5 MR. SHERMAN: The purpose is to remind  
6 Mr. Daugherty that he actually does know why the request  
7 was not honored.

8 JUDGE CHAPPELL: Improper foundation.

9 Sustained.

10 MS. VANDRUFF: Thank you, Your Honor.

11 JUDGE CHAPPELL: You need to remove the document  
12 until we have a proper foundation.

13 BY MR. SHERMAN:

14 **Q. Mr. Daugherty, the FTC, as you've testified, was**  
15 **not very forthcoming with the documents; is that**  
16 **correct?**

17 A. Correct.

18 **Q. Okay. Do you know what was done -- did you ever**  
19 **receive from the FTC unredacted copies?**

20 A. I know we asked. I know -- not -- not that I  
21 recall. We figured it out on our own.

22 **Q. Right.**

23 **And what was it that you were trying to figure**  
24 **out?**

25 A. Well, we needed to know -- well, we needed to

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1 unredacted copies after the CID.

2 **Q. Could you just speak up a little bit.**

3 A. Sorry. I'm trying to speak slow, so that makes  
4 my voice -- sorry.

5 **Q. There's a difference between slow and soft.**

6 A. Did you understand that? Okay.

7 **Q. And so it's your understanding that a request**  
8 **was made to the FTC for unredacted versions of the**  
9 **day sheets; is that correct?**

10 A. Yeah. We were -- we -- it was 2013 and we  
11 needed to know information of what our obligations were  
12 to the patients under HIPAA, so we needed them.

13 **Q. And did the -- was the request made?**

14 A. Yeah. One of my lawyers sent a letter to  
15 Mr. Sheer I believe.

16 **Q. Was the request immediately honored?**

17 A. No.

18 **Q. And do you know why it was not honored?**

19 A. No.

20 MR. SHERMAN: Your Honor, I would like to mark  
21 this RX 531 for identification purposes at this  
22 particular time.

23 MS. VANDRUFF: And Your Honor, if this document  
24 is going to be used to refresh Mr. Daugherty's  
25 recollection, there's no evidence that Mr. Daugherty

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1 know a lot of things. We needed to figure out how it  
2 got out, what it was, what patients were involved, are  
3 there leaks in any -- are there employees that are in  
4 trouble, what are the dates, you know, what are the  
5 notification requirements, how many patients are there  
6 that -- HIPAA has different regulations depending on the  
7 size and geographical location. We needed this  
8 information to protect the patients and to fulfill our  
9 duties under HIPAA.

10 And so what -- so -- so I wanted information, so  
11 I instructed my lawyer to contact the Sacramento police,  
12 and I instructed him to contact the Sandy Springs,  
13 Georgia Police Department.

14 **Q. So, Mr. Daugherty, as you can see on the portion**  
15 **of RX 1 that's up on the screen, there is redacted**  
16 **information; correct?**

17 A. Correct.

18 **Q. And part of your answer was the reason you**  
19 **wanted the unredacted versions was because you wanted to**  
20 **know what your obligations were to the patients;**  
21 **correct?**

22 A. Correct.

23 **Q. And were you able to figure out whether or not**  
24 **the names listed here were in fact patients of your**  
25 **physician clients?**

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1 A. Yeah. It would have been easier to have them  
2 all unredacted, so we thought that would be forthcoming  
3 and that was no big deal, so -- but we only had 60 days  
4 per the regulation, so -- but we thought it would be  
5 forthcoming, so we didn't take the long road until they  
6 just didn't come. And then I -- I just directed my --  
7 my lawyer to just figure out through our staff how we  
8 can connect these billing transaction codes to  
9 patients.

10 **Q. How did you connect the billing transaction**  
11 **codes to patients?**

12 A. We had to go to Lytec and pull each one up one  
13 by one and see what patients could be possibly attached  
14 to that transaction number.

15 **Q. So what is Lytec?**

16 A. Lytec is the software that we use in the billing  
17 department, and that is the software that generated this  
18 report.

19 **Q. And what did you enter into Lytec to try to find**  
20 **out what the full patient information --**

21 A. This billing number, this billing number that's  
22 on the sheet that's to the left of the -- what looks  
23 like the date.

24 **Q. And so --**

25 A. It says "Billing" in the heading.

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1 **Q. And so it's fair to say that by using the**  
2 **billing number you were able to discern who, whose names**  
3 **appeared on the day sheets; correct?**

4 A. Well, we were to reasonably assume since we  
5 didn't see it, so my recollection is that what we  
6 received was way more redacted than this, that there was  
7 nothing open except like the heading and that one  
8 column.

9 **Q. And which column?**

10 A. The Billing column, the column that says  
11 "Billing," that one --

12 **Q. But using that information you were able to**  
13 **discern --**

14 A. That's correct, we were able to discern.

15 **Q. -- the names of the people who were on the day**  
16 **sheets.**

17 A. Yes. Who they likely were, yes, who's attached,  
18 correct.

19 **Q. Mr. Daugherty, up on the screen is RX 348.**

20 **Do you recognize that document?**

21 A. That's the notification letter we sent to the  
22 patients that we put together were on the day sheets.

23 **Q. And what's the date of that letter?**

24 A. March 27, 2013.

25 **Q. And why did you send this letter?**

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1 A. Well, HIPAA requires, after the rule went in  
2 effect and -- and out of an abundance of caution -- the  
3 last day sheet was dated prior to that notification rule  
4 going in effect in 2009, but out of an abundance of  
5 caution, we didn't want to go round and round on when  
6 these were taken.

7 We thought these were taken right in line with  
8 our move because that's right when we were packing up  
9 and moving when the last one was -- was -- was -- the  
10 last day sheet was -- was -- the old -- I guess the  
11 youngest day sheet they'd call it. You know, the  
12 day sheet dates were from 2000 to 2009, so we just  
13 assumed -- we assumed, okay, we're really a small group  
14 here. These are not burned on the hard drives. This  
15 is not about any firewall or any -- anything  
16 electronic. This is a physical paper document theft if  
17 that. We don't have the information, but what do we  
18 know that would let us, you know, know when this  
19 occurred.

20 At the same time, we weren't getting answers  
21 from the Federal Trade Commission, and we were  
22 concerned about HIPAA. We really felt like that we had  
23 to honor HIPAA, especially because we felt like the FTC  
24 was setting us up to fail.

25 So out of an abundance of caution, we pretended

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1 that this happened the day that we were told by the FTC,  
2 even though we found out it had happened almost four  
3 months before.

4 **Q. What --**

5 A. Okay. So -- so anyway, so we sent this to  
6 patients because HIPAA required it.

7 **Q. And you sent it on March 27, 2013; correct?**

8 A. Correct.

9 **Q. And it's your testimony that you learned that**  
10 **the FTC was in possession of these around the end of**  
11 **January; is that correct?**

12 A. Correct. So we had 60 days.

13 **Q. Okay. Did you find out when the FTC came into**  
14 **possession of the day sheets?**

15 A. Yes.

16 **Q. And when did the FTC come into possession of the**  
17 **day sheets?**

18 A. Well, they became aware of them in mid-October  
19 of '13, and they became in possession shortly thereafter  
20 in October 2013 from the Sacramento police, according to  
21 what the Sacramento police told us.

22 **Q. So it's your testimony that the FTC became aware**  
23 **in mid-October and that they did not notify LabMD until**  
24 **late January?**

25 A. That's correct.



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1 MS. VANDRUFF: Objection.  
 2 With respect to the foundation of  
 3 Mr. Daugherty's knowledge, he is basing it exclusively  
 4 on what he was told by the Sacramento police, and I  
 5 believe that was in discovery. I just wanted to note  
 6 that for the record as a hearsay objection, Your Honor.  
 7 That evidence is before Your Honor in the  
 8 record.  
 9 JUDGE CHAPPELL: Are you disputing when the FTC  
 10 learned of this information from --  
 11 MS. VANDRUFF: I'm not disputing it, Your Honor.  
 12 It's just that it's before Your Honor in the transcript  
 13 of the Sacramento Police Department, not through  
 14 Mr. Daugherty. As a fact witness, he should not be able  
 15 to sponsor that testimony, Your Honor.  
 16 JUDGE CHAPPELL: Is that -- is there a document  
 17 in evidence that contains this information?  
 18 MR. SHERMAN: I believe there's testimony in  
 19 evidence from Detective Jestes by way of her deposition  
 20 that contains that information, Judge.  
 21 JUDGE CHAPPELL: The objection is sustained.  
 22 MS. VANDRUFF: Thank you, Your Honor.  
 23 JUDGE CHAPPELL: To the point that his testimony  
 24 will not be cited for the proposition of what the  
 25 Sacramento police said.

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1 Is that 2012 or 2013?  
 2 This letter that's still on the screen for some  
 3 reason says March 2103.  
 4 MR. SHERMAN: It's 2013, but it would have been  
 5 October 2012.  
 6 JUDGE CHAPPELL: Right. He testified 2013.  
 7 THE WITNESS: Thank you, Your Honor. I'll  
 8 correct that. It was October 2012.  
 9 MR. SHERMAN: I believe that information can  
 10 also be confirmed in the deposition transcript of  
 11 Ruth Yodaiken as well.  
 12 JUDGE CHAPPELL: While I'm not sure it's  
 13 disputed, I just wanted to, based on the objection,  
 14 wanted to make it clear that this witness isn't the one  
 15 to give us that information.  
 16 MR. SHERMAN: I understand, Your Honor.  
 17 BY MR. SHERMAN:  
 18 **Q. Mr. Daugherty, are you aware of whether or not**  
 19 **these day sheets were in any way connected to the**  
 20 **individuals that were arrested in Sacramento?**  
 21 A. To my knowledge, they were not.  
 22 **Q. And if we could go to RX 472.**  
 23 JUDGE CHAPPELL: I want to clarify something for  
 24 the record.  
 25 MS. VANDRUFF: I'm sorry. Your Honor --

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1 JUDGE CHAPPELL: When you put an exhibit up  
 2 previously and I sustained an objection to lack of  
 3 foundation, part of the objection was it wasn't in  
 4 evidence. A document used merely to refresh doesn't  
 5 have to be in evidence; however, based on the lack of  
 6 foundation, I sustained the objection. I'm just making  
 7 clear, it didn't have to be in evidence if the proper  
 8 foundation was laid.  
 9 MR. SHERMAN: And you did sustain the objection  
 10 for basically lack of foundation.  
 11 JUDGE CHAPPELL: Right. Not because it wasn't  
 12 in evidence already.  
 13 MR. SHERMAN: Right.  
 14 JUDGE CHAPPELL: Trial practice 101.  
 15 MS. VANDRUFF: And Your Honor, this document on  
 16 the screen, for which there is no foundation with this  
 17 witness, I'd ask that it be taken down until that  
 18 foundation is laid.  
 19 JUDGE CHAPPELL: And this document is in  
 20 evidence?  
 21 MR. SHERMAN: It is in evidence.  
 22 MS. VANDRUFF: Oh, I'm sorry, Your Honor. It is  
 23 in evidence. But nonetheless, Mr. Daugherty is not a  
 24 recipient of this document.  
 25 JUDGE CHAPPELL: Since it's not -- even though

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1 it is in evidence, it's in the record. However,  
 2 flashing it up and letting him look at it before  
 3 questioning him is leading.  
 4 Sustained.  
 5 MS. VANDRUFF: Thank you, Your Honor.  
 6 BY MR. SHERMAN:  
 7 **Q. How did you become aware that these documents**  
 8 **were in no way connected to the individuals who were**  
 9 **arrested in Sacramento?**  
 10 A. I was in -- I attended the deposition in  
 11 Sacramento, California, and I consulted with my lawyers  
 12 as well.  
 13 MS. VANDRUFF: Your Honor, I'd renew my  
 14 objection that this testimony is not properly submitted  
 15 to Your Honor through Mr. Daugherty, rather, if his  
 16 personal knowledge is from testimony that was offered in  
 17 Sacramento, that Your Honor should consider that  
 18 testimony and not the testimony of Mr. Daugherty.  
 19 JUDGE CHAPPELL: Is it disputed whether or not  
 20 these documents are connected to the individuals  
 21 arrested in Sacramento?  
 22 MS. VANDRUFF: Well, Your Honor, the  
 23 documents -- the testimony that Your Honor will review  
 24 will demonstrate that the documents were found in the  
 25 possession of two individuals who pleaded no contest to

24 (Pages 1022 to 1025)

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1 identity theft.

2 And I would need to review the transcript of the  
3 witness to determine with certainty what she said  
4 specifically about the LabMD documents that were found  
5 in their possession. I believe she said that she did  
6 not know.

7 MR. SHERMAN: Well, Your Honor, the exhibit  
8 that I'm attempting to proffer or bring into the  
9 court's current view and knowledge is an e-mail from  
10 Detective Jests to Mr. Sheer and Ms. Yodaiken  
11 concerning just that issue as to whether or not the  
12 day sheets in fact and the receipt of the day sheets in  
13 fact have anything to do with the two individuals who  
14 pled.

15 MS. VANDRUFF: And Your Honor, this document is  
16 in the record, and so to the extent that the court  
17 wishes to draw inferences from it or from the testimony  
18 of the witnesses who have been examined, that certainly  
19 is within the province of the court, but I don't  
20 believe it's a proper subject of Mr. Daugherty's  
21 examination.

22 JUDGE CHAPPELL: We have an improper foundation  
23 for it to be utilized with this witness at this time.  
24 Sustained.

25 MS. VANDRUFF: Thank you, Your Honor.

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1 BY MR. SHERMAN:

2 **Q. So, Mr. Daugherty, you now learned that the case**  
3 **is about the 1718 File and the day sheets as late as**  
4 **January of 2013; correct?**

5 A. Correct.

6 **Q. And is it your position that at that point you**  
7 **still don't know what you did wrong?**

8 A. That's correct.

9 **Q. And Mr. Daugherty, what impact -- and I would**  
10 **say as the investigation proceeded, what impact, if any,**  
11 **did this have on your business?**

12 A. Well, it had -- it was -- it started out -- the  
13 whole impact on the business started in May 2008 with  
14 the beginning of a constant series of "we're not telling  
15 you" from Tiversa and then the Federal Trade Commission.

16 And so it had --

17 **Q. What is it that you contend that the**  
18 **Federal Trade Commission didn't tell you?**

19 A. They didn't tell us they had the day sheets for  
20 three and a half months, even though we're subject to  
21 HIPAA, which requires us to notify in 60 days. That  
22 trust didn't need to be any further obliterated, but  
23 that was validating at that point.

24 On the one hand we're supposed to protect  
25 patients and we're supposed to follow the law, and yet

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1 the federal government is withholding information from  
2 us, so it seems to me they're more eager to lambaste us  
3 and entrap us than keep patients safe.

4 So we were outraged, scared, felt entrapped, and  
5 employees were starting to really break under pressure  
6 when that went down.

7 **Q. What other impacts did it have on LabMD's**  
8 **business?**

9 A. It completely sideswiped, just the relentless  
10 ghost of the FTC hovering over the company all those  
11 years, because they continually showed up and wanted  
12 more and wanted more and wanted more, and it -- look, I  
13 have myself and a VP of operations and general manager.  
14 I had three to four IT people. We were diagnosing  
15 cancer and trying to run a medical facility, and we  
16 can't get an answer about what we're supposed to do.  
17 And we're being treated like we don't care or we're --  
18 and what we're getting is brushstrokes of consent  
19 decrees and we're getting, you know, read -- read this  
20 information, and there's no straight answer. And this  
21 is really -- I can't understate how damaging and  
22 confusing and sideswiping this was to the attention,  
23 energy and morale of the management staff that knew  
24 because we, you know, had a company to run.

25 We had Obamacare coming. We had to diversify

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1 our base, and we were -- and we're being financially and  
2 attention -- I guess attention energy, I guess planning  
3 energy, goal energy, management's energy being diverted  
4 by this looming what-if.

5 So this -- go ahead. I --

6 **Q. Was there any impact -- I take it what you just**  
7 **said described the impact on the business internally.**

8 A. Uh-huh.

9 **Q. Was there any impact on the business**  
10 **externally?**

11 A. Yes.

12 **Q. And what was that?**

13 A. Well, the press broke the story in 2012, so once  
14 the press broke the story, I had -- you know, you can't  
15 control perception, and so I had physicians upset with  
16 me they didn't hear it from myself. I had people  
17 concerned that I -- I mean, there was again -- I guess  
18 the cloud of suspicion just got greater, because  
19 evidently in this process you're guilty until proven  
20 innocent, and so people were just assuming, well,  
21 there's something going on at LabMD or what's going  
22 on -- and when you're trying to plan to grow, that is a  
23 hard thing to have to deal with.

24 So I was at a Christmas party for one client,  
25 and you know, she was a physician who was upset with me

25 (Pages 1026 to 1029)

1030

1 she had to learn about it from the newspaper.  
 2 And those kind of things, I don't know how much  
 3 else went on behind my back.  
 4 I did find out later, for example, the rumor had  
 5 twisted around so that -- because, you know, most people  
 6 in medicine don't know what the FTC is, so I'm getting  
 7 told, I hear you're in trouble with the SEC about some  
 8 trade -- I mean, just the rumors just went crazy.  
 9 **Q. Did you lose clients as a result of the impact  
 10 of this investigation and litigation?**  
 11 A. Okay. See, it's not black-and-white losing  
 12 clients because you lose pieces of clients.  
 13 So we had some clients -- they were so in --  
 14 like that one account, they sent us less stuff except  
 15 for what was really beneficial with the software, so I  
 16 think the impact was much greater in the growth than in  
 17 the actual loss of clients. But then the clients  
 18 themselves -- we had one client who -- the person that  
 19 had said they wished they had learned it earlier, there  
 20 was no growth there and they did use other labs for a  
 21 few other things.  
 22 **Q. Did the investigation process have an impact on  
 23 your third-party providers?**  
 24 A. Well, once we were sued, the Federal Trade  
 25 Commission carpet-bombed with approximately forty

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1 subpoenas to physicians and third-party vendors and  
 2 employees that had been with the company for years, and  
 3 that of course again just stirs the psychological  
 4 warfare pot, and there's just one of me, so yes, that  
 5 had a negative effect.  
 6 **Q. Mr. Daugherty, what is the current state of  
 7 LabMD's operations?**  
 8 A. LabMD is in a very deep coma. We are still in  
 9 business. The corporation is still standing. I'm the  
 10 only employee.  
 11 All we do -- we preserve the slides and the  
 12 electronic data for the physicians so they can still get  
 13 results if they don't have them and they can still send  
 14 slides out for second opinions.  
 15 Because that goes on, you know, that doesn't  
 16 just stop. Those are -- patients can have -- prostate  
 17 cancer is a very slow-growing disease, so you can have  
 18 it for 14 years, so -- and there's technologies that  
 19 kept -- are available now to analyze versus what was  
 20 available five years ago on -- on aggressiveness of the  
 21 tumor cells, so we keep all that available still.  
 22 And then we also still have accounts receivable  
 23 that we still have to try to work from last year.  
 24 But other than that, we're being sued by the  
 25 landlord for early termination for between 800 and

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1 900 thousand dollars.  
 2 We have consolidated everything into the  
 3 corporate condo, and I don't want to say on the public  
 4 record actually where else things are if this is public,  
 5 so...  
 6 **Q. What's the state of LabMD's insurance coverage?**  
 7 A. Well, in the beginning, we of course had medical  
 8 insurance, dental insurance, workmen's comp, vision,  
 9 general liability, medical malpractice for the  
 10 physicians, medical malpractice for the facility.  
 11 So of course we had to let everybody go. They  
 12 still have dental and medical through COBRA should they  
 13 choose at their expense. The vision is gone. The  
 14 workmen's comp is gone. The -- before -- the general  
 15 liability for the corporation has been nonrenewed  
 16 because of the Federal Trade Commission action and  
 17 claims.  
 18 The --  
 19 **Q. How do you know that's the reason?**  
 20 A. Because they told us.  
 21 The medical malpractice -- when you close --  
 22 obviously we're not practicing medicine now and moving  
 23 forward, so the medical malpractice is for tail coverage  
 24 for any claims -- any claims from any practiced medicine  
 25 we did in the last few years would be covered in the

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1 future for the next couple of years.  
 2 We had carriers that flat-out would deny to  
 3 quote us because of the Federal Trade Commission  
 4 investigation, even though, you know, these are medical  
 5 malpractice. I don't think that the  
 6 Federal Trade Commission has any jurisdiction over  
 7 medical malpractice. I don't know, so -- but they  
 8 didn't care.  
 9 And then we had a -- we got -- I got tail  
 10 coverage for the physicians, and there were many fewer  
 11 insurance carriers that were willing to quote it. But  
 12 we did get insurance for -- we did get tail coverage for  
 13 the two physicians that we had to let go.  
 14 MR. SHERMAN: One moment, Your Honor.  
 15 JUDGE CHAPPELL: Okay.  
 16 (Pause in the proceedings.)  
 17 MR. SHERMAN: I have no further questions,  
 18 Your Honor.  
 19 JUDGE CHAPPELL: I have a few.  
 20 THE WITNESS: Yes, sir.  
 21 JUDGE CHAPPELL: Sir, I'm not asking you to  
 22 speculate in any way. I just want you to tell me what  
 23 you know.  
 24 THE WITNESS: Okay.  
 25 JUDGE CHAPPELL: If this cloud that you refer to

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1 is suddenly lifted over your company, are you then able  
 2 to start business immediately?  
 3 THE WITNESS: No.  
 4 JUDGE CHAPPELL: Why is that?  
 5 THE WITNESS: Because I have -- all the  
 6 employees are gone. The key employees have moved to  
 7 Denver to a competitor.  
 8 The landlord is suing the company for over  
 9 \$800,000, and the space has been rerented and is if  
 10 not -- if renovations aren't complete, they will soon be  
 11 for the new tenant to move on.  
 12 The clients have moved on to other labs.  
 13 So the immediate, you know -- and then the  
 14 insurance -- and having to get insurance, to get a new  
 15 spot, I have to get general liability insurance, which  
 16 nobody will even quote until this is gone and over, so I  
 17 would have to find a new space and I'd have to have  
 18 insurance to -- because you can't have a lease unless  
 19 you have insurance where they're the named insured for  
 20 general liability.  
 21 So there's a lot of things, there's a lot of  
 22 shattered glass all over and damaged lives that would  
 23 have to be -- people would have to be replaced,  
 24 you know, or found. It would -- so the immediate is  
 25 impossible.

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1 JUDGE CHAPPELL: What about the patient medical  
 2 insurance that pay for your services? Is that still  
 3 there?  
 4 THE WITNESS: Well, that's up to the patient of  
 5 course. I mean, yes, that's a claim. We have only so  
 6 much time to file those typically, and that's by a  
 7 carrier-by-carrier basis. Medicare is the most  
 8 generous. I believe now it's 18 months to file.  
 9 And most of -- most of the claims for what we  
 10 did from January 15, approximately, before have been  
 11 filed initially, but that is just the first step in the  
 12 collection of the -- the calculation of the patient  
 13 balance and the amount of -- that the patient owes, that  
 14 still has to be sent out. And we are doing that in  
 15 cycles. I have a volunteer that helps. But -- so -- so  
 16 that -- you know, their insurance is still there for  
 17 those prior things, yeah.  
 18 JUDGE CHAPPELL: I guess what I'm trying to find  
 19 out is, regarding Medicare or a company like Blue Cross,  
 20 there's no precertification or ongoing certification  
 21 required. If you do the service, you can bill the  
 22 insurance company?  
 23 THE WITNESS: Well, as a matter fact, it's  
 24 justified based on -- it's called date of service. And  
 25 the date of service is defined as the date that we

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1 released the diagnosis. And we didn't close our  
 2 licensure down until after we closed the company.  
 3 So we were -- you know, we just came to a  
 4 screeching halt, and so all those files, all those  
 5 patient claims are legitimately under our license for  
 6 that time.  
 7 So it's based on when the service was provided  
 8 and what licenses were in place, so we should still be  
 9 able to collect.  
 10 JUDGE CHAPPELL: So there are no certification  
 11 issues with patient insurance.  
 12 THE WITNESS: If we want to move forward, there  
 13 is, but moving back, no, because we had all these  
 14 contracts negotiated, so they're not easy to come by.  
 15 JUDGE CHAPPELL: This system or software you  
 16 described earlier today whereby fields would be  
 17 populated by, let's say, a nurse or a staffperson at a  
 18 doctor's office and sent to you, was this proprietary  
 19 software or what was this system? Did you own it or  
 20 take it off the shelf? How did that work?  
 21 THE WITNESS: No, no. Well, it wasn't  
 22 patented -- see, they -- I think the big question was  
 23 more the difference between trademarks and trade  
 24 secrets and patents and proprietary, so if I can just  
 25 describe it as a layperson, we -- we hired a software

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1 vendor that had an LIS that would most closely fit a  
 2 company of our size, and that was a challenge in and of  
 3 itself.  
 4 Then we adapt -- we told them the additional  
 5 features that we wanted and paid for that.  
 6 Then we paid an overall licensing fee so that my  
 7 team inside could make the desktop more user-friendly  
 8 and customary, because we knew exactly what urologists  
 9 wanted.  
 10 So in that sense, it's not out of the box, but  
 11 it is exclusively us, because we took the base software  
 12 and added unique features to it.  
 13 JUDGE CHAPPELL: Was that system operating over  
 14 the Internet or over the phone lines?  
 15 THE WITNESS: The second system was over the  
 16 Internet. The first system that we had, which I'm not  
 17 sure if it was in place -- it might have been in place  
 18 some over the time period was over phone lines.  
 19 JUDGE CHAPPELL: Okay. That's all I have.  
 20 Do you have any direct regarding my questions?  
 21 MR. SHERMAN: I have none, Your Honor.  
 22 JUDGE CHAPPELL: All right. Any cross?  
 23 MS. VANDRUFF: Yes, Your Honor.  
 24 JUDGE CHAPPELL: Go ahead.  
 25 - - - - -

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1 CROSS-EXAMINATION  
 2 BY MS. VANDRUFF:  
 3 **Q. Good afternoon, Mr. Daugherty.**  
 4 A. Hello.  
 5 **Q. His Honor asked you about the current state of**  
 6 **your business.**  
 7 **It's true, isn't it, that LabMD decided to stop**  
 8 **accepting new specimens because the Affordable Care Act**  
 9 **or Obamacare, if you like, affected LabMD's customer**  
 10 **base?**  
 11 A. Would you clarify if you're saying that's the  
 12 only reason?  
 13 **Q. Let me ask it this way.**  
 14 **Because of Obamacare, LabMD's physician clients**  
 15 **stopped sending specimens to your lab; isn't that**  
 16 **right?**  
 17 A. No.  
 18 **Q. Mr. Daugherty, you were deposed in February of**  
 19 **this year. Do you recall that?**  
 20 JUDGE CHAPPELL: Before we get into that, he did  
 21 ask you to clarify and asked if you meant that's the  
 22 only reason.  
 23 MS. VANDRUFF: Yes, Your Honor. And I attempted  
 24 to rephrase the question. Would you like me to address  
 25 it differently?

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1 JUDGE CHAPPELL: Go ahead.  
 2 BY MS. VANDRUFF:  
 3 **Q. Mr. Daugherty, were you deposed in February of**  
 4 **this year?**  
 5 A. Yes, I was.  
 6 MS. VANDRUFF: Permission to approach,  
 7 Your Honor.  
 8 JUDGE CHAPPELL: Go ahead.  
 9 MS. VANDRUFF: Thank you.  
 10 BY MS. VANDRUFF:  
 11 **Q. Mr. Daugherty, I've handed you the transcript of**  
 12 **your deposition of February 10, 2014. It has been**  
 13 **marked for the record as CX 709.**  
 14 **I would direct your attention to page 130, where**  
 15 **you were asked the following question and you gave the**  
 16 **following answer:**  
 17 **"How does Obamacare fit" --**  
 18 JUDGE CHAPPELL: Wait until he's at the point  
 19 you want him to be.  
 20 MS. VANDRUFF: Yes, Your Honor. Thank you.  
 21 JUDGE CHAPPELL: Are you ready?  
 22 Have you found the place, sir?  
 23 THE WITNESS: Yes, I've found the place.  
 24 JUDGE CHAPPELL: Go ahead.  
 25 THE WITNESS: Thank you.

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1 MS. VANDRUFF: Thank you, Your Honor.  
 2 Thank you, Mr. Daugherty.  
 3 BY MS. VANDRUFF:  
 4 **Q. Mr. Daugherty, on February 10, 2014, you were**  
 5 **asked the following question and you gave the following**  
 6 **answer:**  
 7 **"How does Obamacare fit into the decision to**  
 8 **wind down LabMD?**  
 9 **"ANSWER: It is creating huge anxiety,**  
 10 **destruction, and consolidation to our customer base.**  
 11 **"QUESTION: What does that mean for LabMD?**  
 12 **"ANSWER: That means our customers are in**  
 13 **survival mode and therefore are having to either sell**  
 14 **their practices or merge with others and send their**  
 15 **specimens to where they are told to send them, not where**  
 16 **they want to send them.**  
 17 **"QUESTION: Is LabMD one of the laboratories to**  
 18 **which your clients are told to send their specimens?**  
 19 **"ANSWER: No."**  
 20 **Did I read that correctly?**  
 21 A. Yes, you did.  
 22 **Q. So, Mr. Daugherty, the future of LabMD depends**  
 23 **on Obamacare; isn't that correct?**  
 24 A. No, it does not. Not entirely.  
 25 **Q. Mr. Daugherty, I direct your attention to**

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1 **page 60 of the document that has been marked as RX 709.**  
 2 **Please let me know when you're there.**  
 3 A. Hold on a minute, please.  
 4 What line?  
 5 **Q. Line 9 through 11.**  
 6 A. Okay. I'm there.  
 7 **Q. Mr. Daugherty, on February 10, 2014, you were**  
 8 **asked the following question and you gave the following**  
 9 **answer:**  
 10 **"What is your future plan for LabMD?**  
 11 **"ANSWER: Depends on Obamacare. Other than**  
 12 **that, I don't know."**  
 13 **Did I read that correctly?**  
 14 A. Yeah, you read it correctly. Am I going to be  
 15 able to explain at some point?  
 16 **Q. That will depend on Mr. Sherman.**  
 17 JUDGE CHAPPELL: Before you read the last  
 18 passage, the witness said, "Not entirely." How is that  
 19 different from what you just read into the record from  
 20 his deposition?  
 21 MS. VANDRUFF: Your Honor, in his deposition --  
 22 you'd like to hear argument on this question, or are you  
 23 directing that question to the witness, Your Honor?  
 24 JUDGE CHAPPELL: I'm directing it to the counsel  
 25 who's examining the witness.

28 (Pages 1038 to 1041)

1042

1 MS. VANDRUFF: Thank you, Your Honor.  
 2 JUDGE CHAPPELL: That would be you.  
 3 MS. VANDRUFF: Thank you, Your Honor.  
 4 With respect to the --  
 5 JUDGE CHAPPELL: Because I heard the witness say  
 6 "No, not entirely" and then I heard you read a question  
 7 and answer, and it seemed to me like it was fairly  
 8 within his answer of "not entirely," so I'm wondering  
 9 why we took the time to read the question and answer  
 10 into the record.  
 11 It would be a good idea for you to ask the same  
 12 question today that you asked in a deposition for this  
 13 to be effective, Counselor.  
 14 MS. VANDRUFF: Your Honor, my question to the  
 15 witness was "The future of LabMD depends on Obamacare,"  
 16 which was the answer that Mr. Daugherty gave at his  
 17 deposition on February 10, 2014, but I'd be pleased to  
 18 move on, Your Honor.  
 19 JUDGE CHAPPELL: Go ahead.  
 20 MS. VANDRUFF: Thank you, Your Honor.  
 21 BY MS. VANDRUFF:  
 22 **Q. Mr. Daugherty, you stopped receiving -- and by**  
 23 **"you," LabMD stopped receiving specimens on January 9,**  
 24 **2014; is that correct?**  
 25 A. Are we finished with this exhibit?

1043

1 **Q. You may set it aside, Mr. Daugherty. I don't**  
 2 **know if we're finished.**  
 3 A. Hold on a second.  
 4 **Q. Thank you.**  
 5 A. Okay.  
 6 **Q. It's correct, isn't it, that LabMD stopped**  
 7 **receiving specimens on January 9, 2014?**  
 8 A. Approximately that date, yes.  
 9 **Q. Okay. But it wasn't until January 13, 2014 that**  
 10 **you learned from your insurance broker that an insurer**  
 11 **had denied insurance coverage to LabMD; is that**  
 12 **correct?**  
 13 A. I don't know which insurance you're talking  
 14 about.  
 15 MS. VANDRUFF: May I approach, Your Honor?  
 16 JUDGE CHAPPELL: Go ahead.  
 17 THE WITNESS: Thank you.  
 18 MS. VANDRUFF: Would Your Honor like a copy?  
 19 JUDGE CHAPPELL: No, thank you.  
 20 MS. VANDRUFF: Thank you.  
 21 Your Honor, for the benefit of the record, I've  
 22 handed a document to Mr. Daugherty that has not been  
 23 submitted by the parties in connection with JX 2. But  
 24 for the purposes of identification, I will mark this as  
 25 CXD 957 and submit it so that it be received in the

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1 record.  
 2 May I proceed, Your Honor?  
 3 MR. SHERMAN: Objection. Lack of foundation.  
 4 JUDGE CHAPPELL: Sustained.  
 5 MS. VANDRUFF: I haven't -- I only wanted to  
 6 proceed with those foundational questions, Your Honor.  
 7 JUDGE CHAPPELL: You handed him the document  
 8 before you laid a proper foundation, Counselor, and  
 9 that's why I sustained the objection.  
 10 MS. VANDRUFF: I understand, Your Honor. Shall  
 11 I retrieve the document from Mr. Daugherty?  
 12 JUDGE CHAPPELL: No. Just ask him to stop  
 13 reading it.  
 14 BY MS. VANDRUFF:  
 15 **Q. Mr. Daugherty, will you please set aside the**  
 16 **document that has been marked for identification**  
 17 **purposes as CXD 957.**  
 18 A. Yes, I will.  
 19 **Q. Okay. Did you receive from -- well, is your**  
 20 **insurance broker Mr. Selikop?**  
 21 A. Yes, he is. One of them, yes.  
 22 **Q. Right.**  
 23 **And did he provide to you information from an**  
 24 **insurance carrier related to insurance coverage for**  
 25 **Drs. Vasa and Zhao?**

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1 A. Yes, he did.  
 2 **Q. Was that information memorialized in an e-mail**  
 3 **of January 13, 2014?**  
 4 A. That information was memorialized there, yes,  
 5 but it was conveyed earlier.  
 6 **Q. With Your Honor's permission, I'd ask that**  
 7 **Mr. Daugherty return his attention to CXD 957.**  
 8 MR. SHERMAN: Well, I would object. I don't  
 9 know the purpose. He answered the question yes, it was  
 10 in an e-mail. I'm not sure what the purpose of showing  
 11 him the e-mail that he confirmed that he got the  
 12 information from.  
 13 JUDGE CHAPPELL: That objection is overruled.  
 14 The information you just referred to was  
 15 testified by -- testified to by the witness during the  
 16 foundation. The proper foundation has now been laid.  
 17 Proceed.  
 18 MS. VANDRUFF: Thank you, Your Honor.  
 19 BY MS. VANDRUFF:  
 20 **Q. Mr. Daugherty, returning your attention to**  
 21 **CX -- the document that has been marked as CXD 957, is**  
 22 **this an e-mail that was received -- well, is this an**  
 23 **e-mail that relates to coverage for Drs. Vasa and Zhao**  
 24 **at LabMD?**  
 25 A. Yes, it is.

29 (Pages 1042 to 1045)

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1 **Q. Is it --**  
 2 A. Are you speaking about the forwarded string in  
 3 its entirety or just that one piece?  
 4 **Q. Thank you, Mr. Daugherty.**  
 5 **With respect to the highlighted text that**  
 6 **appears at the bottom of the first page of CXD 957,**  
 7 **does that relate to insurance coverage for**  
 8 **Drs. Vasa and Zhao?**  
 9 A. Yes, it does.  
 10 **Q. And what is the date of that e-mail?**  
 11 A. January 13, 2014 at 8:52 a.m.  
 12 **Q. Thank you.**  
 13 A. Although I don't think I got it until that day  
 14 at 4:33 p.m.  
 15 **Q. Mr. Daugherty, you first considered winding**  
 16 **down LabMD many months ago; isn't that right?**  
 17 A. Are we finished with this exhibit?  
 18 **Q. You may set it aside, Mr. Daugherty.**  
 19 **Thank you.**  
 20 A. Hold on a second.  
 21 **Q. Would you like me to repeat the question?**  
 22 A. No, no, no.  
 23 Many months ago from today?  
 24 **Q. Yes.**  
 25 A. Yes.

1047

1 **Q. So long ago that when my colleague Mr. Sheer**  
 2 **deposed you in February of 2014, you couldn't remember**  
 3 **when you had first considered it.**  
 4 A. I don't recall that. If the -- he wanted to  
 5 know what day or a moment, I don't -- I mean, I know the  
 6 decision wasn't made till very -- just before we  
 7 actually closed. Considering it, with what was going  
 8 on, so you want considered or decision?  
 9 **Q. My question was that you first considered**  
 10 **winding down LabMD so long ago that when you were asked**  
 11 **about it in February of 2014, you couldn't remember when**  
 12 **you had first considered it; isn't that right?**  
 13 A. I don't recall that at all.  
 14 **Q. You stopped paying rent at LabMD's former**  
 15 **location in October of 2013; isn't that right?**  
 16 A. No. We paid rent --  
 17 **Q. Mr. Daugherty, that was a yes-or-no question.**  
 18 **Did you stop --**  
 19 A. No.  
 20 **Q. -- paying rent at LabMD's former location in**  
 21 **October 2013?**  
 22 A. Hold on.  
 23 No, I don't think we did.  
 24 **Q. May I ask you to return your attention then,**  
 25 **please, to your deposition transcript from**

1048

1 **February 2014 and turn to page 140.**  
 2 **Are you with me, Mr. Daugherty?**  
 3 A. Yes, I am.  
 4 What line?  
 5 **Q. Beginning on line 24, you were asked the**  
 6 **following question and you gave the following answer:**  
 7 **"QUESTION: When did LabMD stop paying rent at**  
 8 **Powers Ferry?"**  
 9 **An objection was interposed.**  
 10 **Your answer: "Well, I'll just say -- well,**  
 11 **let's see. Hold on. The last rent check was for**  
 12 **October, and then we were late, and then we haven't paid**  
 13 **since the October month, of 2013."**  
 14 **Did I read that correctly?**  
 15 A. Yes. I think I need clarification of what your  
 16 definition of "stop" is.  
 17 JUDGE CHAPPELL: Sir, she was reading a question  
 18 and answer from a deposition.  
 19 THE WITNESS: Oh, I -- that's my answer then. I  
 20 mean, there's a lot of things in there.  
 21 JUDGE CHAPPELL: I mean, the only pending  
 22 question was did she read it correctly, and you said,  
 23 "Yes."  
 24 THE WITNESS: Oh, she read it correctly.  
 25 JUDGE CHAPPELL: Thank you.

1049

1 MS. VANDRUFF: Thank you, Your Honor.  
 2 Thank you, Mr. Daugherty.  
 3 BY MS. VANDRUFF:  
 4 **Q. October 2013 was months before you alerted your**  
 5 **physician clients that you intended to stop accepting**  
 6 **specimens; isn't that right?**  
 7 A. It was.  
 8 **Q. Is that yes, Mr. Daugherty?**  
 9 A. I don't know. Just a moment, please.  
 10 **Q. Thank you.**  
 11 A. It was -- it appears to be three months.  
 12 **Q. And to be clear, Mr. Daugherty, you do not have**  
 13 **a current plan to dissolve LabMD as a Georgia**  
 14 **corporation; isn't that right?**  
 15 A. That's correct.  
 16 **Q. In fact, you intend to attempt to restart LabMD;**  
 17 **is that correct?**  
 18 A. That is based on many variables of which I don't  
 19 know where they're going to land.  
 20 **Q. If this proceeding were to end, you would**  
 21 **restart LabMD and begin offering cancer detection**  
 22 **testing services; isn't that correct?**  
 23 A. I can't speculate about this. As I said  
 24 before, the -- you've shattered the glass. The damage  
 25 is so done, how -- I can't answer the question of that

30 (Pages 1046 to 1049)

1050

1 one variable. I've just told you it's based on several  
 2 variables. At this stage of the game, it's more than  
 3 this ending. The damage is pretty done, and I have --  
 4 need recovery time, so I can't give you an answer other  
 5 than if you want me to speculate on the variables.  
 6 **Q. If this proceeding were to conclude, you would**  
 7 **attempt to restart LabMD to resume offering testing**  
 8 **services; isn't that correct?**  
 9 MR. SHERMAN: Objection. I hope this proceeding  
 10 is going to conclude at some point, so I think the  
 11 question is nonsensical.  
 12 JUDGE CHAPPELL: Well, he just called your  
 13 question nonsense. What's your response?  
 14 MS. VANDRUFF: My response, Your Honor, is that  
 15 I'm trying to follow Your Honor's guidance and get a  
 16 question posed to Mr. Daugherty, and I will tie this up  
 17 if Mr. Daugherty answers the question that is pending.  
 18 Would it be helpful, Mr. Daugherty, to have it  
 19 read back, pending --  
 20 THE WITNESS: Yes, please.  
 21 MS. VANDRUFF: -- the judge's ruling on the  
 22 objection I think?  
 23 MR. SHERMAN: I don't know that he's ruled yet.  
 24 MS. VANDRUFF: That's why I said pending the  
 25 objection.

1051

1 JUDGE CHAPPELL: I'm pondering it at the  
 2 moment.  
 3 I'm going to partially sustain that, not the  
 4 nonsense part, let's be clear, but I think it's a vague  
 5 question that could be clearer for the witness, so why  
 6 don't you rephrase.  
 7 MS. VANDRUFF: Thank you, Your Honor.  
 8 BY MS. VANDRUFF:  
 9 **Q. Mr. Daugherty, if the commission were to stop**  
 10 **its enforcement proceeding against LabMD, you would**  
 11 **attempt to restart LabMD's business; isn't that**  
 12 **correct?**  
 13 A. That's not the only variable. I can't answer  
 14 the question.  
 15 **Q. Is that no?**  
 16 A. It's what I just said.  
 17 MS. VANDRUFF: Okay.  
 18 Permission to approach, Your Honor?  
 19 JUDGE CHAPPELL: Yes. But I'll point out that  
 20 the witness has said more than once that there are other  
 21 variables, so if you intend to give him the other  
 22 variables, we can move along. But he can't answer the  
 23 question as you've properly got it phrased. That's his  
 24 response.  
 25 But go ahead and approach.

1052

1 THE WITNESS: Are we finished with this exhibit  
 2 or should I put it off to the side?  
 3 BY MS. VANDRUFF:  
 4 **Q. You may set it aside. And Mr. Daugherty, before**  
 5 **I approach, let me just ask you this.**  
 6 **Did you appear before Judge Duffey in the**  
 7 **Northern District of Georgia earlier this month in a**  
 8 **proceeding related to this enforcement proceeding?**  
 9 A. Yes, I did.  
 10 **Q. Did you provide testimony in that proceeding?**  
 11 A. Yes, I did.  
 12 MS. VANDRUFF: And again, Your Honor, may I  
 13 approach?  
 14 JUDGE CHAPPELL: Go ahead.  
 15 MS. VANDRUFF: Thank you.  
 16 BY MS. VANDRUFF:  
 17 **Q. Mr. Daugherty, you've been handed a copy of the**  
 18 **transcript of the proceedings before Judge Duffey on**  
 19 **May 7, 2014, at which you provided testimony; correct?**  
 20 A. Yes.  
 21 **Q. I direct your attention to page 21.**  
 22 A. I'm at page 21. What line?  
 23 **Q. Bear with me, Mr. Daugherty.**  
 24 **The court's indulgence, Your Honor.**  
 25 JUDGE CHAPPELL: All right.

1053

1 (Pause in the proceedings.)  
 2 BY MS. VANDRUFF:  
 3 **Q. With apologies, Mr. Daugherty, if I could direct**  
 4 **your attention, please, to page 31.**  
 5 A. Okay. And what line?  
 6 **Q. 18.**  
 7 A. Okay. I'm at line 18.  
 8 **Q. Okay. In that proceeding before Judge Duffey,**  
 9 **you were asked the following question and you gave the**  
 10 **following answer:**  
 11 **"If the court were to stop the FTC's enforcement**  
 12 **proceedings against LabMD, would you restart the**  
 13 **business to begin offering cancer detection testing**  
 14 **services?**  
 15 **"ANSWER: It would -- I would start the attempt**  
 16 **to."**  
 17 **Did I read that correctly?**  
 18 A. We haven't completed my answer. Are you just  
 19 going to stop reading that part or are you going to read  
 20 the whole answer?  
 21 **Q. I can read the entire answer for --**  
 22 A. Please the read the entire answer.  
 23 **Q. Okay. The question that was posed to you:**  
 24 **"QUESTION: If the court were to stop the FTC's**  
 25 **enforcement proceedings against LabMD, would you restart**

31 (Pages 1050 to 1053)



1054

1 the business to begin offering cancer detection testing  
 2 services?  
 3 "ANSWER: It would -- I would start the attempt  
 4 to. We can't get insurance with this over our head.  
 5 That's the first thing. And we have to -- and we are  
 6 also being sued by the landlord. So we have a long  
 7 stretch to get back.  
 8 "And our key employees have left to other labs.  
 9 Our clients have left to other labs. Our landlord is  
 10 suing us because we had to leave the lease earlier --  
 11 early. We have -- the insurance is not there.  
 12 "And all that healing has to happen. So that  
 13 will be able to start that, and also prevent us from  
 14 going deeper in the hole by having no longer -- no  
 15 longer having access for the physicians for the records  
 16 they need now, which are required by us to keep,  
 17 depending on the record, from five to ten years."  
 18 Did I read that correctly?  
 19 A. Yes, you did.  
 20 Q. Thank you.  
 21 A. Are we done with this exhibit?  
 22 Q. You may set that aside, Mr. Daugherty.  
 23 Thank you.  
 24 Mr. Daugherty, since you founded LabMD, you have  
 25 had oversight of the organization; correct?

1055

1 A. Define "oversight."  
 2 Q. Well, similar to any president or CEO; isn't  
 3 that right?  
 4 A. My position was CEO.  
 5 Q. Is it your position that you did not have  
 6 oversight of the organization?  
 7 A. I need you to define "oversight."  
 8 Q. Your responsibilities as CEO was to provide  
 9 organizational leadership and management; is that  
 10 correct?  
 11 A. Define -- oversight? And define --  
 12 organizational leadership and managers, yes. I'm not  
 13 doing all the management.  
 14 It's a medical facility. I can't practice  
 15 medicine. There's parts of the corporation I can't  
 16 impact. It's against the law.  
 17 Q. But your role as president and CEO was similar  
 18 to that of president and CEO of any other business; is  
 19 that correct?  
 20 A. That's incorrect.  
 21 Q. Until 2013, LabMD was a profitable company;  
 22 correct?  
 23 A. Until what year?  
 24 Q. 2013.  
 25 A. Are you including 2013?

1056

1 Q. No.  
 2 A. Yes, it was profitable. Not including 2013 or  
 3 '14.  
 4 Q. Prior to 2013, LabMD had a profit margin of  
 5 25 percent; right?  
 6 A. That would vary. That, I believe is an  
 7 approximation, yes.  
 8 Q. So prior to 2013, LabMD's profit margin was  
 9 approximately 25 percent; correct?  
 10 JUDGE CHAPPELL: I'm guessing he's trying to get  
 11 you to ask whether that's an average or not.  
 12 MS. VANDRUFF: I'm sorry, Your Honor.  
 13 JUDGE CHAPPELL: Well, you've asked that  
 14 question and he said it would be approximation. You  
 15 asked the same question, so rephrase.  
 16 MS. VANDRUFF: I wanted --  
 17 BY MS. VANDRUFF:  
 18 Q. Is it correct, Mr. Daugherty, that prior to  
 19 2013, LabMD's approximate profit margin was 25 percent?  
 20 A. I can't recall the years that we -- I don't -- I  
 21 don't know. I think when I was asked that before  
 22 that -- are you talking about outside the applicable  
 23 time period for this, this investigation?  
 24 Q. My question --  
 25 A. Or are you talking about from like when the

1057

1 corporation was started?  
 2 JUDGE CHAPPELL: I think you're asking him a  
 3 question that he might think requires very accurate  
 4 accounting to answer, so let's make sure you've got the  
 5 right wiggle words in there or rephrase.  
 6 MS. VANDRUFF: Thank you, Your Honor.  
 7 Thank you, Mr. Daugherty.  
 8 BY MS. VANDRUFF:  
 9 Q. It's true, isn't it, Mr. Daugherty, that there  
 10 was a period that LabMD was generating millions of  
 11 dollars in revenue?  
 12 A. In revenue, yes.  
 13 Q. And during that period, with the exception of  
 14 2013, LabMD's profit margin was approximately  
 15 25 percent; isn't that correct?  
 16 A. See, this is where -- look, the company started  
 17 in 1996. If you're saying I'm blending the whole time,  
 18 it was -- and we had 15 employees in '05. I can't --  
 19 and I don't know if you're talking about '05 to '13 or  
 20 the time that this procedure is covering or if you're  
 21 talking about prior to '05.  
 22 Q. Well, let's talk about the period from  
 23 2005 through 2012.  
 24 It's true, isn't it, that LabMD during that  
 25 period had a profit margin of 25 percent?

32 (Pages 1054 to 1057)

1058

1 A. No. It's true as an -- I believe that was a  
 2 blended approximation, so yes, it was true they had a  
 3 blended approximation of about 25 percent not including  
 4 '13 or '14 and starting probably in '5.  
 5 **Q. So just one more time so that the record is**  
 6 **clear, Mr. Daugherty, from 2005 through 2012, LabMD had**  
 7 **a blended approximation -- approximate profit margin of**  
 8 **25 percent; is that correct?**  
 9 MR. SHERMAN: Objection. It's been asked and  
 10 answered and asked and answered and asked and answered  
 11 again.  
 12 JUDGE CHAPPELL: It has been but not precisely.  
 13 I'm going to allow the pending question and then --  
 14 MS. VANDRUFF: I'll move on.  
 15 JUDGE CHAPPELL: -- hopefully we'll move on.  
 16 Do you want her to read that question again?  
 17 BY MS. VANDRUFF:  
 18 **Q. Mr. Daugherty, do you need the question read**  
 19 **back?**  
 20 A. No, I don't.  
 21 So you're waiting for an answer; right? Am I  
 22 supposed to answer now?  
 23 JUDGE CHAPPELL: Yes.  
 24 THE WITNESS: Okay. So for an approximate  
 25 blended, yes, 25 percent --

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1 MS. VANDRUFF: Thank you --  
 2 THE WITNESS: -- from 2005 to 2012.  
 3 MS. VANDRUFF: Thank you, Your Honor.  
 4 Thank you, Mr. Daugherty.  
 5 BY MS. VANDRUFF:  
 6 **Q. Now, since 2005, LabMD has generated revenue of**  
 7 **between 35 and 40 million dollars; is that correct?**  
 8 A. Well, that's an approximation of revenue.  
 9 That's correct.  
 10 MR. SHERMAN: Objection. I don't know what this  
 11 line of questioning is, unless the law has changed and  
 12 it's against the law to be profitable.  
 13 JUDGE CHAPPELL: I'm trying to figure out the  
 14 legal basis for that objection.  
 15 What's the basis for that?  
 16 MR. SHERMAN: It's not relevant. It's not  
 17 relevant. I'm not sure how it's relevant to their claim  
 18 or Mr. Daugherty's defense.  
 19 JUDGE CHAPPELL: Okay. We have a relevance  
 20 objection on the money LabMD has made. What's your  
 21 response?  
 22 MS. VANDRUFF: Certainly, Your Honor.  
 23 With respect to the -- our claims, it's highly  
 24 relevant because, of course, in order to assess the  
 25 reasonableness of the practices that LabMD undertook in

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1 order to protect sensitive consumer information, it's  
 2 important to weigh the cost of those measures against  
 3 the revenue that the company generated.  
 4 JUDGE CHAPPELL: And this is within the scope of  
 5 the direct how?  
 6 MS. VANDRUFF: I believe it is, Your Honor.  
 7 There was extensive foundational testimony about the  
 8 business, about its unique business model, and about the  
 9 reasons that Mr. Daugherty was a successful  
 10 entrepreneur, so I think it is fairly within the scope  
 11 of the direct, Your Honor.  
 12 MR. SHERMAN: But there was no direct about the  
 13 profitability nor the money spent on data security or  
 14 hardware or software or anything of that nature, which  
 15 is what this line of questioning is going to in terms of  
 16 how profitable was the company and how much money did it  
 17 spend on data security --  
 18 MS. VANDRUFF: That wasn't my question.  
 19 MR. SHERMAN: -- therefore, how reasonable was  
 20 its data security based on the company's profitability.  
 21 MS. VANDRUFF: And of course, Your Honor, that  
 22 wasn't my question. My question was about the company's  
 23 profitability, not about the expenditures with respect  
 24 to information security practices.  
 25 MR. SHERMAN: So if the company's profitability

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1 is not relevant to expenditures on data security as  
 2 that relates to their claim that the data security was  
 3 not reasonable, then my objection that this is  
 4 irrelevant should stand.  
 5 JUDGE CHAPPELL: We have a question and an  
 6 answer regarding the approximation of revenue.  
 7 Are you through with this line of questioning?  
 8 MS. VANDRUFF: Forgive me, Your Honor. The  
 9 court's indulgence.  
 10 (Pause in the proceedings.)  
 11 I'll move along, Your Honor.  
 12 JUDGE CHAPPELL: All right. I'm going to allow  
 13 the response that's in the record now, but she's moving  
 14 on.  
 15 MR. SHERMAN: Thank you, Your Honor.  
 16 MS. VANDRUFF: Thank you, Your Honor.  
 17 BY MS. VANDRUFF:  
 18 **Q. Mr. Daugherty, this morning, you testified about**  
 19 **physician offices sending over ahead of time, I believe**  
 20 **were your words, information regarding their patients to**  
 21 **LabMD. Do you remember that testimony?**  
 22 A. Yes, I do.  
 23 **Q. So LabMD received consumers' personal**  
 24 **information before the consumer's doctor even ordered a**  
 25 **laboratory test; isn't that right?**

33 (Pages 1058 to 1061)

1062

1 A. Sometimes.

2 **Q. And LabMD retained the data in case a physician**  
3 **client might order a test for that consumer; isn't that**  
4 **correct?**

5 A. Yeah. We can't read into the future. We don't  
6 know. Yes.

7 **Q. So LabMD retained the data in case a physician**  
8 **client might order a test that related to that consumer;**  
9 **correct?**

10 A. That patient. Yes.

11 **Q. And LabMD did not have any system in place to**  
12 **purge its files for information about consumers for whom**  
13 **it never performed any services, did it?**

14 A. Define "system" and "purge."

15 **Q. LabMD did not have a process in place by which**  
16 **it could remove from its files information about**  
17 **consumers for whom it never performed any services; is**  
18 **that correct?**

19 A. I'm not saying we didn't have a process. We  
20 didn't do it because we couldn't read into the future.

21 **Q. So LabMD --**

22 A. Certainly we can delete files, but we have  
23 physicians that are expecting their data to be there,  
24 per their release from the patient and their HIPAA  
25 agreement and their desire to have the data there to --

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1 they would send LabMD information on all of their  
2 urology patients?

3 THE WITNESS: Yes.

4 JUDGE CHAPPELL: Even those that didn't have an  
5 appointment.

6 THE WITNESS: I mean, it depended on the  
7 software.

8 JUDGE CHAPPELL: I'm trying to follow whether  
9 did it happen the day the patient had an appointment or  
10 did it happen because these were their patients and they  
11 worked with LabMD, "they" the doctor office.

12 THE WITNESS: Well, I wish I could tell you  
13 that there was one flat answer, Your Honor, but  
14 early -- especially earlier when technology hadn't kept  
15 up, it was a dependent, so I can give you a few  
16 examples.

17 JUDGE CHAPPELL: Let's talk about the data on  
18 consumers that LabMD had, let's say, after 2012.

19 Were you then getting data from doctors' offices  
20 for patients or consumers you were not providing  
21 services for?

22 THE WITNESS: Well, we didn't know that when we  
23 got it, and it depended on the software. It's -- again,  
24 even in 2012 it wasn't all yes or no. I mean, these  
25 physicians' offices don't update their software like

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1 for office operations and clinical best practices.

2 **Q. So LabMD --**

3 JUDGE CHAPPELL: Hold on a second.

4 Why would LabMD have information on a consumer  
5 for whom it never performed any services?

6 THE WITNESS: Because, as I said this morning,  
7 they can't read into the future, so depending on their  
8 software and the system, they send -- the doctor doesn't  
9 know who he's going to order anything on. He doesn't  
10 know until he does and he sees the patient, so they push  
11 everything in, depending on the system, the morning of  
12 or the night before, especially back in those days when  
13 it was -- every office had different software.

14 I mean, every office had different software and  
15 they were into eliminating -- I mean, it was --  
16 you know, it's probability versus severity and it's  
17 over -- it's this benefit of not having to wait, to not  
18 having to have patient -- penmanship mistakes or  
19 diagnosis errors or data entry errors, so all this was  
20 done ahead of time to eliminate all the pitfalls of  
21 handwriting.

22 JUDGE CHAPPELL: All right. I want to get this  
23 clarified.

24 THE WITNESS: Yeah.

25 JUDGE CHAPPELL: A typical urologist practice,

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1 that.

2 JUDGE CHAPPELL: Bottom line --

3 THE WITNESS: So I can think of one that I can  
4 think of usually they could send it over -- most of  
5 them send it over -- okay. I wouldn't say most. They  
6 could send it over -- when they started using LabMD,  
7 they would do an entire database dump. And then we  
8 would have an update. When a patient would check in,  
9 he'd give his new or -- he or she would give their new  
10 insurance information and it would update it.

11 Then as soon as there was updates -- like say  
12 the patient had a test last year and say the patient is  
13 in today and it's not there, but there's new insurance,  
14 and maybe that insurance, believe it or not -- I  
15 shouldn't use the words -- or even if a month maybe  
16 that's the accurate insurance, so they want to  
17 constantly update the database because it's not sliced  
18 into patient by patient.

19 We are their laboratory. We are their covered  
20 entity. We are practicing medicine with them. We're  
21 not like McDonald's.

22 And so the -- you know, and so in our -- in  
23 their -- they -- they sent those over for those reasons  
24 for -- to expedite operations and to have a more  
25 efficient, safer system.

1066

1 JUDGE CHAPPELL: Then do you know how the data  
 2 was organized or maintained by LabMD?  
 3 THE WITNESS: Sure. Nothing --  
 4 JUDGE CHAPPELL: Was it divided by doctor's  
 5 office? Was it divided by alphabetically? How did you  
 6 organize and maintain this stuff?  
 7 THE WITNESS: Oh, no. It was by physician's  
 8 office or physician.  
 9 JUDGE CHAPPELL: Thank you.  
 10 THE WITNESS: It wasn't just all dumped in  
 11 unpartitioned.  
 12 And also, if we hadn't run a test, it wouldn't  
 13 come over to the billing side, just in the lab  
 14 information database, not all over the place. The only  
 15 thing that would come over to the billing side is what  
 16 we did a test on.  
 17 JUDGE CHAPPELL: So you had data on patients you  
 18 performed services for, and then you had data on  
 19 possible patients.  
 20 THE WITNESS: Correct.  
 21 JUDGE CHAPPELL: Thank you.  
 22 MS. VANDRUFF: Thank you, Your Honor.  
 23 BY MS. VANDRUFF:  
 24 **Q. With respect to the individuals you've**  
 25 **identified as possible patients in response to**

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1 **His Honor's question, you never purged that information;**  
 2 **correct?**  
 3 A. I don't know that.  
 4 JUDGE CHAPPELL: When you say "you," do you mean  
 5 this man or someone at LabMD?  
 6 MS. VANDRUFF: I appreciate the clarification,  
 7 Your Honor.  
 8 BY MS. VANDRUFF:  
 9 **Q. With respect to consumers for whom LabMD never**  
 10 **performed any services, LabMD did not have a system in**  
 11 **place to purge its files of that data, did it?**  
 12 A. I don't know that.  
 13 **Q. Mr. Daugherty, do you remember sitting for your**  
 14 **deposition as the designee of LabMD in March of 2014?**  
 15 A. Yes, I do.  
 16 MS. VANDRUFF: Permission to approach,  
 17 Your Honor?  
 18 JUDGE CHAPPELL: Go ahead.  
 19 BY MS. VANDRUFF:  
 20 **Q. Mr. Daugherty, I've handed you a document that**  
 21 **has been marked and received in the record as CX 0710.**  
 22 **It is a transcript of your deposition testimony from**  
 23 **March 4, 2014, when you appeared as the designee of**  
 24 **LabMD.**  
 25 **Direct your attention, please, to page 199.**

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1 MR. SHERMAN: What page, please?  
 2 MS. VANDRUFF: 199.  
 3 BY MS. VANDRUFF:  
 4 **Q. Are you with me, Mr. Daugherty?**  
 5 A. Okay. What line -- did you want me to wait for  
 6 you?  
 7 **Q. I asked if you had found page --**  
 8 A. Oh, I'm sorry. I'm sorry. I thought you said  
 9 "bear with me." Yes, I found it. What line?  
 10 **Q. Beginning at line 14, you were asked the**  
 11 **following question and you gave the following answer:**  
 12 **"Did LabMD have any system in place to purge**  
 13 **files for information about consumers from the**  
 14 **information it had collected?**  
 15 **"ANSWER: No."**  
 16 **Did I read that correctly?**  
 17 A. Yes, you read it correctly.  
 18 **Q. LabMD has retained the information it collected**  
 19 **about consumers since 2005; isn't that correct?**  
 20 A. Are you asking me a question off of this because  
 21 that's not written correctly or are you asking me in  
 22 general?  
 23 **Q. I'm asking you a new question, Mr. Daugherty.**  
 24 A. Not involved with this?  
 25 **Q. You're welcome to set that aside.**

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1 A. Okay. Hold on a second.  
 2 Okay.  
 3 **Q. LabMD has retained the information it collected**  
 4 **about consumers since 2005 without discarding any of it;**  
 5 **isn't that correct?**  
 6 A. If you're saying all and every instance, I doubt  
 7 it. I doubt it.  
 8 **Q. Well, let me ask the question this way,**  
 9 **Mr. Daugherty.**  
 10 **In terms of electronic information, LabMD has**  
 11 **retained the electronic information it collected about**  
 12 **consumers since 2005 without discarding any of it;**  
 13 **correct?**  
 14 A. Upon further thought, I'm not sure.  
 15 **Q. Okay. Let me return your attention then,**  
 16 **please, to the document that's been marked as CX 710 and**  
 17 **specifically back to page 199.**  
 18 **Beginning on page -- excuse me -- line 18, you**  
 19 **were asked the following question and you gave the**  
 20 **following answer:**  
 21 **"Did LabMD retain the information it had**  
 22 **collected about consumers over the -- since 2005 without**  
 23 **discarding any of it?**  
 24 **"ANSWER: Yes. Electronically you're talking**  
 25 **about?**

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1           **"QUESTION: Yes.**  
 2           **"ANSWER: Electronically, yes."**  
 3           **Did I read that correctly?**  
 4           A. Yes, you did.  
 5           MS. VANDRUFF: Thank you.  
 6           Your Honor, I intend to move to a new subject,  
 7           but it's 1:00 and I wanted to ask if this would be a  
 8           good time for us to adjourn for lunch.  
 9           JUDGE CHAPPELL: How much time do you have  
 10          remaining in your cross?  
 11          MS. VANDRUFF: I would estimate, Your Honor,  
 12          about an hour.  
 13          JUDGE CHAPPELL: All right. Let's go ahead and  
 14          take our lunch break.  
 15          MS. VANDRUFF: Thank you, Your Honor.  
 16          MR. SHERMAN: Thank you, Your Honor.  
 17          JUDGE CHAPPELL: We'll reconvene at 2:15.  
 18          We're in recess.  
 19          (Whereupon, at 1:09 p.m., a lunch recess was  
 20          taken.)  
 21  
 22  
 23  
 24  
 25

1072

1           **operations and general manager, Mr. John Boyle, whom**  
 2           **you've referenced several times today, he initiated an**  
 3           **archiving project through which day sheets like the ones**  
 4           **found by the Sacramento Police Department were archived**  
 5           **electronically; correct?**  
 6           A. The project was to archive them electronically,  
 7           correct. But they were not on the Internet.  
 8           **Q. The day sheets were archived electronically;**  
 9           **correct?**  
 10          A. "Electronically" meaning -- okay. When you say  
 11          "electronically," you mean just on hardware whether it  
 12          is or is not available on the Internet?  
 13          **Q. No.**  
 14          **My question was: The day sheets were archived**  
 15          **electronically; correct?**  
 16          A. Okay. And I have to ask you what your  
 17          definition is of "electronically."  
 18          **Q. You've testified, Mr. Daugherty, that the day**  
 19          **sheets existed in paper copy; correct?**  
 20          A. Yes.  
 21          **Q. The day sheets also existed electronically**  
 22          **because they were archived as part of Mr. Boyle's**  
 23          **archiving project; correct?**  
 24          A. Again, I need to understand what you mean by  
 25          "electronic."

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1           AFTERNOON SESSION  
 2                                 (2:23 p.m.)  
 3           JUDGE CHAPPELL: We're back on the record.  
 4           Go ahead.  
 5           MS. VANDRUFF: Thank you, Your Honor.  
 6           BY MS. VANDRUFF:  
 7           **Q. Good afternoon, Mr. Daugherty.**  
 8           A. Good afternoon.  
 9           **Q. Earlier today you described for the court the**  
 10          **Lytec billing software. Do you remember that**  
 11          **testimony?**  
 12          A. I remember mentioning it, mentioning it.  
 13          **Q. LabMD employees created day sheets from the**  
 14          **Lytec billing software; correct?**  
 15          A. Billing employees created day sheets, yes.  
 16          **Q. And those billing employees were LabMD**  
 17          **employees; correct?**  
 18          A. Yes, they were.  
 19          **Q. And LabMD created paper copies of the day**  
 20          **sheets; correct?**  
 21          A. Correct.  
 22          **Q. LabMD never destroyed paper copies of the day**  
 23          **sheets; correct?**  
 24          A. Correct.  
 25          **Q. In fact, your former vice president of**

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1           **Q. I mean it in its ordinary sense, Mr. Daugherty.**  
 2           A. I don't know what -- how ordinary is for you. I  
 3           can describe how they're saved.  
 4           **Q. The day sheets were scanned into an electronic**  
 5           **format; is that correct?**  
 6           A. They were -- they -- okay. Again, I'm sorry.  
 7           I've asked you three times. I need to know what your  
 8           definition is of "electronic."  
 9           **Q. Were the day sheets scanned, Mr. Daugherty?**  
 10          A. Some of them were I believe.  
 11          MS. VANDRUFF: The court's indulgence,  
 12          Your Honor.  
 13          (Pause in the proceedings.)  
 14          Thank you, Your Honor.  
 15          BY MS. VANDRUFF:  
 16          **Q. Those scanned day sheets were saved on LabMD**  
 17          **computers; correct, Mr. Daugherty?**  
 18          A. They were saved on a LabMD hard drive. Whether  
 19          the hard drive was in a computer I'm not sure.  
 20          **Q. Turning your attention, Mr. Daugherty, to**  
 21          **employees' -- and by "employees" of course I mean LabMD**  
 22          **employees -- access to information regarding consumers,**  
 23          **you addressed that this morning while you were**  
 24          **explaining how the business operated; correct?**  
 25          MR. SHERMAN: Objection. I don't believe that

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1 that was the subject of cross -- I'm sorry -- of my  
 2 direct.  
 3 MS. VANDRUFF: Mr. Daugherty -- may I respond,  
 4 Your Honor?  
 5 JUDGE CHAPPELL: Well, if he answered your  
 6 pending question yes, then it was within the scope,  
 7 because she asked him if he addressed it this morning,  
 8 which was the direct.  
 9 THE WITNESS: What was my answer? Excuse me?  
 10 JUDGE CHAPPELL: No answer yet.  
 11 THE WITNESS: Oh.  
 12 So could you repeat the question, please.  
 13 JUDGE CHAPPELL: Go ahead, Josett.  
 14 (The record was read as follows:)  
 15 "QUESTION: Turning your attention,  
 16 Mr. Daugherty, to employees' -- and by 'employees' of  
 17 course I mean LabMD employees -- access to information  
 18 regarding consumers, you addressed that this morning  
 19 while you were explaining how the business operated;  
 20 correct?"  
 21 THE WITNESS: I don't recall that.  
 22 BY MS. VANDRUFF:  
 23 **Q. Well, Mr. Daugherty, this morning --**  
 24 JUDGE CHAPPELL: Objection withdrawn?  
 25 MS. VANDRUFF: I'll rephrase, Your Honor and

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1 Counsel.  
 2 MR. SHERMAN: I still think I would object to  
 3 that line of questioning in that it was not a subject of  
 4 my direct. Employee access to data was not a subject of  
 5 my direct.  
 6 MS. VANDRUFF: May I respond, Your Honor?  
 7 JUDGE CHAPPELL: Go ahead.  
 8 MS. VANDRUFF: While it may be true that  
 9 Mr. Sherman did not present any questions to  
 10 Mr. Daugherty, in explaining how his business operates,  
 11 he explained that he wasn't able to access certain  
 12 information like diagnoses, and so I believe that fairly  
 13 opened the door to this line of questioning.  
 14 JUDGE CHAPPELL: You need to lay the foundation  
 15 through questioning that connects it to the direct.  
 16 MS. VANDRUFF: Certainly.  
 17 BY MS. VANDRUFF:  
 18 **Q. So, Mr. Daugherty, this morning while you were**  
 19 **describing the operation of your business, you described**  
 20 **for His Honor that you could not access all information**  
 21 **like diagnoses; is that correct?**  
 22 A. That's really vague. From the entire morning I  
 23 don't recall. I don't know what specifically you're  
 24 talking about. I mean, that's a general description of  
 25 my testimony, and I don't even know if that's accurate

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1 because that's the whole morning.  
 2 MS. VANDRUFF: And Your Honor, I believe that  
 3 it does fairly represent what his testimony was. It  
 4 would require me to go through the transcript to find  
 5 that.  
 6 JUDGE CHAPPELL: I in fact don't recall asking  
 7 him about that. The question you just asked the man, I  
 8 don't recall asking that either. Maybe Mr. Sherman --  
 9 MS. VANDRUFF: No, Your Honor didn't ask that  
 10 question. I'm not suggesting that you did.  
 11 JUDGE CHAPPELL: Oh, I thought that's what you  
 12 said.  
 13 MS. VANDRUFF: No, Your Honor. No. I believe  
 14 that in response to a question of Mr. Sherman's, while  
 15 Mr. Daugherty was describing his business and how it  
 16 operated, he explained that there were diagnoses that  
 17 even he couldn't access, and so I wanted to follow up on  
 18 that with some limited cross.  
 19 JUDGE CHAPPELL: What's your next question?  
 20 MS. VANDRUFF: My next question, Your Honor,  
 21 is -- is the following:  
 22 Mr. Daugherty, during this matter, LabMD asked  
 23 that LabMD supply complaint counsel with information  
 24 regarding the types of personal information its  
 25 employees could access; isn't that correct?

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1 THE WITNESS: I believe your definition was  
 2 consumers, and it was so broad, it was every human being  
 3 around, so you'll have to focus in more.  
 4 Sorry. Excuse me just a moment.  
 5 MR. SHERMAN: Your Honor, I have to renew my  
 6 objection. I think this is -- based on that question,  
 7 it appears to be beyond the scope of my direct.  
 8 MS. VANDRUFF: May I respond, Your Honor?  
 9 JUDGE CHAPPELL: I think the question is hard to  
 10 follow. It says, "During this matter, LabMD asked that  
 11 LabMD supply complaint counsel with information." Is  
 12 that what you meant to ask?  
 13 MS. VANDRUFF: It wasn't, Your Honor, and I  
 14 apologize if I was unclear. May I restate the  
 15 question?  
 16 JUDGE CHAPPELL: Go ahead.  
 17 BY MS. VANDRUFF:  
 18 **Q. Mr. Daugherty, during this matter, complaint**  
 19 **counsel asked LabMD to supply information regarding the**  
 20 **types of personal information its employees could**  
 21 **access; correct?**  
 22 MR. SHERMAN: Objection. The types of personal  
 23 information its employees could access was not a subject  
 24 matter of my direct examination --  
 25 JUDGE CHAPPELL: I don't recall that either.

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1 MR. SHERMAN: -- of Mr. Daugherty.  
 2 JUDGE CHAPPELL: That objection is sustained.  
 3 You need to move along.  
 4 MS. VANDRUFF: Thank you, Your Honor.  
 5 JUDGE CHAPPELL: I mean, as far as what I heard  
 6 him say, he talked about billing information, but I did  
 7 not hear him say anything about who had access to what.  
 8 MR. SHERMAN: And to be fair and in my duty to  
 9 educate the court, the access I believe was access to --  
 10 access from the physicians' offices to results or to the  
 11 physicians' patients' information at LabMD.  
 12 JUDGE CHAPPELL: That's what I recall, and I  
 13 recall him saying the 1718 File was found on Ros'  
 14 computer. That's what I recall.  
 15 MS. VANDRUFF: All true, Your Honor. I'm happy  
 16 to move on. I'm happy to move on. I understand the  
 17 court's objection -- the court's sustaining  
 18 Mr. Sherman's objection.  
 19 BY MS. VANDRUFF:  
 20 **Q. And so, Mr. Daugherty, I'd like to turn now to**  
 21 **the 1718 File.**  
 22 **Now, the 1718 File was created on a LabMD**  
 23 **computer; correct?**  
 24 A. Yes.  
 25 **Q. And it was stored on a LabMD computer.**

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1 A. Yes.  
 2 **Q. The 1718 File was on the billing manager's**  
 3 **computer; correct?**  
 4 A. Which billing manager?  
 5 **Q. It was on Ms. Woodson's computer; is that**  
 6 **correct?**  
 7 A. Correct.  
 8 **Q. And on that same computer LabMD found the**  
 9 **LimeWire program; correct?**  
 10 A. Correct.  
 11 **Q. LabMD confirmed that the file it received from**  
 12 **Tiversa was a copy of the 1718 File on Ros Woodson's**  
 13 **LabMD computer; correct?**  
 14 A. I don't know.  
 15 No. Let me restate. There's no way to tell. I  
 16 mean, I don't know if that's where it was copied from or  
 17 not. To the best of my knowledge.  
 18 **Q. Well, let me ask the question this way,**  
 19 **Mr. Daugherty.**  
 20 **LabMD confirmed that the file LabMD had received**  
 21 **from Tiversa was a copy of a file on LabMD's billing**  
 22 **manager's computer; correct?**  
 23 A. Just as long as it's a copy, but that doesn't  
 24 mean it was copied from. We're not sure.  
 25 **Q. Okay.**

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1 A. We have no way pulling that link. But it  
 2 appears to be a copy of the same file.  
 3 **Q. So that there's no ambiguity, let me ask the**  
 4 **question one more time.**  
 5 **LabMD confirmed that the file LabMD received**  
 6 **from Tiversa was a copy of a file on LabMD's billing**  
 7 **manager's computer; correct?**  
 8 A. Okay. Here's -- if you're -- if the answer to  
 9 that question means that it was copied from LabMD's --  
 10 Ros Woodson's computer, then your answer is, we have no  
 11 idea of knowing that. But if it was a copy that could  
 12 have been copied someplace else as well, then yes, that  
 13 same information in that same format from a Lytec report  
 14 was on Ros Woodson's computer.  
 15 MS. VANDRUFF: The court's indulgence,  
 16 Your Honor.  
 17 JUDGE CHAPPELL: All right.  
 18 (Pause in the proceedings.)  
 19 BY MS. VANDRUFF:  
 20 **Q. Mr. Daugherty, you were able to determine that**  
 21 **the contents of the 1718 File on the billing manager's**  
 22 **computer and the file that you received from Tiversa**  
 23 **were the same by looking at the documents side by side;**  
 24 **correct?**  
 25 A. I don't recall that. I don't recall printing

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1 them off or putting them side by side or -- and I didn't  
 2 do it.  
 3 **Q. Mr. Daugherty, let me ask you to return your**  
 4 **attention, please, to the transcript of your March 4**  
 5 **deposition which has been marked and received in the**  
 6 **record as CX 0710.**  
 7 A. Okay. So is this my 30(b)(6) or is this my  
 8 personal -- this is a 30(b)(6).  
 9 **Q. This is the deposition in which you were**  
 10 **representing the company that proceeded on March 4,**  
 11 **2014.**  
 12 A. Okay. And what page?  
 13 **Q. Page 36, sir.**  
 14 JUDGE CHAPPELL: Are you sure he hasn't answered  
 15 your question, Counselor? He does not agree with you  
 16 that it was copied from LabMD's computer. But his  
 17 answer some moments ago said, but if you're asking "if  
 18 it was a copy that could have been copied someplace else  
 19 as well, then yes, that same information in that same  
 20 format from a Lytec report was on Ros Woodson's  
 21 computer."  
 22 MS. VANDRUFF: And Your Honor, I asked a  
 23 subsequent question about how they determined --  
 24 excuse me -- how LabMD determined that the documents --  
 25 that the contents of the documents received from Tiversa

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1082	<p>1 and on Ms. Woodson's computer were the same.</p> <p>2 JUDGE CHAPPELL: Right. That's a different</p> <p>3 question.</p> <p>4 MS. VANDRUFF: Yes, Your Honor.</p> <p>5 JUDGE CHAPPELL: It's clear to me that he wasn't</p> <p>6 going to agree with you that it was copied from his</p> <p>7 computer, but he had agreed with you that it was the</p> <p>8 same, essentially the same document.</p> <p>9 MS. VANDRUFF: I think I understand Your Honor's</p> <p>10 point. However, in response to my question about</p> <p>11 whether LabMD was able to determine that the contents</p> <p>12 were the same, Mr. Daugherty's testimony before</p> <p>13 Your Honor was that he was not able to make that</p> <p>14 determination, and I'd like to proceed with an</p> <p>15 impeachment if I may.</p> <p>16 MR. SHERMAN: I would object because that</p> <p>17 mischaracterizes the testimony. He did not say that he</p> <p>18 was not able to make that determination.</p> <p>19 JUDGE CHAPPELL: That's okay. What he said is</p> <p>20 what matters in the record.</p> <p>21 But go ahead.</p> <p>22 MS. VANDRUFF: May I proceed, Your Honor?</p> <p>23 JUDGE CHAPPELL: One thing that's clear to me, I</p> <p>24 don't think he has said how he knows it's the same</p> <p>25 file.</p>	1084	<p>1 representing. This is a 30(b)(6).</p> <p>2 BY MS. VANDRUFF:</p> <p>3 <b>Q. So it's your testimony today that LabMD was able</b></p> <p>4 <b>to determine that the contents were the same by looking</b></p> <p>5 <b>at the documents side by side; is that correct,</b></p> <p>6 <b>Mr. Daugherty?</b></p> <p>7 A. My testimony is that someone at LabMD did a</p> <p>8 comparison, it wasn't me, and they informed me that the</p> <p>9 contents were the same.</p> <p>10 <b>Q. And so LabMD determined that the contents were</b></p> <p>11 <b>the same by looking at the documents side by side; is</b></p> <p>12 <b>that correct?</b></p> <p>13 MR. SHERMAN: Objection. Asked and answered.</p> <p>14 MS. VANDRUFF: I don't believe it has been,</p> <p>15 Your Honor.</p> <p>16 JUDGE CHAPPELL: We know he didn't do it. We</p> <p>17 know someone at LabMD did it.</p> <p>18 That's not enough?</p> <p>19 MR. SHERMAN: And whether or not it was done</p> <p>20 side by side, I don't know that that's probative of</p> <p>21 anything.</p> <p>22 JUDGE CHAPPELL: No, but it's the same wording</p> <p>23 she used today that was used in the transcript</p> <p>24 previously.</p> <p>25 I'll overrule the objection and allow the</p>
1083	<p>1 MS. VANDRUFF: Agreed, Your Honor.</p> <p>2 BY MS. VANDRUFF:</p> <p>3 <b>Q. So, Mr. Daugherty, if I could direct your</b></p> <p>4 <b>attention, please, to page 36, are you with me?</b></p> <p>5 A. I'm here.</p> <p>6 <b>Q. Thank you.</b></p> <p>7 A. What line?</p> <p>8 <b>Q. Line 12.</b></p> <p>9 A. I'm there.</p> <p>10 <b>Q. On March 4, 2014, you were asked the following</b></p> <p>11 <b>question and you gave the following answer:</b></p> <p>12 <b>"QUESTION: So your testimony is that you, you</b></p> <p>13 <b>were able to determine that the contents were the same</b></p> <p>14 <b>by looking at the documents side by side; is that</b></p> <p>15 <b>right?</b></p> <p>16 <b>"ANSWER: Correct."</b></p> <p>17 <b>Did I read that correctly?</b></p> <p>18 A. Well, it depends on what you're saying "you" is.</p> <p>19 This is a 30(b)(6) similar, right, so the "you" in this</p> <p>20 is LabMD in general and everyone at LabMD versus right</p> <p>21 now I'm testifying personally; is that not -- is that</p> <p>22 not correct?</p> <p>23 JUDGE CHAPPELL: That's a good point.</p> <p>24 THE WITNESS: I mean, if you're going to impeach</p> <p>25 me, it has to be with what I said and who I was</p>	1085	<p>1 question.</p> <p>2 Do you need her to read it back?</p> <p>3 MS. VANDRUFF: Thank you, Your Honor.</p> <p>4 (The record was read as follows:)</p> <p>5 "QUESTION: And so LabMD determined that the</p> <p>6 contents were the same by looking at the documents side</p> <p>7 by side; is that correct?"</p> <p>8 THE WITNESS: Okay. So this is where we're</p> <p>9 going to go with the definition of "side by side"</p> <p>10 because these are electronic comparisons, so you take</p> <p>11 two files out and side by side or -- is that what you</p> <p>12 mean, or do you mean we printed off 1700 pages and did</p> <p>13 an audit? What do you mean?</p> <p>14 MS. VANDRUFF: And Your Honor, I'd move to</p> <p>15 strike that as nonresponsive. I asked a question --</p> <p>16 THE WITNESS: I need clarification.</p> <p>17 JUDGE CHAPPELL: I think that's a fair request</p> <p>18 to clarify. "Side by side" is not clear. I know you</p> <p>19 used the phrase or someone did before and you're using</p> <p>20 it today.</p> <p>21 MS. VANDRUFF: Correct.</p> <p>22 JUDGE CHAPPELL: But you didn't just tell him</p> <p>23 whatever the definition was back then, so you need to</p> <p>24 clarify it with him or move on.</p> <p>25 MS. VANDRUFF: Thank you, Your Honor.</p>



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1 BY MS. VANDRUFF:  
 2 **Q. Mr. Daugherty, the 1718 File contains consumer**  
 3 **names; correct?**  
 4 A. It contains patient names. Correct.  
 5 **Q. The 1718 File contains consumers'**  
 6 **Social Security numbers; correct?**  
 7 A. It contains patient Social Security numbers.  
 8 **Q. That's yes?**  
 9 A. That's yes, it contains patient Social Security  
 10 numbers.  
 11 **Q. The 1718 File contains consumers' dates of**  
 12 **birth; correct?**  
 13 A. The 1718 File contains patients' dates of  
 14 birth.  
 15 **Q. The 1718 File --**  
 16 A. Yes.  
 17 **Q. Thank you, Mr. Daugherty.**  
 18 **The 1718 File contains CPT codes; correct?**  
 19 A. It -- the column is listed CPT Code, and there  
 20 are codes on there that the doctor is looking for, but  
 21 as far as CPT codes of actual diagnoses, no.  
 22 So it depends on what you mean by "CPT codes"  
 23 since the specimen is being sent to LabMD to discover  
 24 the disease. The cart doesn't go before the horse.  
 25 So it depends on the definition of "CPT code."

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1 If you're saying it's a diagnosis of a disease, no. If  
 2 it's a reason to get the test run, then yes.  
 3 **Q. So the code that appears in the 1718 File is the**  
 4 **code that a physician uses when ordering a test;**  
 5 **correct?**  
 6 A. Correct.  
 7 Are we done with this? Sorry.  
 8 **Q. You may set it aside. Thank you,**  
 9 **Mr. Daugherty.**  
 10 **With respect to the 1718 File, Mr. Daugherty,**  
 11 **LabMD did not provide notice to consumers whose names,**  
 12 **Social Security numbers, dates of birth or CPT codes was**  
 13 **contained on the 1718 File; correct?**  
 14 A. Yeah. That was before the HIPAA requirement to  
 15 do so, so that's correct.  
 16 MS. VANDRUFF: The court's indulgence,  
 17 Your Honor.  
 18 JUDGE CHAPPELL: All right.  
 19 (Pause in the proceedings.)  
 20 BY MS. VANDRUFF:  
 21 **Q. Mr. Daugherty, when LabMD learned that the**  
 22 **1718 File had been found by Tiversa, LabMD searched its**  
 23 **computers and found LimeWire installed on the billing**  
 24 **manager's computer; correct?**  
 25 A. By meaning "billing manager" do you mean

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1 Ros Woodson.  
 2 **Q. Yes, sir.**  
 3 A. That's correct.  
 4 **Q. And you quarantined that computer; correct?**  
 5 A. We quarantined the hard drive.  
 6 **Q. You removed the hard drive; correct?**  
 7 A. Correct.  
 8 **Q. And you had an image or a forensically --**  
 9 A. And when I say "we," LabMD, not Mike Daugherty.  
 10 **Q. Okay. So that there's no ambiguity in the**  
 11 **record, LabMD quarantined the computer; correct?**  
 12 A. Correct.  
 13 **Q. And LabMD removed the hard drive from the**  
 14 **computer.**  
 15 A. Yes.  
 16 **Q. LabMD also created an image or a copy of that**  
 17 **hard drive; correct?**  
 18 A. Correct.  
 19 **Q. But you don't have the hard drive anymore;**  
 20 **correct?**  
 21 A. Correct.  
 22 **Q. And you don't have the image or the copy of the**  
 23 **hard drive anymore?**  
 24 A. To the best of my knowledge, correct. That's  
 25 correct.

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1 **Q. The person that LabMD retained rendered the**  
 2 **hard drive inoperable; correct?**  
 3 A. To the best of my knowledge, yes.  
 4 **Q. And that person also destroyed the image or the**  
 5 **copy of the hard drive; correct?**  
 6 A. Well, can you define "destroyed"? That sounds  
 7 like there's intent.  
 8 **Q. Was -- well, the person who created --**  
 9 **withdrawn.**  
 10 **The court's indulgence, Your Honor.**  
 11 **(Pause in the proceedings.)**  
 12 **With respect to the image or copy of the**  
 13 **hard drive that was created, that was also rendered**  
 14 **inoperable; correct?**  
 15 A. To the best of my knowledge, yes.  
 16 MS. VANDRUFF: The court's indulgence.  
 17 (Pause in the proceedings.)  
 18 Your Honor, I intend to wrap up my examination,  
 19 but prior to Your Honor gaveling in, I conferred with  
 20 respondent's counsel about a line of questioning on  
 21 which I inferred some sensitivity on the part of  
 22 Mr. Daugherty, and I wonder if we might approach to  
 23 discuss with Your Honor a motion that respondent may  
 24 wish to make and that we will not oppose if respondent  
 25 wishes to make that motion.

40 (Pages 1086 to 1089)

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1 JUDGE CHAPPELL: On the record but not in  
2 public?  
3 MS. VANDRUFF: Yes, Your Honor.  
4 MR. SHERMAN: Yes, Your Honor.  
5 MS. VANDRUFF: I think it would be easier to  
6 explain the parties' position on the record but not in a  
7 public session, so however Your Honor would like to  
8 proceed with that.  
9 JUDGE CHAPPELL: Just come on up.  
10 MS. VANDRUFF: Thank you.  
11 (At the bench, the following discussion was held  
12 off the public record.)  
13 MR. SHERMAN: Your Honor, we conferred.  
14 Complaint counsel intends to ask Mr. Daugherty a line  
15 of questions concerning the location of -- in essence  
16 the location of the data and the network and the slides.  
17 And a lot of the property owned by LabMD and used in the  
18 conduct of its business is at Mr. Daugherty's home and  
19 also at the condo that's owned by Mr. Daugherty. He  
20 does not want to disclose those locations.  
21 I do not object to that line of questioning.  
22 But, again, we conferred and think it would be best, in  
23 order to keep that information confidential, to have  
24 that line of questioning conducted in an in camera  
25 session.

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1 MS. VANDRUFF: And to be clear, I don't intend  
2 to elicit the address but rather the fact that it is at  
3 his home, but I understand why that may be sensitive.  
4 And on direct, he didn't even offer that it was at his  
5 home, and that's the reason that I raised it with  
6 counsel on the break.  
7 JUDGE CHAPPELL: So she's not going to ask the  
8 address, and you can let him know that.  
9 MR. SHERMAN: He already knows that.  
10 JUDGE CHAPPELL: Do we need to be in camera if  
11 she's not going to elicit the address?  
12 Because I have some pretty tough standards for  
13 something to be in camera. Our assumption is everything  
14 is public. That's the presumption.  
15 MR. SHERMAN: He's the author of a book. He has  
16 been on book speaking tours. People know who he is.  
17 And there is available on the Internet obviously  
18 addresses associated with certain individuals. Someone  
19 putting two and two together with regard to where this  
20 sensitive information may be located --  
21 JUDGE CHAPPELL: Well, for purposes of the  
22 decision, I don't see why you're going to need to know  
23 where it is.  
24 MS. VANDRUFF: That you need to know?  
25 JUDGE CHAPPELL: Where it is. But I don't know

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1 that it's important to the record to know where the  
2 information is.  
3 MS. VANDRUFF: I agree.  
4 JUDGE CHAPPELL: So what I'm getting at is, how  
5 about a question that says at a location disclosed to  
6 complaint counsel and leave it at that?  
7 That way, I don't have to get into a  
8 provisional in camera ruling and then a written motion  
9 that is going to have to be filed later and then we're  
10 going to have to analyze it with all the legal steps  
11 required.  
12 Because does anybody see a reason why on the  
13 merits, the location, home, office, on the moon, is even  
14 important?  
15 MR. SHERMAN: Well, I do not. And I do  
16 think --  
17 JUDGE CHAPPELL: I'm not saying not to ask him,  
18 but I'm saying you can say something like "at a location  
19 we're aware of."  
20 MR. SHERMAN: That's fair.  
21 It's also an opportunity to -- well, I want to  
22 renew my objection to bringing in evidence post  
23 July 2010 because I do think that this line of  
24 questioning goes to data security and --  
25 JUDGE CHAPPELL: I thought you didn't have an

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1 objection to the line of questioning.  
2 MR. SHERMAN: Well, I didn't until I just  
3 started thinking about it.  
4 MS. VANDRUFF: But he's talked, Your Honor,  
5 about a server and about the function of that server,  
6 and that server is at present at his home, and so I  
7 think that I'm entitled to a short line of questioning.  
8 I'm happy to do it in camera. I don't object to that.  
9 I just -- I wanted to proceed, and I didn't want to  
10 surprise the court with any concerns by Mr. Daugherty on  
11 the stand. That's all.  
12 MR. SHERMAN: And I see no problem with the  
13 suggested solution by the court if I'm given the  
14 opportunity to explicitly tell Mr. Daugherty not to  
15 disclose any address-type information.  
16 MS. VANDRUFF: And I didn't intend to elicit the  
17 address of course.  
18 JUDGE CHAPPELL: But you'll be able to chat with  
19 him as soon as we're finished.  
20 MR. SHERMAN: Yes.  
21 JUDGE CHAPPELL: Now, what about the other  
22 objection about the timing?  
23 MR. SHERMAN: Well, the only -- we've posited --  
24 JUDGE CHAPPELL: So we've resolved the one issue  
25 about the location.

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1 MS. VANDRUFF: The location relating to  
 2 complaint counsel, let me say, Your Honor, that there is  
 3 evidence that has been submitted that discloses that  
 4 location that respondent --  
 5 JUDGE CHAPPELL: We don't need to talk about  
 6 that here.  
 7 MS. VANDRUFF: Okay. I'll leave that to  
 8 respondent.  
 9 JUDGE CHAPPELL: Point that out in briefing, if  
 10 need be.  
 11 MS. VANDRUFF: Understood.  
 12 MR. SHERMAN: We posited an objection to the  
 13 presentation of evidence of data security beyond July of  
 14 2010.  
 15 JUDGE CHAPPELL: I think I've already ruled on  
 16 that.  
 17 MR. SHERMAN: You have already ruled on that,  
 18 correct.  
 19 JUDGE CHAPPELL: So you're restating the  
 20 objection, and I'll refer you to my order previously  
 21 issued.  
 22 MR. SHERMAN: Yes, sir.  
 23 MS. VANDRUFF: Thank you, Your Honor.  
 24 JUDGE CHAPPELL: Are we done?  
 25 MR. SHERMAN: Yes, sir.

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1 JUDGE CHAPPELL: So go spend as much time as you  
 2 need, and then when you're ready, we'll go back on the  
 3 record.  
 4 So we'll pause.  
 5 (Pause in the proceedings.)  
 6 (In open session.)  
 7 JUDGE CHAPPELL: Okay. All right. The  
 8 attorneys and I just dealt with a sensitive matter, and  
 9 that issue has been resolved, so proceed, Ms. VanDruff.  
 10 MS. VANDRUFF: Thank you, Your Honor.  
 11 BY MS. VANDRUFF:  
 12 **Q. Mr. Daugherty, you've described for His Honor**  
 13 **the Lytec software; correct?**  
 14 A. Yes.  
 15 **Q. And that's contained on a server; is that**  
 16 **correct?**  
 17 A. Yes.  
 18 **Q. And that server is at present at a location**  
 19 **known to complaint counsel; correct?**  
 20 A. Yes.  
 21 **Q. There is Internet connectivity to the Lytec**  
 22 **system; correct?**  
 23 A. Yes.  
 24 MS. VANDRUFF: The court's indulgence,  
 25 Your Honor.

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1 Subject to any redirect, Your Honor, I have no  
 2 further cross.  
 3 JUDGE CHAPPELL: Is there any redirect?  
 4 MR. SHERMAN: Yes, sir, Your Honor.  
 5 JUDGE CHAPPELL: Proceed when ready.  
 6 - - - - -  
 7 REDIRECT EXAMINATION  
 8 BY MR. SHERMAN:  
 9 **Q. Mr. Daugherty, you were shown an exhibit -- --**  
 10 **you were shown Exhibit CXD 957, and I believe that**  
 11 **that's still up there. It is an e-mail from**  
 12 **Fred Selikop.**  
 13 **Do you recall being shown that exhibit?**  
 14 A. Well, I have Plaintiff's Exhibit 15.  
 15 **Q. Well, that's the one.**  
 16 A. Okay. Yes, then this is Plaintiff's Exhibit 15.  
 17 It is in my hand.  
 18 **Q. And the communication down at the bottom begins**  
 19 **with "Hi, Betsy."**  
 20 **Do you see that?**  
 21 A. On page 1 that's highlighted? Yes.  
 22 **Q. Can you read that paragraph into the record,**  
 23 **please.**  
 24 A. "Thank you for the LabMD submission and the" --  
 25 MS. VANDRUFF: Objection, Your Honor. Sorry.

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1 The recitation of the document that's been  
 2 marked as CXD 957 is hearsay, and it's not being offered  
 3 for a nonhearsay purpose.  
 4 I examined Mr. Daugherty about the date of this  
 5 document and how it related to his having informed his  
 6 physician clients that he was no longer receiving  
 7 specimens. I both don't think that this is within the  
 8 scope of the cross and it is inadmissible hearsay.  
 9 MR. SHERMAN: Your Honor, I believe that the  
 10 scope of the examination was about not only whether or  
 11 not the timing of the closing of or the ceasing of the  
 12 operations but also had to do with whether or not  
 13 insurance was available as a reason for the closing or  
 14 the ceasing of operations, and the information in this  
 15 e-mail is directly relevant to that subject with regard  
 16 to insurance.  
 17 JUDGE CHAPPELL: The objection was hearsay, not  
 18 relevance.  
 19 MS. VANDRUFF: And Your Honor, if I may respond  
 20 that the -- Mr. Daugherty has already testified about  
 21 the fact that he was denied insurance coverage. And the  
 22 hearsay that is offered in CXD 957 does not -- it is  
 23 inadmissible notwithstanding Mr. Daugherty's prior  
 24 testimony about the facts.  
 25 MR. SHERMAN: Well, Your Honor, the fact remains

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1 that the information here confirms in fact that  
 2 Mr. Daugherty was denied insurance, and I think that  
 3 that's relevant.  
 4 JUDGE CHAPPELL: We're not talking about  
 5 relevance. We're talking about hearsay.  
 6 What's your response to the hearsay objection?  
 7 MR. SHERMAN: My response to the hearsay,  
 8 Your Honor, is not that it's being offered for the  
 9 truth of the matter, but it's being offered to  
 10 demonstrate that the lack of insurance was a reason for  
 11 the closing and the timing of the closing of LabMD which  
 12 he's already testified which was around January 14,  
 13 2014.  
 14 JUDGE CHAPPELL: If he's not offering it for the  
 15 truth, then it by definition is not hearsay.  
 16 MS. VANDRUFF: Understood, Your Honor. But then  
 17 there's no reason for Mr. Daugherty to read into the  
 18 record the hearsay that is contained in CXD 957. If he  
 19 wants to testify about the fact, which he has on direct,  
 20 of one insurer's decision, he may do that, but reading  
 21 CXD 957 into the record is a hearsay -- an impermissible  
 22 hearsay purpose.  
 23 JUDGE CHAPPELL: Here's what we're going to do.  
 24 I'm not going to let him read from a document that's not  
 25 in evidence. If you want to question him about that

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1 information, you may proceed.  
 2 MS. VANDRUFF: Thank you, Your Honor.  
 3 JUDGE CHAPPELL: That's sustained.  
 4 BY MR. SHERMAN:  
 5 **Q. In terms of CXD 957, Mr. Daugherty, and the**  
 6 **closing of LabMD, did the information contained in here**  
 7 **play a role in terms of your decision to cease**  
 8 **operations?**  
 9 **(Pause in the proceedings.)**  
 10 A. Excuse me just a moment.  
 11 **(Pause in the proceedings.)**  
 12 This is tail coverage, so the answer is no.  
 13 MR. SHERMAN: Okay. I have no further  
 14 questions.  
 15 JUDGE CHAPPELL: Recross?  
 16 MS. VANDRUFF: No further cross, Your Honor.  
 17 Thank you.  
 18 JUDGE CHAPPELL: Thank you, sir. You're  
 19 excused.  
 20 Call your next witness.  
 21 THE WITNESS: Excuse me. Should I -- these  
 22 exhibits, should I bring them down? Everything I was  
 23 handed by the lawyers?  
 24 JUDGE CHAPPELL: Who wants to grab their  
 25 documents?

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1 THE WITNESS: I don't know if they're all --  
 2 MS. VANDRUFF: I'm happy to grab the documents,  
 3 Your Honor.  
 4 THE WITNESS: I can bring them. I just didn't  
 5 know.  
 6 JUDGE CHAPPELL: You can hand them to  
 7 Ms. VanDruff.  
 8 MS. VANDRUFF: Thank you, Your Honor.  
 9 **(Pause in the proceedings.)**  
 10 MR. SHERMAN: Your Honor, did you give me  
 11 permission to call the next witness?  
 12 JUDGE CHAPPELL: Yes, I did.  
 13 MR. SHERMAN: Mr. Daniel Kaufman, please.  
 14 - - - - -  
 15 Whereupon --  
 16 DANIEL KAUFMAN  
 17 a witness, called for examination, having been first  
 18 duly sworn, was examined and testified as follows:  
 19 DIRECT EXAMINATION  
 20 BY MR. SHERMAN:  
 21 **Q. Good afternoon, Mr. Kaufman.**  
 22 A. Good afternoon.  
 23 **Q. Mr. Kaufman, for the record, please identify**  
 24 **yourself and your current occupation.**  
 25 A. My name is Daniel Kaufman, and I am one of two

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1 deputy directors for the FTC Bureau of Consumer  
 2 Protection.  
 3 **Q. And the Bureau of Consumer Protection -- is it**  
 4 **correct to say that the bureau initiated the**  
 5 **investigation and brought the complaint in this matter?**  
 6 A. Technically, the bureau recommended that the  
 7 commission issue -- authorize us to issue the complaint,  
 8 but yes.  
 9 **Q. And as deputy director --**  
 10 A. Yes.  
 11 **Q. -- what are your duties and responsibilities**  
 12 **with regard to the Bureau of Consumer Protection?**  
 13 A. Sure. A wide range of responsibilities from  
 14 reviewing recommendations from staff to either initiate  
 15 a law enforcement action and/or settle a law enforcement  
 16 action. I deal with personnel issues, bureau policy,  
 17 communicate with commissioners and their offices about  
 18 cases and recommendations.  
 19 **Q. Are you familiar with the matter about which we**  
 20 **are here today?**  
 21 A. Yes, I am.  
 22 **Q. And have you been involved or informed about**  
 23 **this matter since its inception?**  
 24 A. Not since its inception. I've had some  
 25 awareness of it generally over time, sometimes more

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1 than others. And I've also been deposed in this  
 2 matter.  
 3 **Q. At what point would you say your involvement**  
 4 **with this matter began in earnest?**  
 5 A. I would say the primary involvement would have  
 6 been when there was a recommendation from staff to issue  
 7 a complaint in this matter.  
 8 **Q. And did you play any role in that**  
 9 **recommendation?**  
 10 A. I reviewed the recommendation and communicated  
 11 with the bureau director on the matter.  
 12 **Q. And so in that review, you became familiar**  
 13 **with -- is it fair to say you became familiar with the**  
 14 **allegations as well as the facts surrounding the**  
 15 **matter?**  
 16 A. I would say generally, yes. There are varying  
 17 degrees of familiarity with the facts, but I have a  
 18 general understanding.  
 19 **Q. Was it your understanding upon making the**  
 20 **recommendation -- I'm sorry. You didn't make the**  
 21 **recommendation, but in reviewing the recommendation,**  
 22 **that this case would be about data security?**  
 23 A. It was my understanding this was a case about  
 24 data security, correct.  
 25 **Q. And did you have an understanding at that point**

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1 **what standard would be applied to this case?**  
 2 A. Yes, I did. We were alleging that the practices  
 3 were unfair under section 5.  
 4 **Q. And so it's your understanding then that the**  
 5 **Bureau of Consumer Protection must prove the unfairness**  
 6 **standard here under section 5; is that correct?**  
 7 A. That's correct.  
 8 **Q. What is the unfairness standard?**  
 9 A. It's a three-part test. We have to show in the  
 10 statute that the practices caused or are likely to cause  
 11 significant consumer harm that is not reasonably  
 12 avoidable by consumers themselves and is not outweighed  
 13 by countervailing benefits to consumers or competition.  
 14 **Q. When you reviewed the recommendation to proceed**  
 15 **in this case, do you recall whether or not you were**  
 16 **presented with any evidence of countervailing benefits?**  
 17 MS. VANDRUFF: Objection, Your Honor. This goes  
 18 to deliberative process, and Your Honor has issued  
 19 multiple rulings that relate to this specifically.  
 20 MR. SHERMAN: Your Honor, I'm not asking him  
 21 whether or not it influenced his decision, just whether  
 22 or not it was part of the evidence that he reviewed.  
 23 MS. VANDRUFF: And the decision-making process  
 24 of the bureau and of the commission is not subject to --  
 25 not a subject of discovery, nor is it relevant to any

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1 claim, defense or relief in this case, Your Honor.  
 2 JUDGE CHAPPELL: I was hoping after the numerous  
 3 pretrial rulings issued as orders and the deposition of  
 4 this individual that there would be a brighter line of  
 5 what would be allowed and not allowed.  
 6 The objection is sustained.  
 7 MS. VANDRUFF: Thank you, Your Honor.  
 8 BY MR. SHERMAN:  
 9 **Q. Mr. Kaufman, did you have an opportunity to**  
 10 **review the complaint in this matter?**  
 11 A. Yes, sir.  
 12 **Q. And so you're familiar with the allegations**  
 13 **contained in the complaint?**  
 14 A. Yes, I am.  
 15 (Pause in the proceedings.)  
 16 MR. SHERMAN: Your Honor, may I approach the  
 17 witness and hand him a copy of the complaint?  
 18 JUDGE CHAPPELL: Sure.  
 19 MR. SHERMAN: I would note for the court that  
 20 this is the nonpublic version of the complaint.  
 21 However, I am just going to ask him about a specific  
 22 section, which is paragraph 10, and I am not including  
 23 in what I'm about to hand him the exhibit that was  
 24 attached that contained sensitive information, which is  
 25 why we kept it nonpublic.

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1 JUDGE CHAPPELL: But what you're handing him  
 2 contains paragraph 10 you're going to ask about?  
 3 MR. SHERMAN: Yes.  
 4 JUDGE CHAPPELL: Go ahead.  
 5 BY MR. SHERMAN:  
 6 **Q. So, Mr. Kaufman, I just handed you a document.**  
 7 **Do you recognize that document?**  
 8 A. Yes, I do.  
 9 **Q. And what is it, please?**  
 10 A. This is the complaint that the commission issued  
 11 in this matter.  
 12 **Q. If you would, sir, please turn to page 3 of the**  
 13 **complaint.**  
 14 **Are you there?**  
 15 A. I am there.  
 16 **Q. And specifically paragraph 10 on page 3.**  
 17 **You would agree that paragraph 10 has**  
 18 **subparagraphs to it (a) through (g); correct?**  
 19 A. Correct.  
 20 **Q. And that (a) through (g) specifies what the**  
 21 **bureau considers to be things that LabMD did not do but**  
 22 **should have done.**  
 23 MS. VANDRUFF: Objection, Your Honor. The  
 24 complaint speaks for itself.  
 25 THE WITNESS: Among other things, it -- I'm

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1 sorry, Your Honor.  
 2 MS. VANDRUFF: In terms of whether it's the  
 3 bureau who's making allegations or the commission who's  
 4 making allegations, I believe that paragraphs 10(a)  
 5 through (g) speak for themselves. I don't know that  
 6 eliciting testimony from this witness is probative of  
 7 any fact in this case.  
 8 JUDGE CHAPPELL: Well, I'm assuming that  
 9 Mr. Sherman meant to include in that question "according  
 10 to this complaint." Is that correct?  
 11 MR. SHERMAN: That's correct, Your Honor.  
 12 JUDGE CHAPPELL: Then I'll allow the question  
 13 and answer, so your objection is partially sustained and  
 14 partially overruled.  
 15 MS. VANDRUFF: Thank you, Your Honor.  
 16 THE WITNESS: Could I hear the question again,  
 17 Your Honor.  
 18 (The record was read as follows:)  
 19 "QUESTION: And that (a) through (g) specifies  
 20 what the bureau considers to be things that LabMD did  
 21 not do but should have done."  
 22 BY MR. SHERMAN:  
 23 **Q. According to the complaint.**  
 24 A. According to the complaint, yes, among other  
 25 things it does say right before paragraphs (a) through

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1 (g).  
 2 **Q. My question is, in terms of paragraph 10**  
 3 **subparagraph (a), is it the bureau or the commission's**  
 4 **position that LabMD should have developed, implemented**  
 5 **or maintained a comprehensive information security**  
 6 **program to protect consumers' personal information**  
 7 **during the course of its operations?**  
 8 MS. VANDRUFF: Objection, Your Honor.  
 9 Mr. Kaufman has been subpoenaed in his individual  
 10 capacity, and I believe that he can respond to questions  
 11 in his individual capacity, but certainly he is not  
 12 competent to bind the commission.  
 13 JUDGE CHAPPELL: Are you asking him for his  
 14 interpretation?  
 15 MR. SHERMAN: No, sir. He is the -- a deputy  
 16 director, Your Honor, and I'm asking him in that  
 17 capacity.  
 18 MS. VANDRUFF: And Your Honor, of course the  
 19 commission will potentially be a fact-finder in this  
 20 case, and so asking Mr. Kaufman to speak on behalf of  
 21 the commission, he doesn't have the authority of the  
 22 commission to do that, Your Honor.  
 23 MR. SHERMAN: Mr. --  
 24 JUDGE CHAPPELL: You're assuming an appeal of my  
 25 fact-finding?

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1 MS. VANDRUFF: No, Your Honor, I'm not making  
 2 that assumption, of course not. But I want to just note  
 3 for the record that Mr. Sherman's question asked  
 4 Mr. Kaufman about the commission's position, and the  
 5 commission is a reviewing authority in this matter, so  
 6 of course the commission's position is in no way final  
 7 at this time, Your Honor.  
 8 MR. SHERMAN: Well, Mr. Kaufman was designated  
 9 as a 3.33 witness in this matter, and he testified with  
 10 regard to the bureau's position was in terms of  
 11 standards, and I'm merely trying to put on the record in  
 12 a more succinct manner what those standards are.  
 13 If the court would prefer to simply submit  
 14 Mr. Kaufman's deposition testimony, that could be  
 15 considered.  
 16 MS. VANDRUFF: We would have no objection to the  
 17 submission of Mr. Kaufman's deposition testimony.  
 18 JUDGE CHAPPELL: It sounds like we have a deal.  
 19 MR. SHERMAN: That's fine. If that is the --  
 20 JUDGE CHAPPELL: I think I heard an offer and I  
 21 think I heard acceptance.  
 22 MR. SHERMAN: That's correct, Your Honor.  
 23 JUDGE CHAPPELL: We're not talking about  
 24 contract law, but still, trial lawyers know a little bit  
 25 about contracts.

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1 MR. SHERMAN: As long as, Your Honor, the  
 2 testimony given by Mr. Kaufman under rule 3.33 is  
 3 binding in terms of the commission and the  
 4 Bureau of Consumer Protection or at least one of those  
 5 entities.  
 6 MS. VANDRUFF: And Your Honor, with respect  
 7 to -- there was motion practice with respect to  
 8 specifically this because the subpoena -- excuse me --  
 9 the notice of deposition issued pursuant to  
 10 rule 3.33 was ambiguous as to whether respondent --  
 11 JUDGE CHAPPELL: I don't need to hear anything  
 12 on it. I mean, I've issued enough rulings regarding  
 13 that. We're way past that.  
 14 What I want to know from Mr. Sherman is, the  
 15 witness can say yes and the witness can say no to your  
 16 current question. What difference does it make?  
 17 MR. SHERMAN: I think that it gives the court at  
 18 least some understanding as to what standards the  
 19 commission or the bureau is applying to this case and  
 20 gives the court, the trier of fact, a measure by which  
 21 to determine if there were reasonable measures taken  
 22 with regard to LabMD's data security to meet what may or  
 23 may not be the standard that LabMD is being held to in  
 24 this particular proceeding such that it is helpful to  
 25 the trier of fact to know to what he should apply the

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1 proofs.

2 JUDGE CHAPPELL: Well, I mean, just using common  
3 sense, if the complaint says respondent failed to do --  
4 fill in the blank -- I can read that and say, well,  
5 okay, they think he should have done -- fill in the  
6 blank. Whether or not that's a violation of law is a  
7 different issue.

8 MR. SHERMAN: Correct.

9 JUDGE CHAPPELL: Which is why this fellow could  
10 say yes or no or whatever. I'm not sure that changes  
11 anything.

12 Because if you ask him is that what the  
13 complaint says, is basically what you're asking him,  
14 he's going to say yes, like he already did, and you can  
15 say is that the position of the bureau. Well, somebody  
16 approved it. It's in the complaint that was issued.

17 So I'm not sure we're really getting anywhere.

18 MR. SHERMAN: Well -- and if that's Your Honor's  
19 position, I will tell Your Honor that the opinion of  
20 complaint counsel's expert follows pretty closely with  
21 the allegations made in paragraph 10.

22 JUDGE CHAPPELL: Opinions which may or may not  
23 be considered in this case.

24 MR. SHERMAN: That's correct.

25 And so likewise, if someone approved these

1111

1 allegations and the opinion of the expert is given, in  
2 my assessment, it assists the trier of fact to know that  
3 whether or not this is in fact what the commission or  
4 the bureau is setting as the standard that my client  
5 LabMD must have or should have met.

6 It's not only instructive, and maybe this isn't  
7 the place, but since part of the commission's argument  
8 is that in order to assess what their standards are,  
9 the regulated community should look at complaints, they  
10 should also look at decisions and many other variety of  
11 sources, such that if we could create a record here that  
12 would assist the regulated community in discerning what  
13 standards they would be held to, I would be willing to  
14 go through that exercise.

15 However, if the court thinks that it would be a  
16 waste of time, we would submit that testimony by  
17 Mr. Kaufman, just so long as the court considers it to  
18 be the testimony of the commission and/or the bureau.

19 JUDGE CHAPPELL: Well, I'm not going to prejudge  
20 anything as a waste of time.

21 MS. VANDRUFF: And Your Honor --

22 JUDGE CHAPPELL: I'm just kind of thinking back  
23 to what's gone on for the last few days, but I'm  
24 definitely not going to say anything is a waste of time,  
25 not yet anyway.

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1 But I think I heard you say that you're willing  
2 to submit the deposition of this witness.

3 MR. SHERMAN: That's correct.

4 JUDGE CHAPPELL: If you're going to question him  
5 the same way he was at the deposition, then -- and if  
6 she says that's fine with her, which I heard her say,  
7 then I think that's a deal.

8 MR. SHERMAN: May I consult?

9 JUDGE CHAPPELL: Right. And again, I'm not  
10 going to tell you how to try your case. And again, I'm  
11 not saying anything is a waste of time at this point,  
12 maybe in a footnote in a decision, but not today.

13 MR. SHERMAN: May I consult with counsel?

14 JUDGE CHAPPELL: Go ahead.

15 MR. SHERMAN: Thank you.

16 (Pause in the proceedings.)

17 I do have one small line of questioning.

18 JUDGE CHAPPELL: So the huddle resulted in  
19 something.

20 BY MR. SHERMAN:

21 **Q. Mr. Kaufman, I want to know if you're familiar  
22 with an organization called the Privacy Institute.**

23 A. Generally, yes. I've just heard about it in the  
24 context of this case.

25 **Q. Are you familiar with whether or not the FTC or**

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1 **the bureau has any connection to or involvement with the  
2 Privacy Institute?**

3 MS. VANDRUFF: Objection, Your Honor. This line  
4 of questioning exceeds the purposes for which  
5 Mr. Kaufman was identified as a witness on respondent's  
6 witness list.

7 According to respondent's witness list,  
8 Mr. Kaufman was expected to testify about the  
9 commission's regulatory scheme, the initiation and  
10 evolution of the commission's standards, and the means  
11 by which the commission has alerted or informed entities  
12 like LabMD of those standards.

13 MR. SHERMAN: And that may have something to do  
14 with the Privacy Institute, Your Honor. I'm just not  
15 sure because --

16 JUDGE CHAPPELL: Based on the objection, you're  
17 going to need to connect that --

18 MR. SHERMAN: Yes, sir.

19 JUDGE CHAPPELL: -- to your narrative regarding  
20 who this witness is and what he's going to say.

21 MS. VANDRUFF: Thank you, Your Honor.

22 BY MR. SHERMAN:

23 **Q. In terms of the Privacy Institute, has it had  
24 any involvement in this case with regard to any of the  
25 evidence of the standards that would be used to**

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1 **determine LabMD's compliance with section 5?**  
 2 A. Can I hear that question back, Your Honor?  
 3 JUDGE CHAPPELL: Do you want her to read it?  
 4 MR. SHERMAN: Please.  
 5 (The record was read as follows:)  
 6 "QUESTION: In terms of the Privacy Institute,  
 7 has it had any involvement in this case with regard to  
 8 any of the evidence of the standards that would be used  
 9 to determine LabMD's compliance with section 5?"  
 10 THE WITNESS: I'm not a hundred percent sure how  
 11 to answer that. All I know is, in connection with this  
 12 case, the bureau had issued a CID to the  
 13 Privacy Institute and received some materials in  
 14 response to that CID. I personally would not describe  
 15 that as having anything to do with the data security  
 16 standards, but there was evidence that was produced that  
 17 is germane to the case.  
 18 BY MR. SHERMAN:  
 19 **Q. Is it your understanding that the 1718 File was**  
 20 **included in that material?**  
 21 MS. VANDRUFF: Objection, Your Honor. The  
 22 foundational issue that I raised previously I don't  
 23 think has been tied up with Mr. Kaufman's prior answer.  
 24 JUDGE CHAPPELL: I don't believe you covered the  
 25 1718 File in your description of his testimony.

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1 MR. SHERMAN: That's correct, Your Honor. I'll  
 2 withdraw the question.  
 3 JUDGE CHAPPELL: The objection is sustained.  
 4 MR. SHERMAN: I'll withdraw the question.  
 5 MS. VANDRUFF: Thank you, Your Honor.  
 6 MR. SHERMAN: I have no more questions for  
 7 Mr. Kaufman.  
 8 JUDGE CHAPPELL: Any cross?  
 9 MS. VANDRUFF: No cross, Your Honor.  
 10 JUDGE CHAPPELL: Thank you, sir. You're  
 11 excused.  
 12 Any further witnesses today?  
 13 MR. SHERMAN: No further witnesses today,  
 14 Your Honor.  
 15 One housekeeping matter, however, is, I am not  
 16 sure whether Mr. Kaufman's deposition was marked as an  
 17 exhibit. And that being the case, based on the deal  
 18 that we have, I would move Mr. Kaufman's --  
 19 JUDGE CHAPPELL: You're going to have to have an  
 20 exhibit number before you move.  
 21 MR. SHERMAN: 532, which would include both  
 22 sessions of Mr. Kaufman's deposition.  
 23 JUDGE CHAPPELL: So we have a pending offer into  
 24 evidence of RX 532.  
 25 Any objection?

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1 MS. VANDRUFF: No objection, Your Honor.  
 2 JUDGE CHAPPELL: So admitted.  
 3 (RX Exhibit Number 532 was admitted into  
 4 evidence.)  
 5 MR. SHERMAN: Thank you, Your Honor.  
 6 JUDGE CHAPPELL: Anything further?  
 7 MR. SHERMAN: Nothing further, Judge.  
 8 MS. VANDRUFF: Your Honor, may I address one  
 9 housekeeping matter before we adjourn?  
 10 JUDGE CHAPPELL: Sure.  
 11 MS. VANDRUFF: With respect to demonstratives,  
 12 in light of Your Honor's ruling earlier today, I don't  
 13 know that complaint counsel has handed up the  
 14 demonstratives that have been used with its witnesses,  
 15 though they've been identified in the record and used  
 16 with witnesses. We intend to submit those to --  
 17 pardon me -- Ms. Whalen -- excuse me -- to Ms. Whalen at  
 18 our first convenience.  
 19 JUDGE CHAPPELL: Is that okay with you (to the  
 20 court reporter)?  
 21 Sounds good.  
 22 MS. VANDRUFF: Thank you, Your Honor.  
 23 JUDGE CHAPPELL: Remember, tomorrow I have  
 24 another -- a hearing in another matter at 0930, and we  
 25 will start at some point after 10:30. I'm not sure how

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1 you want to get the word, but be ready to go at 10:30.  
 2 MS. VANDRUFF: We will, Your Honor.  
 3 JUDGE CHAPPELL: If it's later than that, it  
 4 will be as soon as they leave the courtroom we'll get  
 5 started.  
 6 Anything further?  
 7 MR. SHERMAN: Nothing further.  
 8 MS. VANDRUFF: Nothing further from complaint  
 9 counsel, Your Honor.  
 10 JUDGE CHAPPELL: Until tomorrow at about  
 11 10:30 we're in recess.  
 12 (Whereupon, the foregoing hearing was adjourned  
 13 at 3:36 p.m.)  
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## 1 CERTIFICATION OF REPORTER

2

3 DOCKET/FILE NUMBER: 9357

4 CASE TITLE: LabMD, Inc.

5 HEARING DATE: May 27, 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 31, 2014

14

15

16 JOSETT F. WHALEN, RMR

17

18

## 19 CERTIFICATION OF PROOFREADER

20

21 I HEREBY CERTIFY that I proofread the transcript  
22 for accuracy in spelling, hyphenation, punctuation and  
23 format.

24

25 ELIZABETH M. FARRELL

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