In the Matter of:

LabMD, Inc.

May 28, 2014
Trial - Public Record
Volume 6

Condensed Transcript with Word Index

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FEDERAL TRADE COMMISSION

I N D E X

IN RE LABMD, INC.

TRIAL VOLUME 6

PUBLIC RECORD

MAY 28, 2014

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
)
LabMD, Inc., a corporation,) Docket No. 9357
)
Respondent.)

May 28, 2014
10:37 a.m.
TRIAL VOLUME 6
PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Josett F. Whalen, Court Reporter

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P R O C E E D I N G S
- - - - -
JUDGE CHAPPELL: Back on the record.
Next witness.
MR. SHERMAN: Mr. Adam Fisk.
- - - - -
Whereupon --
ADAM FISK
a witness, called for examination, having been first duly sworn, was examined and testified as follows:
DIRECT EXAMINATION
BY MR. SHERMAN:
Q. Good morning, Mr. Fisk.
For the record, could you identify yourself and your current occupation.
A. Yeah. My name is Adam Fisk, and I'm the president and CEO of the Brave New Software Project.
Q. What is the Brave New Software Project?
A. We're a small business that is funded primarily by the State Department and the USAID, and we work also with entities such as Google and other NGOs to --
Q. I'm just going to ask you to speak a little more slowly --
A. Okay.
Q. -- before the court reporter does.

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A. Okay.
Q. She has a three-strike rule, and I don't want you to get the first strike.
A. Okay. I'll slow down a little bit.
JUDGE CHAPPELL: Well, there's the brushback pitch also. We don't want that either.
THE WITNESS: Yeah.
So I work with a variety of different entities, are primarily funded by the federal government to get around censors in countries that censor the Internet.
So we worked on and built a tool called Lantern that is a piece of peer-to-peer software that bypasses censors in countries like China and Iran where the Internet is censored.
BY MR. SHERMAN:
Q. What is your educational background?
A. I received my bachelor's from Brown University in computer science and U.S. history.
Q. Do you have any postgraduate degrees?
A. Zero.
Q. Upon graduating from Brown, what did you do?
A. I immediately started working at LimeWire, so I think it was, gosh, a couple weeks after graduating. My first job out of school was working on the peer-to-peer file-sharing program LimeWire.

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Q. What year was that?
A. Oh, that was 2000, summer of 2000, yeah. I think in June of 2000 I started.
Q. And what were your duties and responsibilities at LimeWire?
A. So I was the lead engineer on the software, so I -- the areas I really focused on were the search architectures that we developed over time at LimeWire. I wrote a lot of the user interface, and I touched all parts of the code really, so I just would -- I wrote a lot of the code and was one of the architects of the software.
Q. When you say "search architecture," what do you mean?
A. I mean just the -- basically, you know, LimeWire runs on this peer-to-peer network, so that -- it has to search millions of computers, in theory, or this network of millions of computers in real time, so -- so the way to do that gets pretty complicated if you want to do that in an efficient manner.
Q. And you were the lead engineer in that effort; correct?
A. Correct.
Q. And there were other engineers or people who write code who worked with you?

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A. That's right.
Q. Okay. And was LimeWire an active program when you started working at LimeWire?
A. So one of my colleagues, Chris Rohrs, was there for a couple of -- working on it for a couple of weeks before I started.
Q. Was it active?
A. Oh, sorry. Active. No. I mean, no, it wasn't -- we hadn't released it yet, so we didn't release it for probably another eight months or something like that.
Q. And after its release, did you continue to develop it and to -- develop it?
A. Yeah. Yeah. We changed it a lot over time, so the original sort of incarnation of the Gnutella network, which is the protocol that LimeWire uses, was much more sort of rudimentary, so we really iterated a lot on refining particularly the search architecture and also the downloading architecture to just make it work better and to make it more efficient.
Q. We'll get back to that, but I want to know kind of your career path after LimeWire, what did you do.
A. So I started a small business called Last Bamboo LLC, and we wrote a piece of software called LittleShoot that is -- integrates peer-to-peer

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in the browser in a much more sort of seamless way.
And yeah, that was a bit of a learning process for me because we bootstrapped the whole company. And it was successful in some sense, in the sense that it got a lot of press and stuff like that, but we -- it wasn't -- I thought, you know, creating a start-up and making millions of dollars was very easy and after LimeWire but came to find that that wasn't always the case.

Q. And how long did you participate in that venture?

A. Gosh, so probably -- I mean, the entity still exists, so it's -- so the software still exists, so it's -- but I don't -- yeah, the entity still exists now. And a lot of the technology that's in Lantern is actually the -- based on the peer-to-peer technology in LittleShoot, so -- sorry -- so -- sorry -- Lantern is the tool that gets around censors in these countries around the world.

Q. Yeah, just very basically, how was LittleShoot different from LimeWire?

A. So we -- yeah. Sorry. It gets fairly complex pretty quickly. But it -- simply, simply, it tries to just create a more robust architecture for -- for doing peer-to-peer networking.

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Q. When you say "robust," what do you mean?

A. Just more resilient, better engineered.
So it's a -- it uses architectures from voice over IP which are just a little bit more thought out than the peer-to-peer architectures that you see on something like LimeWire.

Q. Was it geared towards searching a certain type of media or data?

A. Not necessarily, no.
So it -- it was more of a -- it was really two things. It was a peer-to-peer platform and it was a -- and also it was a -- this browser plug-in that made things like BitTorrent much easier to use in the browser.

Q. And so after that, what was your next venture or project or occupation?

A. Yeah. So from there I -- I started working on Lantern, so we sort of started getting just small grants from NGOs initially to apply some of these peer-to-peer concepts to getting around censors in these countries that censor access to the Internet, and so on.

Q. And just for the record, what's an NGO?

A. A nongovernmental organization, so just, you know, essentially a nonprofit.

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Q. And did you found Lantern?

A. I did, yeah. Yeah.

Q. And so what is the goal or stated purpose of Lantern?

A. So the goal -- the goal is really to get around censors anywhere in the world in a -- in a blocking resistant way, so in a way that makes it very difficult for a government like China or Iran with sort of infinite resources or a lot more resources than we have certainly to block it.
So it tries do that in a very -- it tries to bypass censors in a very blocking resistant way and in a scalable way so that, you know, if a hundred million users in China tomorrow decide to all use Lantern, it's designed to be able to handle that kind of traffic both technically and financially so that it wouldn't cost a lot of money.

Q. In terms of governmental censorship, how is that similar to data security and securing the network?

A. So there are a lot of similarities. I mean, in some ways you can think of the Chinese, what people call The Great Firewall as sort of the most sophisticated firewall in the world, like the Chinese just have incredible resources that they devote to it, you know, many billions of dollars every year, so it's -- it has a

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lot of similarities with, you know, on a much more basic level, a firewall that you might see on a typical -- at a typical small business or something like that but has many more -- it's much more complicated and has many more capabilities because it's working at this national Internet scale.

Q. Is the goal the same?

A. The goal -- yeah, the goal is the same in the sense that it's trying to control information coming in and out of the network.
JUDGE CHAPPELL: I have a question.
You mentioned Gnutella earlier.
THE WITNESS: Yeah.
JUDGE CHAPPELL: How does that compare to what you called LittleShoot? LittleShot I guess?
THE WITNESS: Yeah, LittleShoot. Sorry.
So LittleShoot does integrate -- LimeWire is all open source and LimeWire runs on the Gnutella protocol, so -- and LittleShoot actually integrates LimeWire.
So LittleShoot is a little bit hard to wrap your head around because it incorporates these few different elements, but it also interoperates with Gnutella because it integrates the code from LimeWire.
JUDGE CHAPPELL: Is Gnutella like a railroad and

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LimeWire the train that runs on the railroad?
THE WITNESS: You could think of it that way. I mean, it's a -- maybe a little bit different in the sense that -- in the sense that the -- with LimeWire like the protocol -- the protocol to some extent doesn't exist without some implementation of it, so it's like you sort of need the train and the tracks at the same time somehow or the train is like building the tracks as it goes or something like that.
JUDGE CHAPPELL: And then in that analogy, where does LittleShot or LittleShoot -- which is it?
THE WITNESS: LittleShoot, yeah.
JUDGE CHAPPELL: How does LittleShoot fit in that analogy?
THE WITNESS: I mean, again, it's sort of these three different things, so it -- it is that train and those tracks, but then it also is basically saying these tracks aren't designed that well, so let's build a new railroad.
JUDGE CHAPPELL: So it's sort of an integrated LimeWire and Gnutella in one thing, in one product.
THE WITNESS: Well, that's really just this one little side of it.
So LimeWire is already integrated into Gnutella, so LimeWire runs on Gnutella and defines a

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lot of what Gnutella is. And LittleShoot does that, but then it also creates this new peer-to-peer platform that uses really protocols from voice over IP that are just more robustly engineered, just more sort of thought out basically than this sort of what you my think of like a shoddy railroad track or something that is Gnutella.
JUDGE CHAPPELL: And what's the status of LimeWire today?
THE WITNESS: The company doesn't exist. Some of the code lives on, so their people, you know, replicated the code repository, so it's open source, so some people -- you know, you can still -- you can still build essentially the same thing as LimeWire using that open-source code. But for the most part, people don't really use it.
JUDGE CHAPPELL: Okay. Thank you.
BY MR. SHERMAN:
Q. So you're currently involved with Lantern; correct?
A. Correct.
Q. Along the way, have you had the opportunity to advise companies on Internet security or data security?
A. I have, yeah. I just -- I've advised a variety of companies.

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Q. Can you describe that for us, please.
A. Yeah.
So I've worked quite a bit with a company in New Zealand, a start-up that is also integrating peer-to-peer technology into their software.
MS. VANDRUFF: Objection, Your Honor.
I'm sorry to interrupt, Mr. Fisk.
This explanation of his background is not included in his report, and I would ask that the court strike the testimony.
JUDGE CHAPPELL: Is it in his CV? Because I thought we were talking about his background rather than his report.
MS. VANDRUFF: Exactly, Your Honor. No.
MR. SHERMAN: That's exactly what we were talking about.
MS. VANDRUFF: It's not in his CV, Your Honor.
MR. SHERMAN: Your Honor, we're talking about his background --
THE WITNESS: Yeah.
MR. SHERMAN: -- just to give the court a well-rounded view of who he is and the weight that should be accorded to his testimony.
MS. VANDRUFF: And had it been included in his CV, Your Honor, we would have examined Mr. Fisk at

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greater length about this background.
JUDGE CHAPPELL: She has a good point. We need to restrict his testimony to what's in the CV and in the expert report that has already been provided to opposing counsel.
MR. SHERMAN: That's fine, Your Honor. We'll move on.
MS. VANDRUFF: Thank you, Your Honor.
JUDGE CHAPPELL: The objection is sustained.
BY MR. SHERMAN:
Q. So let's go back to LimeWire and how it was designed and how it works. Okay?
Can we put the first demonstrative exhibit up on the screen.
In your report, you start out with a very basic engineering explanation of how computers communicate with one another; correct?
A. Correct.
MR. SHERMAN: I'm going to mark for identification purposes at this -- I'm going to mark for identification purposes Mr. Fisk's expert witness report, and we will mark it as RX 533.
(RX Exhibit Number 533 was marked for identification.)
MR. SHERMAN: May I approach and hand this to

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the witness, Your Honor?
JUDGE CHAPPELL: Go ahead.
The expert report is not already in evidence?
MR. SHERMAN: It's not, but we plan to move it in. We've conferred, and complaint counsel will not object to us moving it in.
JUDGE CHAPPELL: Okay. Are you making the offer at this time?
MR. SHERMAN: Yes, Your Honor.
MS. VANDRUFF: No objection, Your Honor.
JUDGE CHAPPELL: RX 533 is admitted.
(RX Exhibit Number 533 was admitted into evidence.)
MR. SHERMAN: Your Honor, with regard to counsel's last objection with regard to Mr. Fisk's testimony, on page 36, under Professional Affiliation, he does list that he sits on the technical advisory committee of the Open Internet Tools Project, serves as technical and security advisor to Human Interface Initiative in Auckland, New Zealand, as well as something else in Spanish.
And so given that, I would like to at least be able to continue questioning him about that experience as it appears on his CV which has been provided to complaint counsel.

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MS. VANDRUFF: And Your Honor, I'd understood the examination to be different. If it's limited to the professional affiliations that are listed on the CV, I have no objection, Your Honor.
JUDGE CHAPPELL: All right.
MR. SHERMAN: But just to be clear, Your Honor, the professional affiliation states that he serves as technical and security advisor, and that's what I was questioning him about, whether or not he advised companies with regard to data security, and he was describing his participation with this company in New Zealand.
JUDGE CHAPPELL: So in response to the previous objection, what you were going into is on the CV.
MR. SHERMAN: Yes, sir.
MS. VANDRUFF: Given Mr. Sherman's explanation of how he intends to conduct the examination, I have no objection if it relates to the affiliations that are listed on Mr. Fisk's CV, Your Honor.
JUDGE CHAPPELL: Then I will vacate my previous sustained on the objection, or do you withdraw the objection?
MS. VANDRUFF: I will withdraw the objection to the extent that Mr. Sherman's examination is in line with what is disclosed on the CV, Your Honor.

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JUDGE CHAPPELL: All right. Next question.
MS. VANDRUFF: Thank you, Your Honor.
MR. SHERMAN: Thank you, Counsel.
BY MR. SHERMAN:
Q. Mr. Fisk, we were talking about advice, whether or not you had advised companies with regard to data security, and you began to explain what you were doing with a company in New Zealand.
If you could please continue the explanation of how you participated with that company.
A. So, yeah, I've been down there a few times. And I sit on their advisory board and have also been fairly hands on with helping them to implement some of their -- some of their technology.
So they're a company that you can think of as sort of somewhere between LimeWire and Facebook, and I've just helped them map out the -- their architecture and certainly how that relates to being able to secure both their corporate data and the data of their users.
Q. Thank you, Mr. Fisk.
Back to your expert witness report.
What we have up on the screen actually appears on page 8 of your expert witness report, but if you could just give us an explanation of why this -- well, not why it's included, but what it depicts with regard

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to your report.
A. Okay. Yeah, so -- so this is simply showing two computers, A and B, with neither computer behind a firewall. And this is simply showing that a network connection in that scenario can be made between either computer in either direction, so A can make a network connection to B, and B can make a network connection to A.
Q. Can we put the next exhibit up.
The next exhibit that's going to be up, can you explain what this is depicting.
A. So this is simply showing the case where computer A is behind a firewall, so this is showing that in that scenario, computer A can make an outgoing connection through the firewall to computer B, but because that firewall is in place around computer A, computer B cannot make an incoming network connection to A.
Q. And I notice in looking at the figure that the arrow from computer A goes through the firewall.
A. Correct.
Q. And does that depict some concept?
A. So that really just depicts that firewalls by default will allow outgoing connections, so, you know, we're sitting behind a firewall here undoubtedly on

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whatever network might be at the FTC and that that network will allow connections coming from computers on the inside of the firewall to the outside.

Q. And so in terms of B trying to make a connection to A, that connection is blocked by the firewall; is that correct?

A. That's correct.

Q. The next depiction on the screen is referenced on page 14 of your report.

Can you explain to us what this is attempting to describe?

A. Yeah. So this is giving some visual representation of the topology of the Gnutella network.

So in this diagram, computers A, B, C and D are essentially ultra peers. And this is simply showing the flow of a search that goes from A to B to C and then to D.

JUDGE CHAPPELL: We're going to need to refer to these as demonstratives if you want the record to make sense.

MR. SHERMAN: Thank you, Your Honor.

And this would be RXD -- I'm sorry.

JUDGE CHAPPELL: Why don't we make the first slide you put up next.

MR. SHERMAN: So the first slide that appears on

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page 8 of Mr. Fisk's report --

JUDGE CHAPPELL: If it's in his report already in evidence, then you can refer to it as the page number in the exhibit, either way. But somehow it needs to be referred to in the record --

MR. SHERMAN: Okay.

JUDGE CHAPPELL: -- what we're looking at.

MR. SHERMAN: Thank you, Your Honor.

What I will do is then refer to it by page number in the report.

JUDGE CHAPPELL: Okay.

MR. SHERMAN: Whereas page -- the first exhibit that we discussed having A and B with no firewall appears on page 8 and is listed as figure 2 in what has been marked as CX 533 -- I'm sorry -- RX 533 -- thank you, Counsel -- as well as figure 3, which was the second depiction that we discussed, also appears on page 8 of RX 533.

And what we are now discussing is the third figure that appears in the report. It's actually labeled figure 6 that appears on page 14 of RX 533.

BY MR. SHERMAN:

Q. So, Mr. Fisk, as we're looking at figure 6 that appears on page 14 of your report, what do the boxes B and C represent?

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A. Those are ultra peers, so they're computers that are on this diagram simply forwarding traffic on behalf of A.

Q. And what is D?

A. D -- you know, I realize I misspoke a little bit earlier in describing all of them as ultra peers, so we -- D is actually intentionally colored in the same color as those other computers connected to C, so D is supposed to be a what's called a leaf node in this, in this diagram, so it's simply a -- the intention is simply for it to be a computer that is receiving a message, if that makes sense.

Q. And what does an ultra peer do, in your estimation?

A. So an ultra peer is really just an optimization that we made to the network to make it denser really.

So on a really large distributed network like Gnutella, like LimeWire, it's very difficult to do things like search the entire network at any one time, so what ultra peers do is, they first are not firewalled, so they're peers that can route traffic and accept incoming traffic.

If we think back to some of those earlier diagrams, there are certainly computers that are not behind firewalls. But the effect of them is to make the

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network denser because they can -- they have a lot of connections.

So -- so one way to think of it is, you know, if you want to -- it's sort of a six degrees of separation type of thing where it's like if you want to talk to someone who you don't know, you might ask someone who knows a lot of people if they know them, so ultra peers know a lot of people. And they make -- so they make the network denser.

Q. Is it possible for a computer to be an ultra peer if it is behind a firewall?

A. No.

Q. Why not?

A. Because the one of the whole purposes of them is to allow these incoming network connections.

So in the diagram, B and C have all of these what we call leaf nodes. And basically those leaf nodes typically would be firewalled, but the only way for them to connect to the network, based on those diagrams that we saw earlier, is to connect to a computer that's not firewalled.

So in order for them to participate in the network, they need to be able to connect to some computer that's not firewalled, and the topology we designed for that was ultra peers.

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Q. I still don't really understand how a computer becomes an ultra peer.
A. Uh-huh.
Q. How does a computer become an ultra peer?
A. So yeah, so basically when you start up LimeWire, there's this series of things that we try and look at to decide whether or not a computer can be an ultra peer, so it was -- I think the method in the code was is ultra peer capable, you know.
And basically there are like things such as the speed of the machine, whether or not the computer is firewalled, the operating system we would take into account, to make sure that it was a machine that was -- that had this variety of characteristics that allowed it to be an ultra peer. And if it had that variety of characteristics, then we would just automatically elect it and appoint it to be an ultra peer.
Q. Now, is it the program that's electing or appointing these computers or is someone sitting back at LimeWire and saying, Boy, that's a good one right there, let's use that as an ultra peer?
A. Yeah, the software just does it automatically, so there's no one that -- we had no visibility or control into any computer on the network at any time because this is a totally distributed system, so it

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would just happen on the endpoints, on those home computers or any computer running LimeWire.
Q. Now, I think we looked at this one. Can we get the other one up?
Okay. Can you describe then what this is depicting?
A. Yeah. So this is -- this is showing basically --
Q. And I need to hold up because this one is not in your report, Your Honor, so if we could reference this as RXD 14.
MS. VANDRUFF: And Your Honor, for the benefit of the record, I think it would be useful to Your Honor for Mr. Sherman to lay the foundation for this document which does not appear in the report. I don't believe that complaint counsel has any objection, but I'd like him to establish the foundation for the document.
MR. SHERMAN: I have no problem doing that.
MS. VANDRUFF: Thank you, Your Honor.
BY MR. SHERMAN:
Q. So the figure up on the screen, Mr. Fisk, did you create the figure?
A. I did not. Actually this, I worked with a graphic designer, who also happens to be my sister, who created this, this --

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Q. So you instructed her, however, on what you wished to be included in the depiction; correct?
A. Yeah. Yeah, that's right.
Q. Okay.
A. That's right.
Q. And in terms of what it depicts, can you explain what that is?
A. Yeah. So basically in order to get around this problem of firewalls only allowing these outgoing network connections, basically what happens here is that computer E sitting behind a firewall is at some point -- well, at some prior point was able to create this outgoing connection to D. And because E is connected to D vicariously through C and B, E is also connected to A.
Q. Is it --
A. So -- yeah.
Q. Is it fair to say that E is searching for a document which A has?
A. This diagram is actually trying to depict the other way around, so A is searching for a document that E has, and this is showing how that can work.
Q. Okay. So could you explain then how A gets the document from E.
A. Yeah. So -- so prior to this or -- well, we could even -- you just use this straight diagram.

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A has sent a search request that has gone through B, C and D and then to E. And that search request has resulted in a search result. And A has clicked on that result and said, Okay, I want to download this file.
But because E is firewalled, A can't directly download the file from E and instead has to send this little green push request message that says, Hey, B, let this guy down the line, E, know that I want to download this file and that E has to create an outgoing connection to me to facilitate that file download.
Q. How does D communicate with E if E is behind a firewall?
A. Because E has prior to this made an outgoing connection to D.
So once -- the establishment of those connections is directional, but once those connections are made, traffic can flow in either direction.
Q. And so is it fair to say that D then communicates with E that A wants a document that E has?
A. That's correct.
Q. And then E does what?
A. Then E creates an outgoing connection to A that because it's outgoing will be allowed through the firewall. And in this case, it's very important to

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recognize that A is not firewalled.
So E creates this outgoing connection to this nonfirewalled computer A. And once that connection is established, then A says, Okay, great, thanks, you know, for establishing this connection, now let me download, download the file.
Q. What would happen if A were firewalled?
A. If A were firewalled, this -- none of this would work, so -- because in that scenario neither A nor E can create a connection to the other.
Q. In speaking about peer-to-peer searches generally, are the searches in any way limited in terms of the time that they can exist?
A. The time that they can exist -- there definitely was some hard cap that we put in there, that I put in there. I don't remember exactly what that hard cap was, but there was a -- this whole adaptive search protocol that I wrote that would -- that would, you know, extend a search if necessary essentially for unpopular content but that would stop the search very quickly if a piece of content was very popular.
Q. And the purpose of stopping the search would be because?
A. Really just because on a peer-to-peer network like that, it's very easy for traffic to build up, so

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it's -- so especially with computers that aren't very powerful, it's really important for the network to be lightweight and efficient, both to not overload those computers and to make things like search work as well as possible so that they can reach as many computers as possible without overloading the network.
Q. Was there an approximate number of computers at which the search was capped?
A. Yeah. So if you're searching for something really, really rare, basically we would target I believe it was 200 results, so we would try to get you about 200 search results. And if something was really, really rare, we would -- the search would extend out to about 300,000 peers, something like that.
But typically that would never happen because most searches were for much more popular content, so typically you'd never get that far. But a search like that, to get back to your earlier question about time, that might cap out at about a minute, something like that, so it would keep searching for about a minute.
Q. So is it fair to say that if you're looking for something rare, it's capped in two aspects; one would be the number of peers that it would search and the other would be time?
A. Yeah. Yeah. That code gets a little bit

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complicated, but it would -- it would certainly not extend -- so here's the tricky thing.
So it would certainly not keep it -- continue to extend the search after those -- that minute, but like basically you're just this peer on the edge of the network and you've sent this search out already. Right?
So by the time you've sent the search out to these other computers, at that point it's just this adaptive process that you don't entirely control, so it's -- so it's this -- and you don't know the exact topology of the network, so you're just guessing at even how many peers you're reaching.
But it would -- like, I mean, in practice it's basically a matter of how long we showed the little spinner to show that you're still searching, you know. And that would basically disappear after about a minute because in practice there's not -- you're not going to see any more search results come back at that point.
Q. So would you consider it to be a search for something rare if one were searching for a one-of-a-kind document?
A. Yeah. I mean -- yeah. That's the rarest possible search except for a search for a document that doesn't exist.

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Q. And would a search for that one-of-a-kind document using LimeWire be limited by both time and number of computers?
A. The time limit is more of a user interface thing I guess, but it's -- so it's -- in practice, it's more that it's limited by the number of computers that it will reach.
And I should say the 300,000 number is also calculated based on a fixed network topology, so it assumes that, you know, every ultra peer is connected to approximately 30 leaves and approximately 30 other ultra peers and is basing its calculations on that. But in practice, the network is much more dynamic than that, so that's really the maximum maximum in sort of a perfect network topology of the number of peers that you would reach.
Q. And so if during the search for that one-of-a-kind document we're not looking -- we're not experiencing the maximum maximum network topology, does it make it even more unlikely that I would find that one-of-a-kind document?
MS. VANDRUFF: Objection, Your Honor. Leading.
JUDGE CHAPPELL: I think the witness could say yes or no to that. That's overruled.
MS. VANDRUFF: Thank you, Your Honor.

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THE WITNESS: Yes.
BY MR. SHERMAN:
Q. Mr. Fisk, you also talk about browse host in your report.
What is browse host?
A. So browse host is a message that you -- it's a network message that you could -- that you could send that would enable you to see all of the files that a given user was sharing.
So if you receive a search result for a file and you wanted to see everything else that user was sharing, you could click on that file or you could click a "browse host" button and see the other files that user was sharing.
Q. Is the browse host function something that's used once a file is found?
A. That's correct. That's correct.
So the only way -- or the primary way to learn about a computer or another user on the network was to search for them or to search for a file and then, yeah, once that file appeared, you could click it and click a "browse host" button. That's correct.
Q. So it's not the case that when using LimeWire, one could put in a search term and use the browse host function as they are initially searching for documents

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that fit that term.
A. That's correct.
JUDGE CHAPPELL: That was leading.
MR. SHERMAN: Well, that's correct, Judge. I didn't know how to get him there without leading him, so if the court wants me to rephrase, I will.
JUDGE CHAPPELL: No. That ship has sailed. Go ahead.
MR. SHERMAN: Thank you, Your Honor.
BY MR. SHERMAN:
Q. Also in your report you talk about search terms or how LimeWire would divide up search terms.
A. Uh-huh.
Q. And in using a specific example -- and you can take that down -- if there were a search for a file named insuranceaging.pdf, for example, how would LimeWire I guess desegregate or segregate, is a better word, applicable searches for that document?
A. So -- so there are really two sides to that, so there's the sharing side and there's the searching side.
So on the sharing side, when a user shares that particular file, LimeWire will take it, take the file name, and look for delimiters for keywords.
Q. And if I could stop you, I'd like to give you a

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more specific example.
A. Okay.
Q. The file name being searched for is insuranceaging_6.05.071.pdf.
And to repeat the question then, how would LimeWire, the LimeWire program, allow one to search for that particular file?
A. So in that case, again there are these two sides to it, so there's the keywords that are searched for and then there's the keywords that are shared.
So when you share that file, LimeWire will break it up into what it can ascertain are the keywords in the file, so it will use delimiters to figure that out.
So in the case of the insurance aging file, you know, it's not intelligent enough to separate "insurance" from "aging," so it will just take "insurance" -- it will see that underscore and it will take "insuranceaging" as one big keyword, and then it will actually do what's called a little bit of prefix matching on that, on that keyword.
So once it's identified "insuranceaging" as a keyword, it will then strip off the final characters of up to three, so it will enter "insuranceaging" as the keyword, and then it will enter "insuranceagin" without

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the "g" and then "insuranceagi" without the "n" and the "g" and "insuranceag" without the "ing" as all -- as separate, as separate keywords. And then it will also enter the numbers as keywords as well.
But there was at the same time this quirky sort of other side to how search worked in the sense that by default on the searching side we would actually not allow numbers as search terms.
So if you searched for the number "6," for example, we would see that in your search and we would not consider that a keyword that would, you know, go through the network.
Q. What is a delimiter?
A. So delimiters are -- there were a number of them. There were probably five or six or something, but certainly underscore. A dash would be a delimiter. I believe a slash would be a delimiter. There were a number of delimiters.
So -- sorry. And you know, more generally, it's a character that we would consider to potentially separate keywords in a file name.
Q. So in the example of the insuranceaging_6.05.071.pdf, are each of the points a delimiter?
A. They actually are, yeah. And my report is --

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was -- I looked back at the code a little bit, and my report is actually slightly incorrect there, so it's actually -- yeah, I thought that we only used periods as delimiters for the file extension, but we actually did use it as a delimiter for the larger file name as well.

Q. And is the underscore a delimiter?

A. It is, yeah.

Q. And is it your testimony that if someone were to search for 6.05.071, would that search be allowed?

A. That specific search would be allowed. And this is -- because I slightly misremembered how we did the delimiters with the period, in that case the search would be allowed for that, but that would not be a keyword that's entered as shared, so that search actually on the -- in that case is sort of the inverse. The search would be allowed, but that would not match any keyword that was actually shared, if that makes sense.

Q. And so if an individual just searched the term "insurance," would they be able to find the file that I used in my example?

A. No.

Q. If they were just to search "aging," would they be able to find the file that I gave you in my example?

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A. No.

Q. What if they were to search just "PDF," would they be able to find the file that I gave you in my example?

A. So that gets into this whole adaptive search thing again, so -- so "PDF" would be considered a keyword for that file that was shared, but because we did this whole adaptive search, because we implemented this whole adaptive search architecture, PDF is such a popular file type to share that you'd very quickly get 200 results, you know, likely searching only a couple hundred computers, something like that.

So -- so -- so it's not a search that -- you know, it would be theoretically possible to find the insurance aging file using a search for "PDF," but it would be, you know, like a needle in a haystack or something like that, especially given that with LabMD's network configuration, that computer was behind a firewall, so -- so the way -- the way that search worked in that case was really important in the sense that -- in the sense that the -- as we saw in the earlier diagrams, the searcher would also have to not be behind a firewall.

So the searcher searching for "PDF" in the LabMD case would only find a result for that file if

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they happened to randomly come across that computer out of these millions of computers out there but also if the searcher itself were not firewalled, which was very -- at that point on the Internet and today on the Internet is very rare, so it's very rare that you'd have a searcher not be firewalled.

So in our, you know, data, we comment about 95 percent of computers were behind firewalls, so you'd really be limiting the potential searchers to about 5 percent of the overall network, and then you'd have to sort of randomly stumble across this file.

MS. VANDRUFF: Your Honor, may I be heard?

JUDGE CHAPPELL: Go ahead.

MS. VANDRUFF: With respect to Mr. Fisk's testimony about 95 percent of computers being behind firewalls, that does not appear in his expert report. I would ask that that be stricken from the record.

MR. SHERMAN: I do not think it does appear in his report, Your Honor. However, I thought it was a logical statement to make based on his knowledge and based on the explanation that he was giving to the question asked.

JUDGE CHAPPELL: One thing we are in here is consistent.

The objection is sustained.

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MS. VANDRUFF: Thank you, Your Honor.

JUDGE CHAPPELL: That part of the response will be disregarded for purposes of the decision.

MS. VANDRUFF: Thank you, Your Honor.

BY MR. SHERMAN:

Q. So you mentioned LabMD's data security, and you were asked to form an opinion concerning LabMD's data security; is that correct?

A. That's correct.

Q. And if you could turn to page 3 of your report.

A. Page 3 you said; correct?

Q. Yes.

The opinion you were asked to give as stated there, is that your recollection as to what you were asked to opine?

A. Yes, that's correct.

Q. And what were you asked to opine?

A. I was asked to analyze the -- LabMD's network as it pertained to the adequacy of its data security.

Q. And in doing so, there were materials that you reviewed; is that correct?

A. Yes. Certainly.

Q. And if you would turn to page 37, which I think is the last page of your report, is that an accurate description of the materials that you used and reviewed,

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analyzed and considered in forming your opinion in this case?
A. It is.
Q. Now, Mr. Fisk, ultimately what was your opinion with regard to LabMD's data security?
A. My opinion was that over the course of the time period that I analyzed that their data security was adequate to protect their data and to protect their network.
Q. Generally what led you to that conclusion?
A. An analysis of the equipment they had in place certainly, an analysis of the depositions describing the network and the practices in place at the company, an analysis of certainly the ProviDyn report that looked at any vulnerabilities on the network.
That's all that come to mind.
Q. Did you analyze whether or not LabMD had firewalls in place?
A. Certainly.
Q. And did they?
A. They did.
Q. And did you conclude whether or not those firewalls were doing what firewalls are supposed to do?
A. Yes, I did.
MS. VANDRUFF: Objection. Leading, Your Honor.

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JUDGE CHAPPELL: I'll allow that. Overruled.
MS. VANDRUFF: Thank you, Your Honor.
BY MR. SHERMAN:
Q. I think your answer was yes to that last question?
A. Yes.
Q. Based on your review of all the materials, what were the firewalls at LabMD doing?
A. So they were -- they were serving the purpose of a firewall, which is to protect the network from unwanted incoming network connections that could in some way be malicious.
Q. Were you aware that or were you made aware in your review that a portion of LabMD's network was connected to the Internet?
A. Certainly.
Q. And did you know or did you become aware of the purpose for such connection within LabMD's network?
A. I did.
Q. And what was that purpose?
A. That purpose was to allow clients to send essentially patient information typically to LabMD's network so that they could do things such as order tests for a given patient.
Q. In your review, were you made aware of whether

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or not specific workstations were connected to the Internet?
A. Specific workstations, no. I believe everyone had network access in the sense that, you know, a typical workstation could use a Web browser to browse the Internet, so in that sense, workstations were connected and everyone could send e-mail, so they were connected to the Internet, but they were behind a firewall.
Q. Were you aware of whether or not there were limitations on access to certain information within the network?
A. Yes.
MS. VANDRUFF: Objection, Your Honor. That, I believe that that is also not in Mr. Fisk's report, while he does address access to downloading, not to information within the network.
MR. SHERMAN: Your Honor, I believe on page 28 of the report, the last paragraph, Mr. Fisk states that the connections in this case simply were not incoming connections requested to a workstation, rather they were outgoing requests depicted in figure 3.
JUDGE CHAPPELL: Why don't you ask the witness if this is in the report.

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MR. SHERMAN: Yes, sir.
BY MR. SHERMAN:
Q. Mr. Fisk, is it your recollection that it is in your report with regard to access to information within the network?
MS. VANDRUFF: Your Honor, I renew the objection. The explanation that Mr. Sherman just provided is not about access within the network but is instead about access to the Internet, which are distinct subjects, particularly in this case.
MR. SHERMAN: Well, let me withdraw that, that line of questioning then, Your Honor, because it's really not a place that is necessary for me to go for our defense.
JUDGE CHAPPELL: Okay. At this time, the objection is sustained, and the response which appears in the record will be disregarded.
MS. VANDRUFF: Thank you, Your Honor. Thanks, Counsel.
(Pause in the proceedings.)
JUDGE CHAPPELL: Go ahead.
BY MR. SHERMAN:
Q. Mr. Fisk, I ask you to turn to page 16 of your report.
What equipment did you find to be utilized and

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operating on LabMD's network?
A. Yeah, as I say here, there were, you know, a variety of switches and routers and firewalls, workstations certainly, in place.
I think I'm making a good point here that, you know, there's -- the switches and the cables and whatnot are just what create a computer network so that that's sort of inherent when you say that they had a network.
Q. And you go on in your report to describe a certain firewall that LabMD in place; is that correct?
A. That's correct, yeah. I describe both the ZyWALL 5 firewall as well as the Cisco 1841 firewall.
Q. Were you familiar with the capabilities of the ZyWALL 5 firewall?
A. I am. I am, yeah. Simply -- simply, I've never, you know, installed it personally myself, but certainly through looking at the documentation on the ZyWALL 5 I am familiar with it, yeah.
Q. And using your experience and your background, you evaluated the operations and the abilities of the ZyWALL firewall; is that correct?
A. That's correct.
Q. You also go on to describe the Cisco 1841 Integrated Services Router --

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A. That's right.
Q. -- in your report; is that correct?
A. That is correct.
Q. And you found that LabMD had that as part of its network; is that correct?
A. That is correct.
Q. And based on your experience and your background, you were able to analyze and evaluate the Cisco 1841; is that correct?
A. That's correct.
Q. Also in your review, Mr. Fisk, you reviewed LabMD's user account policies; is that correct?
A. That's correct.
Q. And did you find LabMD's user account policies to be reasonable given the type of information that they were dealing with on a day-to-day basis?
MS. VANDRUFF: Objection, Your Honor. Leading.
JUDGE CHAPPELL: I'm not sure that suggests an answer. Overruled.
MS. VANDRUFF: Thank you, Your Honor.
THE WITNESS: Sorry. I didn't quite hear that. I can answer?
MR. SHERMAN:
Q. Well, do you want the question read back? Because you can answer it.

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A. Yeah, I guess if you could read it back, that would be good.
(The record was read as follows:)
"QUESTION: And did you find LabMD's user account policies to be reasonable given the type of information that they were dealing with on a day-to-day basis?"
THE WITNESS: I did.
BY MR. SHERMAN:
Q. So, Mr. Fisk, given your review of the -- did you also consider the software that LabMD was using at the time?
A. I did.
Q. And did you take in fact all of the information that you were reviewing, including your education, your knowledge, your skill, your background, your experience, into evaluating each piece of equipment that LabMD had in operation at the time?
A. Certainly, yeah. I analyzed each piece of software or hardware that I had in evidence and determined any -- the degree to which it provided adequate security or not.
Q. Mr. Fisk, you also indicated that -- you mentioned in passing that you reviewed ProviDyn reports that were made available to you; is that correct?

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A. That is correct.
Q. And what did those reports indicate?
MS. VANDRUFF: Your Honor, the results of the ProviDyn reports, with one exception, are not addressed in Mr. Fisk's report, and so given the open question, I want to make sure that the testimony that's elicited is limited to the opinions offered in his report.
MR. SHERMAN: That's fine, Your Honor. in fact, I may just generalize the fact that he reviewed them.
JUDGE CHAPPELL: You need to rephrase. Sustained.
MS. VANDRUFF: Thank you, Your Honor.
BY MR. SHERMAN:
Q. You did review the ProviDyn reports; is that correct?
A. Yes, I did.
Q. Okay. And you reviewed the vulnerabilities that were listed in those reports; is that correct?
A. That is correct.
Q. And given all of the information that you reviewed, including the ProviDyn reports, including the hardware, the software that was in place, the deposition testimony and other documents for your -- that were provided for your review that are listed in

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your Appendix B, which are materials considered and relied upon, were you able to conclude whether or not LabMD's data security practices were reasonable or adequate under the circumstances during the relevant time frame?

A. I was, yeah. I mean, my overall conclusion was that they were not certainly the perfect practices by any stretch, but they were really more than adequate to secure the -- their data and their network. I was -- given the sort of the nature of the case, I was actually surprised at the degree to which they protected their network and their data.

Q. And why would you say that it was more than adequate?

A. You know, particularly really the fact that they had two firewalls in place was -- you know, provided really a double layer of protection to any external intruder. And really external intruders are the primary threat to a small business network.

So this double layer of firewalls with the ZyWALL 5 and the Cisco 1841 really provided a lot of protection. And also both of those pieces of hardware are just -- you know, they're not the most expensive hardware you can buy, but they're certainly more than adequate to protect a network of LabMD's size.

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Q. And --

JUDGE CHAPPELL: Before you continue, we're going to take a short break. We'll reconvene at 12:00 noon.

We're in recess.

(Recess)

JUDGE CHAPPELL: We're back on the record.

Go ahead.

MR. SHERMAN: Thank you, Your Honor.

On the issue, Your Honor, of the objection concerning how much of the Internet was behind the firewall, while that information is not in Mr. Fisk's report, it was specifically asked of him during his deposition by complaint counsel.

The question was: What is the very small percentage of computers not behind a firewall? And he basically said that it was approximately 5 percent.

And so it was my impression that the reason for the rule was such that neither counsel would be surprised by the analysis or opinions of the expert. And given that that information was disclosed to complaint counsel via one of their questions during his deposition, we would argue that that information should be allowed as part of his testimony here today.

MS. VANDRUFF: And Your Honor, I don't dispute

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what Mr. Sherman has represented with respect to the deposition.

Nonetheless, rule 3.31(a) provides that the report signed by the expert contain a complete statement of all opinions to be expressed and the basis and reasons therefor.

And if one of the reasons for Mr. Fisk's opinions in this matter related to the percentage of computers behind firewalls, that should have been included in his report.

And we are not withdrawing the objection.

JUDGE CHAPPELL: I'm not going to allow information given in a depo to expand an expert report. If I do that, then there will be a precedent, and then every attorney is going to start red-lining depos and transcripts. And I don't want to get into a death spiral in here.

The rule says what it is. There's no wiggle room. We'll stick with the rule.

So if you are making a motion, it's denied.

MR. SHERMAN: Thank you, Your Honor.

MS. VANDRUFF: Thank you, Your Honor.

BY MR. SHERMAN:

Q. Mr. Fisk, in evaluating LabMD's network, did you evaluate whether or not they were utilizing FTP versus

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SFTP?

A. I did.

Q. And what does -- what do those acronyms stand for?

A. So "FTP" stands for file transfer protocol, and "SFTP" stands for secure file transfer protocol.

Q. And did you determine whether or not LabMD was using a secure file transfer protocol?

A. I did. And yes, they were.

Q. And what is a file transfer protocol used for?

A. So a file transfer protocol, you know, does really just what it says. It transfers files from one computer to another over a network. It has what's called a control channel and a data channel in the protocol itself.

And really the difference between SFTP and FTP is a significant one in the sense that if you're just using FTP, any network observer can look at the actual contents of that data; whereas, if you're using SFTP, all of that data is encrypted and a network observer cannot decipher the contents of the data.

MS. VANDRUFF: Your Honor, if I may be heard.

With respect to FTP and SFTP, again, this is an opinion that is not contained in Mr. Fisk's expert report. And while it was a subject at his deposition, I

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think Your Honor's ruling on the prior issue is equally applicable here.
MR. SHERMAN: Your Honor, I think Mr. Fisk has my copy of his opinions. May I approach the witness to retrieve it?
JUDGE CHAPPELL: Sure.
Don't we have other witnesses talking about FTP?
MS. VANDRUFF: Your Honor, are you asking whether there are fact witnesses and complaint counsel expert witnesses who have addressed the question of FTP?
JUDGE CHAPPELL: Isn't it in the record somewhere in a document or in testimony?
MS. VANDRUFF: It is in the record, Your Honor. However, it does not appear in Mr. Fisk's expert report, and we would ask that his testimony about it be stricken from the record.
JUDGE CHAPPELL: What I'm getting at is, rather than being rigid and hypertechnical, if something isn't disputed, why don't we let it go.
MS. VANDRUFF: I believe that Mr. Fisk's opinion about whether FTP versus secure FTP was being used is in dispute, Your Honor, and it does not appear in his expert report.

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JUDGE CHAPPELL: So even though we have heard about FTP, we haven't heard about SFTP.
MS. VANDRUFF: It was the testimony of Professor Hill that the secure FTP port was closed, Your Honor, and therefore that that protocol was not being used. Mr. Fisk does not address that issue in his expert report, and any testimony about it should not be received by the court.
JUDGE CHAPPELL: Well, if that's true, then that testimony will not be allowed.
And I'm going to remind you, Mr. Sherman, to please stick to the information in the expert report.
MR. SHERMAN: I understand, Your Honor.
JUDGE CHAPPELL: And if you think it's in the report, you're allowed to have your witness indicate where it is, but until I hear otherwise, the objection is sustained.
MR. SHERMAN: Thank you, Your Honor.
JUDGE CHAPPELL: And that response will be disregarded in the decision in this case.
MS. VANDRUFF: Thank you, Your Honor.
THE WITNESS: I do mention FTP in the report. I don't mean to speak out of turn.
BY MR. SHERMAN:
Q. Well, do you mention FTP in the report?

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A. I believe I discuss the anonymous FTP server.
MR. SHERMAN: May I approach the witness, Your Honor?
JUDGE CHAPPELL: Go ahead.
And as far as limiting expert opinions, if I'm not mistaken, it is not only in the rule in black and white, it's also repeated in the additional provisions in my scheduling order. I made that abundantly clear.
MR. SHERMAN: I understand, Your Honor.
THE WITNESS: Does no one have a digital copy of this? Control F is an amazing feature.
(Pause in the proceedings.)
I don't actually see it so far here.
BY MR. SHERMAN:
Q. Then we'll move on.
A. Okay.
JUDGE CHAPPELL: And if the people diligently searching on your side of the room find it, then let us know.
MR. SHERMAN: Thank you, Your Honor.
JUDGE CHAPPELL: Because we're going to be fair about this. If it is in there, it comes in; if it's not, it doesn't. And again, I'll remind everyone, the expert report is in evidence.

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BY MR. SHERMAN:
Q. So, Mr. Fisk, based on your background, your education, your experience, and your review of the documentation contained in Appendix B of your report, do you have an opinion as to whether or not LabMD's data security practices were reasonable under the circumstances during the relevant time period?
A. You said do I have an opinion?
Q. Yes.
A. I do.
Q. And what is your understanding of what the relevant time period is? I'm not sure that's on the record.
A. I don't remember the exact dates off the top of my head, but I believe it's right here --
Q. Could you turn to page 3 of your report.
A. Yeah, I'm there. And it's from January 2005 to July 2010.
Q. And what is your opinion, sir?
A. My opinion, based on all of the software and hardware and network configuration evidence that I analyzed, is that their data security practices were not just adequate, but I really found them to be more than adequate in terms of deploying a system that had a redundant layer of firewall protection, that used

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perfectly adequate network hardware and that, you know, had reasonable -- beyond that, sort of reasonable company policies to limit the ability of any of their data to be compromised.

So my opinion is that during the relevant time period, their practices and networks and hardware and software were more than adequate to protect their data.

MR. SHERMAN: One moment, Your Honor.

JUDGE CHAPPELL: All right.

MR. SHERMAN: I have no further questions, Your Honor.

JUDGE CHAPPELL: Any cross?

MS. VANDRUFF: Yes, Your Honor.

The court's indulgence, please.

(Pause in the proceedings.)

Thank you, Your Honor.

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CROSS-EXAMINATION

BY MS. VANDRUFF:

Q. Good afternoon, Mr. Fisk.

A. Hi.

Q. Mr. Fisk, this morning Mr. Sherman asked you about advising companies on data security. Do you remember that testimony?

A. I do.

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Q. Okay. And you described work that you'd done with a New Zealand company. Do you remember that testimony?

A. I do.

Q. It was your testimony this morning that you've been asked by companies to evaluate whether they've employed reasonable and appropriate security measures on their network; is that correct?

A. That's correct.

Q. Do you remember your deposition in April of this year where Mr. Sheer asked you questions about this matter?

A. Vaguely.

Q. Okay. Were you -- did you sit for a deposition in this matter?

A. Yes, I did.

Q. Okay. And that deposition took place on April 22 of this year; is that correct?

A. Correct.

MS. VANDRUFF: Permission to approach, Your Honor?

JUDGE CHAPPELL: Go ahead.

BY MS. VANDRUFF:

Q. Mr. Fisk, I've handed you a copy of your deposition transcript from April 22, 2014, and I'd ask

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that you turn to page 11, please.

Are you with me, Mr. Fisk?

A. I believe so. Yes.

Q. At line 6 you were asked the following question and you gave the following answer:

"Have you ever been asked by a company to evaluate whether it employed reasonable and appropriate security measures on its network to prevent unauthorized access to personal information?

"ANSWER: I've never been asked that by external companies. I have done that for my own companies."

Did I read that correctly?

A. You did.

Q. Thank you.

Your current company, Brave New Software Project, makes a tool Lantern; correct?

A. That's correct.

Q. Lantern does not collect Social Security numbers, does it?

A. It does not.

Q. It does not collect consumer health information, does it?

A. It does not. Although it may transport consumer health information, it doesn't, you know, collect it in

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a database somewhere, but it certainly transports lots of things.

Q. Your company does not collect Social Security numbers or consumer health information; correct?

A. We do not, that's correct.

Q. Mr. Fisk, you've never served as a testifying or -- well, you've never served as a testifying expert witness before today; correct?

A. That's correct.

Q. You've never served as a consulting expert before today.

A. That's correct.

Q. In forming your opinions in this case, Mr. Fisk, you did not talk to any current LabMD employees, did you?

A. That's correct.

Q. You didn't talk to any former LabMD employees, did you?

A. In preparing my report?

Q. In preparing your opinions in this case, you did not talk to any former LabMD employees, did you?

A. That's correct.

Q. And in forming your opinions in this case, you did not talk to any former LabMD contractors, did you?

A. That's correct.

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Q. Nor did you speak with any former LabMD vendors, did you?
A. That's correct.
Q. Directing your attention to your report, you quote extensively from user manuals, don't you?
A. I do.
Q. And those are user manuals for, for example, the ZyWALL firewall; correct?
A. That's correct.
Q. But you didn't examine LabMD's ZyWALL firewall; correct?
A. To my knowledge, it no longer existed, so it would not have been possible to examine it.
Q. And you didn't examine the Cisco router that's described in your report, did you?
A. Again, I don't think that would have been physically possible to do.
Q. Nor did you examine the billing manager's computer on which LimeWire had been installed; correct?
A. That's correct. Again, that computer no longer -- that employee no longer exists for the company, and that computer no longer existed by the time I gave my report.
Q. With respect to the configuration of the firewalls that you described for Mr. Sherman earlier

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today, you're not relying on any record evidence in this case to support your conclusions regarding the configuration of the Zywall firewall; correct?
A. I'm relying on -- yes, I am relying on record evidence. I'm relying on the depositions as well as the manuals for the ZyWALL 5 firewall.
Q. We'll circle back to that.
Mr. Fisk, you don't have an opinion as to whether LabMD's security was reasonable and adequate after July 2010, do you?
MR. SHERMAN: Objection.
That's certainly not in his report.
MS. VANDRUFF: I'm confirming that his opinions are limited to his report, Your Honor.
JUDGE CHAPPELL: He was asked if he had an opinion. I'll allow that. Overruled.
THE WITNESS: I didn't specifically look at that. No.
MS. VANDRUFF: Thank you, Your Honor.
Thank you, Mr. Fisk.
JUDGE CHAPPELL: By the way, the way that question was worded, the witness could have just said "Yes, I do, and here it is." However, he did not do that, so let's move along.
MS. VANDRUFF: Thank you, Your Honor.

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JUDGE CHAPPELL: Because the question didn't specify in his report.
MS. VANDRUFF: Thank you, Your Honor.
BY MS. VANDRUFF:
Q. Mr. Fisk, your expert report doesn't disclose how much you're being paid in this matter, does it?
A. No, it does not.
Q. And you're being paid $500 per hour to work on this case; is that correct?
A. That is correct.
Q. I'd like to turn now to LimeWire.
At any one time, two to five million users would be on the LimeWire network; isn't that correct?
A. That is correct.
Q. And LimeWire allows a user to select a folder, the contents of which will be available for sharing to other LimeWire or P2P application users on the network; correct?
A. That is correct.
Q. So in this case, in the facts of LabMD, once an outsider, an outside user, that is, locates a file shared by the billing manager's computer, the outside user can use browse host to view and download any files shared by the billing manager's computer; correct?
MR. SHERMAN: Objection. Assumes facts not in

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evidence.
JUDGE CHAPPELL: The way the question is worded, you include the phrase "in the facts of LabMD." The objection is, it assumes facts not in evidence, which means the premise of your question is incorrect.
What's your response?
MS. VANDRUFF: My response is that Mr. Fisk has testified about the extensive review of the record in this case and his familiarity with it and his competence to offer opinions on behalf of respondent. I think that those facts are in evidence and they're familiar to Mr. Fisk.
JUDGE CHAPPELL: Well, we can get past this if you have him assume the facts and then ask your question, so we can move along.
MS. VANDRUFF: I will, Your Honor. Thank you, Your Honor.
BY MS. VANDRUFF:
Q. Mr. Fisk, I'd like you to assume that an outside user who was not behind a firewall located a file on the billing manager's computer at LabMD.
Given that, could the outside user use browse host -- strike that.
Given that, it's correct, isn't it, that the outside user could use browse host to view and download

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any files shared by the billing manager's computer?
A. That's correct. And I would just again say that the scenario where that other user is not behind a firewall is a very rare scenario, so it's about 5 percent of other users who are not behind a firewall.
Q. But again, given that scenario, the other user could use browse host to view and download any files shared by the billing manager's computer; correct?
A. Correct. And to -- again, to get there is -- requires a long series of sort of very lucky steps, but in the scenario where somehow that person knows about this computer at LabMD, that is correct.
MS. VANDRUFF: The court's indulgence, Your Honor.
(Pause in the proceedings.)
BY MS. VANDRUFF:
Q. Mr. Fisk, your expert report addresses a number of subjects which you've described for His Honor this morning, but there are subjects that your report does not relate to.
For example, your report does not address whether LabMD developed a comprehensive information security program, does it?
A. Developed a comprehensive information security program. Yeah, I guess I don't -- I don't really have

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a -- or yeah, it doesn't include an opinion on that.
Q. And your report does not address whether LabMD maintained more personal information on its network than was necessary, does it?
A. It doesn't mention that as part of this opinion, no.
Q. Your report does not address whether LabMD used adequate measures to prevent employees from accessing personal information not needed to perform their jobs, does it?
A. I mean, I believe I mention access controls in the report. Whether -- I don't think I mention specifically internally whether or not company -- or employees had access to -- like what information different employees had access to. I certainly talk about what an employee -- what employees were allowed to install software, which relates to what information they were allowed to access in the sense that in some cases you almost certainly needed software to access information.
Q. Let me ask the question one more time.
Your report does not address whether LabMD -- strike that.
Your report does not address whether LabMD used adequate measures to prevent employees from accessing

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personal information not needed to perform their jobs.
A. Well, again, one of those measures would be to limit what software employees could install because presumably any information that you are accessing is accessed through software, so it addresses it in the sense that it discusses which employees were enabled to install software.
Q. Your report does not address whether LabMD adequately trained its employees to safeguard personal information, does it?
A. No. I don't really discuss training much there.
Q. Your report does not address whether LabMD used common authentication-related security measures, does it?
A. Whether it used common -- sorry. Can you repeat that?
Q. Your report does not address whether LabMD used common authentication-related security measures.
A. I mean, it addresses it in the sense that in some network scenarios in some, you know, security architectures you need authentication to do different things, so it certainly takes into account whether or not there were clear vulnerabilities on systems that should have authentication that did not.

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Q. You've described your analysis, but I'm asking you about your report.
Your report doesn't address authentication measures at LabMD, does it?
A. It doesn't mention it because I didn't -- that didn't come across as any sort of vulnerability. And if it had, I would have mentioned it.
Q. And your report doesn't address whether LabMD maintained and updated the operating systems of computers and other devices on its network, does it?
A. Again, I did analyze that aspect of their network and practices in reaching my conclusions, but I don't discuss it specifically in the report because I didn't find it to be relevant.
MS. VANDRUFF: The court's indulgence, Your Honor.
(Pause in the proceedings.)
BY MS. VANDRUFF:
Q. Returning, Mr. Fisk, to LabMD's measures to prevent employees from accessing personal information, other than your assessment of LabMD's policies related to employees' ability to download software, your expert report does not address whether LabMD used adequate measures to prevent employees from accessing personal information not needed to perform their jobs.

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A. Well, what I said earlier was that the key component there was whether or not users can or employees could install applications --
Q. Okay.
A. -- regardless of whether or not --
Q. So let me ask the question then more precisely.
JUDGE CHAPPELL: Hold on a second. You didn't let him finish.
MS. VANDRUFF: I apologize, Your Honor.
I apologize, Mr. Fisk.
THE WITNESS: Oh, yeah, I was pretty much done. Whether regardless of whether or not they were downloading it from the Internet, is all I was going to say.
BY MS. VANDRUFF:
Q. So setting aside your assessment of LabMD's policies related to employees' ability to install software, your expert report does not address whether LabMD used adequate measures to prevent employees from accessing personal information not needed to perform their jobs; correct?
A. Again, I don't specifically talk about it in the report, but I don't talk about it because it didn't strike me as an issue with their overall network security.

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Q. I'd like to return to the record evidence that you said you referenced regarding the configuration of the Zywall firewall.
The record evidence that you relied upon is cited in your expert report; correct?
A. I believe so.
Q. I ask you to please refer to your expert report which Mr. Sherman moved into evidence earlier today as RX 533, and I direct your attention, Mr. Fisk, to page 17.
At page 17, the bottom of the page, you describe the Zywall firewall and its function on LabMD's network; correct?
A. That's correct.
Q. And you cite to two depositions for that opinion; isn't that correct?
A. That's correct.
Q. Okay. And the two depositions, Mr. Fisk, are the depositions of Mr. Allen Truett and Mr. Robert Hyer; is that correct?
A. That's correct.
MS. VANDRUFF: Permission to approach, Your Honor?
JUDGE CHAPPELL: Go ahead.
(Pause in the proceedings.)

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BY MS. VANDRUFF:
Q. In support of the proposition that LabMD's firewalls protected servers and employees -- excuse me -- that LabMD's firewalls protected servers and employee computers from incoming traffic, you've dropped two footnotes, footnotes 16 and 17; correct?
A. That's correct.
Q. Okay. And footnote 16 refers to the deposition of Mr. Hyer, which you have in front of you, an excerpt of which you have in front of you, at CX 0719. And I direct your attention to the cited, cited by you, portion of Mr. Hyer's deposition at page 91.
And Jon, can we display that for the court, please.
For the benefit of the record, let me read what appears on page 91 of Mr. Hyer's deposition.
"QUESTION: -- while you were there?
"ANSWER: Yeah.
"QUESTION: And is this on the servers in particular?
"ANSWER: Well, all of the servers and equipment took advantage of Windows firewalls to the extent that they could.
"QUESTION: Were the Windows operating systems at LabMD that it used on its servers centrally

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managed --
"ANSWER: Absolutely.
"QUESTION: -- when you were at LabMD?
"ANSWER: Yes.
"QUESTION: Were the Windows operating systems used on the desktops centrally managed?
"ANSWER: Yes.
"QUESTION: Who centrally managed the operating systems on the servers?
"ANSWER: It was an IT function, so I was responsible for it. The -- we actually had different employees focused on the servers and the desktops."
Did I read the questions and answers that appear on page 91 correctly?
A. You did.
Q. Okay. And page 91 is cited in support of the proposition that the firewalls at LabMD protected servers and employee computers from incoming network traffic; correct?
A. That's correct.
Q. Okay. You also cite for that proposition the deposition of Mr. Truett, which I've handed to you and it's been marked -- I've handed an excerpt to you. Excuse me, Mr. Fisk. It's been marked as CX 0731.
And I direct your attention to the cited

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portion, which is page 41, which begins with the question -- the first full question that appears on that page is:

"Did LabMD implement your recommendations with respect to firewall equipment?

"ANSWER: We did install firewall equipment at LabMD.

"QUESTION: Did APT make any recommendations regarding firewall equipment that LabMD did not complement?

"ANSWER: I don't remember.

"QUESTION: To whom did LabMD make those recommendations?

"ANSWER: I'm sorry. Can you repeat that?

"QUESTION: The recommendations that LabMD -- I'm sorry -- that APT made regarding firewall equipment, to whom at LabMD did APT make those recommendations?

"ANSWER: I don't remember specific staff at LabMD. I don't remember exactly.

"QUESTION: Do you recall if it was to Mr. Daugherty?

"ANSWER: I don't recall. It might have been to Mr. Daugherty that we presented these proposals. I would assume it was, but I don't recall exactly.

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"QUESTION: Do you recall making any recommendations to Mr. Boyle?

"ANSWER: I don't recall making recommendations specifically to Mr. Boyle."

And that last line spilled over onto page 42.

Did I read that correctly Mr. Fisk?

A. You did.

Q. And this again was cited in support of the proposition in your report that the firewalls at LabMD protected servers and employee computers from incoming network traffic; is that correct?

A. That is correct.

Q. And beyond those two citations, you don't identify any other record support for the sentence "These firewalls protected servers and employee computers from incoming network traffic," do you, Mr. Fisk?

A. Well, I believe I also cite page 58 of Allen Truett's deposition.

Q. In the sentence that I read to you, "These firewalls protected servers and employee computers from incoming network traffic"?

A. No. I cite it in the prior sentence.

There were also discussions of the Zywall 5 in other depositions that I didn't cite, but those are --

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Q. I'm asking about what's cited in your report, Mr. Fisk.

JUDGE CHAPPELL: Well, let the witness finish his answer.

MS. VANDRUFF: I apologize, Your Honor. And I apologize to you, Mr. Fisk.

JUDGE CHAPPELL: The question pending was: "Beyond those two citations, you don't identify any other record support." Therefore, he should have the opportunity to fully answer that.

MS. VANDRUFF: Yes, Your Honor.

THE WITNESS: So there were discussions of the Zywall 5 in a number of the depositions that I didn't specifically cite there but took into account when -- in forming my opinion.

BY MS. VANDRUFF:

Q. Let's turn to what you did cite. And you've mentioned Mr. Truett's deposition, which is noted at footnote 15 on page 17 of your expert report which has been marked as RX 533.

You cite to Mr. Truett for the proposition that APT installed several Zywall 5 IPSec firewalls; correct?

A. That is correct.

MS. VANDRUFF: The court's indulgence,

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Your Honor.

JUDGE CHAPPELL: Officer Proctor?

(Pause in the proceedings.)

MS. VANDRUFF: Do you need a moment, Your Honor?

JUDGE CHAPPELL: Go ahead.

BY MS. VANDRUFF:

Q. Mr. Fisk, I'll withdraw that question.

JUDGE CHAPPELL: All right. Now I need a moment.

(Pause in the proceedings.)

Go ahead.

MS. VANDRUFF: Thank you, Your Honor.

The court's indulgence, Your Honor.

(Pause in the proceedings.)

BY MS. VANDRUFF:

Q. Mr. Fisk, you've talked about file sharing on P2P networks; correct?

A. Correct.

Q. It's your opinion, isn't it, that the risk of inadvertent sharing on P2P networks is an FTC concocted issue?

A. I wouldn't describe it that way. I would describe it as an FTC -- inefficient use of FTC funds.

Q. Well, you think that the FTC should be doing

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other things with its time; is that correct?
A. Yes.
Q. Okay. And you believe that the risk of inadvertent sharing on P2P networks is an FTC concocted issue; isn't that right?
A. No. I think -- I wouldn't phrase it that way.
Q. Okay. Well, let me direct your attention back to your expert deposition -- excuse me -- the deposition that proceeded on April 22 of this year and specifically direct your attention to page 188.
(Pause in the proceedings.)
Are you with me, Mr. Fisk?
A. I am.
Q. I direct your attention, please, to line -- excuse me -- line 9 on page 188 where you were asked the following question and you gave the following answer:
"QUESTION: Were you asked to modify LimeWire in any way that would address that issue?
"ANSWER: The inadvertent file-sharing issue? Again, my feeling of that issue is it's basically an FTC concocted issue."
Did I read that correctly?
A. You did.
Q. Thank you.

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In your expert report, your opinion regarding the likelihood of users finding the 1718 File using LimeWire's search function is restricted to casual or typical users of LimeWire; correct?
A. Is restricted to casual or typical users of LimeWire.
Sorry. Can you repeat the question?
Q. Certainly.
In your expert report, you describe your opinions regarding the likelihood of users finding the 1718 File using LimeWire's search function as being restricted to casual or typical users of LimeWire.
A. Yeah. I mean, I think users of LimeWire, the software itself, in general would be very unlikely to ever find the file because, I mean, certainly most of those users are casual users, but -- but I would say more sophisticated users would not use LimeWire, the software, to do that, yeah.
Q. Your report does not address the likelihood of criminals finding the 1718 File using LimeWire; correct?
A. Well, again, if those criminals are considered more sophisticated users, they would not -- if they were sophisticated like technical criminals, they would not use LimeWire to find the 1718 File because it would

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be a just a stupid way to do it. Bad criminals might try to.
I mumble sometimes I have to remember.
Q. Mr. Fisk, let me ask you a question, and I think this is a yes-or-no question. Your Honor will correct me if it's not.
But your report does not address the likelihood of criminals finding the 1718 File using LimeWire, does it?
A. Well, I go into the ability of any users or people in general to find the 1718 File, which would certainly include criminals, and I analyze the ways in which you could find the file through LimeWire as well as through other means.
MS. VANDRUFF: Your Honor, I'd move to strike that as nonresponsive and ask that the witness be instructed to answer.
MR. SHERMAN: Your Honor, I think he answered the question in that the way the question was posed, it opened itself up to interpretation and to explanation.
MS. VANDRUFF: Your Honor, the question related specifically to what the report addressed. I don't think it was open to interpretation.
JUDGE CHAPPELL: Well, based on what he said some moments ago, if indeed his opinion is that

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sophisticated-type users would not use LimeWire, then it doesn't take a leap to mean that's also an opinion that if these criminals are sophisticated, they would not use LimeWire. In that regard, then there is an opinion. One opinion creates the other.
If he says sophisticated users would not use LimeWire, if he says criminal types you're referring to are sophisticated, then I can see why his answer is fair, so I overrule the objection.
MS. VANDRUFF: Thank you, Your Honor.
BY MS. VANDRUFF:
Q. Mr. Fisk, you're familiar with the 1718 File on a LabMD computer; correct?
A. Yes.
Q. And when the billing manager's computer at LimeWire was -- excuse me.
When the billing manager's computer at LabMD was running LimeWire, any user on the LimeWire network who located the 1718 File could download it; correct?
A. Yes. And again, that's a very small subset of users on the LimeWire network. But if you were able to access it through a variety of steps that it would take to access it, to find it in the search results, including not being behind a firewall, then yes.
But that does also relate to the whole

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sophisticated user thing. You probably don't want me to go into that, but that is relevant.

Q. That was not my question. Thank you, Mr. Fisk.

Mr. Fisk, you do not have an opinion about the most likely manner in which the 1718 File was disclosed; correct?

A. The most likely manner? Yeah, I'm not sure what the most likely manner is. That's correct.

Q. And the FBI's involvement is not the most likely way that the 1718 File was disclosed; correct?

A. I just said I didn't have an opinion about what the most likely way that it was shared was, so -- so, you know -- so I don't understand that question I guess. Like if the -- if I don't have an opinion about what was the most likely way, then -- then I don't -- I don't -- I really don't know how it was shared, so that would also apply to the FBI being the means through which it was shared.

Q. And that would be equally applicable to other entities like BigChampagne and the Recording Industry Association of America and the Motion Picture Association of America; correct?

A. That's correct. Those are all entities who have sophistication to not use LimeWire and to do a more sophisticated search of the network, but I don't -- I

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don't know if they were able to actually access this file or not. That is correct.

Q. It's not your opinion that the most likely way that the 1718 File was disclosed was through the involvement of BigChampagne; correct?

MR. SHERMAN: Objection. Asked and answered.

JUDGE CHAPPELL: I'll allow that. Overruled.

THE WITNESS: Again, that is correct. I don't know the most likely way that it was shared.

BY MS. VANDRUFF:

Q. It's not your opinion, Mr. Fisk, that the 1718 File was disclosed without authorization because an employee copied it to a portable storage device like a thumb drive; correct?

A. Yeah. Again, these are all ways that it could have been shared. I don't have an opinion as to what the most likely way was.

JUDGE CHAPPELL: And I want to be clear on my previous ruling. I'm just trying to apply some logic here. I'm not creating new opinions.

If, for example, I have the opinion that only you, Counselor, have access to a network, I can see how that can be seen also as an opinion that he doesn't have access and I don't have access. That's the point I was making. I'm just applying logic.

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MS. VANDRUFF: I understand, Your Honor.

BY MS. VANDRUFF:

Q. Similarly, Mr. Fisk, it's not your opinion that the 1718 File was disclosed without authorization because an employee e-mailed it as an attachment to a friend; correct?

A. It's not my opinion that that didn't happen. It's my opinion -- are you again asking this most likely thing? I don't think you included the phrase "most likely" in that.

Q. Allow me to ask the question again. Thank you, Mr. Fisk.

It is not your opinion that the most likely way that the 1718 File was disclosed without authorization was because an employee e-mailed it as an attachment to a friend; correct?

A. Yeah. Again, that is just a possible way.

Q. Your report states that there's no evidence that the 1718 File was shared with anyone on LimeWire; correct?

A. I'm sorry. Say that one more time. It states that what?

Q. That there's no evidence that the 1718 File was shared with anyone on LimeWire.

A. I don't believe I specifically state that in the

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report.

Q. Allow me to direct your attention, please, to page 12 of the document that's been marked as RX 533.

Let me know when you're with me, Mr. Fisk.

A. I'm there.

Q. Okay. And at footnote 10, you indicate there's no evidence that the 1718 File was shared with anyone on LimeWire; correct?

A. That's correct.

Q. Okay. But it's also true that there's no evidence that the 1718 File was not shared on LimeWire; correct?

A. That's correct.

Q. When a file is downloaded by a LimeWire user, it is shared by default from that user's computer; correct?

A. That is correct.

Q. And so if the 1718 File had been downloaded to another user's computer through LimeWire, there's no way for the original source of the file to recall the file; correct?

A. That is correct.

JUDGE CHAPPELL: Hold on a second.

I want to make sure we're being consistent not with the truth but what I've heard previously.

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MS. VANDRUFF: Certainly.
JUDGE CHAPPELL: Going back two questions, "When a file is downloaded by a LimeWire user, it is shared by default from that user's computer," can we clarify whether that's only possible if that user puts it in a file that allows it to be shared, because that was missing. And I think we've heard testimony that the case with LimeWire is, if I downloaded it from your computer, if I don't have it in a sharing folder or a designated folder, no, you cannot get it, another LimeWire person cannot get it.
I'm not testifying here. I'm just trying to make the record consistent.
MS. VANDRUFF: I appreciate that.
JUDGE CHAPPELL: He's the expert. You're the attorney.
BY MS. VANDRUFF:
Q. I appreciate that, Your Honor.
And His Honor has raised an interesting point, Mr. Fisk, and I think that you can shed some light on His Honor's question.
When a user downloads a file from another computer running LimeWire, it is saved to that user's computer; correct?
A. That's correct.

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Q. And it's saved by default to that user's sharing file; correct?
A. Sharing folder, correct. Yeah.
Q. Okay. So to address His Honor's question, while the initial user must designate a folder for sharing and put files in that folder, the person who downloads the folder, that file is automatically shared by default; correct?
A. Yeah. The person who downloads the file into their -- by default, that file is downloaded and saved to their shared folder, and that shared folder is automatically reshared, so yes, by default, any file that anyone downloads on the Gnutella network using LimeWire is automatically reshared by the downloader.
JUDGE CHAPPELL: And just so I'm clear, then if I downloaded it into a shared folder, I can't then move it immediately out of that folder, making it unavailable?
THE WITNESS: You certainly can. You certainly can.
JUDGE CHAPPELL: But so until I take that action, though, it would be shareable.
THE WITNESS: Yes. That's right. That's right.
So you would have to actively move it from that folder or actively unshare your default shared folder.

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JUDGE CHAPPELL: And just so I'm clear, when I downloaded it, if I'm a LimeWire user, we've been told by default it goes to the shared folder, but does it have to? Can I not direct it to go, for example, to the desktop instead of the shared folder?
THE WITNESS: You can. You can choose your shared folder and you can choose that your shared folder not be shared or your download folder may be more accurately not be shared.
JUDGE CHAPPELL: So just so we're clear, if someone takes it -- if some LimeWire user downloads a file from another LimeWire user, it's available to be shared by other LimeWire users if it's downloaded into the default shared folder and left there.
THE WITNESS: That's correct. And obviously really the key is that in order for that whole sequence to even ever take place, they would have had to somehow find the file and download the file.
JUDGE CHAPPELL: I was assuming that part already.
THE WITNESS: Okay. Yeah. That's the part that's dicey.
MS. VANDRUFF: Thank you, Mr. Fisk.
Thank you, Your Honor.
The court's indulgence, Your Honor.

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(Pause in the proceedings.)
BY MS. VANDRUFF:
Q. Mr. Fisk, before we addressed His Honor's question -- and forgive me if I've already asked this, and I don't intend to draw an asked-and-answered objection -- but for the benefit of the record, if the 1718 File was downloaded to another user's computer by LimeWire, there's no way for the original source of the file to recall that file; correct?
A. That's correct.
Q. And there's no way --
JUDGE CHAPPELL: Let me ask something along those lines, too, I've been wondering -- and it may be in the record -- since you're the LimeWire guy evidently.
If I'm the user the file is downloaded from, do I have any way of knowing it's been downloaded from my computer?
THE WITNESS: You do. You do. We would track statistics on all of those, all of your files, so if you looked in your library, you would see all of your shared files and you would see how many times each file had been uploaded, which is interesting in this case because, as far as I understand it, the screen shot of that, of Ms. Woodson's library, showed zero for all

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uploads of that file.
MS. VANDRUFF: Excuse me, Your Honor. With apologies for interrupting Mr. Fisk, what he's just described is evidence that has not been produced to complaint counsel in this matter.
JUDGE CHAPPELL: Well, I'm going to exclude what he just said about looking at her computer, whatever he just said. I'm not accepting that as fact or opinion.
What I'm -- and I think he answered my question.
If I'm an active LimeWire user, I can see that a file has been downloaded and I can see how many times it's been downloaded?
THE WITNESS: Yeah, that's correct.
JUDGE CHAPPELL: All right. Thank you.
MS. VANDRUFF: The court's indulgence, Your Honor.
(Pause in the proceedings.)
BY MS. VANDRUFF:
Q. So, Mr. Fisk, we were talking about recalling a file.
There's no way for the original user to prevent resharing of a file that was downloaded from the original user's computer; correct?

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A. That's correct.
Q. And there's no way for the original source of a file to permanently remove the file from the P2P network after it's been shared; correct?
A. That's correct.
MS. VANDRUFF: No further cross at this time, Your Honor, subject to any redirect.
JUDGE CHAPPELL: Any redirect?
MR. SHERMAN: Yes, sir.
- - - - -
REDIRECT EXAMINATION
BY MR. SHERMAN:
Q. Mr. Fisk, you were directed to page 188 of your deposition and directed to line 11, and your answer was: "The inadvertent file sharing issue? Again, my feeling of that issue is that it's basically an FTC concocted issue."
What did you mean by that?
A. So, you know -- and this is an issue that the FTC has been pursuing for some time and -- or I think -- I think no longer pursues. But -- but just based on my knowledge of LimeWire and Gnutella and the way that users share content and the way that we designed the user interface to make it clear to users what was happening when they were sharing files, I felt that this

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idea that inadvertent file sharing, that people were mistakenly sharing files on the network, causing some major harm, societal harm, was a -- just a complete overblowing of that issue and a complete misappropriation of FTC resources.
Q. You also mentioned on cross that using LimeWire as a method to search for files for which the searcher would use for some criminal activity is not a very efficient way to commit a crime; is that correct?
A. That's correct, yeah. You know, based on all of these issues that I have mentioned of adaptive search and most users on the network being behind a firewall means that in order to effectively use the Gnutella network and LimeWire -- well, let's say the Gnutella network as a means for criminal activity, using LimeWire to do that would just be an extremely inefficient approach and would be just an approach that, you know, really unsophisticated criminals would use and would likely use very unsuccessfully I would say.
MR. SHERMAN: One moment, Your Honor, please.
(Pause in the proceedings.)
BY MR. SHERMAN:
Q. Mr. Fisk, you were asked a lot of questions about what your opinion wasn't.

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A. Uh-huh.
Q. And I believe your answer was that you didn't specifically mention those things because you did not see them as an issue.
Is that correct?
A. That's correct.
Q. Is it true to say that you did not see them as an issue affecting LabMD's data security?
MS. VANDRUFF: Objection. Leading, Your Honor.
JUDGE CHAPPELL: Sustained.
BY MR. SHERMAN:
Q. Well, what issue did you see them as not having any impact on?
A. Yeah, so my report was on the adequacy of or inadequacy of LabMD's data security, and so I took into account every -- all of the factors I had in evidence when reaching my conclusions. And I mention in my report the evidence that I felt was relevant to answering that question of LabMD's data security. And the thing -- if I -- the things that specifically came up that I left out were things that I left out because I didn't think they were relevant to answering the question of whether or not LabMD had adequate data security.
MR. SHERMAN: I have no further questions.

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JUDGE CHAPPELL: Recross?
MS. VANDRUFF: No recross, Your Honor, although at this time complaint counsel wishes to make a motion, and we'd be happy to have the witness excused prior to doing so.
JUDGE CHAPPELL: Thank you, sir. You're excused.
THE WITNESS: Thank you.
MR. SHERMAN: This witness is excused; is that correct?
MS. VANDRUFF: That is correct, Mr. Sherman.
(Pause in the proceedings.)
At this time, Your Honor, complaint counsel objects to Mr. Fisk's qualification as an expert on two of the topics for which he was offered, specifically, the adequacy of LabMD's network security, hardware or software policies, practices and procedures and the topics of his rebuttal testimony with respect to complaint counsel's expert Dr. Hill insofar as Mr. Fisk's opinion related to network security, hardware, software policies, practices and procedures.
Complaint counsel does not seek to limit Mr. Fisk's opinions as they relate to the technology behind the program known as LimeWire or the operation of peer-to-peer networks.

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Of course, I understand Your Honor's rulings, that this court is likely to admit this report and testimony and weigh it according to the credibility determinations that Your Honor makes.
However, I'd argue that Mr. Fisk's report and the testimony on the topics on which complaint counsel is seeking relief should be accorded no weight or very little weight.
Mr. Fisk's opinions with respect to those topics do not meet the standards of Daubert. He's lacking in expertise in the field of network security, and the gravamen of Mr. Fisk's opinions on network security relate to default settings of various hardware and software, and Mr. Fisk's opinions are not adequately grounded in the record evidence.
Therefore, complaint counsel moves to exclude Mr. Fisk's opinions on the adequacy of LabMD's network security and his opinions in rebuttal to Dr. Hill's opinions as they relate to network security.
JUDGE CHAPPELL: Any response?
MR. SHERMAN: Yes, Your Honor.
Consistent with the court's orders and rulings in regard to the expert testimony and the expert reports that have been submitted in this case, I would urge the court to continue consistently with its stance

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on permitting the evidence to be admitted and accorded whatever weight the court believes necessary.
I would argue and urge the court, however, to take into consideration Mr. Fisk's experience and his background, particularly in terms of his ability to -- his experience as the lead engineer on the development of the LimeWire program on the Gnutella network.
Since that is one of the central issues here, and complaint counsel has seen fit to make the 1718 File and its alleged escape from LabMD central to its case, I think that Mr. Fisk's opinions with regard not only to the technology related to LimeWire but how that technology in turn affects data security should be given considerable weight.
And also given Mr. Fisk's constant and continuous work and employment and business ownership in the area of data security, specifically in his current position and his current development of Lantern, which he testified is a software or a program that is designed specifically to defeat security measures set out by governments, such as Iran and China, to limit the amount of information coming into those countries and being made available to the individuals in those countries who use the Internet and who seek information available upon the Internet, his testimony was that this is very

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similar to security of a network, except on a much larger scale. They are securing the entire access to the Internet for an entire country's population.
And so given his work in this area, dealing with, writing code, creating programs that look at the security measures that nations put in place, I think he is well-qualified to determine whether or not the data security measures of a small business, doing well, but still a small business here in the United States.
Thank you, Your Honor.
JUDGE CHAPPELL: Okay. The objection and the response are in the record.
The objection is overruled.
MS. VANDRUFF: Thank you, Your Honor.
JUDGE CHAPPELL: As I've said, for reasons stated a couple times in the record previously, I will consider the opinions and I will consider the qualifications, and I will give due weight which should be accorded to any opinions that were offered by this witness. And my reasons will be made clear in the decision if I accept or rely upon any of the opinions of this witness.
Anything further?
MR. SHERMAN: Your Honor, there is nothing further.

As we informed the court yesterday, we have condensed our defense. We have no witnesses available to present this afternoon nor tomorrow, and we would resume presenting witnesses in our case on Friday morning.

JUDGE CHAPPELL: And who is scheduled for Friday?

MR. SHERMAN: Friday morning we have Mr. Robert Boback, the CEO of Tiversa, and Mr. Rick Wallace, a former employee of Tiversa.

JUDGE CHAPPELL: And then how many other witnesses do you have?

MR. SHERMAN: Your Honor, we are strongly considering eliminating Mr. Truett. He would be the only other witness which we represented to the court that we would present on the following Tuesday, but we are weighing whether or not he is essential to our defense.

JUDGE CHAPPELL: All right. That's good to know, so there's a chance you will rest on Friday.

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

JUDGE CHAPPELL: All right.

Anything from the government?

MS. VANDRUFF: Nothing from complaint counsel, Your Honor. Thank you.

JUDGE CHAPPELL: All right. So we will reconvene on Friday at 0930.

We're in recess.

(Whereupon, the foregoing hearing was adjourned at 1:21 p.m.)

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: 9357
CASE TITLE: LabMd, Inc.
HEARING DATE: May 28, 2014

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: JUNE 3, 2014

JOSETT F. WHALEN, RMR

CERTIFICATION OF PROOFREADER

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

ELIZABETH M. FARRELL