

In the Matter of:

LabMD, Inc.

May 30, 2014

Trial - Public &

Volume 7

Condensed Transcript with Word Index



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1 FEDERAL TRADE COMMISSION
 2 I N D E X
 3 IN RE LABMD, INC.
 4 TRIAL VOLUME 7
 5 PUBLIC AND [REDACTED]
 6 MAY 30, 2014
 7
 8 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR
 9 (none)
 10
 11
 12 EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED
 13 CX
 14 (none)
 15
 16 RX
 17 (none)
 18
 19 JX
 20 Number3 1242
 21
 22
 23
 24
 25

1220

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1 UNITED STATES OF AMERICA
 2 FEDERAL TRADE COMMISSION
 3 In the Matter of)
 4 LabMD, Inc., a corporation,) Docket No. 9357
 5 Respondent.)
 6 -----)
 7 May 30, 2014
 8 9:35 a.m.
 9 TRIAL VOLUME 7
 10 PUBLIC AND [REDACTED]
 11
 12 BEFORE THE HONORABLE D. MICHAEL CHAPPELL
 13 Chief Administrative Law Judge
 14 Federal Trade Commission
 15 600 Pennsylvania Avenue, N.W.
 16 Washington, D.C.
 17
 18 Reported by: Josett F. Whalen, Court Reporter
 19
 20
 21
 22
 23
 24
 25

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1 May I approach, Your Honor?
 2 JUDGE CHAPPELL: Yes. If you both haven't read
 3 it, you can look at it. I don't want copies floating
 4 around.
 5 MS. VANDRUFF: Understood, Your Honor.
 6 Thank you.
 7 (Pause in the proceedings.)
 8 JUDGE CHAPPELL: Am I correct that the next
 9 joint exhibit would be Number 3?
 10 MS. VANDRUFF: That's correct, Your Honor.
 11 MR. SHERMAN: That's my understanding,
 12 Your Honor. We had discussed JX 2 yesterday, and I
 13 believe JX 3 is the next joint exhibit number.
 14 JUDGE CHAPPELL: All right. So what I have in
 15 my hand, Mr. Sherman, do I have a motion from you to
 16 make JX 3 an exhibit?
 17 MR. SHERMAN: So moved.
 18 MS. VANDRUFF: No objection, Your Honor.
 19 JUDGE CHAPPELL: All right. JX 3 is in
 20 evidence, but I'm giving it provisional in camera
 21 treatment, so it won't be part of the public record.
 22 (Joint Exhibit Number 3 was admitted into
 23 evidence.)
 24 MS. VANDRUFF: Do you require a motion to accord
 25 JX 3 in camera treatment?

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1 JUDGE CHAPPELL: I'm going to consider whether
 2 or not it contains sensitive information, which is an
 3 exception to a motion, and we will let the parties know
 4 if we require a motion.
 5 MS. VANDRUFF: Thank you, Your Honor.
 6 MR. SHERMAN: Thank you, Your Honor.
 7 JUDGE CHAPPELL: All right. So who wants to
 8 give me an update?
 9 MR. BURCK: Your Honor, I'm William Burck,
 10 Quinn Emanuel, attorney for Rick Wallace.
 11 Your Honor, after our discussion earlier this
 12 morning in camera, I did contact the committee staff
 13 for --
 14 JUDGE CHAPPELL: And who's the lady with you?
 15 MR. BURCK: This is Lauren Dickie, who is my
 16 colleague from Quinn Emanuel. We both represent
 17 Mr. Wallace.
 18 JUDGE CHAPPELL: Okay. Thank you.
 19 MR. BURCK: The committee staff for
 20 Chairman Issa has informed me that they have no
 21 objection to disclosure of the fact of the investigation
 22 of Tiversa.
 23 JUDGE CHAPPELL: All right. I'm going to remind
 24 you, we are in public session right now.
 25 MR. BURCK: Yes, Your Honor. And again, they

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1 have no objection to that, the disclosure of the fact of
 2 that investigation.
 3 JUDGE CHAPPELL: Well, then do you have an
 4 objection to the Exhibit JX 3 being part of the public
 5 record?
 6 MR. BURCK: Your Honor, I do not have an
 7 objection to that.
 8 MR. SHAW: I apologize, Your Honor.
 9 Your Honor, my name is Jarrod Shaw. I'm with
 10 the law firm of ReedSmith, and I represent
 11 Robert Boback, the CEO of Tiversa.
 12 JUDGE CHAPPELL: All right.
 13 MR. SHAW: I would at least at this point offer
 14 an objection to disclosing this publicly given that
 15 Tiversa first learned about this investigation about an
 16 hour ago and hasn't had an opportunity to communicate
 17 with the committee staff or gain an understanding of
 18 what the investigation relates to.
 19 So given its lack of knowledge and in fact that
 20 this is a committee investigation of this company, it
 21 would assert that the communication should remain
 22 confidential.
 23 JUDGE CHAPPELL: All right. I won't speak
 24 anymore about the investigation at this time. The
 25 document will remain in camera provisionally at this

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1 time, JX 3.
 2 What I want to know now is about the status of
 3 the testimony of these witnesses, so we don't need to
 4 get into anything else about what the committee is
 5 doing.
 6 MR. BURCK: Certainly, Your Honor.
 7 Mr. Wallace is prepared to take the stand;
 8 however, as I mentioned earlier, he would not be
 9 answering any substantive questions today. He would
 10 stand on his rights.
 11 JUDGE CHAPPELL: He plans to invoke the Fifth?
 12 MR. BURCK: Yes, Your Honor.
 13 JUDGE CHAPPELL: All right. And what about
 14 Mr. Boback?
 15 MR. SHAW: Your Honor, Mr. Boback just learned
 16 about this letter, as I said, at approximately
 17 10:00 this morning.
 18 JUDGE CHAPPELL: And just so we're clear, I
 19 don't need a lot of details.
 20 I'm just wondering, are you advising your client
 21 to invoke the Fifth if he takes the stand today?
 22 MR. SHAW: If you are unwilling to stay this
 23 proceeding to allow me to prepare my client to find out
 24 more about the investigation, Mr. Boback is not going to
 25 appear for his testimony today.

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1 JUDGE CHAPPELL: Well, either he's going to
 2 invoke the Fifth or he's going to testify. Which is
 3 it?
 4 MR. SHAW: Your Honor, the third option
 5 unfortunately is, if you won't permit due process rights
 6 and allow me to --
 7 JUDGE CHAPPELL: Whoa, whoa, whoa. Don't be
 8 saying I'm not permitting due process rights, Counselor.
 9 You might want to step back and think about making
 10 accusations to this court.
 11 MR. SHAW: All I would ask, Your Honor, is --
 12 JUDGE CHAPPELL: Did you hear what I just said?
 13 MR. SHAW: I understand. I apologize.
 14 JUDGE CHAPPELL: I want you to withdraw those
 15 remarks.
 16 MR. SHAW: I withdraw those remarks.
 17 JUDGE CHAPPELL: Thank you. Go ahead.
 18 MR. SHAW: I would just request that my client
 19 be entitled to some amount of time, a couple of days,
 20 to understand what the investigation is about so that I
 21 can adequately understand the scope of the investigation
 22 so that I can properly counsel him on whether or not to
 23 respond to these questions that may be asked at this
 24 proceeding.
 25 JUDGE CHAPPELL: All right. Mr. Sherman, are

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1 you the one calling these witnesses?
 2 MR. SHERMAN: I am, Your Honor.
 3 JUDGE CHAPPELL: What have you got to say?
 4 MR. SHERMAN: Your Honor, as I stated this
 5 morning, my reasons for requesting the stay were
 6 twofold basically. And one was that we believe that
 7 Mr. Wallace will be granted the immunity that he seeks
 8 and therefore be permitted to come into this court and
 9 give full disclosure concerning his knowledge with
 10 regard to central issues in this case.
 11 I secondly, out of my sense of fairness and
 12 what I believe best serves justice, indicated that I
 13 was willing to disclose to counsel for Mr. Boback that
 14 there was an ongoing investigation, however recent, to
 15 give them an opportunity in fact to prepare and give him
 16 an opportunity in fact to advise his counsel given that
 17 backdrop.
 18 Thirdly, Your Honor, I believe that if a stay
 19 is granted, it will also give the commission an
 20 opportunity to reevaluate its case in light of evidence
 21 which may come out in the next few days so that they can
 22 make a determination as to whether or not they wish to
 23 continue to proceed with this complaint.
 24 That's still our position, Your Honor. And I
 25 again think that it's in the best interest of justice

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1 that this matter be stayed so that those determinations
 2 can be made in light of the facts that are likely to
 3 come out within the next two weeks concerning central
 4 issues in this matter.
 5 JUDGE CHAPPELL: Well, here's my concern. If
 6 you've ever dealt with committees down the street,
 7 something set for June 5 clearly doesn't mean it's going
 8 to happen on June 5. Things get rescheduled at the last
 9 minute. It may be months from now before they ever have
 10 a hearing down the street, so it's not a good idea to
 11 peg anything based on a date that anybody knows about
 12 right now.
 13 What I can do is grant a recess or a stay for a
 14 set period of time. But you need to know, Mr. Sherman,
 15 that if someone does invoke the Fifth, there's a
 16 rule 3.39 here that counsel requesting the testimony has
 17 to file a motion, and we have a process and a procedure
 18 for that.
 19 MR. SHERMAN: I understand. I was advised of
 20 that rule by my counsel last night and would intend to
 21 invoke its privileges should the situation present
 22 itself.
 23 JUDGE CHAPPELL: All right. So if I'm clear,
 24 the attorneys for Boback and Wallace are not clear yet
 25 what direction they're going with their clients, in

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1 other words, whether they're going to be able to testify
 2 here or not; is that correct?
 3 MR. SHAW: That is a fair statement.
 4 MR. BURCK: Your Honor, Mr. Wallace will not
 5 testify today. He will take the Fifth if he is required
 6 to appear.
 7 JUDGE CHAPPELL: Okay. Is it your plan to allow
 8 him to testify if he's granted immunity?
 9 MR. BURCK: Your Honor, my plan would be to
 10 allow him to testify if the immunity he's granted would
 11 cover the testimony he would provide here as well.
 12 JUDGE CHAPPELL: Correct.
 13 Are you negotiating that at this time?
 14 MR. BURCK: Your Honor, we are in discussions
 15 with the committee. Yes.
 16 JUDGE CHAPPELL: Do those discussions include a
 17 mention of these proceedings so we don't have to go
 18 through our own immunity process here?
 19 MR. BURCK: Your Honor, at this stage, I would
 20 say that the discussions are very broad, so I think
 21 that it would be fair to say that these proceedings
 22 would also be covered by certainly the subject matter of
 23 the discussions we're having with the committee.
 24 JUDGE CHAPPELL: All right.
 25 All right. Well, at some point, if respondent

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1 wants to call these witnesses, they will do so. And if
2 the witness invokes the Fifth Amendment, then we will
3 then have to deal with that on a motion from the
4 respondent's counsel if they want to pursue the
5 testimony. That means we would have to invoke our
6 process whereby immunity is granted by the
7 attorney general after I make a determination based on
8 your motion.

9 We're not there yet. I was under the impression
10 we were there right now, but it sounds like we're not a
11 hundred percent there regarding the Fifth, especially
12 for one witness.

13 Does the government have anything to say?

14 MS. VANDRUFF: Well, Your Honor, with respect
15 to Mr. Sherman's statement about the three bases on
16 which he seeks Your Honor's continuance, I can
17 represent this, which is that these are newly
18 developing facts that we learned of only very recently
19 and, in light of them, that we in consultation with
20 respondent's counsel this morning did agree that we
21 would consent to a two-week stay, not an indefinite
22 stay, Your Honor, but we think that the interest of
23 justice would be served by allowing for a two-week
24 stay.

25 However, with respect to Mr. Sherman's

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1 representations about the conduct of the -- or --
2 excuse me -- the response of the commission in that
3 interim period, of course I cannot speak to that in the
4 abstract. I have no more facts than Your Honor does.

5 (Pause in the proceedings.)

6 JUDGE CHAPPELL: I'm inclined to grant the stay
7 request, but not two full weeks. I'm thinking Thursday,
8 the 12th rather than Friday, the 13th.

9 MR. SHERMAN: Your Honor, I would ask
10 procedurally that the court inform the witnesses who
11 are subject to the subpoenas that required them to
12 appear today that any such stay to that date, it would
13 be the court's expectation that they would honor the
14 subpoenas and appear on the date set by the court.

15 JUDGE CHAPPELL: Is there a problem with that?

16 MR. SHAW: Your Honor, yes for Mr. Boback.
17 Unfortunately, Mr. Boback has a scheduled trip to Africa
18 from June 8 to June 24.

19 JUDGE CHAPPELL: What do you propose now,
20 Mr. Sherman? That's almost a month.

21 MR. SHERMAN: I propose we take Mr. Boback's
22 testimony today.

23 JUDGE CHAPPELL: Mr. Boback has been deposed?

24 MR. SHAW: Yes, Your Honor.

25 JUDGE CHAPPELL: What about a deposition of

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1 Mr. Boback before he leaves on his African trip?

2 MR. SHAW: Mr. Boback, with the simple caveat of
3 understanding this committee hearing on how they'll
4 respond, would most certainly make himself available as
5 a convenience to get that taken care of.

6 JUDGE CHAPPELL: And I think you told me,
7 Counselor, that you intend to inquire into areas beyond
8 the previous deposition?

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

10 JUDGE CHAPPELL: Any objection to a follow-up
11 deposition of Mr. Boback before he leaves the country?

12 MS. VANDRUFF: No objection from complaint
13 counsel, Your Honor.

14 MR. SHERMAN: I'm willing to take that
15 testimony, Your Honor.

16 JUDGE CHAPPELL: And keep in mind, there's a
17 very good chance that that deposition will be accepted
18 in lieu of live testimony, when you prepare for that
19 deposition.

20 Understood?

21 MR. SHERMAN: I understand, Your Honor.

22 MS. VANDRUFF: Understood, Your Honor.
23 Thank you.

24 MR. SHAW: Thank you, Your Honor.

25 JUDGE CHAPPELL: So we will reconvene on

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1 June 12. However, if the parties are aware of a change
2 in status in that we can move ahead sooner, I'd like to
3 know immediately.

4 I think you should go ahead and schedule the
5 deposition. I guess give him a while to work out what's
6 going to happen down the street so he can get some
7 information.

8 And it sounds to me like that the attorney for
9 Mr. Wallace doesn't think it's going to take two weeks
10 to get an answer on what he's working on. Is that
11 correct?

12 MR. BURCK: Your Honor, it's hard to say at the
13 moment, but I do believe there will be developments in
14 the next two weeks that would be useful for the court to
15 know.

16 JUDGE CHAPPELL: Okay. So what I'm going to do
17 then is, it's not a stay, it's going to be a recess,
18 and we're going to reconvene no later than 0930 on
19 June 12. But I expect to be advised by the parties on
20 any new developments and including could we go forward
21 before June 12.

22 MR. SHERMAN: Your Honor, may I request that the
23 court require the parties to disclose the deposition
24 date of Mr. Wallace -- I'm sorry -- of Mr. Boback by
25 Tuesday of next week.

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1 JUDGE CHAPPELL: Is that acceptable to you?
 2 MR. SHAW: Yes.
 3 MR. SHERMAN: Secondly, Your Honor, I would
 4 request that Mr. Boback be required to travel to
 5 Washington, D.C. for that deposition.
 6 MR. SHAW: I would request that the deposition
 7 take place in Pittsburgh where he resides.
 8 JUDGE CHAPPELL: I'll tell you what's going to
 9 happen. The parties are going to work that out. I'm
 10 not going to micromanage this deposition. I'm giving
 11 you the deposition. He's agreed to it. You people work
 12 out where it's going to happen.
 13 MR. SHAW: I agree.
 14 JUDGE CHAPPELL: Anything further?
 15 MR. SHERMAN: Nothing further, Your Honor.
 16 MS. VANDRUFF: Nothing further from complaint
 17 counsel, Your Honor.
 18 JUDGE CHAPPELL: So we will pause until
 19 June 12 with the caveat that we may come back sooner if
 20 developments require that or allow that.
 21 Is that okay with everyone?
 22 MR. BURCK: Yes, Your Honor.
 23 MR. SHAW: Yes, Your Honor.
 24 JUDGE CHAPPELL: Anyone feel like their
 25 due process rights have been trampled upon?

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1 CERTIFICATION OF REPORTER
 2
 3 DOCKET/FILE NUMBER: 9357
 4 CASE TITLE: LabMD, Inc.
 5 HEARING DATE: May 30, 2014
 6
 7 I HEREBY CERTIFY that the transcript contained
 8 herein is a full and accurate transcript of the notes
 9 taken by me at the hearing on the above cause before the
 10 FEDERAL TRADE COMMISSION to the best of my knowledge and
 11 belief.
 12
 13 DATED: JUNE 3, 2014
 14
 15
 16 JOSETT F. WHALEN, RMR
 17
 18
 19 CERTIFICATION OF PROOFREADER
 20
 21 I HEREBY CERTIFY that I proofread the transcript
 22 for accuracy in spelling, hyphenation, punctuation and
 23 format.
 24
 25 ELIZABETH M. FARRELL

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1 MR. SHAW: No.
 2 MR. BURCK: Not at all, Your Honor.
 3 MS. VANDRUFF: No, Your Honor.
 4 MR. SHERMAN: Absolutely not, Your Honor.
 5 JUDGE CHAPPELL: All right. With that, hearing
 6 nothing further, we are in recess.
 7 (Whereupon, the foregoing hearing was adjourned
 8 at 11:33 a.m.)
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