

No. 14-12144-EE

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

LabMD, Inc.,
Plaintiff/Appellant,

v.

FEDERAL TRADE COMMISSION,
Defendant/Appellee.

Appeal from the United States District Court
for the Northern District of Georgia, Atlanta Division,
District Court Docket No. 1:14-cv-810-WSD
The Honorable William S. Duffey, Jr.

APPELLANT'S REQUEST FOR JUDICIAL NOTICE

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Counsel for Plaintiff/Appellant

Dated: June 24, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LabMD, INC.,)	
)	
Appellant,)	
)	
v.)	Case No. 14-12144-EE
)	
FEDERAL TRADE COMMISSION,)	
)	
Appellee.)	

**APPELLANT’S CERTIFICATE OF INTERESTED
PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, I, the undersigned counsel of record for Appellant, LabMD, Inc. (“LabMD”), certify that LabMD is not publicly held, has no parent corporation, subsidiary, conglomerate or affiliate, and no publicly-held corporation owns 10% or more of its stock. I further certify that to the best of my knowledge the following is a complete list of the trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal:

Cause of Action Institute

Chappell, Hon. D. Michael

Cox, Megan

Brown, Jarad

Daly, John

Daugherty, Michael J.

Dinsmore & Shohl, LLP

Duffey, Jr., Hon. William S.

Epstein, Daniel

Fascett, Lauren E.

Federal Trade Commission, General Counsel's Office

Gorji, Perham

Harris, Lorinda

Holder, United States Attorney General Eric

Kilpatrick Townsend & Stockton LLP

Krebs, John

Lassack, Margaret

Mehm, Ryan

Meyer, William D.

Morgan, Hallee

Pepson, Michael D.

Raider, Ronald L.

Ramirez, Commissioner Edith

Rubenstein, Reed D.

Sheer, Alain

Sherman, William

Sieradzki, David

Singleton, Burleigh L.

VanDruff, Laura Riposo

Respectfully submitted, this 24th day of June, 2014.

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/s/ Michael D. Pepson
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Counsel for Appellant LabMD, Inc.

/s/ Reed D. Rubinstein
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Counsel for Appellant LabMD, Inc.

APPELLANT’S REQUEST FOR JUDICIAL NOTICE

Pursuant to Federal Rules of Evidence 201(b) and (d), Plaintiff-Appellant LabMD, Inc. (“LabMD”) respectfully requests that this Court take judicial notice of certain developments that occurred after the district court dismissed LabMD’s lawsuit against Defendant-Appellee the Federal Trade Commission (the “FTC”). In support of this Request, LabMD shows the Court as follows:

1. This lawsuit concerns an enforcement proceeding initiated against LabMD by the FTC for alleged data security breaches concerning protected health information (“PHI”).

2. In August of 2013, the FTC commenced an administrative enforcement proceeding against LabMD, alleging that LabMD’s data security practices with respect to PHI constitute an unfair practice under Section 5 of the FTC Act, 15 U.S.C. § 45.

3. The FTC has based its enforcement proceeding on two separate incidents of alleged data security breaches.

4. One incident involves an electronic file called the 1718 file, which contained private health information of the patients of LabMD’s physician clients. On June 11, 2014, the Honorable Darrell Issa, Chairman of the House of Representatives’ Committee on Oversight and Government Reform (“OGR”)

wrote a letter to FTC Chairwoman Edith Rodriguez (the “Issa Letter”) informing her that the “information provided to the FTC” about the dissemination of the 1718 file was “incomplete and inaccurate,” and that the FTC source – a company called Tiversa, Inc. – may not have provided truthful testimony and information during the FTC enforcement proceedings. A true and correct copy of the Issa Letter is attached hereto as **Exhibit A**.

5. In addition, on May 12, 2014, Deputy Director Daniel Kaufman, testified in the enforcement proceeding as the FTC’s Bureau of Consumer Protection corporate representative. In his testimony, Mr. Kaufman admitted that the FTC lacks any Section 5 “unfairness” data-security standards and that the FTC has not promulgated Section 5 data-security regulations. (May 12, 2014 Kaufman Dep. at 215:11-15.) Instead, “[t]he standard is Section 5 and reasonableness,” and the BCP’s academic expert, a Dr. Hill, “will be or has provided testimony and report explaining why LabMD’s practices were not reasonable.” (*Id.* at 203:16-19.) A true and correct copy of the transcript of Mr. Kaufman’s deposition is attached hereto as **Exhibit B**.

6. On June 12, 2014, Mr. Richard Wallace, a key witness in the enforcement proceeding, invoked his Fifth Amendment Privilege against compelled self-incrimination. A true and correct redacted copy of the transcript of

the June 12, 2014 proceedings in *In re LabMD, Inc.*, FTC Docket No. 9357 is attached hereto as **Exhibit C**.

7. On June 17, 2014, Chairman Issa wrote another letter on behalf of OGR, requesting that the FTC's Acting Inspector General Kelly Tshibaka "undertake a full review of the FTC's relationship with Tiversa." A true and correct copy of this June 17, 2014 letter is attached hereto as **Exhibit D**.

8. On May 19, 2014, the Commission denied LabMD's motion for summary decision filed in the enforcement proceeding. A true and correct copy of the May 19, 2014 order is attached hereto as **Exhibit E**.

9. Federal Rule of Evidence 201(b) provides in part that "[a] court may judicially notice a fact that is not subject to reasonable dispute because it: . . . (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Rule 201(d) provides that "[a] court may take judicial notice at any stage of the proceeding."

10. The Advisory Committee Notes to Rule 201(d) confirm this rule applies even "on appeal." Fed. R. Evid. 201(d), advisory committee notes. *See also, e.g., Christopher v. Cutter Labs.*, 53 F.3d 1184, 1197 n.4 (11th Cir. 1995) ("[T]his court must take judicial notice of certain facts not explicitly discussed by the trial court."); *Government of Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979) (appellate court may take judicial notice even if trial court did not).

11. This Court has recognized that, pursuant to Federal Rule of Evidence 201, it has the discretion to take judicial notice on appeal. *See, e.g., Christopher*, 53 F.3d at 1197 n.4 (citing Rule 201 of the Federal Rules of Evidence and taking judicial notice of facts not explicitly discussed by the trial court).

12. In this case, these occurrences -- the sending of the Issa Letter and Mr. Kaufman's testimony -- both took place after the district court dismissed LabMD's lawsuit. Accordingly, neither the Issa Letter nor the transcript of Mr. Kaufman's testimony on behalf of the FTC was presented to the district court. Nevertheless, because the FTC cannot reasonably dispute the accuracy or authenticity of Exhibits A and B hereto, LabMD respectfully requests that the Court take judicial notice of those exhibits.

WHEREFORE, LabMD respectfully requests that this Court take judicial notice of Exhibits A through E attached hereto.

This 24th day of June, 2014.

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Senior Vice President for Litigation and
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Counsel for Appellant LabMD, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 2014, the foregoing APPELLANT'S REQUEST FOR JUDICIAL NOTICE was filed in the Eleventh Circuit Court of Appeals using the CM/ECF system. I further certify that electronic copies of the foregoing APPELLANT'S REQUEST FOR JUDICIAL NOTICE were served via the CM/ECF system, and paper copies were served via U.S. Mail to:

Lauren E. Fascett, Esq.
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Washington, D.C. 20530

This 24th day of June, 2014.

/s/ Ronald L. Raider
Counsel for Appellant LabMD, Inc.

EXHIBIT

A

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

FACSIMILE (202) 225-3974

MINORITY (202) 225-5051

<http://oversight.house.gov>

June 11, 2014

The Honorable Edith Ramirez
Chairwoman
U.S. Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Madam Chairwoman:

The Committee on Oversight and Government Reform is investigating the activities of Tiversa, Inc., a company upon which the Federal Trade Commission (“FTC”) relied as a source of information in its enforcement action against LabMD, Inc.¹ Information the Committee recently obtained indicates that the testimony provided by company officials to federal government entities may not have been truthful.

The Committee’s ongoing investigation has shown that competing claims exist about the culpability of those responsible for the dissemination of false information. It is clear at this point, however, that the information provided to the FTC is incomplete and inaccurate. A witness in the proceedings against LabMD, Inc. recently testified to the Committee that he provided incomplete or inaccurate information to the FTC regarding the origin of a “1718” document. In a transcribed interview with Committee staff, Tiversa’s Chief Executive Officer, Robert Boback, testified that he received “incomplete information with regard to my testimony of FTC and LabMD.”² He further stated that the “the original source of the disclosure was incomplete.”³ Mr. Boback testified:

Q How did you determine that it was incomplete or that there was a problem with the spread analysis?

A I had . . . [Tiversa Employee A], perform[] an analysis, again, remember, data store versus the peer to peer. So the information in the data store, [Tiversa Employee B] performed another analysis to say, what was the original source of the file from LabMD and what

¹ See *In re LabMD, Inc.*, No. 9357 (Fed. Trade Comm’n Aug. 29, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130829labmdpart3.pdf>.

² Transcribed Interview of Robert Boback, Transcript at 129-130 (June 5, 2014) [hereinafter Boback Tr.].

³ *Id.*

was the disclosure, a full analysis of it which then provided to me, which expanded upon what [Tiversa Employee B] had told me when I asked [Tiversa Employee B] prior to my testimony. And the only reason why I asked [Tiversa Employee B] in the first place was because [Tiversa Employee B] was the analyst on it at the time when it was found, so I asked the analyst who was most familiar with this. I didn't know [Tiversa Employee B] was going to provide me with less than accurate information.

* * *

Q So at the time that you were first made aware of the 1718 document in April, May of 2008, Tiversa employees had not conducted the spread analysis?

A No.

Q And you did not know the original source of the 1718 document?

A I did not. No.

* * *

Q Did there come a point at which a Tiversa employee determined who the original source of the 1718 document was?

A Well, that's – yes. A Tiversa employee told me who the original source was . . . just before I testified . . . in the deposition [in the FTC LabMD case] in November of last year. And, subsequently, we have done a new search and found that the origin was different than what was provided to me . . . in November.

The Committee brings this matter to your attention because this information bears directly on the ongoing proceeding against LabMD, Inc. The Committee is currently considering next steps with regard to its own investigation, including the possibility of holding hearings, agreeing to hear certain testimony in executive session, and, based on information provided, to immunize certain future testimony pursuant to 18 U.S.C. § 6005. The Committee may request documents and access to relevant FTC witnesses. It is my expectation that you and your staff will cooperate fully with any subsequent requests for documents or transcribed witness interviews.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X.

The Honorable Edith Ramirez
June 11, 2014
Page 3

If you have any questions, please contact the Committee staff at (202) 225-5074.
Thank you for your prompt attention to this matter.

Sincerely,



Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member
William A. Sherman II, Counsel, LabMD, Inc.
Laura Riposo VanDruff, Complain Counsel, U.S. Federal Trade Commission
William A. Burck, Quinn Emanuel Urquhart & Sullivan LLP

EXHIBIT

B

Transcript of the Testimony of **Daniel Kaufman**

Date: May 12, 2014

Case: In The Matter of: LabMD, INC., a corporation



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BEFORE THE UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

- - - - - x

In the Matter of: : Docket Number
LABMD, INC., a corporation, : 937
Respondent. :

- - - - - x

DEPOSITION OF DANIEL KAUFMAN, VOLUME II

Washington, D.C.

Monday, May 12, 2014

REPORTED BY:

SARA A. WICK, RPR, CRR

1 Volume II deposition of DANIEL KAUFMAN, called
2 for further examination pursuant to notice of
3 deposition on Monday, May 12, 2014, in Washington,
4 D.C., at the offices of the Federal Trade
5 Commission, 600 Pennsylvania Avenue Northwest, Room
6 722G, at 9:39 a.m., before SARA A. WICK, RPR, CRR,
7 and a Notary Public within and for the District of
8 Columbia, when were present on behalf of the
9 respective parties:

10

11 LAURA RIPOSO VAN DRUFF, ESQ.
12 Federal Trade Commission
13 Division of Privacy and Identity Protection
14 600 Pennsylvania Avenue Northwest
15 Mail Stop NJ-8100
16 Washington, D.C. 20580
17 202-326-2999
18 lvandruff@ftc.gov
19 On behalf of the Federal Trade Commission

20

21

-- continued --

22

1 APPEARANCES (continued):

2

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6 Suite 610

7 Washington, D.C. 20004

8 202-372-9117

9 william.sherman@dinsmore.com

10 On behalf of Respondent

11

12 KENT HUNTINGTON, ESQ.

13 Cause of Action

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17 202-499-2426

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19 On behalf of Respondent

20

21

22

1 P R O C E E D I N G S

2 (Exhibit Kaufman 1 identified.)

3 Whereupon,

4 DANIEL KAUFMAN,

5 was recalled as a witness and, having first been
6 duly sworn, was examined and testified further as
7 follows:

8 EXAMINATION

9 BY MR. SHERMAN:

10 Q Good morning, Mr. Kaufman.

11 A Good morning.

12 Q It's your understanding and at least it's
13 my understanding that this is a continuation of the
14 deposition that we had begun earlier, and I had
15 asked you certain questions about data security and
16 data security standards. Your counsel objected. We
17 filed a motion.

18 And what I've handed you marked as RX-1
19 for purposes of this deposition is the order
20 granting Respondent's motion to compel testimony.
21 Have you seen that document before?

22 A No, I have not.

1 Q Okay. I will submit to you that this
2 order is the reason why we're here today. As I
3 previously explained in the prior deposition, your
4 counsel had objected to a certain line of
5 questioning regarding data security, and the Court
6 has since that time ruled that we do have the right
7 to question you with regard to data security.

8 Are you prepared today to testify with
9 regard to data security standards that the Bureau or
10 the FTC plans to use to support its allegations
11 against LabMD?

12 A Yes, I am.

13 (Exhibit Kaufman 2 identified.)

14 BY MR. SHERMAN:

15 Q Mr. Kaufman, I've just handed you what's
16 been marked for identification purposes for this
17 deposition a document that's labeled RX-2, and it's
18 entitled the "Complaint."

19 Have you seen the complaint that was filed
20 in this matter before?

21 A Yes.

22 Q I would ask that you turn to paragraph

1 10(a) of the complaint, which can be found on page
2 3. Paragraph 10 reads that "At all relevant times,
3 Respondent engaged in a number of practices that,
4 taken together, failed to provide reasonable and
5 appropriate security for personal information on its
6 computer networks. Among other things, Respondent,"
7 and it goes into subparagraphs.

8 Subparagraph (a) says that "Respondent did
9 not develop, implement, or maintain a comprehensive
10 information security program to protect consumers'
11 personal information."

12 Did I read that correctly?

13 A Yes.

14 Q Is it the Bureau's position that in order
15 to comply with or to avoid violation of Section 5 of
16 the Federal Trade Commission Act as it relates to
17 data security, an entity must have in place a
18 comprehensive information security program?

19 A Are we talking about a deception
20 allegation or an unfairness allegation?

21 Q It's my understanding, and you correct me
22 if I'm wrong, that the Bureau has accused LabMD of

1 an unfair practice and that the Bureau has not
2 alleged that LabMD has committed any deception.

3 Is that your understanding?

4 A That is my understanding.

5 Q Okay. Then my questions will be limited
6 to unfair practices as it relates to the allegations
7 against LabMD.

8 And so my question, then, in that regard
9 is, is it the Bureau's position that in order to
10 comply with Section 5 of the Federal Trade
11 Commission Act, that an entity must have in place a
12 comprehensive information security program?

13 A Assessing whether certain data security
14 practices are unfair under Section 5 of the FTC Act
15 requires a case-by-case factual analysis of the
16 situation. So whether a company has developed,
17 implemented, or maintained a comprehensive
18 information security program may be required under
19 Section 5.

20 Q Is it the Bureau's position that, based on
21 its analysis of the facts in this case, that it will
22 hold LabMD to the standard of requiring a

1 comprehensive information security plan?

2 MS. VAN DRUFF: I'm sorry. May I ask that
3 that question be repeated.

4 (Record read by the court reporter as
5 requested.)

6 MS. VAN DRUFF: And counsel, just for
7 purposes of clarification, are you asking for an
8 explanation of paragraph 10(a), or are you asking
9 Mr. Kaufman whether 10(a) says what it says?

10 MR. SHERMAN: I think we know what it
11 says. I'm not asking him to explain what it says.
12 I'm asking him a very direct question --

13 THE WITNESS: Uh-huh.

14 MR. SHERMAN: -- of whether or not, based
15 on the analysis, case-by-case analysis in this
16 particular case, whether the Bureau's position is
17 that it will hold LabMD to the standard of having to
18 have a comprehensive information security program in
19 order to comply with Section 5.

20 THE WITNESS: The Bureau will allege that
21 one of LabMD's failings, among others, was the
22 failure to have a comprehensive information security

1 program.

2 BY MR. SHERMAN:

3 Q Has the Bureau published or otherwise
4 informed the public that HIPAA-covered entities such
5 as LabMD must have a written comprehensive
6 information security program in place in order to
7 comply with FTC or Bureau data security standards?

8 A I am not sure whether the Commission has
9 issued material specifically relating to the
10 HIPAA-covered entities, but the Bureau has published
11 a great deal of consumer and business education on
12 the issue of what is reasonable data security.

13 The Commission has testified on it on a
14 number of occasions, and there's a lot of other
15 publicly available information on what constitutes
16 reasonable data security.

17 Q Is it the Bureau's position that
18 reasonable data security, as it has analyzed this
19 case, as it does on a case-by-case basis, includes
20 having in place a comprehensive information security
21 plan?

22 MS. VAN DRUFF: And counsel, are you

1 asking -- sorry, that sounded like two questions,
2 generally and as it relates to this case. Which is
3 the question?

4 MR. SHERMAN: As it relates to this case.

5 THE WITNESS: Okay. Can I hear that back.

6 (Record read by the court reporter as
7 requested.)

8 THE WITNESS: In this case the Bureau has
9 alleged that LabMD should have had a comprehensive
10 information security program in place.

11 BY MR. SHERMAN:

12 Q Is the Bureau's definition of a
13 comprehensive information security program the same
14 as the definition for a comprehensive information
15 security program as set out in Dr. Raquel Hill's
16 expert witness report?

17 A I am not aware of a specific definition we
18 have used for comprehensive information security
19 program, but I can certainly look at her definition
20 and see if it seems consistent with my general
21 understanding.

22 Q That's the only reason I brought it.

1 A Okay.

2 (Exhibit Kaufman 3 identified.)

3 BY MR. SHERMAN:

4 Q Mr. Kaufman, you've been handed what's
5 been marked as RX-3 for identification purposes for
6 this deposition. I submit to you that it is a copy
7 of the expert witness report of Dr. Raquel Hill,
8 without the exhibits that were attached to the
9 original report.

10 Have you seen this report before?

11 A Yes.

12 Q I'm going to ask you to turn to page 19 of
13 the report and to look at paragraph 52. Paragraph
14 52 reads "A comprehensive information security
15 program is a plan that sets out an organization's
16 security goals, the written policies that would
17 satisfy those goals, the mechanisms that would be
18 used to enforce the written policies, and how those
19 mechanisms would be used to enforce the written
20 policies."

21 Did I read that correctly?

22 A Yes.

1 Q Is that the Bureau's definition of
2 a comprehensive information security program?

3 A I am not aware of the Commission having a
4 definition for a comprehensive information security
5 program. I know we have stated in business
6 education materials generally what a comprehensive
7 information security program would require.

8 But what is written here in Professor
9 Hill's report appears consistent with what we have
10 said in the past. I think it's as a matter of
11 semantics or different words that are probably being
12 used here. But at its core, it seems quite
13 consistent.

14 Q Paragraph 52 goes on to say that "The best
15 practices for developing a comprehensive information
16 security program would include the seven principles
17 that I," Dr. Hill referring to herself, "discuss in
18 paragraph 31, above: Don't keep what you don't
19 need, patch, ports, policies, protect, probe, and
20 physical."

21 Did I read that correctly?

22 A Yes.

1 Q Does the Bureau adhere to the notion that
2 the best practices for developing a comprehensive
3 information security program includes the seven
4 principles set out in Dr. Hill's report?

5 A I think the best practices for developing
6 a comprehensive information security program is
7 going to be fairly case specific, but the principles
8 that she lays out here are, again, consistent with
9 my understanding of what those best practices would
10 be.

11 Q Has the Bureau published any information
12 which would indicate to HIPAA-covered entities like
13 LabMD that they are expected to apply the seven
14 principles of best practices as it relates to a
15 comprehensive information security program as
16 explained in Dr. Hill's report?

17 A The Bureau has published a great deal of
18 materials that provide guidance regarding
19 comprehensive information security programs from the
20 50 or so settlement orders that have been issued by
21 the FTC that provide such information to business
22 educational, to speeches, to Congressional

1 testimony, and there's additional information
2 available from other organizations as well.

3 Q In any of that literature or the documents
4 that you referenced, is the phrase "comprehensive
5 information security program" used?

6 A I'm not sure.

7 Q In any of the information that you just
8 referenced, do they contain the seven principles as
9 stated in Dr. Hill's report with regard to best
10 practices to establish a comprehensive security --
11 I'm sorry, a comprehensive information security
12 program and list those seven principles as don't
13 keep what you don't need, patch, ports, policies,
14 protect, probe, and physical?

15 A The concepts that are set forth by the
16 seven principles are very consistent with other
17 information that I have seen in some of our
18 materials, including our business educational
19 materials.

20 Q And when you are referencing the business
21 education materials, when did the FTC start
22 publishing business education materials as it

1 relates specifically to data security?

2 A My understanding is that the earliest
3 business educational materials are from 2003.

4 Q And has the FTC or the Bureau continued to
5 publish business education materials related to data
6 security from that time through the present?

7 A Yes, we've done both written materials and
8 videos.

9 Q You mentioned 50 decisions, and I may be
10 using the wrong word because I forgot what --

11 A I said settlements.

12 Q 50 settlements. In any of those
13 settlements, to your knowledge, is the phrase
14 "comprehensive information security program" used?

15 A I would have to take a look. It would not
16 surprise me if they were; it wouldn't surprise me if
17 there was a similar term that was used. The concept
18 is embedded within those orders. But again, I don't
19 have the stack of 50 in front of me, but they're
20 available on our Web site at ftc.gov.

21 Q So is it your -- is it the Bureau's
22 position that in order to discern or discover what

1 data security requirements the Bureau or the FTC
2 expects business entities to comply with with regard
3 to data security can be found on the FTC Web site?

4 A Can I hear that again?

5 MS. VAN DRUFF: Objection; misstates prior
6 testimony.

7 If you could repeat the question, please.

8 (Record read by the court reporter as
9 requested.)

10 THE WITNESS: The Commission has
11 consistently applied the unfairness test in
12 assessing the adequacy of data security. A great
13 deal of information about that is on the Web site.
14 A great deal of information is also available from
15 other sources.

16 BY MR. SHERMAN:

17 Q Has the Bureau or the FTC informed
18 business entities that it should consult the FTC's
19 Web site in order to discern what the Bureau or the
20 FTC's data security requirements are?

21 A Can I hear that back also.

22 (Record read by the court reporter as

1 requested.)

2 A Yes, we have. The whole purpose of doing
3 all the business education that we do is to get the
4 information out there, and we get it out through
5 whether it's speeches or media interviews or the
6 like. There's been a great deal of focus on the
7 availability of this kind of information on the
8 FTC's Web site and on other sources.

9 Q Has the FTC or the Bureau specifically
10 informed HIPAA-covered entities that they, too,
11 should refer to the FTC Web site, FTC settlements,
12 and the other information that the FTC has published
13 in order to discern what is required of them by the
14 FTC or the Bureau in order to comply with data
15 security requirements and the fairness doctrine as
16 set out in Section 5?

17 MS. VAN DRUFF: Objection; vague as to
18 "fairness doctrine" and as to "HIPAA-covered
19 entities."

20 You may answer.

21 THE WITNESS: Sure. I do not have a legal
22 opinion as to what kind of entities are subject to

1 HIPAA.

2 But that said, we very broadly reached out
3 to a wide range of businesses in terms of the
4 availability of this information on our Web site and
5 the need for reasonable data security.

6 BY MR. SHERMAN:

7 Q Is it the Bureau's position that LabMD is
8 a HIPAA-covered entity?

9 A That is a legal question, and I do not
10 have an answer for it.

11 Q So it's your testimony -- or is it your
12 testimony, because I don't want to assume, is it
13 your testimony that the Bureau or the Commission has
14 not specifically reached out to HIPAA-covered
15 entities to make them aware of what data security
16 standards would be applied to them, meaning
17 HIPAA-covered entities as it relates to what the
18 Bureau or the FTC would expect in order to comply
19 with data security standards as set out by Section 5
20 of the Act?

21 A If you're asking whether I'm aware of
22 specific material that focuses on HIPAA-covered

1 entities, I am not aware of such material.

2 But that said, all of our business
3 educational materials and other materials are highly
4 relevant to HIPAA-covered entities and other
5 entities as well.

6 Q My question is a bit more specific. Has
7 the Bureau or the Commission reached out to
8 HIPAA-covered entities in particular and made them
9 aware that there are -- that the FTC or the Bureau
10 has data security requirements outside of HIPAA
11 which they expect these entities to comply with?

12 MS. VAN DRUFF: Objection as to "outside
13 of HIPAA."

14 You may answer if you can.

15 THE WITNESS: Can you explain what you
16 mean by "reached out to"? I think that's where I'm
17 a little confused.

18 BY MR. SHERMAN:

19 Q What I'm trying to figure out is whether
20 or not the Commission or the Bureau has specifically
21 published information that would target
22 HIPAA-covered entities to make them aware that the

1 Commission and the Bureau expect certain data
2 security compliance measures to be in place.

3 A As I previously said, I am not aware of
4 any material that is specifically directed to HIPAA
5 entities. But the materials that I am aware of have
6 broad application above and beyond just general
7 non-HIPAA entities.

8 Additionally, I would find it safe to
9 assume that a number of FTC Staff and Commissioners
10 have made presentations and speeches at audiences
11 that would include HIPAA-covered entities.

12 Q You're making an assumption about that, of
13 course?

14 A Yes, yes, I am. I think it's safe to make
15 that assumption in light of the extensive outreach
16 the Commission does.

17 Q Has the FTC or the Bureau informed the
18 public, including HIPAA-covered entities such as
19 LabMD, that one of the principles of best practices
20 for a comprehensive information security plan is
21 don't keep what you don't need?

22 A Yes, that principle is clearly laid out in

1 our business educational materials.

2 Q And has the FTC and/or the Bureau made it
3 known that entities must adhere to this principle in
4 order to comply with FTC or Bureau data security
5 standards?

6 MS. VAN DRUFF: Objection; misstates prior
7 testimony.

8 You may answer.

9 THE WITNESS: That concept is one of the
10 factors that are considered. I don't think I said
11 that it must occur.

12 BY MR. SHERMAN:

13 Q I didn't say that you did.

14 A I think it's the best practice. Actually,
15 if we can read the question back.

16 Q Sure.

17 (Record read by the court reporter as
18 requested.)

19 A If I can clarify my answer, we've made it
20 clear that this is one of the practices that
21 companies should consider as they're developing data
22 security practices.

1 Q Is this one of the principles that the
2 Bureau would look at in evaluating on a case-by-case
3 basis whether or not an entity has complied with the
4 Bureau or the Commission's data security standards?

5 MS. VAN DRUFF: Mr. Sherman, I will permit
6 Mr. Kaufman to answer that question generally, but
7 as we get into specific applications, that gets into
8 the mental processes of counsel.

9 You're asking the question generally, I
10 understand; is that correct?

11 MR. SHERMAN: Yes.

12 THE WITNESS: It's one of the areas we
13 would look at in assessing whether data security
14 practices were unfair under Section 5.

15 BY MR. SHERMAN:

16 Q Is it one of the principles that the
17 Bureau would look at and consider each time that it
18 is investigating as whether or not an entity's
19 security practices were adequate?

20 A It is something that we would frequently
21 look at. Whether we've looked at it every single
22 time, I can't say, but certainly, it's commonly

1 looked at.

2 Q And so consistent with your previous
3 answers, these evaluations and considerations of
4 adherence to these principles is analyzed on a
5 case-by-case basis; is that fair to say?

6 A We review each case on a case-by-case
7 basis and do a fact-specific analysis.

8 Q And in reviewing the case on a
9 case-by-case basis, is it fair to say that the FTC
10 looks at all seven principles as laid out in
11 Dr. Hill's report?

12 MS. VAN DRUFF: Counsel, are you asking
13 Mr. Kaufman whether, in conducting the
14 reasonableness inquiry that he's described, whether
15 in every case the Bureau considers the principles
16 set forth in paragraph 52 of Dr. Hill's report?

17 MR. SHERMAN: I'm asking whether or not
18 the Bureau considers the seven principles when they
19 are evaluating a case on a case-by-case basis.

20 THE WITNESS: I don't know that the seven
21 principles are each considered on every case, but
22 generally speaking, these principles are looked at

1 on most cases.

2 BY MR. SHERMAN:

3 Q Has the --

4 A For example, there might not be a reason
5 to focus on physical in a certain case. So we might
6 not actually look at that if we're just focused on
7 electronic security.

8 Q Has the Commission or the Bureau published
9 any literature or made the public generally aware by
10 any means or any of the means that you've previously
11 mentioned that these seven principles for a
12 comprehensive information data security program will
13 be looked at in evaluating whether or not an entity
14 is in compliance with the Commission's or the
15 Bureau's data security standards?

16 A Can I hear that one more time?

17 (Record read by the court reporter as
18 requested.)

19 A That's a long question, but it is very
20 consistent with what I've seen in business education
21 materials, in speeches, in Congressional testimony,
22 and in other similar materials.

1 Q Has it been set out as principles, as the
2 seven principles of best practices for a
3 comprehensive information data security program?

4 A As I said previously, I don't believe we
5 have laid it out specifically as these seven
6 principles, but these seven principles are very
7 consistent with the principles that we have laid out
8 within our materials. These are Dr. Hill's seven
9 principles, and they are utterly consistent --
10 consistent with what the FTC or the Bureau has
11 stated.

12 Q If we will go back to the complaint, I
13 think you're still there. No, you're not. You're
14 at Dr. Hill's report. Yes, the complaint, which is
15 RX-2. Again, we're at page 3. Subparagraph (b)
16 reads "did not use readily available measures to
17 identify commonly known or reasonably foreseeable
18 security risks and vulnerabilities on its networks.
19 By not using measures such as penetration tests, for
20 example, Respondent could not adequately assess the
21 extent of the risks and vulnerabilities of its
22 networks."

1 Did I read that correctly?

2 A Yes.

3 Q Has the Commission or the Bureau published
4 information which indicates that an entity must use
5 penetration tests to identify commonly known or
6 reasonably foreseeable security risks or
7 vulnerabilities on its network?

8 A The Commission has, through all the
9 materials I've mentioned, said that companies need
10 to use readily available measures to identify
11 reasonably known security risks, and one of the
12 methods of doing that would be penetration tests.

13 Q Is the use of penetration tests a
14 requirement in order to -- in order for an entity to
15 comply with the Commission's or the Bureau's data
16 security standards?

17 A Whether or not a penetration test is
18 needed is something we would talk to a consulting
19 expert about in terms of assessing the
20 reasonableness of the data security. There might be
21 other means of identifying reasonably foreseeable
22 security risks, but penetration tests would be one

1 means of doing that.

2 Q So is it fair to say that your testimony
3 is that whether or not an entity should use
4 penetration tests is determined on a case-by-case
5 basis?

6 A Yes.

7 Q Has the Commission or the Bureau published
8 information which informed entities that the use of
9 penetration tests in order to determine and identify
10 commonly known or reasonably foreseeable security
11 risks and vulnerabilities on its networks would be
12 determined on a case-by-case basis by the Bureau or
13 the Commission?

14 A Our business education materials have made
15 it clear that one means of assessing reasonably
16 foreseeable security risks is penetration tests and
17 lays out other means as well.

18 Q In those business materials or other
19 published materials, has the Commission or the
20 Bureau informed business entities that the use of
21 penetration tests in order to secure data would be
22 determined on a case-by-case basis?

1 A We've made it clear that penetration tests
2 are one means of assessing reasonably foreseeable
3 security risks and that it's one of the tests or
4 procedures that companies should engage in in
5 developing their security plan.

6 Q Has the Commission or the Bureau informed
7 the public, business entities that deal with data
8 security that the data security requirements that
9 the Commission and the Bureau will look at in order
10 to determine whether or not that business entity is
11 in compliance with Section 5 will be done on a
12 case-by-case basis?

13 A Yes, I've seen a number of Commission
14 materials that have made it clear that we do a
15 case-by-case assessment to determine whether data
16 security practices are reasonable, from speeches, to
17 Congressional testimony, to business educational
18 materials.

19 Q Do you have a date range for when the
20 Commission or the Bureau began advising business
21 entities that these determinations would be made on
22 a case-by-case basis?

1 A I know our business educational materials
2 started as early as 2003, and I'm sure people were
3 providing speeches to business at or about that time
4 as well. But I would have to look at specific
5 documents to see, you know, what's contained in the
6 speeches or testimony or business ed or consumer ed.

7 Q So it's your belief as we sit here
8 currently that from 2003 on it's been the stated
9 policy of the Commission or the Bureau to inform
10 business entities that a determination of the data
11 security requirements as they relate to compliance
12 with Section 5 will be determined on a case-by-case
13 basis?

14 MS. VAN DRUFF: Objection; vague as
15 to "stated policy."

16 You may answer.

17 THE WITNESS: I'm not sure if I can answer
18 that. I mean, we brought our first unfairness test
19 involving data security in 2005. So prior to that,
20 the focus might have been more on the deception
21 analysis in terms of representations that companies
22 made regarding their data security.

1 And I know we've been talking primarily
2 about unfairness. So prior to 2005, I'm not quite
3 sure what the materials would have said, but
4 certainly, I've seen many materials that have made
5 it clear to business that we assess these things on
6 a case-by-case basis and that there's
7 no-one-size-fits-all data security plan.

8 BY MR. SHERMAN:

9 Q Has the Bureau or the Commission published
10 information that would inform business entities that
11 a comprehensive information security program and the
12 seven principles of best practice that apply to it
13 would be determined on a case-by-case basis?

14 MS. VAN DRUFF: Objection; vague.

15 You may answer.

16 THE WITNESS: Yes, my understanding is
17 those concepts have been laid out clearly in
18 speeches, business educational materials,
19 Congressional testimony, and through -- that's it.

20 BY MR. SHERMAN:

21 Q Let's go back to RX-2, subparagraph C,
22 which reads "did not use adequate measures to

1 prevent employees from accessing personal
2 information not needed to perform their jobs."

3 Did I read that correctly?

4 A Yes.

5 Q Has the Commission or the Bureau published
6 information to the general public and business
7 entities that in order to comply with the data
8 security standards as the Commission or the Bureau
9 sees it under Section 5, that they should use
10 adequate measures to prevent employees from
11 accessing personal information not needed to perform
12 their jobs?

13 MS. VAN DRUFF: Objection; lack of
14 foundation.

15 You may answer.

16 THE WITNESS: Yes, that is a principle
17 that I have seen in business educational materials,
18 speeches, Congressional testimony.

19 It's also certainly consistent with
20 information that's been in the 50 or so different
21 FTC -- some of the 50 or so different FTC
22 settlements involving data security matters.

1 BY MR. SHERMAN:

2 Q Has the Commission or the Bureau published
3 information that informs business entities that they
4 should review Commission settlements in order to
5 determine what the data security standards the
6 Commission or the Bureau would expect entities to
7 adhere to?

8 MS. VAN DRUFF: Objection; misstates prior
9 testimony.

10 You may answer.

11 THE WITNESS: Yes, certainly, I've seen a
12 number of speeches to industry where we discuss
13 specific cases and data security issues that were at
14 stake, and we emphasized that the complaints and
15 orders that the Commission has issued are highly
16 informative on a wide variety of areas.

17 BY MR. SHERMAN:

18 Q And do you have a time frame in which the
19 Commission or the Bureau began advising the public
20 that -- and let's talk about unfairness, since
21 that's what this case is about -- that the
22 settlements are a proper source for them to look at

1 to determine what data security standards are
2 expected of them by the Commission and/or the
3 Bureau?

4 A You know, I would have to look at specific
5 documents. But I can certainly state that I started
6 working for Chairman Majoris as one of her advisors
7 in May 2005, and I worked on a number of speeches
8 that she delivered to industry in a wide variety of
9 fora, and she would routinely discuss data security
10 matters and specific data security cases that the
11 Commission has brought.

12 Q Would she discuss the fact that looking at
13 settlements between the Commission and/or the Bureau
14 is a good source for businesses to reference when
15 they are trying to determine what data security
16 standards or expectations the Commission or the
17 Bureau would have of them?

18 A I haven't looked at her speeches in many
19 years, but it would surprise me if that concept did
20 not appear in some or many of her speeches about
21 data security.

22 I will emphasize that she always wanted us

1 to write speeches that really opined on what the
2 issues were and what industry can learn from the
3 cases. So it's utterly consistent with the speeches
4 that she would give as chairman.

5 Q Other than mentioning this process of
6 looking at settlements to determine what the
7 Commission's data security standards were, were
8 there any other -- was there any other information
9 sent out to the public informing them that looking
10 at Commission settlements was a good source for
11 determining what the Commission or the Bureau data
12 security standards were?

13 A Certainly, those are business educational
14 materials, which again I would have to look at them,
15 but I'm pretty sure that concept appears in them.

16 Additionally, there are blogs that the
17 Commission does for the business community. That
18 just started in the last few years. There's
19 Congressional testimony that we've given on the
20 point since about 2003.

21 So I think there's a wide variety of
22 materials that make that point in different

1 fashions.

2 Q Are the speeches that you referred to
3 posted on the FTC Web site?

4 A Generally, yes. I should say that
5 generally, yes, if it's a formal speech. Sometimes
6 people will do panels or the commissioners would do
7 panels where it's more Q and A, and those generally
8 are not posted, but they're often done on data
9 security issues as well. I know the speeches I
10 wrote for Former Chairman Majoris are still on the
11 Web site and have been since 2005.

12 Q What about testimony before Congress?

13 A It's all on our Web site.

14 Q How long is that information maintained on
15 the Web site?

16 A I think you can go on the Web site -- I
17 think you can go on our Web site right now and pull
18 back our testimony from as early as 2003, but I
19 would have to go online. We recently revamped the
20 Web site a few months ago, and I'm not sure every
21 link is live at the moment, but most of them are.

22 And I should say that I'm quite familiar

1 with this because I've written a lot of testimony
2 and speeches, and I routinely will pull up
3 Congressional testimony from our Web site. It's a
4 source not just for business, but for me as well.

5 Q Let's go to subparagraph (d).

6 A Could we take a break before we do that?

7 Q Absolutely.

8 A Thanks.

9 (Recess.)

10 BY MR. SHERMAN:

11 Q Before we took a break, I was about to ask
12 you about subsection (d) in paragraph 10 in terms of
13 it reads "did not adequately train employees to
14 safeguard personal information."

15 And my question, as it has been, is has
16 the Commission or the Bureau published information
17 to the general public or to entities like LabMD that
18 one of the requirements in order to comply with
19 Section 5 would be that it would need to train its
20 employees or adequately train its employees to
21 safeguard personal information?

22 A Consistent with what I've said previously,

1 the Bureau and the Commission has published a wide
2 range of materials that have explained that training
3 employees to safeguard personal information is one
4 of the things that should be done in developing
5 and -- developing a data security program.

6 Q And is training of employees something
7 that the Commission or Bureau looks at each time as
8 it's evaluating a case on a case-by-case basis?

9 A I can't say that it's something that we
10 look at each time, but I know on many occasions we
11 will look at it. And when we're -- as a part of an
12 investigation, we will get copies of a company's
13 data security programs if there are written
14 programs. And certainly, training is something we
15 would look for in those documents, as well as the
16 implementation of the program.

17 Q Let's look at subsection (e), which
18 says "did not require employees, or other users with
19 remote access to the networks, to use common
20 authentication-related security measures, such as
21 periodically changing passwords, prohibiting the use
22 of the same password across applications and

1 programs, or using two-factor authentication."

2 Did I read that correctly?

3 A Yes.

4 Q Are there materials out there that have
5 been published by the Commission or the Bureau
6 indicating that entities will be required to employ
7 authentication-related security measures,
8 periodically changing their passwords, prohibiting
9 the use of same passwords across applications, and
10 using two-factor authentication in order to comply
11 with Section 5?

12 A I know the materials I've looked at have
13 discussed the importance of good password practices.
14 Whether each of them has gone into the specificity
15 of each of the items you mentioned, I'm not sure,
16 but the general concept of changing passwords and
17 making sure they're complex and two-factor
18 authentication for remote access is certainly
19 embedded in many of those materials.

20 Q Is there published information by the
21 Commission or the Bureau which lets business
22 entities know that this type of -- these types of

1 security-related measures as listed in subparagraph
2 (e) are the type that the Commission and the Bureau
3 will look at on a case-by-case basis in order to
4 determine compliance with Section 5?

5 A Yes, through speeches, business education,
6 Congressional testimony, articles, blog entries,
7 these concepts have been laid out pretty clearly in
8 Commission materials, as well as other FTC
9 settlements in the data security area.

10 Q Subparagraph (f) reads "did not maintain
11 and update operating systems of computers and other
12 devices on its networks. For example, on some
13 computers Respondent used operating systems that
14 were unsupported by the vendor, making it unlikely
15 that the systems would be updated to address newly
16 discovered vulnerabilities."

17 Do you see that?

18 A Yeah.

19 Q Again, is there published materials out
20 there by the Commission or the Bureau which
21 indicates that these particular factors would be
22 looked at in assessing whether or not a business

1 entity is in compliance with Section 5?

2 A Certainly, I've seen this concept in our
3 business education materials, emphasizing the
4 importance of maintaining and updating operating
5 systems. That concept certainly appears in there
6 and probably in other materials as well, but
7 business ed is what jumps at me first.

8 Q In terms of subparagraph (g), "did not
9 employ readily available measures to prevent or
10 detect unauthorized access to personal information
11 on its computer networks. For example, Respondent
12 did not use appropriate measures to prevent
13 employees from installing on computers applications
14 or materials that were not needed to perform their
15 jobs or adequately maintain or review records of
16 activity on its networks."

17 Did I read that correctly?

18 A Yes.

19 Q Is there published information out there
20 from the Commission or the Bureau that capsulizes
21 these concepts as well?

22 A Sure. I'm pretty sure those concepts

1 appear in our business educational materials as
2 well.

3 Q So is it the Bureau's position that LabMD
4 could have learned of each of these requirements in
5 the subparagraphs of paragraph 10 of the complaint
6 by researching the published business literature
7 from the Commission, looking at the Commission's
8 testimony before Congress, researching speeches made
9 by commissioners, tracking the blogs of the
10 commissioner, and generally following the
11 information that was published by the Commission?

12 MS. VAN DRUFF: Objection; misstates prior
13 testimony.

14 You may answer.

15 THE WITNESS: I would say that the
16 Commission has consistently applied the three-part
17 test in assessing whether practices were unfair.
18 We've published a great deal of information
19 providing guidance and information about certain
20 data security practices, and that information has
21 been publicly available. But at its core, it is all
22 about reasonableness under Section 5.

1 BY MR. SHERMAN:

2 Q And the three-part test that you're
3 referring to is what?

4 A It is the unfairness test, which in order
5 to assess whether a practice is unfair, we have to
6 show that it causes or likely to cause
7 substantial -- causes or likely to cause substantial
8 injury that is, two, not reasonably avoidable by
9 consumers themselves and, three, that is not
10 outweighed by countervailing benefits to consumers
11 or competition.

12 Q That's better than you did the first time.

13 A Yes, much better than I did last time.
14 Thank you for pointing that out. You caught me off
15 guard last time, and my brain was not working. It
16 was painful reading that back in the transcript. I
17 wanted to correct it, but it was what I said.

18 Q I gave you the opportunity, and you did
19 well. In your testimony, we've talked about a lot
20 of different sources from which the information
21 could have been gleaned by LabMD as to what data
22 security practices or standards would have been

1 acceptable to the Commission.

2 What we have in front of us is the
3 complaint, which we've gone through each of the
4 subsections of the main allegations, I will call it,
5 but we also have Dr. Hill's expert witness report.

6 And my question is whether it's the
7 Bureau's position that LabMD should have taken each
8 action as outlined in Dr. Hill's report.

9 A I can't state that every single action
10 that's stated in her report was required. Clearly,
11 Dr. Hill has done a thorough analysis of the
12 programs or lack thereof that were in place by LabMD
13 and has had significant problems with what they did,
14 but I can't say that one in isolation would sort of,
15 per se, have been a problem. I just can't point to
16 one in particular, if that answers your question.

17 Q Is Dr. Hill's report a fair example of
18 what the Commission and the Bureau mean by each case
19 will be evaluated on a case-by-case basis?

20 MS. VAN DRUFF: Objection; vague as
21 to "fair example."

22 You may answer.

1 THE WITNESS: I would say in most of our,
2 if not all of our data security cases, we work with
3 outside experts to assess the reasonableness of the
4 practices. Obviously, the Dr. Hill report has been
5 put into writing. So it's probably different than
6 what we do in a lot of cases where it is not
7 necessarily put into writing. So it is different in
8 that sense.

9 But we will talk to experts about
10 certainly many, if not all of the issues that are
11 raised by Dr. Hill's report in other cases.

12 BY MR. SHERMAN:

13 Q Is Dr. Hill's report and the concepts and
14 principles set out therein the standard, the data
15 security standard that the Commission and/or the
16 Bureau will hold LabMD to meet?

17 A At its core, unfairness requires
18 reasonableness, and what Dr. Hill has done here is a
19 much more granular analysis of LabMD's practices
20 that apply to LabMD and the case-specific analysis
21 for LabMD. So I can't generalize what she has said
22 here to other entities.

1 Q And that's fair, and what I'm -- the
2 question was, is this the standard that will be
3 applied to LabMD. You've already testified that
4 each case will be assessed on a case-by-case basis,
5 and obviously, this is, as you stated, a granular
6 analysis of LabMD's data security practices.

7 The question is, is this the standard to
8 which the Commission believes LabMD should have had
9 its data security practices, and anything less the
10 Commission would have deemed unreasonable?

11 MS. VAN DRUFF: Counsel, by "this," are
12 you referring to Dr. Hill's report or the Section 5
13 reasonable analysis that Mr. Kaufman testified
14 about?

15 MR. SHERMAN: Dr. Hill's report.

16 THE WITNESS: The standard is Section 5
17 and reasonableness. Dr. Hill is the expert who will
18 be or has provided testimony and report explaining
19 why LabMD's practices were not reasonable.

20 BY MR. SHERMAN:

21 Q I guess what I'm trying to find out is
22 whether or not the Bureau is adopting Dr. Hill's

1 report as what would have been reasonable for LabMD
2 to do, and anything less than what she has set out
3 would have been considered unreasonable by the
4 Bureau?

5 MS. VAN DRUFF: Objection; asked and
6 answered.

7 You may answer.

8 THE WITNESS: I don't think we're opining
9 on a hypothetical situation where if LabMD did A,
10 but not B and C, would it have been reasonable.
11 That's not what she's opining on. She looked at
12 their data security practices as a whole and has
13 reached the conclusion that they were not
14 reasonable.

15 BY MR. SHERMAN:

16 Q So she's reached the conclusion that they
17 were not reasonable based on the information that
18 she reviewed?

19 A She sets forth a lot of information that
20 she reviewed, correct.

21 Q So if some other entity looks at
22 Dr. Hill's report as it relates to the LabMD case,

1 is it the Commission's position that the report and
2 the facts in this case will be instructive to a
3 similarly situated entity as to what is expected by
4 the Commission or the Bureau with regard to data
5 security?

6 MS. VAN DRUFF: Objection, Counsel. With
7 respect -- may I actually have the question read
8 back.

9 (Record read by the court reporter as
10 requested.)

11 MS. VAN DRUFF: Counsel, I think it's
12 clear that the Court's ruling in this case allows
13 you to inquire of Mr. Kaufman about the legal
14 standards applied in this case, but it also makes
15 clear that the mental processes of staff, including
16 Bureau staff and Commission staff with respect to
17 other investigations, is not a proper line of
18 inquiry.

19 So possibly I misunderstand your question,
20 but if you can restate it, and then perhaps I can
21 let Mr. Kaufman answer it.

22 BY MR. SHERMAN:

1 Q Well, Mr. Kaufman, you've testified that
2 the source for information for a company like LabMD
3 that has been published are settlements, speeches,
4 blogs, the business educational materials that are
5 on the Web site.

6 My question is, if that information is
7 instructive as to what the Commission would expect
8 of an entity, would you also consider Dr. Hill's
9 report to be instructive in terms of an entity
10 looking at that and trying to discern what the FTC
11 expects in terms of data security?

12 MS. VAN DRUFF: Without revealing the
13 legal reasoning or mental processes of staff or the
14 Commission, you may answer the question.

15 THE WITNESS: I would say that there
16 are -- it would be instructive to other entities to
17 look at her report and get a sense of the kind of
18 issues that the Commission looks at. I will leave
19 it at that. And I should say that the Bureau looks
20 at, because I'm testifying for the Bureau.

21 BY MR. SHERMAN:

22 Q Are there other reports like Dr. Hill's

1 that have been published on the Commission Web site?

2 MS. VAN DRUFF: Objection; vague as
3 to "like Dr. Hill's."

4 MR. SHERMAN: Expert witness reports
5 outlining deficiencies found in an entity's data
6 security.

7 THE WITNESS: I'm not aware of an expert
8 report at the level of detail like Professor Hill's.

9 That said, our complaints do provide a
10 good deal of information regarding the adequate data
11 security practices that were the subject of an FTC
12 lawsuit.

13 BY MR. SHERMAN:

14 Q So it's the Commission's or the Bureau's
15 position that an entity reading the LabMD complaint
16 could find instructive information in terms of data
17 security expectations of the Commission?

18 A I think it is one of the things they could
19 certainly look at, as well as other materials and
20 other source documents that exist outside of the
21 FTC's Web site.

22 Q What kind of other source documents are

1 you referring to?

2 A It could be materials from SANS, from
3 NIST, hardware/software manufacturers. There's a
4 lot of information out there on data security.

5 Q I may have asked you this before, but I
6 need to ask it again. Has the Commission or the
7 Bureau published information informing the general
8 business public that they should look at SANS and
9 NIST and hardware/software product literature, as
10 well as the FTC's business education materials,
11 attend FTC seminars and speeches, and follow the FTC
12 blog and follow the FTC testimony before Congress in
13 order to determine what the FTC or the Bureau
14 considers to be reasonable data security practices?

15 A We certainly haven't said that an entity
16 needs to do all of those things to be aware of it,
17 but certainly, we have issued a lot of different
18 materials that have set forth how we look at data
19 security cases.

20 Q So there's been no -- and you correct me
21 if I'm wrong. There's been no specific announcement
22 or pronouncement or even a warning letter saying

1 hey, business community, if you're not looking at
2 what the FTC is saying about data security, you are
3 likely to not be complying, so you need to look at
4 our business education materials, our testimony
5 before Congress, our settlements that are on our Web
6 site, the speeches that commissioners give, you need
7 to look at our blogs, you need to look at SANS,
8 NIST, check your hardware/software product
9 literature in order to get an idea of what the FTC
10 and the Bureau's data security requirements are.

11 MS. VAN DRUFF: Objection; argumentative.
12 You may answer.

13 THE WITNESS: We have issued in connection
14 with probably all of our data security cases press
15 releases describing the cases, describing the data
16 security inadequacies. We've provided links to our
17 business educational materials, links to blogs.
18 Some of the speeches have been probably subject to
19 press releases but more likely posted on Web sites.
20 As well as the Congressional testimony, we've issued
21 press releases for all of those. And I view those
22 as announcements. So I kind of disagree with the

1 proposition you're starting with there.

2 BY MR. SHERMAN:

3 Q So it's the Commission and the Bureau's
4 position that it has put business entities on notice
5 that they should be looking at all of these types of
6 materials that you've testified here today in order
7 to discern, have some idea of what the Commission's
8 or the Bureau's data security standards are?

9 MS. VAN DRUFF: Misstates prior testimony.
10 You may answer.

11 THE WITNESS: We have provided a lot of
12 outreach that has set forth the availability of this
13 kind of information about reasonable data security
14 on our Web site, and that information has been out
15 there.

16 BY MR. SHERMAN:

17 Q When you say "outreach," what are you
18 referring to?

19 A I'm referring to everything from press
20 releases, media interviews, speeches, Congressional
21 testimony, things of that nature.

22 MR. SHERMAN: Can we take ten minutes?

1 THE WITNESS: Sure.

2 (Recess.)

3 BY MR. SHERMAN:

4 Q Mr. Kaufman, is there a data security
5 standard that the Commission or the Bureau applies
6 to business entities that deal with data that
7 contains sensitive information?

8 A Yes, the Bureau and the Commission have
9 consistently applied the reasonableness standard in
10 the FTC Act.

11 Q So does the term "data security" appear in
12 Section 5 of the Act?

13 A No, it does not.

14 Q So in order for a business entity to
15 determine what data security requirements the FTC
16 would look at, would the Commission advise that
17 entity to look at the FTC Web site, to follow the
18 FTC blog, to research FTC testimony before Congress,
19 to look at the FTC's business education materials
20 that have been published, to consult SANS, to
21 consult NIST, and to look at their hardware/software
22 product literature?

1 MS. VAN DRUFF: Objection; calls for a
2 legal conclusion, vague.

3 You may answer.

4 THE WITNESS: These are among the items
5 that exist where businesses can get a better sense
6 of how the Commission applies its reasonableness
7 standard, but I'm sure there are other sources as
8 well that exist.

9 BY MR. SHERMAN:

10 Q So is it fair to say that there is maybe
11 contained in a speech somewhere this idea has been
12 communicated to business entities that all of the
13 sources I named in the prior question should be
14 consulted when that business entity is trying to
15 determine what data security it should put in place
16 in order to comply with the reasonableness standard
17 of the Act?

18 Can you read that back, please.

19 A Yes. Thank you.

20 (Record read by the court reporter as
21 requested.)

22 MS. VAN DRUFF: Objection; calls for a

1 legal conclusion, vague.

2 You may answer.

3 THE WITNESS: The Bureau has consistently
4 made it clear that those are materials that exist
5 that businesses can look at to get a better sense of
6 how the Commission evaluates what is reasonable data
7 security.

8 BY MR. SHERMAN:

9 Q It's correct, isn't it, that the FTC or
10 the Bureau determines whether a business entity's
11 data security practices were reasonable by
12 investigating what those practices were prior to
13 filing its formal complaint?

14 MS. VAN DRUFF: I caution Mr. Kaufman that
15 he may respond to the question as a general matter,
16 but the reasoning or mental processes of the Bureau
17 regarding its reasonableness determinations in any
18 given case is privileged.

19 THE WITNESS: Can I hear the question
20 again, please.

21 (Record read by the court reporter as
22 requested.)

1 THE WITNESS: Yes, the Bureau will
2 investigate the reasonableness of an entity's data
3 security practices before filing a complaint --
4 before seeking Commission authority to file a
5 complaint, I should say.

6 BY MR. SHERMAN:

7 Q And the Bureau, similar to the business
8 entities, do not have one set of documents that it
9 looks to when determining the reasonableness of a
10 business's security practices? In fact, the Bureau
11 must do what you've suggested the business entities
12 do, which is to consult with all of the various
13 sources that are out there in order to make that
14 determination?

15 MS. VAN DRUFF: Objection; misstates prior
16 testimony. You may answer.

17 THE WITNESS: The sources that are out
18 there that we've been talking about are pretty
19 consistent in how they describe the Commission's
20 approach to assessing reasonableness and data
21 security.

22 There was something else I wanted to say,

1 but it just escaped my mind, if I could hear the
2 question again.

3 (Record read by the court reporter as
4 requested.)

5 THE WITNESS: Yeah, I would just add that,
6 obviously, the issue of data security is an issue
7 that is fact specific, and that changes fairly
8 frequently. So it's not something that there is
9 just a list that exists.

10 BY MR. SHERMAN:

11 Q It's correct that the FTC has not
12 promulgated regulations with regard to data security
13 for personal identifying information?

14 A In connection with Section 5 of the FTC
15 Act, that is correct. We have, nevertheless,
16 consistently applied Section 5 and the unfairness
17 test to assess the reasonableness of the security
18 practices.

19 Q But that's not promulgation of regulation;
20 is that correct?

21 A Yes. Sorry.

22 Q And it's also correct that the Commission

1 nor the Bureau has specifically taken into
2 consideration any different data security standards
3 for HIPAA-covered entities?

4 A Can I hear that back.

5 (Record read by the court reporter as
6 requested.)

7 MS. VAN DRUFF: Objection; vague as
8 to "different."

9 MR. SHERMAN: Let me reword that.

10 THE WITNESS: Okay. Thanks.

11 BY MR. SHERMAN:

12 Q That in terms of applying the fairness
13 standard and looking at the published information
14 out there to determine whether an entity's data
15 security practices comply with Section 5, the
16 Commission nor the Bureau give any special
17 consideration as to whether or not that entity is a
18 HIPAA-covered entity?

19 MS. VAN DRUFF: Objection; vague as
20 to "fairness standard" and "special consideration."

21 You may answer.

22 THE WITNESS: As I said earlier, I'm not

1 aware of any materials that specifically focus on
2 HIPAA entities.

3 But that said, our materials deal with the
4 reasonableness of data security with respect to
5 sensitive personal information, of which the kind of
6 information that HIPAA entities have certainly comes
7 within the ambit of sensitive personal information.

8 BY MR. SHERMAN:

9 Q And so the same analysis would apply to,
10 for example, a Neiman-Marcus, which is high-end
11 retail and doesn't deal with personal health
12 information, as it would to a LabMD, which is a
13 medical lab that solely deals with personal health
14 information?

15 MS. VAN DRUFF: Objection, Counsel. Can I
16 ask you to rephrase the question so it doesn't
17 relate to a specific entity to the extent that
18 they're -- it may raise concerns for Mr. Kaufman in
19 responding?

20 MR. SHERMAN: That's true. I didn't
21 think --

22 THE WITNESS: How about ACME Tool and Die?

1 Let's go to Roadrunner.

2 BY MR. SHERMAN:

3 Q Can we change Neiman-Marcus to ACME Tool
4 and Die, have some fun with this?

5 A If both companies were being looked at
6 from --

7 MS. VAN DRUFF: I'm sorry to interrupt,
8 Mr. Kaufman.

9 Just so the record is clear, can I ask you
10 to restate the question so that there's a clean Q
11 and A?

12 MR. SHERMAN: Yes.

13 BY MR. SHERMAN:

14 Q So is it fair to say that the data
15 security standards that you would apply to a
16 company, for example ACME Tool and Die which
17 specifically deals with retail and the personal
18 identifying information that they receive regarding
19 a purchase at retail, it would be the same analysis
20 that you would do for a company like LabMD, who is a
21 medical laboratory and all of the personal
22 identifying information that it receives is

1 protected health information? The analysis would be
2 the same?

3 MS. VAN DRUFF: Objection; lacks
4 foundation.

5 You may answer.

6 THE WITNESS: The reasonableness analysis
7 that is a part of Section 5 would require a
8 case-by-case analysis of the specific facts of both
9 entities, but they would both be subject to the same
10 reasonableness analysis. But again, it is case
11 specific based on different factors.

12 BY MR. SHERMAN:

13 Q And therefore, the fact that an entity
14 like LabMD has HIPAA regulations to comply with is
15 not a factor that is taken into consideration when
16 the Bureau is analyzing its fairness standard?

17 MS. VAN DRUFF: Objection; misstates prior
18 testimony, lack foundation.

19 You may answer.

20 THE WITNESS: Can I hear that one more
21 time.

22 (Record read by the court reporter as

1 requested.)

2 THE WITNESS: I'm not quite sure how to
3 answer that. Certainly, our analysis ultimately is
4 the unfairness test and reasonableness, but I just
5 don't know how to answer it beyond that.

6 BY MR. SHERMAN:

7 Q Well, you are aware that it is the
8 Bureau's position in this case that HIPAA and HITECH
9 regulations are irrelevant; correct?

10 MS. VAN DRUFF: Objection, Counsel. Do
11 you want to point Mr. Kaufman to a specific
12 document?

13 MR. SHERMAN: No. I'm asking if he is
14 aware that that is the Bureau's position.

15 MS. VAN DRUFF: I'm sorry. I thought you
16 were asserting that it is the Bureau's position.

17 THE WITNESS: I am aware that we are
18 bringing this action under the FTC Act and not under
19 HIPAA or HITECH. So to the extent that the focus is
20 on the FTC Act, that is the focus of the case and
21 not other acts that we're not litigating under.

22 MR. SHERMAN: Okay. I think that's all I

1 have. Kent? That's it.

2 THE WITNESS: Okay.

3 MS. VAN DRUFF: Thank you.

4 (Whereupon, at 11:26 a.m., the deposition
5 was concluded.)

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1 I HEREBY CERTIFY that I have read this
 2 transcript of my deposition and that this transcript
 3 accurately states the testimony given by me, with
 4 the changes or corrections, if any, as noted.

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X _____

Witness

Subscribed and sworn to before me this day of
 , 20 .

X

Notary Public

My commission expires: .

1 C O N T E N T S

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3 WITNESS EXAMINATION

4 DANIEL KAUFMAN, VOLUME II

5 by MR. SHERMAN 162

6

7

8

9 E X H I B I T S

10

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EXHIBIT

C

In the Matter of:

LabMD, Inc.

June 12, 2014
Trial - Public & Nonpublic Record
Vol. 8

Condensed Transcript with Word Index



For The Record, Inc.
(301) 870-8025 - www.ftrinc.net - (800) 921-5555

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

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

JUDGE CHAPPELL: Let me call to order or recall Docket 9357. And actually we're reconvening after our recess.

All right. Hit me with it. What have you got?

MR. SHERMAN: Good morning, Your Honor.

JUDGE CHAPPELL: Good morning.

MR. SHERMAN: When we were last here, the court graciously granted a recess to let certain things transpire.

I think the main issue was whether or not a witness which respondent had called would receive immunity for his testimony between now and the time of break. He has not at this particular point, Your Honor.

To that issue specifically, it would be our position to ask the court for an additional week based on information that we've received from the oversight committee with regard to them further proceeding with their investigation.

JUDGE CHAPPELL: Is that the same information source that said it would only be two weeks?

MR. SHERMAN: That is the exact same source, Your Honor. And I do recall your statement on the

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JUDGE CHAPPELL: Well, if all he's going to give us is his name, that's a lot of inferencing.

MR. SHERMAN: I understand that, Your Honor.

Your Honor, while you consider that, it may be appropriate for me to move on to the other issue which I think the court should be advised of.

The court recalls that the issue of the testimony of Mr. Robert Boback was raised the last time we were before the court, and Mr. Boback was unavailable to come back and give live testimony. At least according to his attorney, his trip to Africa was to begin on June 8 and end on June 24.

Given those factors, there was an agreement amongst the parties, with the court's permission, to take the deposition of Mr. Boback for what I believed to be hearing testimony purposes.

We set that deposition for June 7, which was a Saturday, in Pittsburgh. We traveled to Pittsburgh, and we took testimony from Mr. Boback.

It was my position -- and I stated it on the record -- that this deposition was taken for trial testimony purposes only and that the rules that apply to trial testimony or hearing testimony in this case should apply to that particular deposition.

JUDGE CHAPPELL: If you have a motion, it

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record that oftentimes that source does not move as quickly as they promise, and you've been proven right.

JUDGE CHAPPELL: Unfortunately.

So we have no witness today.

MR. SHERMAN: We do have a witness today, Your Honor.

JUDGE CHAPPELL: Who is that?

MR. SHERMAN: Mr. Rick Wallace.

And we're prepared to proceed, should this court deem it appropriate for us to proceed, to put him on the stand. His attorney of course is here. It's my understanding that he will invoke his Fifth Amendment rights.

JUDGE CHAPPELL: For everything or certain areas?

MR. SHERMAN: For everything other than I believe his name, his previous place of employment.

JUDGE CHAPPELL: Do you intend to request that I go through the attorney general, that we invoke our process for immunity?

MR. SHERMAN: I do not, Judge. I believe that if put on the stand and asked the questions in the manner that I intend to ask, we would then request that the court make whatever inferences the court may make under these circumstances.

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should have been made in writing. You shouldn't have waited until today if you're intending to make a motion right now on the record, if that's where you're going. It should have been done in writing because we're up to June 12 now and you're referring to June 7.

MR. SHERMAN: I'm not making a motion, Your Honor. I'm just bringing the court's attention to several objections that were raised during that testimony.

We intend to present that particular deposition transcript as an exhibit, Exhibit CX 541, which would be the next exhibit we would present, in lieu of Mr. Boback coming in here and testifying live.

What I am making the court aware of is that complaint counsel and counsel for Mr. Boback decided that they were going to treat that deposition as a discovery deposition, which I thought was outside the scope of what the court had permitted us to do for those purposes on that day. And in doing so, Mr. Boback's attorney made objections on the record which he obviously would not have been able to do in this forum. Complaint counsel attempted to bring in precisely the evidence which you and complaint counsel discussed on the record, which you said was not going to happen, and so --

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

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

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

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

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

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

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

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

4 JUDGE CHAPPELL: Do you want to respond?

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

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

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

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

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

24 JUDGE CHAPPELL: Wait, wait, wait.

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

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

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

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

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

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

20 JUDGE CHAPPELL: Go ahead.

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

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1 rule 3.39.

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

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

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

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

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

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

24 MR. SHERMAN: Yes, sir.

25 JUDGE CHAPPELL: -- in case any credibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 JUDGE CHAPPELL: And how much time do you need
2 to respond? Keeping in mind you can be working on it
3 the whole time. We know what the issue is.
4 MS. VANDRUFF: Certainly, Your Honor. We will
5 be able to respond on Tuesday.
6 JUDGE CHAPPELL: Is Tuesday close of business
7 adequate?
8 MS. VANDRUFF: Close of business Tuesday we will
9 respond, yes, Your Honor.
10 JUDGE CHAPPELL: Then I will take this offer of
11 RX 542 under advisement.
12 MS. VANDRUFF: Thank you, Your Honor.
13 JUDGE CHAPPELL: Now what we have to deal with
14 is what to do about Mr. Wallace.
15 I'm not sure it's going to expedite anything to
16 have him take the stand and invoke the Fifth, but I
17 also don't like holding this proceeding open for one
18 witness.
19 It's your position, Mr. Sherman, his testimony
20 is crucial to your case?
21 MR. SHERMAN: We absolutely believe it is
22 crucial to our defense, Your Honor.
23 JUDGE CHAPPELL: What do you propose, we
24 reconvene once a week because of Mr. Wallace?
25 MR. SHERMAN: Given these circumstances,

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1 Your Honor -- and I'm going to speak generally -- at
2 the beginning of the case, in my opening statement I
3 indicated that what I believe that the government would
4 fail to prove is likely to cause substantial consumer
5 injury.
6 If Mr. Wallace's testimony as I believe it to be
7 comes into evidence and he is allowed to state it, given
8 immunity, I believe that it will eliminate a core
9 section of the government's evidence.
10 JUDGE CHAPPELL: Well, based on the evidence
11 I've heard, what can he address other than how the
12 government got the information from Tiversa?
13 And am I correct, that's the issue he's supposed
14 to testify regarding?
15 MR. SHERMAN: That's correct, how he got the
16 information.
17 And I think he can also address the veracity of
18 that information, whether or not in fact that
19 information is what it purports to be.
20 And without that information and without that
21 piece of evidence, I would submit that the government
22 has a very slim chance of proving that LabMD
23 participated in an unfair practice, that being its data
24 security, and that the state of LabMD's data security
25 was likely to cause substantial consumer injury.

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1 JUDGE CHAPPELL: Tiversa was responsible for the
2 1718 File; is that correct?
3 MR. SHERMAN: They were responsible for
4 providing it to the FTC. They in fact were the ones who
5 possessed it prior to giving it to the FTC.
6 JUDGE CHAPPELL: Ms. VanDruff?
7 MS. VANDRUFF: Yes, Your Honor.
8 JUDGE CHAPPELL: Your case is based on what
9 physical evidence other than the 1718 File?
10 MS. VANDRUFF: Physical evidence. I'm not sure
11 how to address that question, Your Honor.
12 JUDGE CHAPPELL: Documents?
13 MS. VANDRUFF: Pardon me?
14 JUDGE CHAPPELL: Documents.
15 MS. VANDRUFF: We have presented substantial
16 proofs on the state of LabMD's security.
17 JUDGE CHAPPELL: I'm not asking for a closing
18 argument.
19 MS. VANDRUFF: No.
20 JUDGE CHAPPELL: I'm asking what documents your
21 case is based on. We got the 1718 File. We all know
22 what that is, we do, among us.
23 What other documents regarding information of
24 the customers that was released?
25 MS. VANDRUFF: So if you're asking specifically

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1 about the unauthorized disclosure of information --
2 JUDGE CHAPPELL: That's right.
3 MS. VANDRUFF: -- is that Your Honor's question?
4 Because there certainly are many other documents that
5 are probative of the elements in our case.
6 But with respect to specific unauthorized
7 disclosures, there are two known specific unauthorized
8 disclosures.
9 The first is of the 1718 File, which Mr. Boback
10 testified at his deposition was found at four IP
11 locations and more recently provided --
12 JUDGE CHAPPELL: I don't need to know any of the
13 details.
14 MS. VANDRUFF: I understand. I know.
15 JUDGE CHAPPELL: Just give me the name of the
16 document.
17 MS. VANDRUFF: And that is the 1718 File.
18 And then the other unauthorized disclosure
19 about the -- that is known is the unauthorized
20 disclosure of the information that was found by the
21 Sacramento Police Department.
22 JUDGE CHAPPELL: And the Sacramento police
23 information we'll call that, was that information that
24 was included in the 1718 File?
25 MS. VANDRUFF: It was not coextensive,

<p style="text-align: right;">1289</p> <p>1 Your Honor, no. 2 JUDGE CHAPPELL: All right. 3 You may have told me this already, but do you 4 think you'll know something in a week? 5 MS. DICKIE: Your Honor, I believe that we will 6 be able to make additional representations about the 7 progress, and we hope that we will have a more final 8 determination by next week. 9 However, based on how things have gone and how 10 Congress moves and the fact that immunity requires a 11 two-thirds vote of the full committee, I think it would 12 be prudent to give a little more time than a week, so 13 that we are not back in this same position next week, or 14 a process by which the parties could inform the court 15 where we are next week. 16 JUDGE CHAPPELL: We're going to take a short 17 recess, and I'm going to ponder these issues. But I 18 want you to consider this, a status update every 19 Wednesday, so we don't have to have this whole dog and 20 pony show going here with all these people expecting to 21 hear a trial and there isn't one, so think about that. 22 We're going to take a break. We're going to 23 reconvene at 10:30. 24 We're in recess. 25 (Recess)</p>	<p style="text-align: right;">1291</p> <p>1 Redacted</p>
<p style="text-align: right;">1290</p> <p>1 JUDGE CHAPPELL: Let's go back on the record. 2 Call your next witness, Mr. Sherman. 3 MR. SHERMAN: Mr. Rick Wallace, please. 4 MS. VANDRUFF: Your Honor, if I may inquire, I 5 understand that Your Honor has asked that Mr. Wallace 6 be prepared to take the stand. Are you -- are you 7 planning to let Mr. Sherman conduct his full 8 examination? 9 JUDGE CHAPPELL: It's his witness. 10 MS. VANDRUFF: Okay. And Your Honor, then in 11 that respect, Mr. Sherman and I conferred prior to 12 gaveling in. May we approach, Your Honor? 13 There is an issue on which I think that the 14 court would benefit from having some additional 15 information. 16 JUDGE CHAPPELL: All right. 17 MS. VANDRUFF: Thank you, Your Honor. 18 (At the bench, the following discussion was held 19 off the public record.) 20 Redacted</p>	<p style="text-align: right;">1292</p> <p>1 Redacted</p>

1293 1 Redacted	1295 1 Redacted
1294 1 Redacted	1296 1 Redacted

<p>1297</p> <p>1 Redacted</p>	<p>1299</p> <p>1 Redacted</p>
<p>1298</p> <p>1 Redacted</p> <p>23 (In open session.)</p> <p>24 JUDGE CHAPPELL: The parties' attorneys and I</p> <p>25 just had a discussion regarding the testimony of this</p>	<p>1300</p> <p>1 MS. DICKIE: May I make two representations on</p> <p>2 behalf of my client?</p> <p>3 JUDGE CHAPPELL: Go ahead.</p> <p>4 MS. DICKIE: First, that he does not hear that</p> <p>5 well out of his right ear, so to the extent that the</p> <p>6 parties could keep their voices up and just be aware of</p> <p>7 that. And Mr. Wallace, if you can't hear, just let them</p> <p>8 know.</p> <p>9 And the second would be that his counsel has</p> <p>10 provided him with a sheet of paper that just sets forth</p> <p>11 his Fifth Amendment rights, teaching him in fact on what</p> <p>12 to say and not respond, so to the extent he pulls that</p> <p>13 piece of paper out and reads from it, we wanted the</p> <p>14 court and the parties to know what that was.</p> <p>15 JUDGE CHAPPELL: And based on the motion I just</p> <p>16 granted, the joint motion, once he does invoke, if he</p> <p>17 does, that will end the questioning for today.</p> <p>18 MS. DICKIE: Understood, Your Honor.</p> <p>19 JUDGE CHAPPELL: Josett, have you sworn the</p> <p>20 witness?</p> <p>21 - - - - -</p> <p>22 Whereupon --</p> <p>23 RICHARD WALLACE</p> <p>24 a witness, called for examination, having been first</p> <p>25 duly sworn, was examined and testified as follows:</p>

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

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

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

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

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

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

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

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

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EXHIBIT

D

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House of Representatives

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STAFF DIRECTOR

June 17, 2014

Ms. Kelly Tshibaka
Acting Inspector General
Federal Trade Commission
Room CC-5206
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Dear Ms. Tshibaka:

The Committee on Oversight and Government Reform is investigating the activities of Tiversa, Inc., a company that provided information to Federal Trade Commission in an enforcement action against LabMD, Inc.¹ In 2008, Tiversa allegedly discovered a document containing the personal information of thousands of patients on a peer-to-peer network.² Tiversa contacted LabMD in May 2008, explaining that it believed it had identified a data breach at the company and offering “remediation” services through a professional services agreement.³ LabMD did not accept Tiversa’s offer because LabMD believed it had contained and resolved the data breach. Tiversa, through an entity known as the Privacy Institute, later provided the FTC with a document it created that included information about LabMD, among other companies.⁴ Apparently, Tiversa provided information to the FTC about companies that refused to buy its services. In the case of LabMD, after Tiversa provided questionable information to the FTC, the Commission sought an enforcement action against the company under its Section 5 authority related to deceptive and unfair trade practices.⁵

In addition to concerns about the merits of the enforcement action with respect to the FTC’s jurisdiction, the Committee has substantial concerns about the reliability of the information Tiversa provided to the FTC, the manner in which Tiversa provided the information, and the relationship between the FTC and Tiversa. For instance, according to testimony by

¹ See Complaint, *In re LabMD, Inc.*, No. 9357 (Fed. Trade Comm’n, Aug. 29, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130829labmdpart3.pdf>.

² Respondent LabMD, Inc.’s Answer and Defenses to Administrative Complaint, *In re LabMD, Inc.*, No. 9357 (Fed. Trade Comm’n, Sept. 17, 2013), at 5.

³ Respondent LabMD, Inc.’s Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings, *In re LabMD, Inc.*, No. 9357 (Fed. Trade Comm’n, Nov. 12, 2013), at 5.

⁴ H. Comm. on Oversight & Gov’t Reform, Transcribed Interview of Robert Boback, Chief Executive Officer, Tiversa, Inc., Transcript at 42 (June 5, 2014) [hereinafter Boback Tr.].

⁵ See generally 15 U.S.C. § 45.

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Tiversa CEO Robert Boback, the Committee has learned of allegations that Tiversa created the Privacy Institute in conjunction with the FTC specifically so that Tiversa could provide information regarding data breaches to the FTC in response to a civil investigative demand. The Committee has also learned that Tiversa, or the Privacy Institute, may have manipulated information to advance the FTC's investigation. If these allegations are true, such coordination between Tiversa and the FTC would call into account the LabMD enforcement action, and other FTC regulatory matters that relied on Tiversa supplied information.

Further, the Committee has received information from current and former Tiversa employees indicating a lack of truthfulness in testimony Tiversa provided to federal government entities. The Committee's investigation is ongoing, and competing claims exist about the culpability of those responsible for the dissemination of false information. It is now clear, however, that Tiversa provided incomplete and inaccurate information to the FTC. In a transcribed interview with Oversight and Government Reform Committee staff, Mr. Boback testified that he received "incomplete information with regard to my testimony of FTC and LabMD."⁶ He stated that he now knows "[t]he original source of the disclosure was incomplete."⁷ Mr. Boback testified:

Q How did you determine that it was incomplete or that there was a problem with the spread analysis?

A I had . . . [Tiversa Employee A] perform[] an analysis, again, remember, data store versus the peer to peer. So the information in the data store, he performed another analysis to say, what was the original source of the file from LabMD and what was the disclosure, a full analysis of it which then provided to me, which expanded upon what [Tiversa Employee B] had told me when I asked [Tiversa Employee B] prior to my testimony. And the only reason why I asked [Tiversa Employee B] in the first place was because [Tiversa Employee B] was the analyst on it at the time when it was found, so I asked the analyst who was most familiar with this. I didn't know [Tiversa Employee B] was going to provide me with less than accurate information.⁸

* * *

Q So at the time that you were first made aware of the 1718 document in April, May of 2008, Tiversa employees had not conducted the spread analysis?

A No.

Q And you did not know the original source of the 1718 document?

⁶ Boback Tr. at 129.

⁷ *Id.*

⁸ *Id.* at 129-130.

A I did not. No.

* * *

Q Did there come a point at which a Tiversa employee determined who the original source of the 1718 document was?

A Well, that's – yes. A Tiversa employee told me who the original source was ... just before I testified ... in the deposition [in the FTC LabMD case] in November of last year. And, subsequently, we have done a new search and found that the origin was different than what was provided to me ... in November.⁹

The possibility that inaccurate information played a role in the FTC's decision to initiate enforcement actions against LabMD is a serious matter. The FTC's enforcement actions have resulted in serious financial difficulties for the company.¹⁰ Additionally, the alleged collaboration between the FTC and Tiversa, a company which has now admitted that the information it provided to federal government entities—including the FTC—may be inaccurate, creates the appearance that the FTC aided a company whose business practices allegedly involve disseminating false data about the nature of data security breaches. The Committee seeks to understand the motivations underlying the relationship between Tiversa and the FTC.

The Committee is currently considering next steps, including the possibility of holding hearings, agreeing to take certain testimony in executive session, and, based on information provided, to immunize certain future testimony pursuant to 18 U.S.C. § 6005. Concurrent with the Committee's investigative efforts, I request that you undertake a full review of the FTC's relationship with Tiversa.

Specifically, I ask that your office examine the following issues:

1. FTC procedures for receiving information that it uses to bring enforcement actions pursuant to its authority under Section 5, and whether FTC employees have improperly influenced how the agency receives information.
2. The role played by FTC employees, including, but not limited to, Alain Sheer and Ruth Yodaiken, in the Commission's receipt of information from Tiversa, Inc. through the Privacy Institute or any other entity, and whether the Privacy Institute or Tiversa received any benefit for this arrangement.
3. The reasons for the FTC's issuance of a civil investigative demand to the Privacy Institute instead of Tiversa, the custodian of the information.

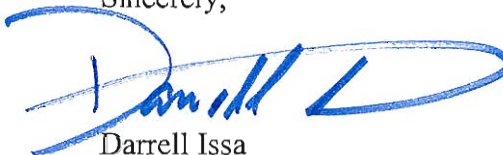
⁹ *Id.* at 162-163.

¹⁰ Rachel Louise Ensing, *FTC Cyber Case Has Nearly Put Us Out of Business, Firm Says*, WALL ST. J., Jan. 28, 2014, <http://blogs.wsj.com/riskandcompliance/2014/01/28/ftc-cyber-case-has-nearly-put-us-out-of-business-firm-says/>.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and may at “any time” investigate “any matter” as set forth in House Rule X.

If you have any questions about this request, please contact Tyler Grimm or Jennifer Barblan of the Committee staff at (202) 225-5074. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Darrell Issa", with a large, stylized flourish extending to the right.

Darrell Issa
Chairman

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

EXHIBIT

E

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Joshua D. Wright
 Terrell McSweeney

)	
In the Matter of)	
LabMD, Inc.,)	DOCKET NO. 9357
a corporation.)	PUBLIC
)	

**ORDER DENYING RESPONDENT LABMD, INC.’S
MOTION FOR SUMMARY DECISION**

By Commissioner Joshua D. Wright, for a unanimous Commission:¹

Respondent LabMD, Inc. (“LabMD”) seeks a summary decision dismissing with prejudice the Complaint in this matter. Motion for Summary Decision, filed April 21, 2014 (“Motion”). It argues that there is “no genuine dispute as to any material fact regarding liability or relief” in this case, and that we should proceed to “issue a final decision and order” in LabMD’s favor. Motion at 8 (quoting 16 C.F.R. § 3.24(a)(2)). Complaint Counsel opposes that request.² We find that there are genuine disputes about some of the facts asserted by LabMD in its Motion, and that other such facts are not material to the ultimate question of whether LabMD is liable for engaging in “unfair acts or practices” in violation of Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a). That question must be resolved based on factual evidence presented at an evidentiary hearing. Accordingly, we deny LabMD’s Motion for Summary Decision.

BACKGROUND

On August 28, 2013, the Commission issued an administrative Complaint commencing this adjudicatory proceeding. The Complaint alleges that LabMD’s data security practices, “taken together, failed to provide reasonable and appropriate security for personal information

¹ Commissioner Brill did not take part in the consideration or decision herein.

² See Complaint Counsel’s Response in Opposition to Respondent’s Motion for Summary Decision, filed May 5, 2014 (“CC Opp.”); Complaint Counsel’s Separate and Concise Statement of Material Facts as to Which There Exist Genuine Issues for Trial, filed May 5, 2014 (“CC Stmt.”). See also LabMD Reply in Support of Motion to Dismiss, filed May 12, 2013 (“LabMD Reply”).

stored on its computer networks,” even though LabMD “could have corrected its security failures at relatively low cost using readily available security measures.” Complaint, ¶¶ 10, 11. The Commission thus found “reason to believe” that LabMD’s conduct could constitute “unfair . . . acts or practices” in violation of 15 U.S.C. § 45(a), and determined that an adjudicatory proceeding would be “in the public interest.” *Id.*, Preamble & ¶¶ 22-23 (quoting 15 U.S.C. § 45(b)).

The Complaint sets forth specific allegations of “reasonable and appropriate” data security measures that LabMD allegedly should have implemented, but failed to implement, to minimize the risk of security breaches. Complaint, ¶¶ 10(a)-(g), 11. The Complaint goes on to allege that LabMD experienced two security breach incidents. First, unauthorized third parties allegedly retrieved a June 2007 “insurance aging report” and possibly other files containing sensitive consumer information from LabMD’s computer systems via Limewire, a peer-to-peer file-sharing application that was installed on the computer of LabMD’s billing manager. *Id.*, ¶¶ 17-20. Second, the Sacramento Police Department discovered identity thieves in possession of LabMD “day sheets” containing personal information and consumer checks payable to LabMD. *Id.*, ¶ 21.

The Complaint charges (1) that LabMD’s purported data security failures caused, or were likely to cause, harm to consumers, including “identity theft, medical identity theft, and . . . disclosure of sensitive, private medical information” and other personal information including addresses, telephone numbers, social security numbers, bank account and credit card numbers. *Id.*, ¶¶ 6, 9, 12, 19, 21, 22; (2) that consumers could not have learned about LabMD’s data security practices or avoided these potential injuries independently, *id.*, ¶ 12; and (3) that LabMD’s alleged data security failures did not substantially benefit LabMD or anyone else, *id.*, ¶¶ 11, 20, 22.

In its Answer to the Complaint and Affirmative Defenses, filed September 17, 2013 (“Answer”), and its Objections and Responses to Complaint Counsel’s Requests for Admission pursuant to 16 C.F.R. § 3.32, filed March 3, 2014 (“LabMD Admissions/Denials”), LabMD admits most, but not all, of the Complaint’s allegations regarding the nature of its business, the services it provides, and the types of consumer information stored on its computer systems. *See* Answer, ¶¶ 1, 3-6, 8-9; LabMD Admissions/Denials, ¶¶ 1-13, 16-28, 35-38.³ LabMD admits that Limewire had been installed on a computer used by its billing manager and that a company called Tiversa, Inc. had obtained access to LabMD’s June 2007 insurance aging report. But in other respects, LabMD either denies, or pleads insufficient knowledge to admit or deny, most of the charges concerning the Limewire and Sacramento data breach incidents. Answer, ¶¶ 17-20; LabMD Admissions/Denials, ¶¶ 39-49. LabMD denies the Complaint’s allegations concerning the list of specific data security measures that it did not implement. Answer, ¶¶ 10-11. It also generally denies the allegations regarding the causal relationship between its conduct and actual or potential consumer injury, and whether such injury was avoidable by consumers or whether its conduct had any countervailing benefits. *Id.*, ¶¶ 11-12, 22-23.

³ LabMD denies that it maintained electronic copies on its computer networks of patients’ checks, Answer, ¶ 9(c); LabMD Admissions/Denials, ¶¶ 33-34; and it takes issue with the allegations concerning the number of laboratory tests and the number of affected consumers. Answer, ¶ 7; LabMD Admissions/Denials, ¶¶ 14-15, 19-20.

On November 12, 2013, LabMD filed a motion to dismiss the Complaint. It contended that (1) the Commission has no authority to address private companies' data security practices as "unfair . . . acts or practices" under Section 5(a)(1) of the FTC Act; (2) the Health Insurance Portability and Accountability Act ("HIPAA") and other statutes touching on data security implicitly strip the Commission of authority to enforce Section 5 in the field of data security; and (3) due process requires the Commission to adopt regulations governing data security before we may engage in an enforcement action. The Commission rejected those arguments and denied the motion. *See Order Denying Respondent LabMD's Motion to Dismiss* (issued January 16, 2014) ("MTD Denial Order").

From December 2013 through April 2014, LabMD and Complaint Counsel engaged in discovery concerning factual issues and expert testimony, including extensive document production, depositions, and requests for admissions. This Motion for Summary Decision followed.

STANDARD OF REVIEW

We review LabMD's Motion for Summary Decision pursuant to Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24, whose "provisions are virtually identical to the provisions of Fed. R. Civ. P. 56, governing summary judgment in the federal courts." *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607, 610-11 (2011); *see also Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972). A party moving for summary decision must show that "there is no genuine dispute as to any material fact," and that it is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

"[T]he substantive law will identify which facts are material . . . [*i.e.*, those] that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Here, the applicable substantive law is Section 5(n) of the FTC Act, which deems an act or practice to be "unfair" if it [1] "causes or is likely to cause substantial injury to consumers"; [2] such injury "is not reasonably avoidable by consumers themselves"; and [3] such injury "is not outweighed by countervailing benefits to consumers or competition." 15 U.S.C. § 45(n). Facts are "material" for present purposes only if they tend to prove or disprove that LabMD's data security practices satisfy one or more of these criteria. Facts that have no bearing on these dispositive questions "are irrelevant or unnecessary [and] will not be counted." *Anderson*, 477 U.S. at 248.

There is no "genuine" dispute over material facts where the "evidence favoring the non-moving party . . . is merely colorable, [but] not significantly probative." *Id.* at 249. The "party seeking summary judgment always bears the initial responsibility of . . . identifying" factual information in the record that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where, as here, the party opposing the motion bears the ultimate burden of proof, *see* 16 C.F.R. § 3.43(a) (imposing burden of proof on Complaint Counsel), the moving party may "discharge this initial responsibility" either by showing that "there is an absence of evidence to support the non-moving party's case" or by supplying "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-

16 (11th Cir. 1993). “Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.” *Clark v. Coats & Clark, Inc.*, 929 F.2d, 604, 608 (11th Cir. 1991); *see also* 16 C.F.R. § 3.24(a)(3) (“When a motion for summary decision is made and *supported as provided in this rule*, a party opposing the motion . . . must set forth specific facts showing that there is a genuine issue of material fact for trial.”) (emphasis added). “On summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

ANALYSIS

I. GENUINE ISSUES OF MATERIAL FACT

In a section of its Motion entitled “Statement of Facts,” LabMD sets forth facts that it contends are both “material” and not subject to “genuine” dispute. *See* Motion at 4-8 (“LabMD Stmt.”); *cf.* 16 C.F.R. § 3.24(a). We consider the assertions in each of the 24 paragraphs in this Statement,⁴ as well as factual assertions set forth in other sections of LabMD’s Motion, to determine (1) whether they constitute “material” facts; (2) if so, whether there is no “genuine” dispute about them; and (3) whether, on that basis, LabMD is entitled to a summary decision in its favor as a matter of law.

A. HIPAA Data Security Standards

LabMD asserts that “[a]ll information received, utilized, maintained and transmitted by LabMD is protected health information (‘PHI’) as defined by the Health Insurance Portability and Accountability Act of 1996 (‘HIPAA’).” Motion at 1 (citing 45 C.F.R. § 160.103).⁵ LabMD’s Statement of Facts includes five paragraphs relating to the data security requirements imposed by HIPAA and related statutes and rules (collectively, “HIPAA Standards”), and characterizes that text as a set of “material” facts that are not in “genuine” dispute.⁶

⁴ We refer to each of these paragraphs using the convention “[X.Y],” where X refers to the page number of the Motion and Y refers to the position of the paragraph in sequence of the paragraphs beginning on that page. Thus, “LabMD Stmt. 5.2” refers to the second full paragraph on page 5 of the Motion.

⁵ Significantly, LabMD does not assert that the scope of personal health information included in the definition of “PHI” is co-extensive with the scope of the “personal information” at issue here, as defined in the Complaint (¶ 6), nor does it refer to any evidence or legal authority that would support that proposition.

⁶ *See* LabMD Stmt. 4.2 (“LabMD is a “Covered Entity” that receives, maintains and transmits PHI during the normal course of its business.”); *id.* 5.5 (“LabMD is a HIPAA-covered entity. . . . It must comply with HHS’s HIPAA and Health Information Technology for Economic and Clinical Health Act (“HITECH”) regulations”); *id.*, 5.6 (“HIPAA’s Security Rule establishes substantive data-security standards involving PHI with which HIPAA-covered entities, like LabMD, must comply.”); *id.* 5.7 (“HHS exclusively enforces HIPAA and HITECH. . . .”); *id.*, 6.1 (“The FTC has not accused LabMD of violating HIPAA, HITECH or any implementing regulations. . . .”).

LabMD further contends that Complaint Counsel’s expert witness, Dr. Raquel Hill, articulated data security standards pursuant to Section 5 “that are difficult to reconcile with,” and are “far more stringent” than, the HIPAA Security Rule and other HIPAA Standards. Motion at 3, 20. For example, LabMD asserts that Dr. Hill’s proposed standards “do not account, as required by HIPAA, for the needs and capabilities of small health care providers and rural health care providers,” improperly “presume a level of technical knowledge generally not available to small health care providers,” and are “inconsistent with HHS guidance that the risk assessment can be a qualitative and manual process.” *Id.* at 21. From those asserted facts, LabMD contends that its “compliance with the HIPAA [Standards]” should not be deemed “irrelevant to . . . Section 5 unfairness claims,” but rather should be a complete “defense” to such claims. *Id.* at 20.

Complaint Counsel responds that LabMD’s asserted facts relating to HIPAA “are irrelevant or immaterial” and that it need not “demonstrate that [LabMD’s] conduct violated other laws in order to establish that [LabMD’s] practices were unfair under Section 5.” CC Opp. at 4. Complaint Counsel contends that “the Commission [has] already rejected the argument that the FTC Act and HIPAA are at odds,” *id.* at 12 (citing MTD Denial Order at 12), and asserts that LabMD’s arguments “that the FTC’s data security ‘standards’ are not scalable or presume too high a level of technical knowledge for small health care providers should be addressed at trial and do not support a summary decision.” *Id.*

We conclude that LabMD’s factual contentions regarding HIPAA data security standards do not justify a summary decision in LabMD’s favor. As LabMD concedes, “[t]he FTC has not accused LabMD of violating HIPAA, HITECH or any implementing regulations,” Motion at 6 (LabMD Stmt. 6.1), and “this case has nothing to do with HIPAA.” *Id.* at 10 (quoting MTD Denial Order at 12). Rather, this case concerns LabMD’s compliance with Section 5 of the FTC Act. Thus, the facts that LabMD alleges about HIPAA could be “material” for purposes of this Motion for Summary Decision only if LabMD were correct that, as a matter of law, the Commission could not hold LabMD liable under Section 5 if its data security practices complied with HIPAA Standards. Motion at 1. But that legal argument is now foreclosed. We held in the Order denying LabMD’s Motion to Dismiss that HIPAA does not “trump” Section 5, and that LabMD therefore “cannot plausibly assert that, because it complies with [HIPAA], it is free to violate” requirements imposed independently by Section 5 of the FTC Act. MTD Denial Order at 11, 13; *see infra*, Part II.⁷

In any event, LabMD’s statements of fact regarding HIPAA Standards would be insufficient to merit summary decision in its favor even if, counterfactually, those Standards *did* define the scope of Section 5 liability as a matter of law. LabMD points to no record evidence regarding what measures, if any, it implemented to prevent data breaches. It does not explain which HIPAA Standards apply to LabMD’s actions or why LabMD’s conduct satisfied them. Indeed, LabMD does not even assert that it *complied* with the applicable HIPAA Standards; it merely avers that the Commission has not accused it of *violating* those requirements. *See, e.g.,*

⁷ Consistently, HHS, in adopting regulations implementing HIPAA, recognized that entities subject to HIPAA “may be required by other Federal law to adhere to additional or more stringent security measures,” and consequently, that “[s]ecurity standards in [HHS’s] final rule establish a minimum level of security that covered entities must meet.” Health Insurance Reform: Security Standards, 68 Fed. Reg. 8334, 8355 (Feb. 20, 2003).

LabMD Stmt. 6.1. The “party seeking summary judgment bears the initial responsibility of informing the [adjudicator] of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323 (quotation marks omitted). LabMD has not carried this burden.⁸

In sum, because we conclude that LabMD’s HIPAA-related factual assertions are not “material” to the violations of law alleged in the complaint and, in any event, are not supported by any evidence, we need not determine whether they are in “genuine” dispute.

B. Alleged Limewire and Sacramento Security Breaches

LabMD identifies what it characterizes as “material” facts regarding the two specific security breaches alleged in the Complaint – *i.e.*, the alleged breach relating to the installation of Limewire on a billing computer,⁹ and the alleged breach discovered by the Sacramento Police Department.¹⁰

We conclude that these factual claims, even if undisputed, are not material and would not support a summary decision in LabMD’s favor. LabMD has not attempted to show how its factual assertions regarding the Limewire and Sacramento incidents are material to its liability as alleged in the Complaint. For example, even if we accepted as true the claims that Tiversa retrieved the Insurance Aging File without LabMD’s knowledge or consent (LabMD Stmt. 4.3), that Tiversa improperly passed on that file to Professor Johnson or others (*id.*, 4.5), and that Tiversa touted its unique technology (*id.*, 4.3 n.2), these facts would not resolve the ultimate questions we must decide in this case. In particular, they would not compel us, as a matter of

⁸ We cannot determine, on the present record, whether, in fact, LabMD *has* complied with or violated HIPAA Standards. For purposes of the present Motion, we must draw all reasonable inferences in support of the party opposing the Motion—*i.e.*, Complaint Counsel—and consequently, we cannot infer from LabMD’s unsupported assertions that it complied with applicable HIPAA Standards. Moreover, we express no view on whether and to what extent such compliance or noncompliance might be a relevant factor in our assessment of whether LabMD violated Section 5. We agree with Complaint Counsel that any such arguments “should be addressed at trial.” CC Opp. at 12.

⁹ See LabMD Stmt. 4.3 (“On or about February 5, 2008, without LabMD’s knowledge or consent, Tiversa, Inc. (‘Tiversa’), took possession of a single LabMD insurance aging file (the ‘Insurance Aging File’).”); *id.* n.2 (“Tiversa has testified before Congress that it possesses unique technology which among other things allows it to download computer files from unsuspecting third persons inadvertently sharing computer files via peer to peer (‘P2P’) networks.”); *id.*, 4.4 (“The Insurance Aging File contained PHI for over 9,000 patients of LabMD’s physician clients.”); *id.*, 4.5 (“Subsequently, Tiversa made the Insurance Aging File available to Professor Eric Johnson, of Dartmouth College, who was conducting research under a government contract for his article entitled, ‘Data Hemorrhages in the Health Care Sector’.”); *id.*, 4.6 (“In January 2010, the FTC began a three year full investigation of LabMD’s data security practices based upon the disclosure of the PHI contained in the Insurance Aging File.”).

¹⁰ See LabMD Stmt. 5.1, 5.2, and 5.3 (“In October 2012, during a raid of a house of suspected identity thieves, the Sacramento Police Department found LabMD ‘day sheets’ and copies of checks made payable to LabMD. Again, the day sheets and checks contained PHI from patients of LabMD’s physician clients.”); *id.* 5.2 (“In an attempt to notify LabMD of its find, the Sacramento police ‘googled’ LabMD, and discovered that LabMD was under investigation by the FTC.”); *id.*, 5.3 (“The Sacramento police then notified the FTC of its find, but did not notify LabMD, despite Sacramento’s awareness of LabMD’s duty to notify under HIPAA.”).

law, to dismiss the allegations in the Complaint that LabMD failed to implement reasonable and appropriate data security and that such failure caused, or was likely to cause, unavoidable and unjustified harm to consumers. To the contrary, LabMD's factual contentions concerning Tiversa and the Sacramento Police Department are fully consistent with the Complaint's allegations that LabMD failed to implement reasonable and appropriate data security procedures.

C. Genuine Disputes Over Reasonable and Appropriate Data Security Practices

LabMD raises a number of contentions that could be construed as addressing issues of material fact, but it fails to demonstrate that there is no "genuine dispute" over these issues. For example, LabMD criticizes the opinions of Complaint Counsel's expert witness concerning appropriate data security measures. *See* Motion at 13, 16, 18, 20-22; *id.*, Exh. 5. The issues addressed by this expert report are undoubtedly material. But there is plainly also a genuine dispute about them. Indeed, LabMD submitted the declaration of its own expert witness, whose report conflicts with that of Complaint Counsel's expert witness.¹¹ *See* Motion, Exh. 12; *see also* Motion at 22; LabMD Reply at 11-13. Such conflicting expert opinion is precisely the type of dispute that evidentiary hearings are held to resolve.

Similarly, LabMD's Statement asserts, "The FTC has never specified what data security standards were in place at any given point during the relevant time period or when LabMD specifically violated them." LabMD Stmt. 6.4. This contention could be read as encompassing both factual and legal issues,¹² of which at least some are genuinely disputed.¹³ We cannot resolve such disputes on the present record, and LabMD has not shown, with respect to this contention, that it is entitled to judgment as a matter of law.

¹¹ We decline to address Complaint Counsel's request that we strike Mr. Baker's declaration on the grounds that LabMD "did not timely designate Mr. Baker [as an expert] in this proceeding and its use of his declaration contravenes the Scheduling Order." CC Opp. at 4 n.2. The Commission (or the ALJ) may consider a Motion to Strike if submitted as a stand-alone pleading, rather than as a footnote to a brief regarding another motion.

¹² It is unclear whether LabMD, in using the term "the FTC" in Stmt. 6.4, intends to refer to Complaint Counsel or to the Commission. To the extent LabMD is contending that Complaint Counsel, in the course of this adjudication, has yet to identify with specificity what data security standards it alleges LabMD violated, this contention is not a material fact because the adjudication is still underway and, as discussed below, the Commission is not bound by Complaint Counsel's arguments or characterizations. *See infra* notes 15-18 and accompanying text. To the extent LabMD's statement is simply an alternative formulation of its legal argument that the Commission infringed its Constitutional due process rights by providing inadequate advance notice, the statement is unavailing because we have already rejected that legal argument. *See infra* Section II; *see also* MTD Denial Order at 14-17 (rejecting LabMD's due process/fair notice argument); Motion at 11-18 (rearguing the same legal claim); LabMD Reply at 3-12 (same). We recognize that there may be other ways to interpret LabMD's statement that might implicate unresolved legal questions or material issues of fact; but for present purposes, we cannot draw inferences in LabMD's favor.

¹³ Compare LabMD Stmt. 6.4, 6.5, and 7.1 with CC Stmt. ¶¶ 1-10 (and evidence cited therein) (genuine factual disputes over applicable standards and LabMD's conduct). *See also* LabMD Reply at 6-9 (citing and disputing legal arguments in Complaint Counsel's Pre-Trial Brief (filed May 6, 2014)).

D. Other Immaterial Matters

We conclude that the remaining factual assertions in LabMD's Statement of Facts are immaterial. First, the procedural history of this case, even if undisputed, does not support any particular conclusion on whether LabMD's conduct violated the FTC Act.¹⁴

In addition, the propositions cited in LabMD's Statement of Facts characterizing the Commission's positions on the basis of Complaint Counsel's statements to the Administrative Law Judge during an Initial Pretrial Conference,¹⁵ Complaint Counsel's responses to LabMD's discovery demands¹⁶ and requests for admissions,¹⁷ and Complaint Counsel's objections to questions posed during a deposition,¹⁸ do not constitute facts at all, let alone material facts. Just because Complaint Counsel has made particular statements or taken certain positions does not necessarily mean *the Commission* has adopted those positions. To the contrary, the Commission is not bound by characterizations employed by Complaint Counsel, and is free to reject Complaint Counsel's arguments or reject its evidence. Moreover, the statements of counsel cited by LabMD are not contained in sworn affidavits or testimony, as required under 16 C.F.R.

¹⁴ See, e.g., LabMD Stmt. 4.6 ("In January 2010, the FTC began a three year full investigation of LabMD's data security practices . . ."); *id.*, 5.4 ("In August, 2013, FTC filed an Administrative Complaint."); *id.*, 6.2 ("The FTC alleges that LabMD's data-security is inadequate to protect the PHI it possesses and that this failure to adequately protect PHI is an unfair practice affecting consumers in violation of Section 5 of the Federal Trade Commission Act.").

¹⁵ See LabMD Stmt. 6.6 ("When asked by the ALJ whether 'the Commission issued guidelines for companies to utilize to protect...[sensitive] information or is there something out there for a company to look to,' the FTC admitted that '[t]here is nothing out there for a company to look to.'"); *id.*, 7.1 ("The FTC admits that it has never promulgated data-security regulations, guidance, or standards under Section 5: '[T]here is no rulemaking, and no rules have been issued . . .'); *id.*, 7.2 ("When asked about other sources of data-security standards, FTC said, the 'Commission has entered into almost 57 negotiations and consent agreements that set out . . . the method by which the Commission assesses reasonableness.' . . . And finally the FTC argued that 'the IT industry has issued a tremendous number of guidance pieces and other pieces that basically set out the same methodology . . .,' except that the 'Commission's process' involves 'calculation of the potential consumer harm from unauthorized disclosure of information.'"); *id.*, 8.1 ("At the hearing, the ALJ asked: 'Are there any rules or regulations that you're going to allege were violated here that are not within the four corners of the complaint?' The FTC responded 'No.'"); *id.*, 8.2 ("The FTC also admits that '[n]either the complaint nor the notice order prescribes specific security practices that LabMD should implement going forward.'") (quoting colloquy between Complaint Counsel Alain Sheer and Chief Administrative Law Judge D. Michael Chappell, Transcript of Initial Pretrial Conference, September 25, 2013).

¹⁶ See LabMD Stmt. 7.3 ("In response to LabMD's written discovery requesting documents relating to the standards the FTC enforces regarding data-security, the FTC produced thousands of pages of consent decrees, reports, PowerPoint presentations, and articles from the FTC's website, including many in Spanish.") (citing attachments to letters from Complaint Counsel transmitting responses to LabMD document requests).

¹⁷ See LabMD Stmt. 6.5 ("The FTC claims it need not 'allege the specific industry standards Respondent failed to meet or specific hardware or software Respondent failed to use.'") (quoting Complaint Counsel's Amended Response to LabMD's First Set of Requests for Admission (filed as Exh. B to Complaint Counsel's Motion to Amend Complaint Counsel's Response to Respondent's First Set of Requests for Admission)).

¹⁸ See Motion at 14 ("Respondent's counsel asked [FTC Bureau of Consumer Protection Deputy Director Daniel] Kaufman a series of questions related to published standards that the Bureau sought to enforce against LabMD; however, Complaint Counsel instructed the witness not to respond to any of these questions.") (citing Deposition of Daniel Kaufman, April 14, 2014).

§ 3.24(a)(3) & (4), and thus are little more than “mere allegations or denials,” 16 C.F.R. § 3.24(a)(3), which can neither support nor defeat a Motion for Summary Decision.

Most significantly, even if these statements or arguments of Complaint Counsel could be construed as facts, and even if they were not genuinely in dispute, they still would not be material to this case. The statements and arguments of Complaint Counsel that LabMD lists in its Statement of Facts relate primarily to LabMD’s legal arguments concerning due process, jurisdiction, and related matters, which we already rejected in our Order denying LabMD’s Motion to Dismiss. *See infra*, part II. They appear to have little, if any, bearing on the open issues affecting our decision on whether LabMD’s data security practices violated Section 5.

Finally, LabMD’s contention that it “owns” the consumer information at issue also is immaterial. *See* Motion at 9-10. LabMD contends that “the PHI in LabMD’s possession is information that patients voluntarily gave to their doctors, who in turn, voluntarily provided this information to LabMD,” and thus, that the information at issue is LabMD’s “own property.” *Id.*¹⁹ The central questions to be decided here are whether LabMD’s data security practices were reasonable and whether they caused, or were likely to cause, significant injury to consumers that was unavoidable and unjustified by offsetting benefits. Those questions do not turn on the “ownership” of the data. It is quite possible that a company could use (or misuse) its “own property” in a manner that causes, or is likely to cause, significant harm to others. If such misuse satisfies the criteria of Section 5, it may constitute an “unfair act or practice.”

II. LABMD’S RENEWED DUE PROCESS AND JURISDICTIONAL CHALLENGES

LabMD asserts that we wrongly denied its Motion to Dismiss, Motion at 8, and implicitly asks us to reconsider the issues raised in that Motion. We decline to do so. We have already carefully addressed and disposed of LabMD’s arguments that (1) its due process rights were infringed and that it lacked adequate notice of what conduct is prohibited (*compare* Motion at 11-12, 15-16, and LabMD Reply at 4-6, *with* MTD Denial Order at 16-17); (2) the Commission cannot bring enforcement actions to address statutory violations unless it has adopted specific rules or announced detailed compliance standards in advance (*compare* Motion at 13-18 and LabMD Reply at 6-10, *with* MTD Denial Order at 14-17); and (3) HIPAA supersedes any FTC authority over unfair data security practices and that HIPAA and the FTC Act are in irreconcilable conflict (*compare* Motion at 18-20, and LabMD Reply at 13-15, *with* MTD Denial Order at 10-13).

¹⁹ In support of this assertion, LabMD contends that, as a matter of law, “consumers who voluntarily provide personal information to third parties lose their privacy rights because the information in question once given, belongs to the receiver and not the consumer.” Motion at 9. LabMD therefore rejects what it characterizes as “FTC’s foundational premise”—that “consumers who voluntarily give PHI to medical providers have some protectable privacy or other interest in that information beyond that which Congress authorized HHS to carve out under HIPAA.” *Id.* at 10. *See also* CC Opp. at 8 & n.3 (opposing argument). For present purposes, we need not resolve the merits of this novel legal proposition.

We need not reiterate the legal analysis set forth in our earlier Order. LabMD identifies no “new questions raised by the decision . . . upon which [it] had no opportunity to argue,” *see* 16 U.S.C. § 3.55; and even if it had done so, it failed to submit a Petition for Reconsideration within 14 days of the service of our Order. *Id.* To the extent LabMD continues to disagree with the legal conclusions set forth in that interlocutory decision, it may seek judicial review pursuant to 15 U.S.C. § 45(c)-(d)—but *only* if and when we issue a final order against LabMD at the conclusion of this adjudicatory proceeding. *See, e.g., FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980).²⁰ We express no view on the open legal questions at issue in this proceeding, or on the numerous, genuinely disputed issues of material fact that have not yet been resolved.

Accordingly,

IT IS ORDERED THAT Respondent LabMD, Inc.’s Motion for Summary Decision **IS DENIED.**

By the Commission, Commissioner Brill not participating.

Donald S. Clark
Secretary

SEAL:
ISSUED: May 19, 2014

²⁰ *See also LabMD, Inc. v. FTC*, No. 13-15267-F (11th Cir. Feb. 18, 2014) (*per curiam*) (dismissing challenge to adjudicatory proceeding for lack of jurisdiction, because no cease and desist order had been issued); *LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD (N.D. Ga. May 12, 2014) (same), *appeal pending*.