

In the Matter of:

LabMD, Inc.

May 5, 2015
Trial - Public Record
Volume 9

Condensed Transcript with Word Index



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1 FEDERAL TRADE COMMISSION
2 I N D E X
3 IN THE MATTER OF LABMD, INC.
4 TRIAL VOLUME 9
5 PUBLIC RECORD
6 MAY 5, 2015
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8 WITNESS: DIRECT CROSS REDIRECT RECROSS VOIR
9 WALLACE 1337 1414
10 1421 1431
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13 EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED
14 CX
15 (none)
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17 RX
18 Number545 1419
19 Number546 1426
20 Number549 1423
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22 JX
23 (none)
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1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 In the Matter of)
4 LabMD, Inc., a corporation,) Docket No. 9357
5 Respondent.)
6 -----)
7 May 5, 2015
8 10:11 a.m.
9 TRIAL VOLUME 9
10 PUBLIC AND NONPUBLIC RECORD
11
12 BEFORE THE HONORABLE D. MICHAEL CHAPPELL
13 Chief Administrative Law Judge
14 Federal Trade Commission
15 600 Pennsylvania Avenue, N.W.
16 Washington, D.C.
17
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19 Reported by: Josett F. Whalen, Court Reporter
20
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1 MS. MARSHALL: Erica Marshall, Cause of Action.
 2 JUDGE CHAPPELL: Thank you.
 3 Have any of the Cause of Action attorneys filed
 4 appearances?
 5 MR. KHETAN: Yes, Your Honor. I believe we all
 6 have.
 7 JUDGE CHAPPELL: All right.
 8 You'll need to come up during the break and
 9 give the court reporter your names. She couldn't hear
 10 you.
 11 MR. KHETAN: Okay.
 12 JUDGE CHAPPELL: First off, I need the lead
 13 attorneys only to approach the bench.
 14 (At the bench, discussion off the record.)
 15 (In open court.)
 16 JUDGE CHAPPELL: All right. Let me start
 17 with -- is it "Daugherty" or "Daugherty"?
 18 MR. SHERMAN: Daugherty.
 19 JUDGE CHAPPELL: Let's talk about this
 20 Daugherty affidavit which has sprung out of nowhere
 21 here.
 22 I have pending a number of motions pertaining to
 23 an affidavit supposedly executed by LabMD president
 24 Michael Daugherty on or about April 17, 2014.
 25 I have pending complaint counsel's motion to

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1 PROCEEDINGS
 2 - - - - -
 3 JUDGE CHAPPELL: Call back to order Docket 9357,
 4 In Re LabMD.
 5 It's been a while. I'm going to take
 6 appearances of the parties. We'll start with the
 7 government.
 8 MS. VANDRUFF: Good morning, Your Honor.
 9 Laura VanDruff on behalf of complaint counsel.
 10 With me today is Jarad Brown and Alain Sheer and
 11 our technical support, Jon Owens.
 12 JUDGE CHAPPELL: Okay. For the respondents?
 13 MR. SHERMAN: Good morning, Your Honor.
 14 William Sherman from the law firm of
 15 Dinsmore & Shohl on behalf of the respondent.
 16 To my left is Mike Daugherty, owner of LabMD.
 17 To his left is my law partner, Reed Rubinstein.
 18 And to his left is our associate, Sunni Harris.
 19 JUDGE CHAPPELL: Is there anyone here from
 20 Cause of Action?
 21 MR. SHERMAN: Yes, there is, Your Honor. There
 22 are several lawyers here from Cause of Action.
 23 MR. MASSARI: Patrick Massari, Your Honor.
 24 MR. KHETAN: Good morning, Your Honor. I'm
 25 Prashant Khetan.

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1 compel production of that document and an opposition
 2 from respondent.
 3 I have respondent's motion to reconsider an
 4 order granting the motion to compel in part, requiring
 5 an in camera review in my chambers.
 6 And then I have complaint counsel's motion for
 7 in camera treatment.
 8 The motion for in camera treatment states that
 9 respondent is unopposed, but it's unclear to me, does
 10 that mean respondent concurs with all the relief
 11 requested in that motion for in camera treatment?
 12 MR. RUBINSTEIN: Your Honor, Reed Rubinstein.
 13 Without getting too much into the background,
 14 respondent is prepared to produce the affidavit for your
 15 review and for your determination as to whether or not
 16 the pending objections are appropriate.
 17 JUDGE CHAPPELL: So the -- you will then file a
 18 notice to withdraw on your motion to reconsider.
 19 MR. RUBINSTEIN: With the understanding that,
 20 yes, we will produce the affidavit to you -- this is the
 21 result of communications and correspondence the parties
 22 have had with the House counsel with respect to their
 23 claim of legislative privilege. We are prepared to
 24 produce the document to you for your review and
 25 determination.

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1 JUDGE CHAPPELL: All right. Now, it sounds
 2 like we are going to have to get into the weeds
 3 somewhat.
 4 You're still going to maintain it's privileged
 5 even though I have a representation from the government
 6 that the attorney for the Ethics Committee of the House
 7 is not asserting the privilege in this proceeding.
 8 MR. RUBINSTEIN: With the understanding that if
 9 you determine it is a document that should be produced,
 10 that it will be given in camera treatment. That at
 11 least is my understanding of House counsel's position as
 12 it was communicated to me in a phone call.
 13 JUDGE CHAPPELL: So the nonopposition only goes
 14 to me reviewing the document.
 15 MR. RUBINSTEIN: That's correct.
 16 And if you should determine that it is
 17 appropriate to be produced, then my understanding --
 18 and please, Counsel, correct me if I'm wrong -- is that
 19 the affidavit will be designated in camera going
 20 forward.
 21 MS. VANDRUFF: That's the relief sought,
 22 Your Honor, in the complaint counsel's unopposed motion
 23 for in camera treatment, correct.
 24 JUDGE CHAPPELL: But that doesn't get us to the
 25 merits. You're still going to assert your objection

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1 that it should be -- should not be produced.
 2 MR. RUBINSTEIN: Yes, Your Honor. We would ask
 3 that you review the affidavit, and we're prepared to
 4 produce that to you today whenever you should ask us to
 5 do so.
 6 JUDGE CHAPPELL: And if I determine that it
 7 should be produced, where are we then?
 8 MR. RUBINSTEIN: Then it will be designated
 9 in camera and we'll provide a copy to complaint counsel.
 10 MS. VANDRUFF: And Your Honor, complaint counsel
 11 would request, without getting into the merits because
 12 of witnesses who are present in the courtroom, but that
 13 the court conduct that examination as quickly as
 14 possible because it may be relevant to today's
 15 proceeding.
 16 JUDGE CHAPPELL: This might seem obvious, but
 17 when I read the letter from House counsel referring to
 18 the affidavit, I just want to make real sure, we are
 19 talking about the exact same affidavit?
 20 MR. RUBINSTEIN: Yes, Your Honor.
 21 JUDGE CHAPPELL: How soon could you have that
 22 delivered to room 110?
 23 MR. MASSARI: Within the hour, Your Honor.
 24 JUDGE CHAPPELL: Thank you.
 25 All right. Thank you.

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1 MS. VANDRUFF: Your Honor, if I can request
 2 clarification, are you ordering that that be produced
 3 within the hour to your chambers?
 4 JUDGE CHAPPELL: I didn't really have to order
 5 it. They agreed to do it.
 6 MS. VANDRUFF: I just want to be clear for the
 7 record.
 8 JUDGE CHAPPELL: No need to order when I have a
 9 volunteer.
 10 MS. VANDRUFF: Okay. Thank you, Your Honor.
 11 JUDGE CHAPPELL: The Army way.
 12 Let me talk a little bit about rebuttal, since
 13 I'm at a disadvantage here, the attorneys know what
 14 you're planning this week, but I do not.
 15 My position on rebuttal is, as it's always
 16 been, if any party wishes to offer a rebuttal witness
 17 in this case or offer rebuttal evidence, the request
 18 shall be made in writing in the form of a motion to
 19 request a rebuttal witness or rebuttal evidence as soon
 20 as possible.
 21 That motion shall include the name of any
 22 witness being proposed or a detailed description of the
 23 rebuttal evidence being offered.
 24 Next is the most important part.
 25 That motion shall also include a cite to the

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1 record by page and line number to the evidence that you
 2 intend to rebut. That way, I have no misunderstandings.
 3 I don't have to go from memory.
 4 The motion shall also demonstrate that the
 5 witness the party seeks to call has previously been
 6 designated on the witness list or that the evidence the
 7 party seeks to introduce has been previously listed on
 8 the exhibit list, unless good cause can be demonstrated
 9 as to why such exhibit could not have been previously
 10 listed or a witness could not have been previously
 11 listed in this case.
 12 And I suppose, after we hear testimony from
 13 Mr. Wallace, I'll ask complaint counsel if they want to
 14 pursue rebuttal and how much time they need to file a
 15 motion.
 16 And if the respondent just absolutely must do
 17 it, I will allow a reply or opposition to their rebuttal
 18 request, but there will be a very short time fuse on
 19 that as we're trying to move along.
 20 Any questions on that?
 21 MR. SHERMAN: No questions, Your Honor.
 22 MS. VANDRUFF: No, Your Honor. Thank you.
 23 Is Mr. Wallace here?
 24 MR. SHERMAN: He is, Your Honor.
 25 JUDGE CHAPPELL: Is he in the courtroom?

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1 MR. SHERMAN: He is, Your Honor.
 2 Would you like for me to point him out?
 3 JUDGE CHAPPELL: Mr. Wallace?
 4 MR. WALLACE: Yes.
 5 JUDGE CHAPPELL: Welcome. Thank you. It's been
 6 a long and winding road, but here we are.
 7 And your attorney is here.
 8 MS. BUCHANAN: Yes, Your Honor.
 9 Mary Beth Buchanan from the law firm of Bryan Cave and
 10 my associate, Jacquelyn Schell.
 11 MS. SCHELL: Good morning, Your Honor.
 12 JUDGE CHAPPELL: Good morning.
 13 And you have filed an appearance in the case?
 14 MS. BUCHANAN: Yes, Your Honor, we have.
 15 JUDGE CHAPPELL: All right. Thank you.
 16 MS. BUCHANAN: And we also have a pending
 17 motion before the court to ask the court's
 18 permission --
 19 JUDGE CHAPPELL: Whoa. I've got that on my
 20 agenda. I'll get to that.
 21 Thank you. You can have a seat.
 22 MS. BUCHANAN: Thank you, Your Honor.
 23 JUDGE CHAPPELL: It's been a while, so I'm going
 24 to bring everybody up to speed on where we are.
 25 Pursuant to a September 29 order requiring

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1 testimony under grant of immunity, Mr. Richard Wallace,
 2 formerly of Tiversa, has been ordered to appear to
 3 testify at this evidentiary hearing. His testimony
 4 will be in public session, absent a showing under
 5 rule 3.45 that all or part of his testimony should be
 6 given in camera treatment.
 7 Also pursuant to the September 29 order and
 8 pursuant to the October 9 order and the authorization
 9 granted by the attorney general of the United States on
 10 November 14, 2014, Richard Wallace shall have immunity,
 11 under 18 United States Code Section 6002, in giving
 12 testimony or other information that he has refused to
 13 give on the basis of the privilege against
 14 self-incrimination.
 15 Mr. Wallace will be called to the stand on
 16 direct by respondent; is that correct?
 17 MR. SHERMAN: That's correct, Your Honor.
 18 JUDGE CHAPPELL: When respondent has finished
 19 its direct examination, we will be in recess to allow
 20 complaint counsel to depose Mr. Wallace pursuant to the
 21 December 8 order. And these are all 2014.
 22 Complaint counsel's deposition of Mr. Wallace shall not
 23 exceed two hours without further order from the court.
 24 MR. SHERMAN: Your Honor, I have a question
 25 concerning the scope of that deposition.

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1 Is the scope of the deposition following
 2 Mr. Wallace's direct examination limited to the subject
 3 matter of his direct examination?
 4 JUDGE CHAPPELL: I don't have that in front me,
 5 but I believe that was covered in the order I issued
 6 limiting that deposition.
 7 It was requested of me that the deposition of
 8 Mr. Wallace was only for cross-examination. Is that
 9 correct? To allow proper cross-examination, that was
 10 the purpose of the request.
 11 MS. VANDRUFF: That is the purpose, Your Honor.
 12 And I have Your Honor's order in front of me.
 13 JUDGE CHAPPELL: Well, you know, we don't have
 14 to go that far. They have two hours. They have two
 15 hours.
 16 Do you intend to go beyond the scope of direct?
 17 MS. VANDRUFF: Without hearing the direct,
 18 Your Honor, I don't know the scope of the deposition.
 19 JUDGE CHAPPELL: All right. Does anyone have a
 20 copy of that order?
 21 MS. VANDRUFF: Your Honor, with respect to the
 22 scope of complaint counsel's deposition, of course it
 23 may be necessary for complaint counsel to ask questions
 24 that relate to Mr. Wallace's credibility.
 25 JUDGE CHAPPELL: Credibility is always within

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1 the scope of cross.
 2 MS. VANDRUFF: Thank you for that
 3 clarification.
 4 JUDGE CHAPPELL: Credibility, bias, impeachment,
 5 always within the scope.
 6 Does that help?
 7 MS. VANDRUFF: That does help, Your Honor.
 8 JUDGE CHAPPELL: All right. Beyond that, I'll
 9 refer you to the order I issued with the limitations on
 10 the deposition.
 11 MR. SHERMAN: Thank you, Your Honor.
 12 JUDGE CHAPPELL: And there will be no other
 13 limitations other than I've already expressed in that
 14 order. That matter is dealt with, previously.
 15 MS. VANDRUFF: Thank you, Your Honor.
 16 MR. SHERMAN: Thank you, Your Honor.
 17 JUDGE CHAPPELL: Pending motion.
 18 I have pending before me an unopposed motion to
 19 allow Mr. Wallace's counsel to engage in a redirect exam
 20 of Mr. Wallace after the conclusion of
 21 complaint counsel's cross-exam, provided that
 22 complaint counsel and respondent's counsel can
 23 thereafter reexamine Mr. Wallace based on the testimony
 24 adduced in the redirect questioning by Mr. Wallace's
 25 counsel.

| | | | |
|------|--|------|--|
| 1325 | <p>1 Is my summary of the motion correct?</p> <p>2 MR. SHERMAN: To my understanding, Your Honor.</p> <p>3 MS. VANDRUFF: Complaint counsel agrees,</p> <p>4 Your Honor.</p> <p>5 JUDGE CHAPPELL: And as I've previously noted,</p> <p>6 Mr. Wallace's counsel has filed an appearance in this</p> <p>7 matter.</p> <p>8 Pursuant to commission rules 3.42(c) and</p> <p>9 3.43(d), the unopposed motion is hereby granted. A</p> <p>10 written order confirming this ruling will issue within</p> <p>11 the next day or so.</p> <p>12 Mr. Sherman, do you intend to call any witnesses</p> <p>13 in addition to Mr. Wallace?</p> <p>14 MR. SHERMAN: We do not, Your Honor.</p> <p>15 JUDGE CHAPPELL: Thank you.</p> <p>16 I've made a number of evidentiary-type rulings,</p> <p>17 in the months since we were here, regarding various RXs</p> <p>18 and CXs.</p> <p>19 Are there any questions or clarification needed</p> <p>20 on any of those rulings?</p> <p>21 MR. SHERMAN: No, Your Honor.</p> <p>22 We would just -- as we've indicated to</p> <p>23 complaint counsel that certain documents that were the</p> <p>24 subject of respondent's motion to admit certain</p> <p>25 documents from the Oversight Committee's letter, that we</p> | 1327 | <p>1 a motion, and by order dated March 12, 2015, in camera</p> <p>2 treated was granted to a number of provisional</p> <p>3 exhibits.</p> <p>4 If those exhibits are offered into evidence,</p> <p>5 please identify them as in camera subject to the</p> <p>6 March 12 order.</p> <p>7 MS. VANDRUFF: I understand, Your Honor.</p> <p>8 It's complaint counsel's understanding that</p> <p>9 respondent wishes to use portions of certain of those</p> <p>10 documents during his examination, and I defer,</p> <p>11 Your Honor, without having to -- we can address that now</p> <p>12 or we can address it during the examination.</p> <p>13 JUDGE CHAPPELL: Have you conferred on how</p> <p>14 you're going to handle this?</p> <p>15 MR. SHERMAN: We have, Your Honor.</p> <p>16 JUDGE CHAPPELL: Is there a disagreement?</p> <p>17 MR. SHERMAN: Yes, there is.</p> <p>18 JUDGE CHAPPELL: I'll handle the disagreements.</p> <p>19 MS. VANDRUFF: Well, I don't know that it's a</p> <p>20 disagreement, Your Honor.</p> <p>21 MR. SHERMAN: I don't know that it's a</p> <p>22 disagreement.</p> <p>23 We conferred concerning the 1718 File.</p> <p>24 Mr. Wallace, since we last were before Your Honor,</p> <p>25 produced two iterations of the 1718 File. We intend to</p> |
| 1326 | <p>1 intend to, as per the court's order, lay the proper</p> <p>2 foundation for admission of those exhibits, certain of</p> <p>3 those exhibits. Complaint counsel is aware of which</p> <p>4 exhibits we intend to comply with the court's order by</p> <p>5 laying a correct foundation.</p> <p>6 JUDGE CHAPPELL: With a witness?</p> <p>7 MR. SHERMAN: Yes, sir.</p> <p>8 JUDGE CHAPPELL: Other than Mr. Wallace?</p> <p>9 MR. SHERMAN: No, sir.</p> <p>10 JUDGE CHAPPELL: Okay. Which is why you said no</p> <p>11 to any other witnesses.</p> <p>12 MR. SHERMAN: That's correct, Your Honor.</p> <p>13 JUDGE CHAPPELL: All right. Thank you. Thanks</p> <p>14 for letting me know that.</p> <p>15 Anything further?</p> <p>16 MS. VANDRUFF: Not from complaint counsel,</p> <p>17 Your Honor. Thank you.</p> <p>18 JUDGE CHAPPELL: Let's talk about in camera</p> <p>19 issues.</p> <p>20 By a February 19, 2015 order, the parties and</p> <p>21 nonparties were directed, "If a party or nonparty has</p> <p>22 material that has been or will be offered into evidence,</p> <p>23 the deadline for filing a motion for in camera treatment</p> <p>24 is February 24, 2015."</p> <p>25 Pursuant to that order, complaint counsel filed</p> | 1328 | <p>1 introduce those 1718 Files into the record, but we do</p> <p>2 not intend to display those files in toto. We do not</p> <p>3 intend to display any page of those files which</p> <p>4 contains PII or PHI. We only intend to display the</p> <p>5 cover sheet so that Mr. Wallace can identify it for</p> <p>6 what it is.</p> <p>7 JUDGE CHAPPELL: These are different documents</p> <p>8 than we've seen before.</p> <p>9 MR. SHERMAN: They are the same document. They</p> <p>10 are produced from a different source.</p> <p>11 JUDGE CHAPPELL: But they're identical to</p> <p>12 documents that have been granted in camera status?</p> <p>13 MS. VANDRUFF: And Your Honor, I think that the</p> <p>14 response to that question needs to be elicited from</p> <p>15 Mr. Wallace as opposed to characterized by Mr. Sherman.</p> <p>16 JUDGE CHAPPELL: In the event there are</p> <p>17 documents that I would call related to, springing from,</p> <p>18 fruit of a document, for example, 1718 File, that are</p> <p>19 somewhat different, if they would fairly come under the</p> <p>20 in camera ruling, then bring that up, and we'll give</p> <p>21 them an identifier, like if it was RX 54, it would be</p> <p>22 RX 54-A, so we're very clear on the record.</p> <p>23 I don't need to go into another analysis for</p> <p>24 in camera if the document is very similar but in some</p> <p>25 respects different.</p> |

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1 Is that clear?
 2 MS. VANDRUFF: I think it is, Your Honor,
 3 although the conference that Mr. Sherman and I had this
 4 morning, complaint counsel doesn't necessarily have any
 5 concerns about the single page that Mr. Sherman intends
 6 to use being granted in camera treatment, if that's
 7 helpful to the court.
 8 MR. SHERMAN: Well, I don't mean to sound flip.
 9 Why would you have a concern with a single page being
 10 granted in camera treatment when I think the issue that
 11 we're trying to address is whether or not it's
 12 necessary to go in camera for Mr. Wallace to identify
 13 the cover page of the document, state what it is and
 14 then --
 15 JUDGE CHAPPELL: I see. We're talking about
 16 two different things. We're talking about a document
 17 that's been granted in camera treatment and we're
 18 talking about an in camera proceeding where we clear the
 19 courtroom. And the general rule there, when in doubt,
 20 we clear out.
 21 But if the attorneys are aware where we are and
 22 the witness is advised, don't go into anything that's
 23 protected without letting us know, then we can keep the
 24 public in the courtroom.
 25 And is Mr. Wallace aware of the information

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1 that's been given in camera treatment?
 2 MR. SHERMAN: I don't know. I've not been able
 3 to speak to Mr. Wallace --
 4 JUDGE CHAPPELL: Mr. Wallace --
 5 MR. SHERMAN: -- given the type of immunity that
 6 he has.
 7 JUDGE CHAPPELL: -- if you or your attorney --
 8 if you need to answer a question and you or your
 9 attorney feel like it's getting into an area that might
 10 be in camera or kept private, just let us know that we
 11 may need to have this answer given in private, and we'll
 12 determine it at that time. All right?
 13 MS. BUCHANAN: I think one of the issues,
 14 Your Honor, is that we do not know precisely which
 15 documents he's seeking in camera treatment for.
 16 JUDGE CHAPPELL: All right. Then the attorneys
 17 questioning the witness are on guard. If the witness
 18 goes into an area that might be in camera, let me know.
 19 We try to make the hearing and proceeding
 20 public to the extent possible, but we don't want any
 21 mistakes. We can't unring the bell if something comes
 22 out in open court. And there is always someone from the
 23 press in the courtroom. And we invite them, bring them
 24 on, but there are certain things that shouldn't be
 25 disclosed.

1331

1 Any other questions before we hear Mr. Wallace?
 2 MR. SHERMAN: The only other -- there's a couple
 3 of small matters.
 4 I am told that Mr. Wallace is hard of hearing,
 5 so I am going to be speaking probably directly into the
 6 microphone when addressing him. And I would, you know,
 7 suggest and implore complaint counsel to do the same, as
 8 well as the court, may it please the court.
 9 JUDGE CHAPPELL: Would it help to question the
 10 witness from the middle of the courtroom?
 11 MS. BUCHANAN: Yes, Your Honor, it would.
 12 Mr. Wallace also reads lips, and so when you're
 13 questioning the witness and any of the parties, if they
 14 can directly face him, he can hear out of his left ear,
 15 and so he is very hard of hearing and if counsel could
 16 look directly at him when they're asking questions.
 17 JUDGE CHAPPELL: Unfortunately, the acoustics
 18 are not that good. They were, however, state of the art
 19 when this building was built in 54 A.D., but it's
 20 difficult to hear in the courtroom.
 21 With that, call your next witness.
 22 MR. SHERMAN: One other matter, Your Honor.
 23 JUDGE CHAPPELL: All right.
 24 MR. SHERMAN: Mr. Wallace's counsel has
 25 requested that she be allowed to sit at counsel table

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1 while Mr. Wallace is being questioned. We have no
 2 objection to that, but it's your courtroom, Judge.
 3 MS. VANDRUFF: And there's no objection from
 4 us.
 5 JUDGE CHAPPELL: Do you want to sit over
 6 here (indicating)?
 7 MS. BUCHANAN: I'm happy to sit anywhere.
 8 JUDGE CHAPPELL: I mean, have you chosen a
 9 desired location?
 10 MS. BUCHANAN: Well, I actually was thinking the
 11 witness stand was --
 12 JUDGE CHAPPELL: It's over here (indicating).
 13 MS. BUCHANAN: Oh, okay. Well, then sure, the
 14 other side is actually more convenient.
 15 JUDGE CHAPPELL: Our dock is over
 16 here (indicating).
 17 So if you want to give her a chair or if she
 18 wants to -- whatever you guys want to do is fine.
 19 (Pause in the proceedings.)
 20 MR. SHERMAN: One other housekeeping matter,
 21 Your Honor.
 22 If there are any witnesses in the courtroom, I
 23 would request sequestration of any other witnesses,
 24 particularly those who may be called in rebuttal or
 25 those who have testified before. I don't know that

1333

1 there are.
 2 JUDGE CHAPPELL: The rule has just been
 3 invoked. Anyone who knows they're going to be a
 4 witness in this proceeding needs to leave the
 5 courtroom.
 6 MS. VANDRUFF: Your Honor, may I approach?
 7 JUDGE CHAPPELL: Off the record?
 8 MS. VANDRUFF: We can do it off the record or
 9 in camera. I don't think it's appropriate to do it in
 10 open court.
 11 JUDGE CHAPPELL: All right. Come on up.
 12 MS. VANDRUFF: Thank you.
 13 (At the bench, the following discussion was held
 14 off the public record.)
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 20 (In open court.)
 21 JUDGE CHAPPELL: Are there any Tiversa employees
 22 in the courtroom? If so, please stand and identify
 23 yourselves.
 24 MR. LIBEN: Your Honor, my name is Lucas Liben.
 25 I'm outside counsel for Tiversa. There are no Tiversa

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1 employees in the courtroom this morning.
 2 JUDGE CHAPPELL: Thank you.
 3 (At the bench, the following discussion was held
 4 off the public record.)
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 14 (In open court.)
 15 JUDGE CHAPPELL: Go ahead, Mr. Sherman.
 16 MR. SHERMAN: Your Honor, I will withdraw my
 17 motion for sequestration of the witnesses at this time
 18 with a reservation of rights to remake the motion should
 19 circumstances change.
 20 JUDGE CHAPPELL: Okay. And I'll request that
 21 counsel for Tiversa inform the court if any employees of
 22 your client enter the courtroom.
 23 MR. LIBEN: Absolutely, Your Honor.
 24 JUDGE CHAPPELL: Thank you.
 25 Mr. Sherman, call your next witness.

1337

1 MR. SHERMAN: Rick Wallace.
 2 - - - - -
 3 Whereupon --
 4 RICHARD EDWARD WALLACE
 5 a witness, called for examination, having been first
 6 duly sworn, was examined and testified as follows:
 7 DIRECT EXAMINATION
 8 BY MR. SHERMAN:
 9 **Q. Mr. Wallace, for the record, could you state**
 10 **your full name.**
 11 A. Richard Edward Wallace.
 12 JUDGE CHAPPELL: If at any time you don't hear a
 13 question, just let us know.
 14 THE WITNESS: Okay.
 15 BY MR. SHERMAN:
 16 **Q. And you can hear me okay?**
 17 A. Yeah.
 18 **Q. Mr. Wallace, are you a former employee of a**
 19 **company known as Tiversa?**
 20 A. Yes, I am.
 21 **Q. When did you begin your employment with**
 22 **Tiversa?**
 23 A. July of 2007.
 24 **Q. When did you end or did your employment end**
 25 **with Tiversa?**

1338

1 A. Did I do what?
 2 **Q. When did your employment end?**
 3 A. February of 2014.
 4 **Q. When you began your employment with Tiversa --**
 5 **well, how were you contacted to -- strike that.**
 6 **How did you find out that there was an**
 7 **employment opportunity at Tiversa?**
 8 A. I was mentioned in a news article out of
 9 Fox News Chicago, and employees at Tiversa saw that I
 10 was quoted in that article and they made contact with
 11 me.
 12 **Q. What was the substance of that article?**
 13 A. It was the ability to find and expose data, PII,
 14 that is loose on peer-to-peer networks.
 15 **Q. And so you were the subject of an article based**
 16 **on your ability to find PII on peer-to-peer networks?**
 17 A. Yes. Uh-huh.
 18 **Q. And were you finding PII on peer-to-peer**
 19 **networks for any particular purpose at that time?**
 20 A. At that time, no, other than, prior to being
 21 mentioned in this article, my wife was in the Army --
 22 she was a major in Germany -- and we were looking for
 23 soldiers' information that has been inadvertently
 24 exposed.
 25 JUDGE CHAPPELL: She was a major in the

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1 U.S. Army?
 2 THE WITNESS: Yes. Uh-huh.
 3 BY MR. SHERMAN:
 4 **Q. Which employee from Tiversa contacted you?**
 5 A. Bob Boback.
 6 **Q. And who is Bob Boback?**
 7 A. He was the CEO or still is the CEO as far as I
 8 know.
 9 **Q. And did Bob Boback describe for you what he**
 10 **wanted you to do in the course of your employment with**
 11 **Tiversa?**
 12 A. Yes.
 13 **Q. What did he say?**
 14 A. They arranged for me to travel from Illinois out
 15 to Pittsburgh, where there were two meetings that I had
 16 with Bob and then also the rest of the executive team,
 17 and I would be hired as a forensic analyst.
 18 **Q. And what was your understanding of what a**
 19 **forensic analyst at Tiversa would be required to do?**
 20 A. A forensic analyst at Tiversa would not be
 21 limited to but that one function would be to look
 22 through data that has been downloaded and ticket it for
 23 clients, meaning write up a one-page narrative
 24 normally, where the information is found, what type of
 25 information it is and who the disclosing source could

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1 possibly be.
 2 **Q. In your meetings with Tiversa prior to**
 3 **employment, was Tiversa's business explained to you; in**
 4 **other words, did they explain what Tiversa was in the**
 5 **business of doing?**
 6 A. Yes. Data security company.
 7 Data security.
 8 **Q. And being a data security company, they did**
 9 **what?**
 10 A. They would scour peer-to-peer networks and
 11 download information that's available on predominantly
 12 the Gnutella network back in those days.
 13 JUDGE CHAPPELL: I just want the record to be
 14 clear.
 15 Is that what you did or what Tiversa did?
 16 THE WITNESS: Is that what what?
 17 JUDGE CHAPPELL: What you just described, is
 18 that what your job was or is that what Tiversa did?
 19 THE WITNESS: Tiversa's platform was a series of
 20 algorithms that allowed the entire peer-to-peer network
 21 to be captured not going any deeper into any computer
 22 system but just has more breadth.
 23 JUDGE CHAPPELL: So we're probably going to hear
 24 more about what your job was.
 25 Was there anyone else at Tiversa doing what you

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1 did at the time?
 2 THE WITNESS: Yes.
 3 JUDGE CHAPPELL: Who was that?
 4 THE WITNESS: There was Keith Tagliaferri. He
 5 was an analyst. We were just basically the only two
 6 analysts at that time. The other people were sales and
 7 support and executive level.
 8 JUDGE CHAPPELL: So there were two Tiversa
 9 employees, one being you, doing basically the same job.
 10 THE WITNESS: Right.
 11 JUDGE CHAPPELL: Thank you.
 12 BY MR. SHERMAN:
 13 **Q. Can you describe how you did your job when you**
 14 **got to Tiversa, what did you do?**
 15 A. When I was first brought on, we were preparing
 16 for a congressional hearing, and I was told to basically
 17 use any and all means available to find information that
 18 would be relevant for that hearing.
 19 **Q. What kind of information was relevant for that**
 20 **hearing?**
 21 A. Everything from health insurance information to,
 22 you know, PII, Social Security numbers, basically
 23 anything that should not be out, you know, on these
 24 networks.
 25 **Q. Is it safe to assume that you did that and you**

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1 **provided that information to whomever was testifying at**
 2 **the congressional hearing for Tiversa?**
 3 A. Yes, I did.
 4 **Q. And who testified at the congressional hearing**
 5 **for Tiversa?**
 6 A. That was Bob Boback, our CEO.
 7 **Q. Did you attend the hearing?**
 8 A. I did not.
 9 JUDGE CHAPPELL: Let me ask a question.
 10 Sometimes I wait until the end, but there are certain
 11 phrases of things I need to understand. We've been
 12 waiting a long time for Mr. Wallace, so I have a few
 13 things I just need to understand.
 14 I've heard you talk about viewing, searching and
 15 downloading. In the context of your job at Tiversa,
 16 tell me what each term means, "downloading," "viewing"
 17 and "searching." Did you do all of these or do they
 18 mean the same thing? Tell me what they meant in the
 19 context of your work.
 20 THE WITNESS: There were multiple positions --
 21 or multiple activities under my position. One of them
 22 would have been, you know, using a standard,
 23 off-the-shelf peer-to-peer client, such as LimeWire or
 24 BearShare or Kazaa or Morpheus, any of those that are,
 25 you know, affiliated with the Gnutella network. I would

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1 be able to use those clients to supplement other
 2 information that Tiversa's system possibly hadn't
 3 downloaded.
 4 So it would be just another tool to supplement
 5 the information that Tiversa would have in the data
 6 store.
 7 JUDGE CHAPPELL: Who made the decision of what
 8 to download?
 9 THE WITNESS: That would be the person sitting
 10 at the keyboard, so me.
 11 JUDGE CHAPPELL: Did you have a set of written
 12 parameters like if you find this, you download it, or
 13 how did that work?
 14 THE WITNESS: No. Because it would be very
 15 difficult to know what's inside of a file prior to
 16 downloading it. You know, it could be a file titled,
 17 you know, ABC123, and inside of that file could be
 18 several thousand Social Security numbers or it could be,
 19 you know, a child's homework, so you wouldn't really
 20 know what you're downloading until you open it up and
 21 review the data.
 22 JUDGE CHAPPELL: So when you did a search, to
 23 do a view, you would have to download; is that correct?
 24 THE WITNESS: What you would do is you would
 25 issue a search, for example, whatever type of

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1 information you're looking for. You would -- if we were
 2 looking for insurance information for a healthcare
 3 company, I might use the name of that company, I might
 4 use "insurance," I might use "report," anything that
 5 would generate a file to download or would be able to
 6 identify an exposed file at -- on one of these
 7 networks.
 8 JUDGE CHAPPELL: And once you downloaded a
 9 file, what did you do with it? Did you decide that,
 10 okay, this is worth something and then you tell
 11 Mr. Boback?
 12 THE WITNESS: Yes.
 13 JUDGE CHAPPELL: How did that process work?
 14 THE WITNESS: Basically, I worked very closely
 15 at the time with Bob Boback. If it was something of --
 16 significant in nature, then I would definitely go to
 17 Bob and say this is what we have, you know, and he
 18 would make the decision at that point how to best
 19 monetize that information, whether it be giving it to a
 20 salesperson or him calling the company directly.
 21 JUDGE CHAPPELL: All right. Thank you.
 22 BY MR. SHERMAN:
 23 **Q. So, Mr. Wallace, when you were viewing files, is**
 24 **it correct to say that when you were viewing files on**
 25 **the network, you were not actually viewing the content**

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1 **of those files?**
 2 A. You would start out by viewing the file title,
 3 the type of file that it is, and you would record the IP
 4 and port.
 5 **Q. And was a decision made based on the title**
 6 **whether you would then download the file to attempt to**
 7 **view the content?**
 8 A. No. I mean, this is on a DSL line, so it's not
 9 going to cost you any more to download 50 files today
 10 rather than, you know, 150, so basically pulling down
 11 any and all information that was available.
 12 **Q. So is it your testimony that while doing your**
 13 **job, you would search the peer-to-peer networks and pull**
 14 **down any and all information that was available?**
 15 A. That is correct, yes.
 16 **Q. You used the term "pull down."**
 17 **Does that mean that you would download those**
 18 **files?**
 19 A. Yes.
 20 When you are on these networks, you have the
 21 ability to find what you're searching for. You know,
 22 you find a file that you can also browse that host and
 23 see what other files are emanating from that IP
 24 address.
 25 JUDGE CHAPPELL: In your job, did you do a

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1 complete search like a Google search of the Internet or
 2 did you only search peer-to-peer networks?
 3 THE WITNESS: Normally only peer-to-peer
 4 networks. However, if there was not enough information
 5 to identify who the possible source of the files are,
 6 then you might go to Facebook and see if they,
 7 you know -- if you have meta data, you might be able to
 8 go find their Facebook profile or a news article or
 9 something like that on Google that would help you
 10 identify the person that the -- is the source of the
 11 information.
 12 JUDGE CHAPPELL: So am I correct that the first
 13 broad net you cast was a peer-to-peer search only?
 14 THE WITNESS: That is correct, yes.
 15 JUDGE CHAPPELL: And then you would drill down
 16 if need be.
 17 THE WITNESS: And then drill down from there,
 18 yes.
 19 BY MR. SHERMAN:
 20 **Q. After the testimony at the congressional**
 21 **hearing for which you provided some documentation, did**
 22 **there begin to be communications between Tiversa and the**
 23 **FTC?**
 24 A. Yes.
 25 **Q. How soon after the congressional hearing did**

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1 **these communications begin?**
 2 A. I couldn't say for sure, but I would venture to
 3 speculate maybe around two months after.
 4 **Q. And were you present during these**
 5 **communications?**
 6 A. Yes.
 7 **Q. And how often were these communications**
 8 **occurring once they began?**
 9 A. There were different things happening, so
 10 sometimes there would be communication that was quite
 11 frequent, other times, you know, maybe weekly.
 12 JUDGE CHAPPELL: For the record, you asked him a
 13 question about after the congressional hearing. Have
 14 you established on the record when that began?
 15 BY MR. SHERMAN:
 16 **Q. The congressional hearings that you believe I'm**
 17 **talking about occurred in 2007, shortly after you began**
 18 **working at Tiversa; correct?**
 19 A. That's correct. July 2007.
 20 JUDGE CHAPPELL: Just so I'm clear -- I'm asking
 21 you this -- these letters from Chairman Darrell Issa,
 22 the letters that we got, that all began in 2007?
 23 MR. SHERMAN: No, sir.
 24 JUDGE CHAPPELL: This is a different hearing?
 25 MR. SHERMAN: Yes, sir.

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1 JUDGE CHAPPELL: All right. Let's just keep the
 2 record clear then.
 3 MR. SHERMAN: I understand.
 4 BY MR. SHERMAN:
 5 **Q. You said sometimes the communications between**
 6 **Tiversa and the FTC were weekly; correct?**
 7 A. Yes.
 8 **Q. Were there times when they were more frequent**
 9 **than that?**
 10 A. There were times when I was working on a project
 11 specifically for the FTC that there might need to be
 12 several calls in a short period of time to clarify,
 13 you know, rectify, explain.
 14 **Q. And was that during the period two months after**
 15 **the 2007 congressional hearings or was that at some**
 16 **later time?**
 17 A. It was at a later time. I couldn't say
 18 specifically.
 19 **Q. So let's talk about the period more closely**
 20 **related to immediately after the 2007 congressional**
 21 **hearings.**
 22 **Correct me if I'm wrong. I believe your**
 23 **testimony is that there began to be communication**
 24 **between Tiversa and the FTC approximately two months**
 25 **after those hearings took place. Correct?**

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1 A. Yes, approximately.
 2 **Q. And during that time, the communications were**
 3 **how frequent?**
 4 A. It was hit-and-miss.
 5 We did, you know, receive a visit from some
 6 individuals from the FTC where we were able to showcase,
 7 if you will, the technology and type of information
 8 that's available on these networks, but it wasn't --
 9 you know, there was a process there where there were
 10 some legal hurdles, from what I understand, that had to
 11 be dealt with prior to the FTC using the data we could
 12 provide.
 13 JUDGE CHAPPELL: When you say you got a visit
 14 from the FTC, where did these visits take place, city
 15 and town -- I mean, city and state?
 16 THE WITNESS: What was it?
 17 JUDGE CHAPPELL: Where did the visits take
 18 place, what city and what state?
 19 THE WITNESS: Cranberry Township at Tiversa's --
 20 this is prior to Tiversa buying the building in
 21 Pittsburgh.
 22 JUDGE CHAPPELL: In Pennsylvania?
 23 THE WITNESS: Yes.
 24 BY MR. SHERMAN:
 25 **Q. You indicated that you participated in these**

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1 **communications beginning in 2007; correct?**
 2 A. Yes.
 3 **Q. What was the subject matter of those**
 4 **communications? What did you talk about?**
 5 A. We talked about information that was available
 6 on these networks.
 7 You know, there's always the big wow factor when
 8 people would visit our facility, like, you know, my
 9 gosh, I can't believe that this information is available
 10 for anyone to download.
 11 Then it -- it went from there to providing
 12 information that only met a certain threshold that was
 13 relatively fluid at the beginning, but we were able to
 14 work through it.
 15 **Q. So are you saying that the FTC began requesting**
 16 **information that met a certain threshold?**
 17 MS. VANDRUFF: Objection, Your Honor. This is
 18 respondent's witness. I'd ask that he not lead the
 19 witness, please.
 20 JUDGE CHAPPELL: That was a good example of a
 21 leading question. Sustained.
 22 I know you were clarifying, but it was leading.
 23 BY MR. SHERMAN:
 24 **Q. Did the FTC begin requesting information that**
 25 **met a certain threshold?**

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1 A. Yes.
 2 And Bob Boback did not feel comfortable
 3 providing information to the FTC under Tiversa's name.
 4 At the time, there was talk of a possible acquisition,
 5 that Tiversa would be acquired by another large identity
 6 theft company, so we didn't want to muddy the waters at
 7 the time, so that extended the whole process.
 8 **Q. You mentioned the FTC visiting Tiversa in**
 9 **Pennsylvania; correct?**
 10 A. Yes.
 11 **Q. Do you recall what year that occurred?**
 12 A. That would have been the fall or winter of
 13 2007.
 14 **Q. So that was after the congressional hearings and**
 15 **testimony that we have been talking about?**
 16 A. Yes.
 17 **Q. When did the FTC begin requesting information of**
 18 **a certain threshold, as you described?**
 19 A. It was after another entity was set up that a
 20 formal request could be made from the FTC to Tiversa.
 21 That's when that threshold and different types of
 22 information were gathered up and, you know, put
 23 together.
 24 JUDGE CHAPPELL: I have a question.
 25 Do you know who initiated the contact or

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1 communications with Tiversa and the FTC?
 2 THE WITNESS: Well, it was Bob Boback was
 3 testifying along with -- and I'm not -- I don't remember
 4 her name, but it was some executive from the FTC at the
 5 same hearing.
 6 JUDGE CHAPPELL: So there would have been a
 7 meeting at the hearing.
 8 THE WITNESS: They were -- both Bob and the lady
 9 from the FTC were testifying at the same hearing.
 10 JUDGE CHAPPELL: But you're not sure who
 11 suggested meeting, whether it was the FTC or Tiversa.
 12 THE WITNESS: No. I don't know.
 13 JUDGE CHAPPELL: Off the record.
 14 (Discussion off the record.)
 15 Go ahead.
 16 BY MR. SHERMAN:
 17 **Q. Mr. Wallace, do you know what a civil**
 18 **investigative demand is?**
 19 A. Yes. I'm familiar with that.
 20 **Q. And how are you familiar with what that is?**
 21 A. That is a document that came from the FTC to --
 22 well, there was some talk about it being issued to
 23 Tiversa. We backed out of that process and accepted it
 24 through another company.
 25 **Q. What other company accepted the civil**

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1 **investigative demand?**
 2 A. The Privacy Institute.
 3 **Q. Do you know whether the Privacy Institute**
 4 **existed prior to the talk of issuing the civil**
 5 **investigative demand to Tiversa?**
 6 A. No, it did not.
 7 **Q. So is it your understanding that the**
 8 **Privacy Institute was established for the sole purpose**
 9 **of receiving the CID from -- the civil investigative**
 10 **demand from the FTC?**
 11 MS. VANDRUFF: Objection, Your Honor. Leading.
 12 JUDGE CHAPPELL: Any response?
 13 MR. SHERMAN: I can rephrase the question.
 14 JUDGE CHAPPELL: Thank you.
 15 BY MR. SHERMAN:
 16 **Q. What is your understanding as to why the**
 17 **Privacy Institute was established?**
 18 A. It was a way to protect Tiversa from knowingly
 19 giving other entities information because, like I said,
 20 at the time there were some talks about an acquisition.
 21 **Q. Did you do anything in order to help the**
 22 **Privacy Institute respond to the civil investigative**
 23 **demand?**
 24 A. Yes.
 25 **Q. What did you do?**

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1 (Pause in the proceedings.)
 2 Do you still need to approach?
 3 MR. SHERMAN: If he can identify what it is, we
 4 will not.
 5 BY MR. SHERMAN:
 6 **Q. Mr. Wallace, can you identify what that document**
 7 **is?**
 8 A. It looks to me like it's a redacted spreadsheet
 9 that would have information from LabMD in their
 10 insurance aging file. This probably came from a list
 11 that we used for IRCs they're called, incident response
 12 cases.
 13 MS. VANDRUFF: Your Honor, I'm sorry to
 14 interrupt the witness, but his testimony was predicated
 15 with that it probably did, and I'd ask that the witness
 16 be restricted to what's within his personal knowledge as
 17 opposed to his speculation.
 18 JUDGE CHAPPELL: That's sustained.
 19 MS. VANDRUFF: Thank you, Your Honor.
 20 MR. SHERMAN: Your Honor, may we approach?
 21 JUDGE CHAPPELL: Yes.
 22 (At the bench, the following discussion was held
 23 off the public record.)
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1 A. I collected companies' information and the
 2 actual files that were associated, burned those to
 3 discs, and they were provided in compliance with the
 4 CID.
 5 **Q. Did you provide anything else in response to the**
 6 **CID?**
 7 A. Not that I'm aware of.
 8 JUDGE CHAPPELL: I just want to be clear of
 9 something. This is not something within my purview.
 10 Was there only one civil investigative demand
 11 that we're talking about? Was there only one sent to
 12 Tiversa?
 13 THE WITNESS: Yes. Only one that I'm aware of.
 14 JUDGE CHAPPELL: Thank you.
 15 BY MR. SHERMAN:
 16 **Q. Is there a page on the screen in front of you,**
 17 **Mr. Wallace?**
 18 A. Yes. I can't really tell what it is, but there
 19 is.
 20 I'm familiar with what that is.
 21 MR. SHERMAN: Your Honor, can we approach the
 22 bench?
 23 JUDGE CHAPPELL: Yes. But whoever is displaying
 24 the document can increase it to 100 percent. You can
 25 make it larger.

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1 **Q. What is an IRC?**
2 A. An incident response case. It would be if
3 you -- if an individual or a company has a data breach,
4 their information, as the analysts are going through
5 data, they would enter it into a database or a
6 spreadsheet so that the salespeople or Bob or whoever
7 would be able to make the phone call to describe the
8 problem that they're having and then offer them
9 remediation services.
10 **Q. So the document that you have in your hand was
11 created in response to the CID?**
12 A. It began as a spreadsheet for the IRCs but was
13 then copied and pasted for response to the CID, yes.
14 And this is a working copy as well.
15 JUDGE CHAPPELL: You said that if there was a
16 data breach, the analysts would --
17 THE WITNESS: Pardon me?
18 JUDGE CHAPPELL: You said that if there was a
19 data breach found, the analysts would create an IRC?
20 THE WITNESS: You would take the information --
21 that's where this came from.
22 JUDGE CHAPPELL: And the analysts would be you
23 or the other name you gave me earlier? You were the two
24 analysts?
25 THE WITNESS: Right.

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3 (In open court.)
4 JUDGE CHAPPELL: Mr. Wallace, we've had an
5 objection which I sustained. You're allowed to testify
6 to what you know, what you saw, what you did. And maybe
7 inadvertently, because you're not an expert witness, you
8 were talking about something probably was or might be.
9 Let's stick to what you know for certain and no
10 speculation.
11 THE WITNESS: Okay.
12 JUDGE CHAPPELL: Thank you.
13 MR. SHERMAN: May I approach the witness,
14 Your Honor?
15 JUDGE CHAPPELL: Yes.
16 BY MR. SHERMAN:
17 **Q. Mr. Wallace, I've just handed you what's been
18 marked as RX 551 for identification purposes only.
19 I'll ask that you take a look at that document
20 and tell me whether or not you recognize it.**
21 A. Yes, I do.
22 **Q. What is it?**
23 A. This began as a list for IRCs and was the
24 information that was provided to the FTC in response to
25 the CID.

1360

1 JUDGE CHAPPELL: Is there something else you
2 wanted to say?
3 THE WITNESS: Or if there's a salesperson that's
4 in the data store looking around, maybe they would find
5 a company that's on here, they would put the information
6 on there, the amount of people affected, the type of
7 information it was, the file title. The only thing that
8 is not on here is the IP address.
9 JUDGE CHAPPELL: And you referred to something
10 called a data breach.
11 What would be a data breach that would create
12 this IRC?
13 THE WITNESS: It would be any of these
14 individuals who the analyst would come across their
15 information and a way for us to monetize and sell our
16 services, whether it be data monitoring, a takedown
17 notice that we could issue to an ISP.
18 The IRC is different than -- it's more of a
19 one-off, if you will. Rather than purchasing a
20 monitoring contract over an extended period of time,
21 maybe this company only has one file with 5,000 people's
22 PII it's about and they just need the name of the person
23 that is exposing it.
24 JUDGE CHAPPELL: You might have misunderstood my
25 question.

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1 At the time you and the other analysts were
 2 doing this job, what was considered to be a data
 3 breach? You said you would look at a data breach.
 4 What was a data breach? What would constitute a
 5 data breach?
 6 THE WITNESS: There was no guideline. It was
 7 based on what the analyst or the salespeople that were
 8 in the data store, what they would constitute as
 9 information that should not be available publicly.
 10 JUDGE CHAPPELL: And you used the word I think
 11 "monetize"?
 12 THE WITNESS: Yes.
 13 JUDGE CHAPPELL: Something that could be
 14 monetized?
 15 THE WITNESS: We -- early on, we were having
 16 problems at Tiversa, we were having problems selling a
 17 monitoring contract, so we started contacting individual
 18 companies when information came out, and you would be
 19 able to charge them a lesser amount than a yearlong
 20 contract, just basically a one-off to take care of that
 21 problem right then.
 22 JUDGE CHAPPELL: All right. Thank you.
 23 BY MR. SHERMAN:
 24 **Q. So, Mr. Wallace, without naming any of the**
 25 **companies on that list, does this represent -- and I**

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1 **think you've already testified to this -- does this**
 2 **represent the list that you created or compiled to**
 3 **respond to the CID?**
 4 A. Yes.
 5 **Q. Approximately how many companies appear on that**
 6 **list?**
 7 A. I believe there were eighty- -- like 89 I want
 8 to say.
 9 **Q. Was there a criteria for which companies should**
 10 **appear on that list?**
 11 A. There is.
 12 **Q. And what is it?**
 13 A. That was 100 individuals' PII. That was the
 14 threshold, if you will.
 15 **Q. And who determined that threshold?**
 16 A. I am not sure. I know it came -- I received the
 17 threshold from Bob Boback.
 18 **Q. And so is it fair to say then that each**
 19 **company's name who appears on that list had PII exposed**
 20 **for over 100 people?**
 21 A. No. I mean, I can see that that's -- there are
 22 some on here that only have ten people exposed.
 23 **Q. Why does their name appear on the list?**
 24 A. In order to basically get the most bang for our
 25 buck.

1363

1 **Q. Why does their name appear on the list?**
 2 A. So that the FTC would contact them and notify
 3 them of a data breach and hopefully we would be able to
 4 sell our services to them.
 5 **Q. Did someone tell you to put their name on the**
 6 **list?**
 7 A. Yes.
 8 **Q. Who?**
 9 A. Our CEO, Bob Boback.
 10 **Q. Why?**
 11 A. To use -- to be able to use any means necessary
 12 to let them know that an enforcement action is coming
 13 down the line and they need to hire us or face the
 14 music, so to speak.
 15 **Q. Did you, at the time this was created, have**
 16 **information on companies who fit the threshold but whose**
 17 **names do not appear on that list?**
 18 A. Yes.
 19 **Q. Why does their name not appear on the list?**
 20 A. The list was scrubbed of all clients in the past
 21 and future clients that we felt that there might be,
 22 you know, the prospect of doing business with them.
 23 Their information was removed.
 24 **Q. Clients of Tiversa?**
 25 A. Yes.

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1 **Q. Who made the decision to remove their names from**
 2 **the list?**
 3 A. Bob Boback.
 4 **Q. In response to a question that the judge asked**
 5 **you, you indicated that there was an effort to monetize**
 6 **this information. Do you recall saying that?**
 7 A. Yes.
 8 **Q. How did Tiversa monetize the information that**
 9 **they would gather from the peer-to-peer networks?**
 10 A. Either by selling a monitoring contract which
 11 would look for a certain amount or a certain number of
 12 keywords over a certain period of time or an IRC, which
 13 would be, again, like a one-off, that you would just
 14 take care of that, you know, that breach or that problem
 15 at that given point.
 16 **Q. Were you aware of whether every company that**
 17 **Tiversa contacted accepted the offer to do business with**
 18 **Tiversa?**
 19 A. Did you say did every company accept it? No.
 20 **Q. When a company refused to do business with**
 21 **Tiversa, did Mr. Boback have a certain reaction to**
 22 **that?**
 23 A. Yes.
 24 **Q. What was that reaction?**
 25 A. Usually it would be something to the effect of

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1 they -- you know, they -- I've heard this said many,
 2 many times, that, you know, you think you have a problem
 3 now, you just wait.
 4 It would -- their information would then
 5 proliferate over these networks, actually in our data
 6 store, but we would make it look like data had spread to
 7 multiple places to then follow up with that company
 8 again and try to get them to do business again.
 9 **Q. Are you aware of whether or not LabMD agreed or**
 10 **refused to do business with Tiversa?**
 11 A. I think initially I don't think that there was
 12 a -- I don't think that they did not want to do business
 13 with Tiversa initially, and I think that as the
 14 communication advanced back and forth from Bob and
 15 different people with LabMD, I think that that's when
 16 they decided that they did not want to do business with
 17 Tiversa.
 18 **Q. Did Mr. Boback have a reaction to LabMD's**
 19 **decision not to do business with Tiversa?**
 20 A. Yes.
 21 **Q. And what was that reaction?**
 22 A. Do I say it?
 23 MS. BUCHANAN: Answer the question.
 24 THE WITNESS: He basically said f--- him, make
 25 sure he's at the top of the list.

1366

1 BY MR. SHERMAN:
 2 **Q. What list?**
 3 A. This list in my hand (indicating).
 4 JUDGE CHAPPELL: Is there an average contract
 5 that you can tell me what -- what would be the cost of a
 6 contract for a company?
 7 THE WITNESS: It would depend on the size of the
 8 company. Some of the larger financial companies we were
 9 selling monitoring services for, you know, in
 10 the million dollar price range, or a small mom-and-pop
 11 company, you know, might be in the low thousands per
 12 month.
 13 JUDGE CHAPPELL: That's a million per month?
 14 THE WITNESS: A million per year. That was one
 15 of our largest contracts.
 16 BY MR. SHERMAN:
 17 **Q. You testified earlier that when a company would**
 18 **refuse to do business with Tiversa, somehow their**
 19 **information would proliferate.**
 20 A. Yes.
 21 **Q. What do you mean by that?**
 22 A. Basically what happened would -- there needed to
 23 be a reason for Bob or somebody at Tiversa to contact
 24 that individual again or that company, so in order to
 25 use the -- you basically say that your file spread to a

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1 bad guy's IP address at, you know, Apache Junction,
 2 Arizona or wherever you could find a bad guy to put the
 3 file there as far as the system sees it, but it's
 4 really -- no data is transferring.
 5 **Q. Can you explain to us --**
 6 A. Pardon me?
 7 **Q. Can you explain to us how you would make it**
 8 **appear as though the data had proliferated?**
 9 A. Sure.
 10 So as we talked about earlier, if you use a
 11 stand-alone client like a LimeWire or Kazaa or BearShare
 12 or whatever you have to supplement the data store with
 13 information, there is a folder that I would direct -- or
 14 that I would put files in that would show up in the data
 15 store, you know, with Coveo or whatever application
 16 you're using to have a front end. It would show up just
 17 like it was downloaded from that IP.
 18 JUDGE CHAPPELL: Let me get this straight.
 19 So it was your job, number one, to make it look
 20 like it was proliferated, but you also did --
 21 THE WITNESS: Yes.
 22 JUDGE CHAPPELL: -- spread the document out
 23 there.
 24 THE WITNESS: Yes.
 25 JUDGE CHAPPELL: You made it look like it and

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1 you actually did it.
 2 THE WITNESS: Pardon me?
 3 JUDGE CHAPPELL: You actually did it. You
 4 actually made it available around the Internet in
 5 peer-to-peer --
 6 THE WITNESS: No. No. We would only make it
 7 appear to have been downloaded from a known bad actor.
 8 So if you have an identity thief in Arizona,
 9 say, for example, we already know law enforcement has
 10 already dealt with that individual. We know that the IP
 11 is dead. We know that the computer is long gone.
 12 Therefore, it's easy to burn that IP address because
 13 who's going to second-guess it.
 14 JUDGE CHAPPELL: So to boil this down, you would
 15 make the data breach appear to be much worse than it
 16 actually had been.
 17 THE WITNESS: That's correct.
 18 JUDGE CHAPPELL: Go ahead.
 19 BY MR. SHERMAN:
 20 **Q. Is there a document on your screen,**
 21 **Mr. Wallace?**
 22 A. Yes.
 23 **Q. I submit to you that what's on your screen has**
 24 **been marked as CX 19 and has been admitted into evidence**
 25 **in this case.**

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1 **Do you recognize that document?**
2 A. Yes, I do.
3 **Q. What is that document?**
4 A. That is a list of IP addresses that was created
5 in the November 2013 time frame of Bob came to me and
6 basically said that him and LabMD are having it out,
7 there's -- I didn't really follow the whole legal
8 proceedings, but I knew that there was some bad water
9 there. And Bob said that under no circumstances can the
10 insurance aging file appear to have come from a 64 IP or
11 in the Atlanta area.
12 These IPs that are used here, these are all
13 identity thieves that was provided from me to Bob.
14 **Q. How do you know these are identity thieves' IP**
15 **addresses?**
16 A. Because you can look in the data store and see
17 what files they downloaded and what files they're
18 reexposing. And plus I worked with law enforcement, so
19 I'm very familiar with all four of these.
20 **Q. So the purpose of creating the document in front**
21 **of you was what?**
22 A. That was after Bob came to me and said that
23 under no circumstances can the insurance aging file
24 originate from a Georgia IP address or an Atlanta area
25 IP address. And in addition to that, he told me to

1 THE WITNESS: Yes.
2 JUDGE CHAPPELL: "Data store," what does that
3 mean?
4 THE WITNESS: It is a depository of ICE long
5 servers that as data is pulled in from different
6 networks or peer-to-peer networks, it's stored in the
7 data store.
8 JUDGE CHAPPELL: Was it something on your
9 computer, your server at Tiversa?
10 THE WITNESS: Yes. It would be accessible from
11 a workstation at Tiversa. There are several
12 workstations.
13 JUDGE CHAPPELL: And what was in the data store?
14 THE WITNESS: That would be hard copies of
15 files that were downloaded from the Gnutella network.
16 JUDGE CHAPPELL: This would not be where these
17 IP addresses would be located.
18 THE WITNESS: Yes.
19 JUDGE CHAPPELL: It would be or would not be?
20 THE WITNESS: It would be.
21 JUDGE CHAPPELL: So that was also there, where a
22 file could be located, as well as the actual file?
23 THE WITNESS: Yes.
24 BY MR. SHERMAN:
25 **Q. Mr. Wallace, during the course of your**

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1 find an individual in San Diego to include with this
2 list.
3 **Q. To your knowledge, was the insurance aging file**
4 **belonging to LabMD ever found at any of these IP**
5 **addresses on this list?**
6 A. No, it was not.
7 **Q. Where was the insurance aging file that belonged**
8 **to LabMD found?**
9 MS. VANDRUFF: Objection.
10 THE WITNESS: It was on our workstation.
11 MS. VANDRUFF: Mr. Wallace, excuse me. I'm
12 sorry.
13 Mr. Wallace may be competent to answer that
14 question, but I believe that Mr. Sherman needs to lay
15 the foundation first.
16 JUDGE CHAPPELL: The question regarding where
17 the insurance aging file that belonged to LabMD was
18 found?
19 MS. VANDRUFF: Correct. How Mr. Wallace would
20 have personal knowledge of that fact.
21 MR. SHERMAN: I'll lay a foundation,
22 Your Honor.
23 JUDGE CHAPPELL: All right. Go ahead.
24 Before you do that, Mr. Wallace, you've used the
25 term "data store."

1 **employment at Tiversa, did you find the LabMD insurance**
2 **aging file?**
3 A. Yes, I did.
4 **Q. How did you find that file?**
5 A. I was looking, using a stand-alone desktop
6 computer, looking for a health insurance company who we
7 were providing data services for. Again, I was using
8 that to supplement the -- Tiversa's Eagle Vision, is
9 what it's called or what the secret sauce is, so I was
10 using that just to look and see if there's information
11 that our systems were not downloading or not catching.
12 **Q. And in doing that, you -- did you come across**
13 **the insurance aging file?**
14 A. Yes.
15 **Q. And where did you find the insurance aging file?**
16 A. That was in Atlanta.
17 **Q. And were you able to then capture the IP**
18 **address?**
19 A. Yes. Basically, I downloaded the insurance
20 aging file, saw that it was something of interest for
21 sure, browsed the host and downloaded the additional
22 files that were at that IP.
23 JUDGE CHAPPELL: Let me talk about the data
24 store again.
25 You were talking about you would make it appear

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1 that a file was proliferated when it actually wasn't.
 2 Could you tell by looking at your data store
 3 where the file actually had been seen or downloaded from
 4 as well as these IPs you had created to make it appear
 5 to be worse?
 6 THE WITNESS: Yes. Because the folder where I
 7 would add that information to or the -- prepend the IP
 8 address to the file title, it would go into a separate
 9 folder that was called Input From Lab, so it wasn't
 10 stored in the normal directories that the rest of the
 11 files would be.
 12 JUDGE CHAPPELL: So you could -- you knew
 13 exactly where the file had been found, but how did you
 14 then show that to -- let's say Company B didn't want to
 15 have a contract and you were told to make it look like
 16 the file was all over the Internet.
 17 How did you show that information to Company B?
 18 How did you demonstrate that?
 19 THE WITNESS: Usually it would be after the
 20 fact, Bob would make contact with the company, without
 21 coming to me or coming to anyone else first, and say,
 22 you know, your file has spread to three additional IP
 23 addresses, it's in Europe and Nigeria and Poland and who
 24 knows.
 25 So then it would be up to me to make it appear

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1 that way in the data store so, if there was ever an
 2 audit or, you know, somebody was catching on, the data
 3 would be there if you -- Coveo is basically a front end
 4 for the data store. It's like a Google site, so you
 5 could type in there "insurance aging" and it's going to
 6 come up with a list of IP addresses along with the file,
 7 date and time.
 8 So in order to have that displayed, it needs to
 9 be inside the data store and indexed.
 10 JUDGE CHAPPELL: In the scenario you just gave
 11 me for fictitious Company B, when Mr. Boback told
 12 Company B that, that was untrue.
 13 THE WITNESS: Yes.
 14 BY MR. SHERMAN:
 15 **Q. So let's look at the document that's on your**
 16 **screen.**
 17 **The first set of numbers on the first horizontal**
 18 **line of information, what is that number?**
 19 A. That is an IP address.
 20 **Q. The second set of numbers, what is that?**
 21 A. That is the -- would be the date and time
 22 modified or downloaded.
 23 **Q. The third set of numbers after the "at" symbol?**
 24 A. That would be the file title and the way that it
 25 would be saved in the Tiversa data store with the IP

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1 address prepended to the file title.
 2 **Q. I think you skipped a couple.**
 3 **Right after the "at" symbol, what is that?**
 4 A. That is the time.
 5 **Q. The time of what?**
 6 A. The time of the modification. It's a date and
 7 time of when the file was either modified or
 8 downloaded.
 9 **Q. And the following numbers after that, what is**
 10 **that?**
 11 A. That is the IP address on the front with the
 12 file title. That is exactly how it would be indexed in
 13 our data store so that the IP addresses would show up
 14 properly. That's why they're in brackets, the IP
 15 address.
 16 **Q. Okay. So if someone were to go to Tiversa's**
 17 **data store around the time that -- shortly after this**
 18 **document was created and they searched the**
 19 **173.16.83.112 IP address, would they find an indication**
 20 **that the insurance aging file was downloaded from that**
 21 **IP address?**
 22 A. Yes. It will be in the Input From Lab
 23 directory.
 24 **Q. How did that information come to be there?**
 25 A. Pardon me?

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1 **Q. How did that information come to be there in the**
 2 **data store --**
 3 A. It would be --
 4 **Q. -- under that IP address?**
 5 A. It would be from me inputting it in there.
 6 So you have your Eagle Vision system that is
 7 automatically creating directories and saving data,
 8 files, if you will, and then there's the other half of
 9 it, which was a scratch drive, basically my drive, where
 10 I could deposit files with a modification date to make
 11 it look like on the main screen that, yes, it came from
 12 this IP address; however, if you were to go look at the
 13 file individually, you would see that it was put in
 14 there from the input.
 15 JUDGE CHAPPELL: Hold on a second.
 16 This IP address, let's say the line 1,
 17 173., et cetera, are you familiar with that IP address,
 18 the first line?
 19 THE WITNESS: Yes. 173.16.83?
 20 JUDGE CHAPPELL: What is that site?
 21 THE WITNESS: That is a -- it's important to
 22 understand, IP addresses are only leased for a certain
 23 period of time.
 24 In 2008, this IP address went back to a known
 25 identity thief in Apache Junction, Arizona. Right now,

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1 this IP address resolves to Chicago and it's a complete
 2 separate, you know, different computer.
 3 JUDGE CHAPPELL: I'm just trying to clarify
 4 this.
 5 THE WITNESS: Uh-huh.
 6 JUDGE CHAPPELL: If I understood you correctly,
 7 it was not true that the file was at this IP address.
 8 THE WITNESS: That is correct.
 9 JUDGE CHAPPELL: And if I were Company B in my
 10 earlier scenario, do I have any way to go to
 11 Apache Junction and see if they've downloaded my data?
 12 THE WITNESS: We would see that in our -- in our
 13 real data store, we would show -- like, for example,
 14 with this one, this individual had over -- I was very
 15 familiar with this guy. He had over 3,000 tax returns,
 16 and he was zipping them up and selling them. Therefore,
 17 we knew that he was a bad actor, and it made it easy to
 18 put this file there, so to speak, even though he never
 19 had it physically on that computer, but we made it
 20 look -- appear like he did.
 21 JUDGE CHAPPELL: All right. So if I follow you
 22 correctly, you never -- the file was never actually at
 23 Apache Junction.
 24 THE WITNESS: No.
 25 JUDGE CHAPPELL: But I, Company B, had no way of

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1 ever verifying that or knowing that.
 2 THE WITNESS: Right.
 3 BY MR. SHERMAN:
 4 **Q. For the other three IP addresses and line of**
 5 **information on this document the same is true as for the**
 6 **first line, that you put this information into Tiversa's**
 7 **data store under these IP addresses for the purpose of**
 8 **making it appear that the insurance aging file was found**
 9 **there.**
 10 A. That is correct.
 11 MS. VANDRUFF: Objection, Your Honor. Leading.
 12 JUDGE CHAPPELL: That's sustained.
 13 I'll disregard the response to that question.
 14 Do you want to rephrase?
 15 MS. VANDRUFF: Thank you, Your Honor.
 16 MR. SHERMAN: Yes, sir. We'll move through it.
 17 BY MR. SHERMAN:
 18 **Q. Line 2 on CX 19?**
 19 A. Uh-huh.
 20 **Q. What does the first set of numbers represent?**
 21 A. That is an IP address.
 22 **Q. The second set of numbers?**
 23 A. Pardon me?
 24 **Q. I'm sorry.**
 25 **The second set of numbers, what does that**

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1 **represent?**
 2 A. I still didn't hear you.
 3 **Q. What does the second set of numbers --**
 4 A. Oh, second set.
 5 **Q. -- represent?**
 6 A. That is the date, the date and time of the
 7 modification or download.
 8 **Q. And then the third line of information, the**
 9 **third?**
 10 A. That would be the file title as it would appear
 11 in the data store for any input.
 12 **Q. And is it true that you, Rick Wallace, went into**
 13 **Tiversa's data store and entered this information under**
 14 **the 68.107.85.250 IP address to make it appear that that**
 15 **file was found there?**
 16 MS. VANDRUFF: Objection, Your Honor. Leading.
 17 JUDGE CHAPPELL: Yes. Beginning with "is it
 18 true" pretty much indicates it's leading.
 19 Sustained.
 20 MS. VANDRUFF: Thank you, Your Honor.
 21 BY MR. SHERMAN:
 22 **Q. So the information that appears on the second**
 23 **line?**
 24 A. Pardon?
 25 **Q. The information that appears on the second line**

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1 **of this exhibit?**
 2 A. Okay. Yes.
 3 **Q. You're familiar with that information; correct?**
 4 A. Yes.
 5 **Q. Did you place that information in Tiversa's data**
 6 **store?**
 7 A. Yes.
 8 **Q. And why did you place that particular**
 9 **information in Tiversa's data store?**
 10 A. Again, this was after Bob came to me and said
 11 that we needed a new spread on the insurance aging file
 12 because there were some things going on between LabMD
 13 and Tiversa and in no way, shape or form could it ever
 14 have been found in Atlanta. There's something to do
 15 with Bob claiming that we never connected to an IP -- to
 16 a LabMD computer.
 17 **Q. And is that true, that Tiversa never connected**
 18 **to a LabMD computer?**
 19 A. That is not true.
 20 **Q. The third line of information on CX 19?**
 21 A. Yes.
 22 **Q. Oh, by the way, was the insurance aging file**
 23 **ever found, to your knowledge, at 68.107.85.250?**
 24 A. No, it was not.
 25 **Q. The third line of information on CX 19, are you**

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1 **familiar with that information?**
 2 A. That is also a known person who -- called an
 3 information concentrator or an identity thief, someone
 4 who is downloading information that's out there in the
 5 wild that's available.
 6 **Q. And did you place this information in Tiversa's**
 7 **data store?**
 8 A. Yes.
 9 **Q. And the purpose of placing this information in**
 10 **Tiversa's data store was for what?**
 11 A. Because Bob had came to me, explained that we
 12 had to have spread on these files and had to move it off
 13 of the IP address that would emanate from and, you know,
 14 in Atlanta.
 15 **Q. And so that's what you did; correct?**
 16 A. Yes.
 17 **Q. The fourth line of information, are you familiar**
 18 **with that as well?**
 19 A. Yes.
 20 **Q. And did you place this information in Tiversa's**
 21 **data store?**
 22 A. Yes.
 23 **Q. And why did you place this information in**
 24 **Tiversa's data store?**
 25 A. It was just another IP address that was

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1 available that you could see was a bad actor.
 2 **Q. If someone then goes into Tiversa's data store**
 3 **and they see this information, what are they led to**
 4 **believe?**
 5 A. That the file was -- that the file would have
 6 emanated from that IP address. It would -- it would
 7 show up in a way, if you search for that IP address,
 8 where it would be a laundry list of files and insurance
 9 aging would show up in that list based on an IP search.
 10 **Q. If you do an IP search of what?**
 11 A. Of the data store.
 12 **Q. Tiversa's data store?**
 13 A. Yes.
 14 JUDGE CHAPPELL: Who has access to the data
 15 store?
 16 THE WITNESS: Pardon me?
 17 JUDGE CHAPPELL: Who has access to the data
 18 store?
 19 THE WITNESS: Basically every employee at
 20 Tiversa.
 21 JUDGE CHAPPELL: Did LabMD have access to the
 22 Tiversa data store?
 23 THE WITNESS: Did who? LabMD? No. No. We
 24 would --
 25 JUDGE CHAPPELL: I'm sorry. Let me restate

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1 that.
 2 Was there a LabMD data store?
 3 THE WITNESS: Was there?
 4 JUDGE CHAPPELL: A LabMD data store.
 5 MR. SHERMAN: May I, Your Honor?
 6 THE WITNESS: I'm not sure --
 7 JUDGE CHAPPELL: Go ahead.
 8 BY MR. SHERMAN:
 9 **Q. The question was: Was there a LabMD data**
 10 **store?**
 11 A. No. LabMD's data, I believe that there were
 12 19 files total. They were all put in their own
 13 directory on the data store along with millions of other
 14 IP addresses.
 15 JUDGE CHAPPELL: And these -- what is this
 16 document number on the screen?
 17 MR. SHERMAN: CX 19.
 18 JUDGE CHAPPELL: CX 19, these four IP addresses
 19 were created by you, and they're actually -- for all
 20 practical purposes, they're fake, as far as the aging
 21 file was not found on these three IP addresses;
 22 correct?
 23 THE WITNESS: On all four of them.
 24 JUDGE CHAPPELL: And you created all four of
 25 these at whose request?

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1 THE WITNESS: At Bob's.
 2 JUDGE CHAPPELL: Bob Boback requested that.
 3 THE WITNESS: Yes.
 4 JUDGE CHAPPELL: How was this information
 5 presented to LabMD?
 6 THE WITNESS: It never was presented in --
 7 other than I typed it up and I think it was either
 8 e-mailed or -- I'm not really sure. But I know that
 9 the actual file was never -- the actual files that were
 10 doctored up were never provided to LabMD. They just --
 11 I just had to put them in the data store so they would
 12 look real.
 13 JUDGE CHAPPELL: But again, if LabMD couldn't
 14 access the data store, what was the point?
 15 THE WITNESS: Because if there was ever an
 16 audit or if somebody were to come in and say, Hey,
 17 you know, show me a bad guy at 173, here he has already
 18 been prosecuted by law enforcement and we know the IP is
 19 dead, I would be able to show, wow, look at this. It
 20 was basically for the wow factor.
 21 One thing I would like to mention is the date
 22 and the time was also adjusted on each file, so it was
 23 very difficult at times and time-consuming because I had
 24 to go backwards, like on the 11-5-2008 at 11:26 p.m.,
 25 that file, the modified date on that had to be changed

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1 to reflect the same time frame when actual downloads
 2 were happening from that IP address.
 3 JUDGE CHAPPELL: Go ahead.
 4 BY MR. SHERMAN:
 5 **Q. You mentioned the word "spread."**
 6 A. Uh-huh.
 7 **Q. What does that mean?**
 8 A. That would be where a file is available and it
 9 appears to have been downloaded and being reshared to
 10 the network by multiple people.
 11 **Q. Isn't that a point of CX 19?**
 12 A. Yes.
 13 **Q. Mr. Wallace, have you ever traveled to**
 14 **Washington, D.C. to meet with the FTC?**
 15 A. Yes.
 16 **Q. When did you do that?**
 17 A. I would say it would have been -- it would have
 18 been after the CID was issued, but I'm not sure of the
 19 exact date.
 20 **Q. Would it also have been after the list of**
 21 **companies was provided pursuant to the CID?**
 22 A. Yes. That was the purpose of the meeting, was
 23 to clarify the -- how I put the data together, how it
 24 would correspond with the list and the actual file.
 25 JUDGE CHAPPELL: Is there any dispute as to this

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1 issue? If not, may he place the witness?
 2 MS. VANDRUFF: I'm sorry, Your Honor. I don't
 3 understand the question.
 4 JUDGE CHAPPELL: Is there a dispute as to when
 5 he came to visit with the FTC?
 6 MS. VANDRUFF: I don't believe there's another
 7 witness who has testified about when he came to meet
 8 with the FTC, so I actually -- I don't --
 9 JUDGE CHAPPELL: All right.
 10 BY MR. SHERMAN:
 11 **Q. You testified that the purpose of the meeting**
 12 **was to discuss the information provided pursuant to the**
 13 **CID; is that correct?**
 14 A. Yes.
 15 **Q. And do you recall who was at the meeting?**
 16 A. There were multiple people. I mean, I don't --
 17 I don't remember specific -- I do remember Alain was
 18 there.
 19 **Q. Alain who?**
 20 A. Alain Sheer.
 21 **Q. How long did the meeting last?**
 22 A. Gosh, it's been so long ago. A couple of hours
 23 maybe.
 24 **Q. And was there any discussion of particular**
 25 **companies that appeared on the list? And -- and don't**

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1 **name them if there was.**
 2 A. Well, all of them would have been discussed. I
 3 mean, it was something where you could look at the list
 4 and then say okay, this is a file that corresponds with
 5 this entry.
 6 **Q. Was LabMD specifically discussed?**
 7 A. Was LabMD on the list?
 8 **Q. Were they specifically discussed that day, if**
 9 **you remember, at the meeting with the FTC?**
 10 A. I don't remember.
 11 **Q. How did you get to D.C.?**
 12 A. There was a previous commitment that we just
 13 worked in an afternoon meeting. There was I believe
 14 four of us that came from Tiversa.
 15 **Q. Who traveled to D.C. from Tiversa?**
 16 A. Bob Boback was driving. I was in the car,
 17 Anju Chopra and Keith Tagliaferri.
 18 **Q. Following the meeting, did the people from**
 19 **Tiversa have discussions about the meeting?**
 20 A. Yeah. I mean, we -- Bob spoke to me about next
 21 steps on the way home.
 22 **Q. And what were the next steps?**
 23 MS. VANDRUFF: Object to the extent that it's
 24 being offered for the truth of the matter asserted.
 25 MR. SHERMAN: It's background as to what the

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1 next steps were, Your Honor. It's not based on the
 2 truth of what --
 3 JUDGE CHAPPELL: Not for the truth?
 4 MR. SHERMAN: It's not for the truth.
 5 JUDGE CHAPPELL: Overruled.
 6 MR. SHERMAN: He said what the next steps were,
 7 and I want to know what was discussed.
 8 MS. VANDRUFF: Your Honor, I'm sorry. Just to
 9 be clear, the testimony is permitted but not admitted
 10 for its truth; is that correct?
 11 JUDGE CHAPPELL: He said it's not for the truth.
 12 Therefore, by definition, it is not hearsay.
 13 MS. VANDRUFF: Thank you, Your Honor.
 14 BY MR. SHERMAN:
 15 **Q. You said there were next steps discussed.**
 16 **What were the next steps discussed?**
 17 A. Bob had indicated to me that the files needed to
 18 have spread on them, you know, basically look for them
 19 and see if they are available at other IP addresses, and
 20 if they're not, make them appear to have -- you know, be
 21 at different IP addresses.
 22 **Q. In taking the next steps following the meeting**
 23 **with the FTC, did you search for the insurance aging**
 24 **file associated with LabMD?**
 25 A. I did not.

1389

1 Well, I did search our data store. However, I
 2 did not go out and probe the network for the specific
 3 insurance aging file title, so I did look to see if we
 4 would have picked it up, because we have other
 5 healthcare clients at the time where, because of the
 6 file title, we would have downloaded it multiple times
 7 if it was offered up from any IP address.
 8 JUDGE CHAPPELL: This document on the screen,
 9 CX -- is it 19?
 10 MR. SHERMAN: Yes.
 11 JUDGE CHAPPELL: This was created before or
 12 after the meeting with the FTC?
 13 THE WITNESS: This was created in November of
 14 2013. This was far after.
 15 BY MR. SHERMAN:
 16 **Q. The information that's in Tiversa's data store,**
 17 **where does that information come from?**
 18 A. Well, I'm not sure what information -- it would
 19 come from --
 20 JUDGE CHAPPELL: Are you asking him about LabMD
 21 or in general?
 22 MR. SHERMAN: I'm asking him in general where
 23 does the information that's retained in Tiversa's data
 24 store come from.
 25 THE WITNESS: There are two different ways to

1390

1 get data in the data store. Using Eagle Vision, it
 2 would automatically download a file based on the file
 3 title. Or there's the scratch drive or -- for the input
 4 where somebody like myself who's using a stand-alone
 5 client, I can insert data in -- you know, legitimate
 6 data is what it was -- the purpose was.
 7 BY MR. SHERMAN:
 8 **Q. And so based on your review of the data store in**
 9 **looking for the insurance aging file, is it your**
 10 **testimony that you did not find that it had been**
 11 **downloaded again from any source into --**
 12 A. That's correct.
 13 **Q. -- the Tiversa data store?**
 14 A. That is correct.
 15 **Q. So that being the case, how did you create**
 16 **spread for the insurance aging file?**
 17 A. I -- like I said, I'm very familiar with these
 18 IP addresses -- and there are several more -- that I
 19 would use not only for LabMD but for other companies as
 20 well. Usually it's reactionary after Bob comes to me
 21 and says, Look, we need this at four different IP
 22 addresses and they need to be bad guys and it can't be
 23 from a certain area. Then that's when this would be
 24 created.
 25 **Q. Was this an unusual request made by you -- made**

1391

1 **by Mr. Boback to you?**
 2 A. Pardon me?
 3 **Q. Was this an unusual request --**
 4 A. No.
 5 **Q. -- made by --**
 6 A. No. It was common practice.
 7 **Q. Are there any other examples?**
 8 A. Probably every company that we've ever done
 9 business with.
 10 **Q. Is it fair to say that in fact that was**
 11 **Tiversa's business model?**
 12 A. There were ways to ensure that we were able to
 13 constantly provide valuable information to a client,
 14 whether it be having a file spread or hanging on to a
 15 file for a later date.
 16 So I guess having the actual file for a later
 17 date is just as valuable as creating spread.
 18 **Q. Mr. Wallace, is there a document on the screen?**
 19 A. Yes.
 20 **Q. I submit to you that what's on the screen has**
 21 **been marked as RX 545 for identification purposes.**
 22 **Do you recognize that document?**
 23 A. I recognize this incident record, yes.
 24 **Q. Is that the type of document that Tiversa would**
 25 **generate in the regular course of its business?**

1392

1 A. Yes.
 2 **Q. Can you -- yes, scroll.**
 3 **Go back to page 1, please.**
 4 **Mr. Wallace, if you look at the -- well, what's**
 5 **an Incident Record Form?**
 6 A. That is also referred to as a ticket. It's a
 7 deliverable for a company who subscribes to a monitoring
 8 service.
 9 **Q. And so, Mr. Wallace, if you could read the**
 10 **narrative in the box near the bottom of the screen for**
 11 **us, please.**
 12 MS. VANDRUFF: Excuse me, Counsel. Are you
 13 asking the witness to read this into the record?
 14 MR. SHERMAN: Well, he's on the record. Yes.
 15 MS. VANDRUFF: Okay. Well, then, Your Honor, I
 16 would object on the basis of hearsay and the document
 17 speaks for itself and does not need to be read into the
 18 record.
 19 JUDGE CHAPPELL: Is the document in evidence?
 20 MR. SHERMAN: It is not. It is not. This is
 21 one of the documents that, pursuant to the court's
 22 order, we must lay a foundation for.
 23 And so I'll withdraw the last question and
 24 rephrase.
 25 MS. VANDRUFF: Thank you, Your Honor.

1393

1 BY MR. SHERMAN:
 2 **Q. So, Mr. Wallace, you indicated that you**
 3 **recognize this document; correct?**
 4 A. I recognize this document, yes.
 5 **Q. Did you input the information into this**
 6 **document?**
 7 A. Yes.
 8 **Q. And in doing so, you wrote the narrative in the**
 9 **Section 4 Incident Summary?**
 10 A. I normally would have, yes. However, I do not
 11 believe that it ever stated that one file was detected.
 12 I think that that -- that is not correct. I think it
 13 has been changed since I would have submitted it to
 14 CIGNA.
 15 **Q. So CIGNA was a client of Tiversa; correct?**
 16 A. Yes.
 17 **Q. And they were a client on or about April of**
 18 **2008; is that correct?**
 19 A. Yes.
 20 **Q. And do you recall generating an incident report**
 21 **or ticket for CIGNA concerning the information that**
 22 **appears on RX 545?**
 23 A. Yes.
 24 **Q. Your testimony is, however, that you believe**
 25 **this document is somewhat different than the information**

1394

1 **you submitted; is that correct?**
 2 A. That is correct.
 3 **Q. In what way is it different?**
 4 A. There were additional files at the
 5 64.190.82.42 IP address that would identify LabMD as
 6 being the source of the insurance aging file.
 7 **Q. Would you have included that in the narrative?**
 8 A. Yes.
 9 **Q. When we look at RX 545, in the**
 10 **Section 2 Incident Information section, do you see**
 11 **that?**
 12 A. Yes.
 13 **Q. It indicates that the date of the incident is**
 14 **4-18-2008.**
 15 **Do you see that?**
 16 A. Yes.
 17 **Q. According to the Incident Record Form, what**
 18 **incident occurred on 4-18-2008?**
 19 A. Like I had discussed previously or tried to
 20 explain -- and maybe I didn't do a very good job --
 21 when there's a lot of information for specific
 22 companies that we're providing monitoring services for,
 23 you don't want to bombard them with a whole bunch of
 24 information and then have a dry run with no tickets, so
 25 you'd basically stack the information or hang on to it

1395

1 for a rainy day.
 2 The actual incident on this one I believe
 3 happened on the 25th of February of 2008. That was when
 4 the actual file was downloaded from the Atlanta IP.
 5 **Q. But the report or the incident report -- the**
 6 **Incident Record Form was generated to indicate that the**
 7 **incident occurred on April 18, 2008; correct?**
 8 A. Right. That's what I'm reading, yes.
 9 **Q. And that information is not true; is that**
 10 **right?**
 11 A. It's not uncommon for -- when providing
 12 monitoring services for a company, it would not be
 13 uncommon to not ticket it immediately and hang on to
 14 it.
 15 **Q. That's fine, but why then doesn't the form**
 16 **indicate the actual incident date?**
 17 A. That would be the date that we would provide
 18 this to a client, not necessarily the date of the
 19 incident.
 20 **Q. Even though the form says that it's the incident**
 21 **date; correct?**
 22 A. Right.
 23 **Q. So it was a common practice for Tiversa to give**
 24 **false information concerning when and where they found**
 25 **certain documents to their clients.**

1396

1 A. Yes.
 2 **Q. Do you recognize -- in section 3, under**
 3 **IP Address, do you recognize that IP address?**
 4 A. Yes, I do.
 5 **Q. And who does that IP address belong to?**
 6 A. I believe it's Cypress Communications.
 7 **Q. And under Summary Disclosure Name/ID, why does**
 8 **the name LabMD appear there?**
 9 A. Because that is who the data appears to be
 10 originating from, a device owned or operated by them.
 11 **Q. Does this information indicate that the**
 12 **insurance aging file was downloaded from a computer at**
 13 **LabMD?**
 14 A. Yes.
 15 JUDGE CHAPPELL: Mr. Sherman, how much more time
 16 do you think you're going to need on direct?
 17 MR. SHERMAN: Maybe an hour, 45 minutes.
 18 MS. BUCHANAN: Your Honor, could I suggest a
 19 restroom break. Mr. Wallace is a little uncomfortable.
 20 JUDGE CHAPPELL: That's where we're going.
 21 Why don't we take a short break and we will
 22 reconvene at 12:30.
 23 (Recess)
 24 JUDGE CHAPPELL: Before we go back to
 25 Mr. Wallace, let me try to wrap up some of these pending

1397

1 motions.
 2 I've reviewed the affidavit and I'm prepared to
 3 make my ruling.
 4 First of all, let me make sure the status is
 5 clear.
 6 The motion to reconsider is being withdrawn.
 7 There will be a notice to withdraw filed.
 8 MR. RUBINSTEIN: That's correct, Your Honor.
 9 JUDGE CHAPPELL: So that's off the table.
 10 I had granted in part the motion to compel for
 11 in camera review, which was voluntarily agreed to. I've
 12 done that review. What I have pending now after the
 13 review is my ruling on the motion to compel.
 14 I find the document is responsive to discovery
 15 requests. I find it is relevant and may not be withheld
 16 on grounds of privilege.
 17 Respondent is ordered to produce it to
 18 complaint counsel immediately. It will be given
 19 in camera treatment, as requested by complaint counsel.
 20 Any questions?
 21 MS. VANDRUFF: No, Your Honor. Thank you.
 22 MR. RUBINSTEIN: Thank you, Your Honor.
 23 MS. VANDRUFF: If I may inquire, is it something
 24 that we can receive now?
 25 JUDGE CHAPPELL: We're all wondering what that

1398

1 is, Mr. Sherman.
 2 That was an anticipatory delivery.
 3 MR. SHERMAN: Someone is thinking ahead of me,
 4 that's for sure.
 5 JUDGE CHAPPELL: Well, off the record.
 6 (Discussion off the record.)
 7 (Pause in the proceedings.)
 8 JUDGE CHAPPELL: Go ahead.
 9 BY MR. SHERMAN:
 10 **Q. Mr. Wallace, is there a document up on your**
 11 **screen?**
 12 A. Yes.
 13 **Q. Mr. Wallace, you've been -- you haven't been**
 14 **handed, but it might be easier if I do hand it to you.**
 15 **Mr. Wallace, up on your screen I'll represent to**
 16 **you is what has been marked as Exhibit RX 546 for**
 17 **identification purposes at this point.**
 18 **Your Honor, may I approach the witness?**
 19 JUDGE CHAPPELL: Go ahead.
 20 BY MR. SHERMAN:
 21 **Q. This might make it easier.**
 22 A. Yeah.
 23 **Q. Mr. Wallace, if you could look through each page**
 24 **of what I just handed you, which is marked for**
 25 **identification purposes RX 546.**

1399

1 **(Pause in the proceedings.)**
 2 MS. BUCHANAN: Excuse me, Your Honor. May I
 3 make a request?
 4 When this witness is being questioned with
 5 regard to the document in front of him, could counsel
 6 be directed to tell him where he got it, what -- why he
 7 is -- what is it that he's showing him. Because it's
 8 my understanding that these documents came attached to
 9 a congressional letter, and if he's going to be
 10 questioned about the document, it would be important I
 11 think to tell him where this letter came from to
 12 question him about it.
 13 JUDGE CHAPPELL: Which I wouldn't -- I'm okay
 14 with that, but I think he's perhaps laying a
 15 foundation.
 16 Are you finished reviewing?
 17 THE WITNESS: Pardon?
 18 JUDGE CHAPPELL: Are you finished reviewing the
 19 documents?
 20 THE WITNESS: Yes.
 21 BY MR. SHERMAN:
 22 **Q. Mr. Wallace, after having reviewed what's been**
 23 **marked as RX 546, is this the type of document that**
 24 **Tiversa would create and send to its clients?**
 25 A. Yes.

1400

1 **Q. And the document is titled Forensic**
 2 **Investigation Report for Ticket and there's a ticket**
 3 **number; correct?**
 4 A. Yes. This would be a follow-up to a ticket.
 5 **Q. And I think you referred to Exhibit RX 545 as a**
 6 **ticket, and I can refresh your --**
 7 A. I believe so, yeah.
 8 MR. SHERMAN: May I approach, Your Honor?
 9 JUDGE CHAPPELL: Go ahead.
 10 BY MR. SHERMAN:
 11 **Q. I've just handed you what has been marked as**
 12 **Exhibit 545.**
 13 **Would you refer to that as a ticket?**
 14 A. Yes, I would.
 15 **Q. Having looked through Exhibit RX 546, did you in**
 16 **any way provide any information for this report?**
 17 A. No. I -- I do not remember ever reviewing
 18 this.
 19 I mean, one thing that I can pick up on right
 20 out of the gate, it shows the specifics of this ticket
 21 were reported as follows. It shows 19 total files, yet
 22 in the copy of the write-up it only shows one file
 23 again, so I'm not familiar with this, no.
 24 **Q. And where does it say 19 total files on this**
 25 **document?**

1401

1 A. It shows it right below the introduction, is
 2 that there's one CIGNA related file and 19 files total.
 3 The other thing that I find shocking is the
 4 data -- the date of disclosure, I know it to be
 5 February 25, 2008. It's recorded on here as 4-18-2008,
 6 yet the front cover of this report shows August 12,
 7 2008, so I don't know. I mean, something is not making
 8 sense.
 9 **Q. In Tiversa's ordinary course of business, when**
 10 **it would issue a forensic investigation report for a**
 11 **ticket, would that forensic investigation report be**
 12 **closer in time to the date of the incident, in your**
 13 **experience?**
 14 A. Especially something this severe as this would
 15 be considered, yes.
 16 The idea of having a forensic investigation
 17 report is to provide more information when the ticket
 18 does not provide enough to cease the disclosure from
 19 continuing.
 20 **Q. I would ask that you turn to page 3 of**
 21 **Exhibit 546.**
 22 **Looking at the figure marked 2-1-1, there is a**
 23 **column in that figure that is entitled**
 24 **Proliferation Point.**
 25 **Do you see that?**

1402

1 A. Yes, I do.
 2 **Q. What is a proliferation point?**
 3 A. It would be the same thing as a spread, where
 4 the file is available, has been downloaded by another
 5 individual, that is available then to be redownloaded
 6 from a different IP address.
 7 **Q. So the first proliferation point third column**
 8 **has the IP address; correct?**
 9 A. The third column, yes.
 10 **Q. Do you recognize that IP address?**
 11 A. Yes, I do.
 12 **Q. And what IP address is that?**
 13 A. That would be the originating source.
 14 **Q. Do you know who was utilizing that IP address at**
 15 **that time?**
 16 A. I believe that that was a LabMD-owned or
 17 controlled device.
 18 **Q. Do you recognize the other two IP addresses**
 19 **below the LabMD address?**
 20 A. I do not.
 21 I do recognize the San Diego IP address.
 22 The other, the 64.190.79.36, is probably an IP
 23 shift.
 24 **Q. And what is an IP shift?**
 25 A. An IP shift would be most likely a traveling

1403

1 computer like a laptop that would access the same ISP,
 2 however, would not have, you know, the same IP address
 3 all the time. It's not leased or dedicated.
 4 The 68.8.250.203 is a known information
 5 concentrator or identity thief and located in San Diego.
 6 That is an IP address that was attached to the insurance
 7 aging file and put in the data store.
 8 **Q. If we go back to page 2 on RX 546, under**
 9 **subsection 1.1, does the same IP address appear under**
 10 **bullet point -- on the second bullet point, Disclosing**
 11 **IP Location?**
 12 A. Yes.
 13 MS. VANDRUFF: I'm sorry, Your Honor. I'm not
 14 clear what counsel is asking. Same as what? We just
 15 discussed three IP addresses.
 16 JUDGE CHAPPELL: Do you want to rephrase?
 17 MR. SHERMAN: Yes. Thank you.
 18 BY MR. SHERMAN:
 19 **Q. Are you at page 2 of RX 546?**
 20 **Mr. Wallace, are you at page 2 of RX 546?**
 21 A. Yes.
 22 **Q. Under section 1.1, do you see the second bullet**
 23 **point?**
 24 A. Yes.
 25 **Q. Do you recognize that IP address under the**

1404

1 **second bullet point?**
 2 A. Yes.
 3 **Q. What does "Disclosing IP Location" mean?**
 4 A. That would mean the originating source of this
 5 file.
 6 **Q. Does that necessarily mean where the source was**
 7 **found or located or viewed?**
 8 A. It would be the source that whoever is creating
 9 this document would believe to be the originating
 10 source.
 11 So it would be an actionable IP, so this
 12 forensic report could then be used by CIGNA to go to
 13 LabMD and say, Hey, there's a computer at
 14 64.190.82.42 that's disclosing information on our
 15 customers or our patients.
 16 **Q. Now, earlier you used the phrase "to browse the**
 17 **host."**
 18 **What does that mean?**
 19 A. That would mean that if you find something that
 20 would be of interest, you would then look at their
 21 shared directory and see all the other files that are
 22 available at that IP and at that client.
 23 **Q. When you found the insurance aging file at the**
 24 **LabMD IP address, did you browse that host?**
 25 A. Yes, I did.

1405

1 **Q. Did you find other documents at that host?**
 2 A. Yes.
 3 **Q. And did those documents help you identify the**
 4 **owner of those documents?**
 5 A. Yeah. Well, it only -- you know, not only did
 6 it support who we believed the originating source was,
 7 but there were things in there that were confidential to
 8 LabMD where only an employee there would have it, user
 9 names and passwords and things like that in a Word
 10 document.
 11 **Q. And did you download then --**
 12 A. Yes.
 13 **Q. -- those documents as well?**
 14 A. Yes, I did.
 15 **Q. And when you downloaded those documents, were**
 16 **they then put into the Tiversa data store?**
 17 A. Yes, they were.
 18 **Q. And in downloading them into the Tiversa data**
 19 **store, would they carry with them the IP address from**
 20 **where they were downloaded?**
 21 A. Yes.
 22 **Q. So there is, as of the date that you downloaded**
 23 **not only the insurance file, the insurance aging file,**
 24 **but the other files from LabMD, there is evidence in the**
 25 **Tiversa data store of where those documents were**

1406

1 **downloaded from, the date and time?**
 2 A. Yes. That's -- in this one ticket summary, the
 3 data store would be wherever the analyst pulled this
 4 information from, where it shows the 19 total files, one
 5 of them is related to CIGNA, the disclosing source,
 6 severity, and this says the date submitted is 4-18-2008.
 7 That's also the detection date supposedly, according to
 8 this.
 9 One more thing that I find it very interesting
 10 is the -- if this was created in 2008, how is the
 11 68.8.250.203 IP address on there when I believe that
 12 that was one that I submitted to Bob with the list of
 13 four in November of 2013. And that is showing a date of
 14 8-5-08, and it's showing that person being an identity
 15 thief or information concentrator, but like I said, if
 16 that was submitted in 2013, how could it be on this
 17 document in 2008.
 18 **Q. Looking also at the third bullet point under**
 19 **1.1 on page 2 of RX 546?**
 20 A. Okay.
 21 **Q. Is it your testimony that the 19 total files**
 22 **represent the other files that you downloaded from the**
 23 **LabMD IP address other than the insurance aging file?**
 24 A. The insurance aging file would be in the 19-file
 25 total, 18 additional. I'm not sure why that was -- why

1407

1 it's written this way.
 2 **Q. Do you know whether the FTC ever asked Tiversa**
 3 **to verify the IP addresses where the insurance aging**
 4 **file was found?**
 5 A. No.
 6 JUDGE CHAPPELL: Just so we're clear, you don't
 7 know or the answer was no, they did not?
 8 THE WITNESS: I am not aware or I was not
 9 present for that conversation. I provided the spread to
 10 Bob Boback on multiple occasions, and I'm not sure where
 11 he used that information.
 12 BY MR. SHERMAN:
 13 **Q. You mentioned that you attended a meeting in**
 14 **Washington, D.C. with the FTC and Bob Boback and a**
 15 **couple of other Tiversa employees.**
 16 **Were you present in the meeting for the entire**
 17 **meeting?**
 18 A. Yes. I -- yes, I was there for the entire
 19 meeting.
 20 **Q. And you were present in the room for the entire**
 21 **meeting?**
 22 A. As best as I can remember, yes.
 23 **Q. During that meeting, did the FTC ever mention**
 24 **its capabilities using Interlab or Internet Lab?**
 25 A. I believe that that was a -- I believe that that

1408

1 was a way to view files that we had submitted for the
 2 CID, but I'm not -- it is ringing a bell, but I'm not --
 3 I couldn't say for sure what it is.
 4 **Q. Did they mention having capability under a**
 5 **program called Sentinel?**
 6 JUDGE CHAPPELL: Who's "they"?
 7 MR. SHERMAN: The FTC.
 8 THE WITNESS: What was the name again?
 9 BY MR. SHERMAN:
 10 **Q. Sentinel?**
 11 A. I'm not familiar with that.
 12 MR. SHERMAN: Your Honor, may we approach?
 13 JUDGE CHAPPELL: Go ahead.
 14 (At the bench, the following discussion was held
 15 off the public record.)
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18 (In open court.)
19 MR. SHERMAN: May I approach the witness?
20 JUDGE CHAPPELL: All right.
21 BY MR. SHERMAN:
22 **Q. Mr. Wallace, you've been handed what has been**
23 **marked as RX 549. I will tell you for the record that**
24 **the entire document is 1719 pages long. It has been**
25 **granted in camera status, which means that it cannot be**

1410

1 **disclosed to the public because of the sensitivity of**
2 **the information contained therein.**
3 **Have you had a chance to look at that document?**
4 A. Yes.
5 **Q. Do you recognize what that sheet of paper is?**
6 A. Yes.
7 **Q. What is it?**
8 A. It's the insurance aging file.
9 **Q. Okay. It is in fact the cover sheet of the**
10 **insurance aging file; is that correct?**
11 A. It is the first page of the insurance aging
12 report.
13 **Q. And you've had an opportunity to look at the**
14 **entire insurance aging report; is that correct?**
15 A. Yes.
16 **Q. And you can identify it upon sight; correct?**
17 A. Yes.
18 **Q. Is that the same cover sheet and attendant**
19 **insurance aging report that you found at the LabMD IP**
20 **address?**
21 A. Yes.
22 **Q. And is that the same insurance aging file that**
23 **you downloaded from the LabMD IP address?**
24 A. Yes.
25 **Q. And did you ever in your experience find on a**

1411

1 **peer-to-peer network that same insurance aging file?**
2 A. Not from any other IP address, no.
3 **Q. Did you ever download the insurance aging file**
4 **from any other IP address?**
5 A. No.
6 **Q. In looking at the lab -- or looking in the LabMD**
7 **data store, outside of the information that you**
8 **admittedly inserted into the data store concerning the**
9 **insurance aging file, did you ever find any other**
10 **indication in the data store that the LabMD insurance**
11 **aging file had been downloaded from some other IP**
12 **address?**
13 A. No.
14 MR. SHERMAN: If I may have a moment,
15 Your Honor?
16 MS. VANDRUFF: And Your Honor, before
17 Mr. Sherman continues, just for the benefit of the
18 record, the document that Mr. Wallace has been shown,
19 while granted in camera status, the single page that's
20 been displayed in the courtroom does not contain any
21 sensitive personal information, and as we discussed at
22 the bench, neither the court nor complaint counsel had
23 any concerns about it being displayed.
24 JUDGE CHAPPELL: Thank you.
25 MR. SHERMAN: Your Honor, at this point I would

1412

1 request that Exhibits 545 and 546 be admitted into
2 evidence.
3 JUDGE CHAPPELL: Any objection?
4 MS. VANDRUFF: If you'll bear with me,
5 Your Honor.
6 (Pause in the proceedings.)
7 The court's indulgence, Your Honor.
8 JUDGE CHAPPELL: All right.
9 (Pause in the proceedings.)
10 MR. SHERMAN: Your Honor, as well as
11 Exhibit 549, which is the cover sheet.
12 MS. VANDRUFF: Okay. Well, I am pleased to
13 address these in turn, Your Honor.
14 With respect to the document that's been marked
15 for identification as RX 545, Mr. Wallace testified that
16 this was a document that had been altered.
17 JUDGE CHAPPELL: So you're saying that even
18 though it was offered under a business records
19 exception, there is indicia of unreliability.
20 MS. VANDRUFF: I don't know the basis on which
21 Mr. Sherman is -- has advanced --
22 JUDGE CHAPPELL: Well, we need to know that
23 first if you don't know that.
24 What's your basis for admissibility of 545?
25 MR. SHERMAN: The basis for admissibility is

1413

1 that Mr. Wallace, an employee of Tiversa, identified
 2 this document as something that he in fact put
 3 information in, as something that Tiversa kept and
 4 created in the ordinary course of its business and
 5 provided to its clients.
 6 He did, however, say that it was different from
 7 the document that he actually produced, although the
 8 information in it is information that he's familiar with
 9 and put into the report.
 10 It is also important I think that it has been
 11 mentioned that these documents come from the letter from
 12 the chairman of the House Committee on Oversight and
 13 Government Reform, and they were produced to that
 14 committee by Tiversa, and so to the extent that
 15 Mr. Wallace can identify them as business records for
 16 Tiversa, I think that they should be admitted, even
 17 though he indicates that it was not the business record
 18 that he created, although most of the information in
 19 there he does recognize as information he put in the
 20 business record that he created.
 21 JUDGE CHAPPELL: So did he say the information
 22 was incorrect or it's just not the way he would have
 23 done the document?
 24 MS. VANDRUFF: Your Honor, I believe it was
 25 Mr. Wallace's testimony that this was not a true and

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1 accurate copy of the document that he created because he
 2 testified specifically --
 3 JUDGE CHAPPELL: Let's do this. He's offered it
 4 under business record. If you want to go ahead and
 5 question him on that offer, go ahead.
 6 MS. VANDRUFF: Certainly.
 7 - - - - -
 8 CROSS-EXAMINATION
 9 BY MS. VANDRUFF:
 10 **Q. Mr. Wallace, do you have a copy of RX 545 in**
 11 **front of you?**
 12 A. Yes, I do.
 13 **Q. Okay. Thank you.**
 14 **And in section 4 of RX 545, Mr. Sherman had**
 15 **directed your attention to the first sentence.**
 16 **Are you with me?**
 17 A. Yes.
 18 **Q. Okay. And after reviewing that sentence, am I**
 19 **correct that it was your testimony that this is not a**
 20 **true and accurate copy of the document that was**
 21 **maintained at Tiversa?**
 22 MR. SHERMAN: Objection. Because it
 23 mischaracterizes the question that he was asked.
 24 JUDGE CHAPPELL: Overruled.
 25 MS. BUCHANAN: You can answer the question.

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1 THE WITNESS: Yes. In the first sentence it
 2 says one file was detected. I can remember
 3 specifically providing a ticket to CIGNA that clearly
 4 stated that there were 19 files available at that IP
 5 address.
 6 BY MS. VANDRUFF:
 7 **Q. So I believe it's your testimony, Mr. Wallace,**
 8 **that the document that's been marked as RX 545 is not a**
 9 **true and accurate copy of the document that was created**
 10 **at the time that you were an employee at Tiversa. Is**
 11 **that correct?**
 12 A. That's correct.
 13 JUDGE CHAPPELL: All right. Your motion to
 14 admit RX 545 is denied.
 15 MR. SHERMAN: Your Honor, just in response to
 16 that, it never was represented that this exhibit was in
 17 fact the exhibit that he created.
 18 JUDGE CHAPPELL: Well, what I just heard the
 19 witness say, this document is inaccurate. Therefore,
 20 it's not coming in.
 21 MR. SHERMAN: Well, under the business record
 22 exception, Mr. Wallace, as an employee of Tiversa, can
 23 testify that this in fact is the type of business record
 24 that Tiversa normally provided to its clients. His
 25 knowledge --

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1 JUDGE CHAPPELL: Well, maybe what's going on
 2 here is maybe what we have is a failure to communicate.
 3 Mr. Wallace, are you saying this document is
 4 inaccurate because it contains information that's
 5 false?
 6 THE WITNESS: Yes.
 7 JUDGE CHAPPELL: But is it an accurate depiction
 8 of the document that was prepared in the normal course
 9 of business by Tiversa?
 10 THE WITNESS: No. I believe that the original
 11 ticket was altered to show only one file was available
 12 at this IP address.
 13 JUDGE CHAPPELL: So you have reason to believe
 14 that this is not a normal business document that Tiversa
 15 would have in its files.
 16 THE WITNESS: This is a document that Tiversa
 17 would have in its files, yes. But it has -- in the
 18 section 4, the incident summary, it describes one file
 19 being detected.
 20 JUDGE CHAPPELL: Okay. So listen closely.
 21 I think I follow you that you think this
 22 document contains inaccurate information. Correct?
 23 THE WITNESS: Yes.
 24 JUDGE CHAPPELL: But this document as you see it
 25 would be in Tiversa's files?

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1 THE WITNESS: Yes, it would be.
 2 JUDGE CHAPPELL: There you go. Therefore,
 3 unless you can clarify, I'm changing my ruling.
 4 MS. VANDRUFF: Well, Your Honor, I mean, to the
 5 extent that --
 6 JUDGE CHAPPELL: So what he's saying is, the
 7 document is not true, but it's a document we maintain in
 8 our files. Therefore, it's a business record. It's an
 9 accurate depiction of a record in the files of Tiversa,
 10 which brings it under the hearsay exception, if I
 11 understood the witness.
 12 MS. VANDRUFF: Your Honor --
 13 JUDGE CHAPPELL: You may consult if you need to.
 14 MS. VANDRUFF: I'm sorry, Your Honor?
 15 JUDGE CHAPPELL: You may consult. I'm seeing a
 16 lot of people popping up here.
 17 MS. VANDRUFF: I will do that. Thank you,
 18 Your Honor.
 19 (Pause in the proceedings.)
 20 Your Honor, for this witness to sponsor the
 21 document that's been marked as RX 545 as a business
 22 record of Tiversa, he would need to testify on the basis
 23 of his personal knowledge that this is a true and
 24 accurate copy of the document that was maintained at
 25 Tiversa. And I believe that it is his testimony

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1 unambiguously that the document that may have been in
 2 the business records has been altered, so I don't
 3 believe he can lay that foundation on the basis of his
 4 personal knowledge.
 5 JUDGE CHAPPELL: I disagree that the business
 6 record exception has a prong that requires him to have
 7 personal knowledge of the particular document. That's
 8 wrong. He just needs to know it's a document kept in
 9 the ordinary course of business, by information
 10 transmitted to somebody at Tiversa, that this is what
 11 they do, and he's basically told me it may be
 12 inaccurate, but this is what they do.
 13 MS. VANDRUFF: Well, I believe what he's told
 14 Your Honor is this is the type of document that was
 15 created at Tiversa, but because of the discrepancy
 16 between the first line in section 4 and Mr. Wallace's
 17 testimony, only a custodian of records at Tiversa could
 18 testify as to whether or not this document is a business
 19 record of Tiversa.
 20 JUDGE CHAPPELL: Is this a document that you
 21 maintained while you were at Tiversa, this type of
 22 document?
 23 THE WITNESS: Yes. This is a standard ticket
 24 form for --
 25 JUDGE CHAPPELL: This document as it is, true or

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1 false, is it the type of document, if you went and
 2 pulled the file, it would be in there as it exists right
 3 here in front of you?
 4 THE WITNESS: Yes.
 5 JUDGE CHAPPELL: There you go.
 6 545 is admitted.
 7 (RX Exhibit Number 545 was admitted into
 8 evidence.)
 9 JUDGE CHAPPELL: Next objection.
 10 MR. SHERMAN: Your Honor, I think the same
 11 arguments apply to 546 as well.
 12 MS. VANDRUFF: Your Honor, before Mr. Wallace
 13 was even examined about the exhibit that's been marked
 14 as 546, his counsel asked that Mr. Sherman describe the
 15 document for the witness. The witness was not asked
 16 whether this is a document with which he was familiar.
 17 Instead, he was walked through information contained in
 18 the document and has not indicated that he has any
 19 personal knowledge whatsoever of the document that's
 20 been marked as RX 546. Therefore, he is not a witness
 21 competent to sponsor this document.
 22 JUDGE CHAPPELL: I believe she's correct. I
 23 don't think I heard a proper foundation for this
 24 document.
 25 MR. SHERMAN: Your Honor, he was asked whether

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1 or not this was the type of document that Tiversa
 2 created and kept in the normal course of its business.
 3 MS. VANDRUFF: And again, Your Honor, the fact
 4 that it is a type of document that Tiversa created is
 5 not sufficient to admit -- to lay the foundation to
 6 admit the document that's been marked as 546.
 7 MR. SHERMAN: Your Honor, I think also one of
 8 the reasons to mention that this was given to the
 9 oversight committee, congressional oversight committee,
 10 is that that gives it an additional layer of
 11 reliability.
 12 JUDGE CHAPPELL: I don't get that. Just because
 13 it was given to them, that doesn't convince me it's any
 14 more or less reliable. It means it was provided to the
 15 committee.
 16 Anything else?
 17 MR. SHERMAN: Well, yes, Your Honor. I mean, a
 18 review of the record -- if that makes a difference, a
 19 review of the record will show that he testified that it
 20 is the type of document they kept and created in the
 21 ordinary course of their business.
 22 JUDGE CHAPPELL: Would you like to question him
 23 on the foundation?
 24 MS. VANDRUFF: I believe that the foundation is
 25 clear that he can't lay it. If you'd like me to examine

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1 him, Your Honor, I shall.
 2 JUDGE CHAPPELL: Well, we have a difference of
 3 opinion of what was asked, and I don't recall everything
 4 that was asked earlier today, so if you would like to
 5 question the witness, go ahead.
 6 MS. VANDRUFF: I'd be happy to do that.
 7 Thank you, Your Honor.
 8 - - - - -
 9 CROSS-EXAMINATION
 10 BY MS. VANDRUFF:
 11 **Q. Mr. Wallace, do you have the document that's**
 12 **been marked as RX 546 in front of you?**
 13 A. Yes, I do.
 14 **Q. Prior to reviewing this document today, had you**
 15 **seen this document before?**
 16 A. No, I had not.
 17 MS. VANDRUFF: Do you require any further
 18 examination, Your Honor?
 19 (Pause in the proceedings.)
 20 JUDGE CHAPPELL: Are we waiting on him?
 21 MS. VANDRUFF: No. I asked if Your Honor
 22 required any further examination. The witness testified
 23 he had never seen this document before it was shown to
 24 him today.
 25 JUDGE CHAPPELL: I'm sorry. I thought you asked

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1 him to look at it.
 2 MS. VANDRUFF: I did ask him to look at it and
 3 then I asked him --
 4 JUDGE CHAPPELL: Well, I was flipping back, and
 5 I can confirm that a proper foundation was not laid.
 6 What's the document number?
 7 MS. VANDRUFF: It is RX 546, Your Honor.
 8 JUDGE CHAPPELL: Your request to admit -- your
 9 motion to admit 546 is denied.
 10 Next?
 11 MS. VANDRUFF: The third document that
 12 Mr. Sherman sought to admit has been marked for
 13 identification purposes as RX 549. To the extent that
 14 this is the single-page document that Mr. Wallace
 15 testified to, I don't know that complaint counsel has an
 16 objection, but I want to clarify with respondent's
 17 counsel what it is exactly that respondent seeks to
 18 admit.
 19 JUDGE CHAPPELL: Isn't the document already in
 20 evidence, 549?
 21 MR. SHERMAN: It is not. It is one of several
 22 insurance aging files that have been produced in this
 23 litigation. This was recently produced by Mr. Wallace,
 24 in response to the FTC's subpoena, from Mr. Wallace's I
 25 think hard drive.

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1 JUDGE CHAPPELL: So 549 is not the cover sheet?
 2 MS. VANDRUFF: That's my question, Your Honor,
 3 is whether respondent is seeking to move this single
 4 page or whether he's seeking to move something more.
 5 It's not clear to me what's being moved.
 6 JUDGE CHAPPELL: Single page?
 7 MR. SHERMAN: Well, for the purpose of
 8 establishing that Mr. Wallace is familiar with the
 9 1718 File, the insurance aging file that we've been
 10 talking so much about, without --
 11 JUDGE CHAPPELL: Well, hold on a second. She
 12 wanted to know if this was all you're offering, one
 13 page.
 14 If he is, do you object?
 15 MS. VANDRUFF: If he's offering the single page,
 16 549, complaint counsel does not have an objection. If
 17 he's -- Your Honor, I want to be clear.
 18 JUDGE CHAPPELL: There's no need for an if. He
 19 said it's only the single page.
 20 RX 549 is admitted.
 21 (RX Exhibit Number 549 was admitted into
 22 evidence.)
 23 MR. SHERMAN: Thank you, Your Honor.
 24 I don't have any further questions for
 25 Mr. Wallace.

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1 MS. VANDRUFF: Your Honor, before we discuss any
 2 break that Your Honor might be willing to undertake,
 3 could I ask that counsel approach?
 4 JUDGE CHAPPELL: All right.
 5 (At the bench, the following discussion was held
 6 off the public record.)
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3 JUDGE CHAPPELL: Are we in agreement?
4 MS. VANDRUFF: Let me make sure that I
5 understand what the question is, Your Honor.
6 If the question is whether counsel for
7 Mr. Wallace may conduct a redirect before
8 complaint counsel proceeds with its deposition, we are,
9 Your Honor.
10 JUDGE CHAPPELL: Okay.
11 MS. VANDRUFF: She may conduct that
12 examination.
13 JUDGE CHAPPELL: Does anyone object to taking a
14 break now, we'll come back and have the redirect, and
15 then we'll break for the deposition?
16 MR. SHERMAN: May I put on the record the
17 renewal of the motion to have RX 546 admitted into
18 evidence. It's being offered not for the truth.
19 MS. VANDRUFF: And Your Honor, at this time, I
20 understand the court's position, but complaint counsel
21 renews its objection that Mr. Wallace has not laid a
22 foundation for this document.
23 JUDGE CHAPPELL: If the document is offered not
24 for the truth, then it's by definition not hearsay. I
25 do find it's relevant. Therefore, RX 546 is admitted

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1 not for the truth of the matter asserted therein.
2 (RX Exhibit Number 546 was admitted into
3 evidence.)
4 MR. SHERMAN: Thank you, Your Honor.
5 JUDGE CHAPPELL: All right. We're going to take
6 a lunch break now. We will reconvene at 2:45.
7 We're in recess.
8 (Whereupon, at 1:48 p.m., a lunch recess was
9 taken.)
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1 AFTERNOON SESSION
2 (2:54 p.m.)
3 JUDGE CHAPPELL: Let's go back on the record.
4 I believe now we're going to have redirect by
5 Ms. Buchanan.
6 MS. BUCHANAN: Thank you, Your Honor.
7 JUDGE CHAPPELL: And we all agreed to take this
8 out of order before the cross so the record will make
9 more sense.
10 MS. BUCHANAN: That's correct, Your Honor.
11 And I also spoke with both complaint counsel and
12 respondent counsel to ask if they would have any
13 objection to my leading Mr. Wallace through a few points
14 of redirect in an effort to shorten those areas in which
15 I can address issues that may not have been adequately
16 addressed in the -- in his direct testimony this
17 morning.
18 MS. VANDRUFF: And complaint counsel has no
19 objection, Your Honor. The only reason I rise is that
20 my LiveNote doesn't appear to be working and I just
21 wanted to be sure that I got it working before
22 Ms. Buchanan started her exam.
23 (Pause in the proceedings.)
24 JUDGE CHAPPELL: Can we talk about scheduling on
25 the record. I think you told me that the government

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1 will not have any idea about rebuttal until after the
2 deposition?
3 MS. VANDRUFF: No, Your Honor. I think that
4 prior to our break for lunch I advised you that we would
5 have a much better sense of that after lunch.
6 JUDGE CHAPPELL: Okay.
7 MS. VANDRUFF: I will tell you that that's
8 modified slightly in that we will be able to advise
9 Your Honor with much greater precision after
10 Ms. Buchanan completes her redirect.
11 JUDGE CHAPPELL: I'm wondering if we should --
12 since you're going to need to request rebuttal in
13 writing and Mr. Sherman may want to oppose it, I'm
14 wondering if that's even doable in the next couple days
15 or if we should just concede we're not going to wrap
16 this up by the end of the week.
17 MS. VANDRUFF: Well, Your Honor, from the
18 perspective of complaint counsel, today's testimony is a
19 lot to digest, and so it certainly would be helpful to
20 have time to consider what rebuttal, if any,
21 complaint counsel wishes to seek leave to present.
22 JUDGE CHAPPELL: All right. I think what I'll
23 do now is, why don't we just say we're going to skip
24 Thursday, we're here today, we're here tomorrow, and
25 then Friday is available.

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1 Any objection to that?
 2 MR. SHERMAN: No objection.
 3 MS. VANDRUFF: No objection.
 4 JUDGE CHAPPELL: So everyone can plan ahead,
 5 schedule whatever you need to do.
 6 And I know what you said, Ms. Buchanan, but I
 7 think Mr. Wallace will be finished tomorrow.
 8 MS. BUCHANAN: Okay.
 9 JUDGE CHAPPELL: All right?
 10 MS. BUCHANAN: Thank you, Your Honor.
 11 JUDGE CHAPPELL: So we will take a break all day
 12 Thursday. That way, if you file a written request for
 13 rebuttal, you'll have time -- respondent will have time
 14 to respond, and then I can make my decision and let you
 15 know in time for Friday hopefully.
 16 MS. VANDRUFF: So, Your Honor, just to make sure
 17 that I understand, we're seeking time to evaluate
 18 today's testimony after we receive a copy of the
 19 transcript --
 20 JUDGE CHAPPELL: Yes.
 21 MS. VANDRUFF: -- and to assess what, if
 22 anything, requires rebuttal. And to meet Your Honor's
 23 standards set forth this morning during preliminaries,
 24 we would ask for -- and I understand some scheduling
 25 constraints with respect to the bench -- but for,

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1 you know, as much time as we can have for that, and I
 2 don't know that 24 hours is going to be sufficient.
 3 JUDGE CHAPPELL: Well, and if it's not and we
 4 don't finish this week, then we'll wait a few weeks.
 5 And I'm fine with that. I just -- as long as it's been
 6 now, let's just get everything resolved. And if that
 7 happens by Friday, that's fine; if not, it will be a few
 8 weeks later.
 9 MR. SHERMAN: I'd prefer to get things
 10 resolved. I understand complaint counsel's concern
 11 with reviewing the record. But since we have a say, our
 12 say would be to push forward and get this resolved or
 13 completed by Friday.
 14 MS. VANDRUFF: And Your Honor, I'm confident
 15 that we can file our motion within a week, but I'm not
 16 confident that we can conduct the assessment that's
 17 necessary so that Your Honor can rule by Friday. And I
 18 know that that crunches some other deadlines, and for
 19 that I apologize.
 20 JUDGE CHAPPELL: Okay. Well, for now, we'll
 21 just -- we won't be here Thursday, and then we'll
 22 reassess tomorrow after Mr. Wallace is finished.
 23 MS. VANDRUFF: Thank you, Your Honor.
 24 JUDGE CHAPPELL: And I think from what I'm
 25 hearing from you, you'll have a better idea -- in fact,

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1 right now we don't know that you want rebuttal. You may
 2 want rebuttal. And if you do, we have a process. And I
 3 understand it's going to take time.
 4 MS. VANDRUFF: That's correct, Your Honor.
 5 JUDGE CHAPPELL: So you'll get whatever time is
 6 reasonable.
 7 MS. VANDRUFF: Thank you, Your Honor.
 8 JUDGE CHAPPELL: All right?
 9 MS. VANDRUFF: Yes, Your Honor.
 10 JUDGE CHAPPELL: All right. Thanks.
 11 Go ahead.
 12 MS. BUCHANAN: Thank you, Your Honor.
 13 - - - - -
 14 REDIRECT EXAMINATION
 15 BY MS. BUCHANAN:
 16 **Q. Good afternoon, Mr. Wallace.**
 17 **You testified this morning that you were**
 18 **contacted in about 2007 by Bob Boback about a job**
 19 **opportunity with Tiversa; is that correct?**
 20 A. That's correct.
 21 **Q. And he contacted you after he saw you quoted in**
 22 **a Fox News story in Chicago.**
 23 A. That's correct.
 24 **Q. In this news story that you were quoted in, you**
 25 **talked about the ease at which peer-to-peer networks**

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1 **could be used to disclose personal identifying**
 2 **information.**
 3 A. Yes.
 4 **Q. And when he contacted you, did he tell you that**
 5 **he liked this ability of yours to be able to find this**
 6 **information and he wanted to incorporate this into the**
 7 **Tiversa --**
 8 A. Yes. I mean, that's where he saw the value in
 9 hiring me.
 10 **Q. And at the time that you joined Tiversa, you**
 11 **already had in your possession a number of files of**
 12 **personal information that you had discovered on the**
 13 **Internet while doing your own searching prior to even**
 14 **joining Tiversa.**
 15 A. Yes.
 16 **Q. And in the late 2007 when Mr. Boback was**
 17 **testifying before Congress at a hearing regarding**
 18 **peer-to-peer networks and identity theft, he asked you**
 19 **to help him prepare for that testimony; is that**
 20 **correct?**
 21 A. Yes.
 22 **Q. And did you provide him with documents that you**
 23 **had found on the Internet long before ever joining**
 24 **Tiversa?**
 25 A. Yes.

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1 **Q. And at the time Mr. Boback testified at the**
 2 **congressional hearing, did he tell Congress who had**
 3 **found those documents?**
 4 A. Yes. He said that Tiversa's system had
 5 downloaded the documents.
 6 **Q. And that was not true, was it?**
 7 A. No.
 8 **Q. The documents, in fact, the majority of the**
 9 **documents that Mr. Boback referred to in his first**
 10 **congressional testimony in 2007 were documents that were**
 11 **identified by you rather than by Tiversa.**
 12 A. That's correct.
 13 **Q. And I believe that you indicated this morning in**
 14 **your direct testimony that there were other members of**
 15 **the panel who testified before Congress in late 2007 on**
 16 **the topic of identity theft.**
 17 A. Yes.
 18 **Q. And at that time you were told if the**
 19 **commissioner of the Federal Trade Commission,**
 20 **Edith Ramirez, was also on the panel.**
 21 A. I believe that that's who was testifying with
 22 Bob. I believe it was Bob Boback, Tom Sydnor from the
 23 Patent and Trademark Office, and I believe that it was
 24 Edith Ramirez.
 25 **Q. Now, you were not at the testimony; correct?**

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1 A. But I was not there. No. I did watch it
 2 online.
 3 **Q. And you read the transcript of the hearing.**
 4 A. Yes.
 5 **Q. And you talked to Mr. Boback about how the**
 6 **hearing went; is that correct?**
 7 A. Yes.
 8 **Q. And then following the 2007 FTC hearing,**
 9 **Mr. Boback began to have some communications with**
 10 **individuals from the Federal Trade Commission.**
 11 A. Individuals from where?
 12 **Q. From the Federal Trade Commission.**
 13 A. Yes.
 14 **Q. Now, this morning, during your direct testimony,**
 15 **you made reference to a meeting that was held at**
 16 **Tiversa's offices in the Pittsburgh, Pennsylvania area**
 17 **in which members of the Federal Trade Commission came to**
 18 **visit the Tiversa facilities.**
 19 A. That's correct.
 20 **Q. And you initially indicated on your direct**
 21 **examination that you thought that that had occurred at**
 22 **some point in late 2007. Is that correct for what you**
 23 **said this morning?**
 24 A. I think that it was probably spring of 2008.
 25 **Q. And can you describe what the purpose of this**

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1 **visit was?**
 2 A. It was a -- kind of like a show-and-tell, if you
 3 will. Basically, we would present our technology to the
 4 members -- or the representatives from the FTC, and they
 5 would evaluate whether or not they could use it. The
 6 main purpose of the meeting, though, was to further
 7 investigate, I believe, the examples that were shown at
 8 the House oversight hearing.
 9 **Q. So the visit to Pittsburgh included a tour of**
 10 **the Tiversa facilities led by Mr. Boback; correct?**
 11 A. Right. Yes.
 12 **Q. And did it also include a description by**
 13 **Mr. Boback of the forensic capabilities of the computer**
 14 **system that Tiversa operated?**
 15 A. Yes.
 16 **Q. And can you tell me if there was anything that**
 17 **the FTC was told that day by Mr. Boback regarding the**
 18 **capabilities of Tiversa that was not true?**
 19 A. Yes. Well, there -- I couldn't say specifically
 20 for that day, but one of the capabilities that we have
 21 always talked about at Tiversa is having the ability to
 22 record searches and IP address that issue searches, and
 23 that's just completely not true.
 24 **Q. Now, you also performed a demonstration for the**
 25 **FTC; is that correct?**

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1 A. Yes.
 2 **Q. And you showed the FTC how you were able to find**
 3 **personal identifying information, which was referred to**
 4 **this morning as PPI (sic), by a review of peer-to-peer**
 5 **networks.**
 6 A. Yes.
 7 **Q. And what was the response of the members of the**
 8 **FTC when you demonstrated how easily it was that this**
 9 **information could be found on the Internet?**
 10 A. They were very excited to see if there's an
 11 opportunity for us to work together.
 12 **Q. So following the 2008 visit by members of the**
 13 **FTC to Tiversa, you indicated this morning that frequent**
 14 **conversations began to occur between individuals at**
 15 **Tiversa and members of the FTC; correct?**
 16 A. Yes.
 17 **Q. Now, those conversations were between either**
 18 **Mr. Boback and the FTC or Mr. Kopchack and the FTC, but**
 19 **not necessarily between you and the FTC.**
 20 A. That's correct.
 21 **Q. But were you present often -- or were you**
 22 **present for some of these communications in that you may**
 23 **have been standing in the room and you overheard**
 24 **conversations on the telephone?**
 25 A. Yes.

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1 Q. This morning you testified regarding IRCs that
2 were developed from --

3 A. Yes.

4 Q. -- information that is found on the Internet,
5 and you record this information by logging in the
6 company that had the disclosure, what was disclosed,
7 when it was disclosed; is that correct?

8 A. Yes.

9 Q. And is that something that you did as a daily
10 part of your duties at Tiversa?

11 A. Yes. All the analysts that would review files
12 would update that spreadsheet several times throughout
13 the day as data is found and cataloged.

14 Q. So would you say that the information that was
15 compiled on these spreadsheets -- was it more
16 information about clients that Tiversa actually had or
17 was it more aspirational with regard to clients Tiversa
18 would like to have?

19 A. It would be a list of companies that would be
20 put together on a spreadsheet for the simple reason to
21 make a sales call, to make a cold call.

22 Q. So to be clear, to be clear, Mr. Wallace, your
23 job was to search the Internet to find disclosures of
24 personal information and to log that in; is that
25 correct?

1 A. Yes.

2 Q. When you searched peer-to-peer networks for
3 personal identifying information, at the time you found
4 a file that you wanted to download, would you know where
5 that file came from? Would you have some idea of how
6 that file was disclosed?

7 A. Yeah. The program that I used was
8 self-modified, and an IP address would definitely
9 display.

10 Q. So from the very moment or shortly thereafter
11 that you discovered information, you pretty much knew
12 where it came from; correct?

13 A. Yes.

14 Q. But according to Tiversa's standard business
15 model, when Tiversa would make phone calls to potential
16 clients, what information would they make available to
17 companies that had -- that their information had been
18 detected by you?

19 A. Usually they would say that the IP address,
20 port, client, any of that information was not recorded
21 as they're not a client yet, and if they would sign on
22 as a client, then that information could be found in
23 databases or somewhere that don't exist.

24 Q. And was that true?

25 A. No.

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1 A. That was one of the functions, yes.

2 Q. And then you would turn this information over to
3 Mr. Boback or to others on Mr. Boback's sales force;
4 correct?

5 A. Yes.

6 Q. And then Mr. Boback and his sales force would
7 use this information to contact these companies whose
8 information was found by you.

9 A. Yes.

10 Q. And did you ever participate in these
11 conversations, meaning you personally calling companies
12 and telling them that their information was found
13 somewhere, somewhere out on the Internet?

14 A. No. I used to, but the last conversation that I
15 had was with the Social Security Administration, and I
16 was accused by Bob of giving them way too much
17 information, not holding back IP addresses that would
18 allow them to function and do work with the information
19 without hiring Tiversa, so I was basically accused of
20 sabotaging a business deal, and that was the end of me
21 reaching out to anyone.

22 Q. So after that point, you were kept in the back
23 room trolling the Internet, finding the information,
24 and it was left to others to actually make the sales
25 calls.

1 Q. Can you tell us whether Mr. Boback and his
2 sales staff had much success gaining clients in this
3 manner?

4 A. Yes.

5 So the first thing that we would do, like
6 especially with an IRC client, would be -- or a
7 prospective IRC client, would be to strip the IP
8 address off the front and remove any meta data that's
9 in that file that might give that company or
10 organization the ability to shut down the data source
11 without Tiversa's help, so we would make sure that all
12 that went away.

13 Q. And is that something that you personally did,
14 Mr. Wallace? Did you personally strip the meta data off
15 of --

16 A. Yes.

17 Q. -- files so that the originating source could
18 not be detected?

19 A. Yes.

20 Q. And would you also maintain other files that
21 would allow you to keep it all straight in your head
22 where these files were actually really found?

23 A. Yes.

24 Q. Now, with respect to the 1718 File that we
25 heard so much about this morning, you are the one, the

1441

1 **analyst at Tiversa, who actually found that file;**
 2 **correct?**
 3 A. Yes. I downloaded that file.
 4 **Q. And at the time you found the file, you also**
 5 **found other documents along with it.**
 6 A. Yes. But I downloaded the file and the other
 7 documents on a stand-alone machine. I did not use
 8 Tiversa's system, so I didn't find it in the data store.
 9 I found it live online.
 10 **Q. But after you found it live online, you**
 11 **actually inputted that information into the Tiversa**
 12 **data store.**
 13 A. Yes.
 14 **Q. And just to make sure we're clear on exactly**
 15 **what a data store is, Tiversa maintained a record of the**
 16 **files that it actually found along with files that it**
 17 **wanted to create the appearance that they were found in**
 18 **other locations on the Internet.**
 19 A. Right.
 20 **Q. Now, with respect to the 1718 File, I believe**
 21 **you indicated this morning that you found this file in**
 22 **February of 2008. Correct?**
 23 A. Yes. February 25.
 24 **Q. And at the time you found that file, is there**
 25 **any doubt in your mind that this file was found on a**

1442

1 **LabMD computer in Atlanta, Georgia?**
 2 A. Yeah -- well, after I downloaded the file, I
 3 immediately went and browsed the host because I wanted
 4 to get any other piece of information that would be at
 5 that IP address, because when you pull open a PDF and
 6 it's packed full of, you know, 8,000 people's healthcare
 7 information or however many that are in there, chances
 8 are there's other information there that would be
 9 valuable as well.
 10 **Q. And after you found this file in February 2008,**
 11 **did you tell Mr. Boback that you found this?**
 12 A. Yes. Within just a few minutes of opening it,
 13 he was standing over my shoulder looking at it.
 14 **Q. And when you showed this file to Mr. Boback,**
 15 **what did he do next? Did he do anything himself or did**
 16 **he direct you to do anything?**
 17 A. He was very excited and told me that he was
 18 going to take the lead on it.
 19 **Q. I'm sorry. He was going?**
 20 A. He was going to take the lead on it. He was
 21 going to make contact with LabMD.
 22 **Q. And do you know if he actually contacted LabMD?**
 23 A. I would imagine he probably did. I mean, I was
 24 not in the room.
 25 **Q. But do you know today whether he has contacted**

1443

1 **LabMD?**
 2 A. I would say yes.
 3 **Q. Have you heard conversations in the Tiversa**
 4 **offices about contacts that Mr. Boback made with LabMD?**
 5 A. Yes.
 6 **Q. Did LabMD ever hire Tiversa to do anything for**
 7 **them?**
 8 A. No.
 9 **Q. So they did not accept Boback's proposal to**
 10 **remediate their problem.**
 11 A. No.
 12 **Q. Was LabMD ever told by Tiversa where their file**
 13 **had been found on the peer-to-peer networks?**
 14 A. I believe that the initial contact, there was no
 15 identifying information as far as the location on it. I
 16 think it was the usual sales pitch where, if you pay us,
 17 we can go look, but we don't know right now.
 18 And then I think that there was a subsequent
 19 e-mail that went out. After things went cold, Bob
 20 reached back out to LabMD that, hey, your files --
 21 either your files are being searched for or it is being,
 22 you know -- it's spread all over the peer-to-peer space
 23 and you need to remediate it.
 24 **Q. But that wasn't true, was it?**
 25 A. No.

1444

1 **Q. In fact, the file was never -- never spread**
 2 **anywhere on the Internet.**
 3 A. No. No. The originating source in Atlanta is
 4 the only source that it's ever been seen at.
 5 **Q. Now, there was a lot of talk this morning about**
 6 **IP addresses that you provided to Mr. Boback, and at**
 7 **least four of them were found on a document that has**
 8 **been discussed today as CX 19; correct?**
 9 A. Yes.
 10 **Q. Now, these were not the only IP addresses that**
 11 **Tiversa used to make it appear that files spread to**
 12 **other locations on the Internet.**
 13 A. No.
 14 **Q. Do you have any idea today of approximately how**
 15 **many different IP addresses that may have been used by**
 16 **Tiversa to make it appear as though files were spread on**
 17 **the Internet?**
 18 A. I would say approximately twenty.
 19 **Q. Twenty?**
 20 A. Twenty.
 21 **Q. And were there certain IP addresses that you**
 22 **seemed to use more frequently than others?**
 23 A. Yes.
 24 **Q. And why was that?**
 25 A. Like we were talking about this morning, if you

1445

1 know that the IP address is dead and there's no computer
 2 on the other end of it, especially if law enforcement
 3 has already taken action, whether it be somebody who has
 4 material that's used to exploit children or, you know,
 5 banking information for identity theft or for whatever
 6 the reason is, if law enforcement has already acted on
 7 it, that computer is gone, so therefore, it's going to
 8 be impossible to say was this insurance aging file at
 9 173 in Apache Junction when that's -- like I say, that's
 10 long gone, so there's no way to contradict what Tiversa
 11 is saying.
 12 **Q. Now, just briefly, Mr. Wallace, in addition to**
 13 **the duties that you had in the regular course of your**
 14 **business for Tiversa, did you also from time to time**
 15 **assist law enforcement in different investigations that**
 16 **would give you access to some of these IP addresses?**
 17 A. Yes.
 18 **Q. And Mr. Boback, was he aware that these were IP**
 19 **addresses that --**
 20 A. Yes.
 21 **Q. -- you had found from known criminals?**
 22 A. Yes.
 23 **Q. Now, looking at CX 19, Mr. Sherman directed you**
 24 **to a series of questions about the pieces of information**
 25 **contained on this document.**

1446

1 **And the first column contains an IP address;**
 2 **correct?**
 3 A. Which one are we looking at?
 4 **Q. I'm sorry. I'm looking at CX 19 with the list**
 5 **of four IP addresses.**
 6 A. Yes. Yes.
 7 MS. VANDRUFF: And Your Honor, if I may,
 8 Counsel, are we going to -- do you intend to elicit
 9 questions that Mr. Sherman didn't -- answers to
 10 questions that Mr. Sherman did not ask?
 11 Okay. Because it sounds like you're asking the
 12 same questions.
 13 THE WITNESS: I don't have that because it was
 14 on the screen, but yes, the first column would be an IP
 15 address. The next would be a date and a time when that
 16 file was supposedly downloaded. Then there would be a
 17 file title that would have the IP address prepended to
 18 it.
 19 BY MS. BUCHANAN:
 20 **Q. The only point that I really want to clarify**
 21 **with respect to this document is that in the third**
 22 **column -- and I know you don't have it in front of you**
 23 **right now -- excuse me. Jackie, would you give this to**
 24 **the witness.**
 25 THE WITNESS: I know what it is.

1447

1 BY MS. BUCHANAN:
 2 **Q. Just to be clear, the third column lists a time,**
 3 **like the first one, for example, is 11:26 p.m., the**
 4 **second is 3:49 p.m.**
 5 A. Yes.
 6 **Q. These times do not actually represent when these**
 7 **files were actually downloaded.**
 8 A. No. That time -- it was simple to -- it's
 9 simple to change them, but it took a lot of keeping
 10 track of what times to use because, for example, that
 11 173.16 IP address, the date modified of that file has
 12 to correspond with when that IP address was really
 13 active.
 14 And the other thing that you have to look for is
 15 to make sure that you're not creating a previous
 16 exposure before the original source.
 17 **Q. And this particular document, CX 19, you**
 18 **compiled this at or around the time of Mr. Boback's**
 19 **deposition in this proceeding; correct?**
 20 A. Yes.
 21 **Q. And he asked you to come up with IP addresses**
 22 **that would relate to locations other than Atlanta,**
 23 **Georgia; correct?**
 24 A. Yes.
 25 **Q. But this is by no means the only set of IP**

1448

1 **addresses that you may have ever given Mr. Boback or**
 2 **used on prior occasions.**
 3 A. No.
 4 JUDGE CHAPPELL: I have a question.
 5 You told me earlier that you wanted to make sure
 6 the IP address was valid at the time you listed in case
 7 you were audited.
 8 THE WITNESS: Pardon me?
 9 JUDGE CHAPPELL: In case you were audited, is
 10 that what you said, in case of an audit?
 11 THE WITNESS: Yes. Or that way, when you go and
 12 you pull up the main screen on any of the operating
 13 centers or the user centers, those files will show up as
 14 looking like they're coming from that IP address.
 15 JUDGE CHAPPELL: But let's say you gave that IP
 16 address to LabMD. They can't do anything with that IP
 17 address, can they?
 18 THE WITNESS: Yes.
 19 JUDGE CHAPPELL: What can they do with the IP
 20 address?
 21 THE WITNESS: They would be able to identify
 22 where -- what part of the country it's coming out of,
 23 what the ISP is, what the carrier is. And if the file
 24 actually continued to be disclosed from that IP address
 25 and, say, LabMD was not able to find the laptop or find

1449

1 the station that's broadcasting it, you could contact
 2 the ISP and request them to cease service for that
 3 ISP -- or for that IP address based on their terms of
 4 user -- terms of service user agreement.
 5 JUDGE CHAPPELL: I understand they could trace
 6 the IP address, but you were talking earlier about
 7 whether they were active or not.
 8 If LabMD had that IP address, could they find
 9 out a history of that IP address, whether it was valid
 10 and when it was valid?
 11 THE WITNESS: You could do some searching
 12 online. Yes.
 13 BY MS. BUCHANAN:
 14 **Q. I'd like to direct your attention to**
 15 **Respondent's Exhibit RX 545, which is the CIGNA ticket**
 16 **that you testified about this morning.**
 17 A. Yes.
 18 **Q. And with regard to this CIGNA ticket, in the**
 19 **section 4 labeled Incident Summary?**
 20 A. Yes.
 21 **Q. This summary purportedly indicates that a**
 22 **disclosure of the CIGNA files, which would have**
 23 **contained the same files from the insurance aging file,**
 24 **was found on April 18.**
 25 A. Yes.

1450

1 **Q. But that's not correct, is it?**
 2 A. No.
 3 **Q. And you indicated this morning that it was part**
 4 **of the business practice that information needed to be**
 5 **continually flowing to customers so that they could see**
 6 **that things were being done.**
 7 A. Right.
 8 MS. VANDRUFF: And Your Honor, just if I may,
 9 while complaint counsel agreed that Ms. Buchanan can
 10 examine her client, rehashing this morning I don't think
 11 is efficient, so I just want to make sure that
 12 Ms. Buchanan covers areas where there was some
 13 confusion.
 14 MS. BUCHANAN: I'm getting to the point.
 15 MS. VANDRUFF: Okay. Thank you.
 16 BY MS. BUCHANAN:
 17 **Q. Now, with respect to this particular ticket, it**
 18 **indicates that a disclosure was discovered by Tiversa on**
 19 **April 18, 2008, and you indicated this morning that that**
 20 **wasn't the actual date that it was found.**
 21 A. That's correct.
 22 **Q. But this ticket that was provided to CIGNA, this**
 23 **ticket that was actually paid for by CIGNA, was supposed**
 24 **to be disclosed to CIGNA in real time as in like right**
 25 **after the disclosure was made.**

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1 A. That's correct.
 2 **Q. And would it have helped CIGNA to know that the**
 3 **disclosure of their files actually occurred in February**
 4 **as opposed to April so they could have taken some**
 5 **investigation and found the disclosure source for**
 6 **themselves?**
 7 A. Right.
 8 JUDGE CHAPPELL: At the time indicated on this
 9 document, was CIGNA a client or were they being groomed
 10 to be a prospective client?
 11 THE WITNESS: CIGNA was a client, a monitoring
 12 client, so we were providing peer-to-peer monitoring
 13 services for CIGNA.
 14 But the other thing that we would do is, say,
 15 for example, if LabMD did not purchase our services, we
 16 could reach out to CIGNA and say, LabMD has disclosed
 17 one hundred and -- I forget how -- 113 of your
 18 insureds' information, you need to reach out to LabMD,
 19 and you know, you could strong-arm people that way as
 20 well.
 21 JUDGE CHAPPELL: And why would you do that?
 22 THE WITNESS: If they did not want to become
 23 customers.
 24 JUDGE CHAPPELL: To monetize the target?
 25 THE WITNESS: No. What we would do is there

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1 would be a delay before we -- before we give it to
 2 somebody else to give Tiversa the chance to reach out to
 3 that customer and let them become a customer before
 4 going the third way around, before having an existing
 5 customer reach out to them.
 6 JUDGE CHAPPELL: So if I understood you
 7 correctly, the process you just described would help
 8 force LabMD to become a client.
 9 THE WITNESS: Right.
 10 BY MS. BUCHANAN:
 11 **Q. You testified this morning that in like the fall**
 12 **of 2009 you traveled to the FTC along with others from**
 13 **Tiversa to discuss the CID that had been produced.**
 14 A. Right.
 15 **Q. And essentially you were asked to explain how**
 16 **this spreadsheet was constructed and what information**
 17 **was contained on it; correct?**
 18 A. Right. Uh-huh.
 19 **Q. Can you tell us whether, in addition to**
 20 **providing the spreadsheet to the FTC, whether Mr. Boback**
 21 **made other use of this list?**
 22 A. Yes. This was the master list that we would
 23 cold-call people for IRCs off of as well.
 24 **Q. And after he actually delivered it to the FTC,**
 25 **did he tell clients that they in fact were aware of**

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1 **their disclosures?**
2 A. Yes. He actually contacted a lot of the people
3 on this list after the FTC was notified that they --
4 that these companies had a disclosure and would be
5 saying that the FTC is going to be taking action against
6 you if you don't become clients.
7 JUDGE CHAPPELL: Does this list have a document
8 number?
9 MS. BUCHANAN: Yes, Your Honor, it does. My
10 apologies. It's RX 551.
11 JUDGE CHAPPELL: Thank you.
12 MR. SHERMAN: Your Honor, it was not admitted
13 into or even presented for admission into evidence.
14 There is a redacted version of the list that is in
15 evidence. The only name that appears on that list is
16 LabMD. And that is document -- it's 307 I believe.
17 Yes, CX 307.
18 JUDGE CHAPPELL: So the list you're talking
19 about, Counselor, in evidence is a document labeled
20 RX 307 which is redacted.
21 MS. BUCHANAN: Correct. Thank you, Your Honor.
22 BY MS. BUCHANAN:
23 **Q. Now, in addition to all the companies that are**
24 **listed on this exhibit, which would represent companies**
25 **in which Tiversa would have created the appearance that**

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1 **their documents were spread all over the Internet, in**
2 **addition to these examples, were there other times when**
3 **Mr. Boback would go out and make statements, then ask**
4 **you to try to create a scenario that would make it look**
5 **like the information that he was given was actually**
6 **true?**
7 A. Yes. There were multiple, multiple times. Some
8 of them were very high level, very well publicized.
9 You know, one example would be, there was a
10 defense contractor in Washington, D.C., actually western
11 Virginia, and he was in charge of -- well, he was CEO of
12 a company that was working on a project to upgrade the
13 cockpit avionics for Marine One. And that file had
14 already been dealt with by law enforcement, had already
15 been remediated and taken off-line. The CEO knew about
16 it. It was gone.
17 Mr. Boback found out about it sometime later and
18 said we need to make hay out of this, so the media was
19 contacted and the story then was that the file had been
20 found at an Iranian IP address.
21 **Q. So basically Mr. Boback asked you to create the**
22 **appearance that the file had been found on an Iranian**
23 **address as opposed to where it was actually found.**
24 A. Right.
25 **Q. Now, Mr. Wallace, you are testifying today for**

1455

1 **the first time; correct?**
2 A. Yes.
3 **Q. And your deposition was noticed back in 2014;**
4 **correct?**
5 A. It -- I've never been deposed.
6 **Q. The parties here to this proceeding wanted to**
7 **take your deposition.**
8 A. Oh, yes. Yes.
9 **Q. And that was in 2014; correct?**
10 A. Yes. It was around the same time Bob's
11 deposition was done as well.
12 **Q. And did you ever give a deposition in this**
13 **case?**
14 A. Did I ever what?
15 **Q. Did you ever provide a deposition --**
16 A. No.
17 **Q. -- testimony?**
18 A. No, I did not.
19 **Q. Did you ever have discussions with Mr. Boback**
20 **about you giving a deposition testimony?**
21 A. Yes. Especially in regard to the LabMD file,
22 there was a lot of pressure to give false information,
23 which I just was not willing to do.
24 **Q. And so that Mr. Boback specifically asked you to**
25 **lie to the FTC in connection with your deposition;**

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1 **correct?**
2 A. There was not much asking. It was more
3 telling.
4 **Q. And on this occasion, you finally refused to do**
5 **something that Boback asked you to do that you knew was**
6 **wrong.**
7 A. Yes.
8 MS. BUCHANAN: I don't have any other questions,
9 Your Honor.
10 JUDGE CHAPPELL: All right.
11 MS. VANDRUFF: Your Honor, may I ask for the
12 court's indulgence for just a moment because I think
13 we're going to ask to approach.
14 JUDGE CHAPPELL: Okay.
15 MS. VANDRUFF: If I may? Thank you.
16 (Pause in the proceedings.)
17 MS. BUCHANAN: I just have actually one
18 follow-up question.
19 BY MS. BUCHANAN:
20 **Q. It was your testimony this morning with regard**
21 **to the kinds of documents that you found along with the**
22 **1718 File from LabMD computers -- and I don't think that**
23 **you -- that it was stated on the record what kind of**
24 **documents they were and why you believed that they came**
25 **from LabMD.**

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1 A. Yes. They were -- several of them were -- it
 2 had the red and white LabMD logo on the top of them.
 3 There were -- in the meta data of the Word document it
 4 clearly showed LabMD.
 5 Then there was also a Word document that had
 6 what an employee for LabMD would use to log in to
 7 different Web portals for insurance carriers to I
 8 believe submit information to it for payment.
 9 Like I say, every single one of the files was
 10 related to LabMD in one way or another.
 11 **Q. And finally, you made reference -- I had asked**
 12 **you whether there were other examples of times in which**
 13 **Mr. Boback would make statements and ask you to create a**
 14 **scenario that made it seem as though information was**
 15 **found in one place and it was really found somewhere**
 16 **else. And you made reference to him making statements**
 17 **about a disclosure of information, that you were**
 18 **directed to make it look like this information was found**
 19 **on an Iranian IP address?**
 20 A. Yes.
 21 **Q. And you made reference to Marine One; is that**
 22 **correct?**
 23 A. That is true.
 24 **Q. And are you referring to the president's**
 25 **helicopter?**

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1 A. Yes.
 2 It was a very publicized story. Tiversa,
 3 you know -- it was very good press for Tiversa. And
 4 believe it or not, it was not easy to find an active
 5 Iranian IP address that law enforcement couldn't get
 6 ahold of.
 7 **Q. And this is just one of the many --**
 8 A. This is one of many.
 9 **Q. -- examples of occasions where you were asked to**
 10 **create a scenario that information was found in**
 11 **locations where it never existed.**
 12 A. That is true.
 13 MS. BUCHANAN: I have no further questions.
 14 JUDGE CHAPPELL: All right.
 15 MS. VANDRUFF: May respondent's counsel and I
 16 approach, Your Honor?
 17 JUDGE CHAPPELL: All right.
 18 (At the bench, discussion off the record.)
 19 (In open court.)
 20 JUDGE CHAPPELL: We're going to take a short
 21 recess. We will reconvene at 4:00 p.m.
 22 (Recess)
 23 JUDGE CHAPPELL: Let's go back on the record.
 24 Mr. Sherman?
 25 MR. SHERMAN: May we approach, Your Honor?

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1 JUDGE CHAPPELL: Yes.
 2 MR. SHERMAN: I think that was the plan.
 3 (At the bench, discussion off the record.)
 4 (In open court.)
 5 JUDGE CHAPPELL: Mr. Wallace, you're excused.
 6 Thank you for your time.
 7 THE WITNESS: Oh.
 8 JUDGE CHAPPELL: Just like that. No deposition.
 9 You're free.
 10 THE WITNESS: Thank you.
 11 (At the bench, discussion off the record.)
 12 (In open court.)
 13 JUDGE CHAPPELL: So, Ms. VanDruff, can you tell
 14 us for the record your position on any cross or
 15 deposition of Mr. Wallace?
 16 MS. VANDRUFF: Yes, Your Honor. At this time,
 17 complaint counsel will not be proceeding with the
 18 deposition permitted by Your Honor's order, and we are
 19 not conducting cross-examination.
 20 JUDGE CHAPPELL: All right. Then the only
 21 question left to ask is whether Mr. Sherman has
 22 follow-up questions based on the redirect of
 23 Ms. Buchanan.
 24 MR. SHERMAN: I do not have any follow-up
 25 questions of Mr. Wallace, Your Honor.

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1 There is the issue of the admission of certain
 2 documents as exhibits.
 3 JUDGE CHAPPELL: Before that, Mr. Wallace and
 4 his counsel are excused.
 5 All right.
 6 MR. SHERMAN: In terms of those documents,
 7 complaint counsel and I have --
 8 JUDGE CHAPPELL: Do we have exhibit numbers?
 9 MR. SHERMAN: I think it is Exhibit Number -- or
 10 it should be --
 11 JUDGE CHAPPELL: Well, there's a chance we will
 12 reconvene, if there's rebuttal, we will reconvene, so we
 13 may not need to deal with this at the moment. And if
 14 there's no objection -- well, let me get this clear.
 15 The government is not in a position to say
 16 whether or not they will request rebuttal at this time?
 17 MS. VANDRUFF: That's correct, Your Honor.
 18 JUDGE CHAPPELL: Okay. So we're going to
 19 recess here shortly, and then I assume, if you want
 20 rebuttal, you'll be filing a motion requesting
 21 rebuttal.
 22 MS. VANDRUFF: Yes, Your Honor. And I would ask
 23 for one week to file that motion.
 24 JUDGE CHAPPELL: Any objection?
 25 MR. SHERMAN: No objection to that, Your Honor,

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1 if -- if it would then be proper after that week, should
 2 she -- should the -- should the FTC decide not to put on
 3 any rebuttal, then at that time we could deal with the
 4 submission of the exhibit that we were discussing
 5 before.
 6 MS. VANDRUFF: And Your Honor, complaint counsel
 7 would be amenable to doing that by consent motion or
 8 otherwise.
 9 JUDGE CHAPPELL: A joint motion.
 10 MS. VANDRUFF: Well, it would not be
 11 complaint counsel's motion, Your Honor, but I can see
 12 that we would --
 13 JUDGE CHAPPELL: He could offer the attachments,
 14 but from what I'm hearing, what I heard in our
 15 conference at the bench, you're going to -- these are
 16 going to need to be in camera?
 17 MR. SHERMAN: That's correct, Your Honor. There
 18 is some sensitive information contained in some of the
 19 documents.
 20 JUDGE CHAPPELL: So we're going to need a motion
 21 for in camera treatment.
 22 MR. SHERMAN: And we would be willing to make
 23 that motion if the court would indulge us to wait until
 24 the FTC has made its decision on rebuttal. Or -- and
 25 not that that is a mechanism for us making the motion,

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1 we could do it in the meantime. It's --
 2 JUDGE CHAPPELL: Is the offer of these exhibits
 3 contingent upon rebuttal or not connected?
 4 MR. SHERMAN: They are not.
 5 MS. VANDRUFF: And Your Honor, it would be
 6 easier for at least complaint counsel to assess the
 7 rebuttal to know that respondent has closed its
 8 evidence.
 9 I think the only outstanding issue are these
 10 18 documents that Mr. Sherman has described.
 11 JUDGE CHAPPELL: Well, I think you raise a good
 12 point.
 13 Does respondent rest? Other than these
 14 documents we're talking about.
 15 MR. SHERMAN: Yes, Your Honor.
 16 JUDGE CHAPPELL: Okay.
 17 MR. SHERMAN: Respondent rests.
 18 JUDGE CHAPPELL: Okay.
 19 MS. VANDRUFF: That addresses my concern,
 20 Your Honor. Thank you.
 21 JUDGE CHAPPELL: I'm just trying to figure out
 22 how to handle these exhibits if there's no rebuttal and
 23 whether we would need to get together again here for me
 24 to wrap everything up.
 25 Because there's no need for provisional

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1 in camera if we're not referring to a document in open
 2 court, we need to go with the standard in camera, so
 3 we'll need a motion to be filed, and you know the
 4 guides, the standards, et cetera, that apply to that, so
 5 we'll need a motion for in camera treatment.
 6 And I could rule on that. And I will not be
 7 able to close the record until that's resolved.
 8 So I think I've handled everything I can
 9 today.
 10 We will give -- you have a week to file a motion
 11 for rebuttal or to notify us that you don't intend to
 12 request rebuttal; right?
 13 MS. VANDRUFF: Yes, Your Honor.
 14 JUDGE CHAPPELL: And you have a week for that.
 15 You can get this in camera motion in pretty
 16 quickly; right?
 17 MR. SHERMAN: Yes, Your Honor.
 18 JUDGE CHAPPELL: How many pages are we talking,
 19 just ballpark?
 20 MR. SHERMAN: 56. 50.
 21 JUDGE CHAPPELL: Okay. Not thousands.
 22 MR. SHERMAN: No, sir.
 23 JUDGE CHAPPELL: And I believe if the calendar
 24 is right that you have until May 12 for your rebuttal
 25 motion.

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1 MS. VANDRUFF: Thank you, Your Honor. That's
 2 exactly what I was counting.
 3 MR. SHERMAN: Your Honor, the only procedural
 4 step I think we need to take at this point, having
 5 rested our case, we would renew our motion to dismiss.
 6 JUDGE CHAPPELL: Yes. I have that in writing.
 7 MR. SHERMAN: And we would submit that on the
 8 brief that's been submitted already.
 9 JUDGE CHAPPELL: I have that in writing.
 10 So we'll see what develops with the rebuttal
 11 request and the document. Until then --
 12 MR. SHERMAN: Your Honor, one more thing.
 13 JUDGE CHAPPELL: Okay. Go ahead.
 14 MR. SHERMAN: One more thing.
 15 I think there's a -- there's a request
 16 Mr. Rubinstein wants to make on the record.
 17 JUDGE CHAPPELL: All right.
 18 MR. RUBINSTEIN: Good afternoon, Your Honor.
 19 This is to give you notice that we will be
 20 filing a motion with you in very short order, asking
 21 that you to consider a referral of Tiversa and
 22 Mr. Boback, under 18 U.S.C. 1505, for obstruction of
 23 this proceeding.
 24 Based on the testimony taken in this case, the
 25 document productions and the information obtained from

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| 1465 | <p>1 the House Oversight and Government Reform Committee and</p> <p>2 based on the testimony heard today, we believe there is</p> <p>3 ample evidence to suggest that Tiversa provided false</p> <p>4 testimony under oath, that Mr. Boback provided false</p> <p>5 testimony under oath, that documents that were</p> <p>6 responsive to subpoenas from the government were not</p> <p>7 produced or willfully withheld, and that for these</p> <p>8 reasons it would be appropriate for this court to ask</p> <p>9 for criminal investigation.</p> <p>10 And we are going to ask the government to join</p> <p>11 us in that motion.</p> <p>12 JUDGE CHAPPELL: Okay. Let me just tell you,</p> <p>13 thanks for the warning or notice, but I'm not going to</p> <p>14 accept that orally in open court. That will need to be</p> <p>15 done in writing.</p> <p>16 MR. RUBINSTEIN: Yes, Your Honor. We will</p> <p>17 provide that to you in writing fairly soon.</p> <p>18 JUDGE CHAPPELL: All right.</p> <p>19 Anything further?</p> <p>20 MS. VANDRUFF: No, Your Honor. Just -- except</p> <p>21 for just an administrative point.</p> <p>22 With respect to cleanup of exhibit lists,</p> <p>23 et cetera, is that something that you expect the parties</p> <p>24 to resolve or do you want us to present on that at our</p> <p>25 next proceeding?</p> | 1467 | <p>1 JUDGE CHAPPELL: All right. Until we meet</p> <p>2 again, we're adjourned.</p> <p>3 (Whereupon, the foregoing hearing was adjourned</p> <p>4 at 4:16 p.m.)</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> |
| 1466 | <p>1 JUDGE CHAPPELL: I would like for you to work on</p> <p>2 eliminating any duplicative exhibit, one that's a CX as</p> <p>3 well as an RX, so it becomes much easier in posttrial</p> <p>4 briefing. And hopefully you can do that without my</p> <p>5 involvement.</p> <p>6 MR. SHERMAN: I think we can handle that,</p> <p>7 Your Honor.</p> <p>8 JUDGE CHAPPELL: And as far as I'm concerned, it</p> <p>9 gets no greater weight for one side or the other whether</p> <p>10 it's a CX or an RX. It's just an exhibit.</p> <p>11 MS. VANDRUFF: And so we can resubmit then,</p> <p>12 Your Honor, in the coming days?</p> <p>13 JUDGE CHAPPELL: I think the best way to do it</p> <p>14 is if we have, for example, a CX 5 and an RX 25 and</p> <p>15 they're the same exhibit, then I think create a list</p> <p>16 of what you're withdrawing, and in open court you can</p> <p>17 say we're withdrawing, for example, RX 25 because it's</p> <p>18 the same exhibit as CX 5, so that the record is clean.</p> <p>19 MS. VANDRUFF: Okay.</p> <p>20 JUDGE CHAPPELL: It's better to withdraw than to</p> <p>21 add.</p> <p>22 MS. VANDRUFF: Understood.</p> <p>23 JUDGE CHAPPELL: Okay. Anything else?</p> <p>24 MR. SHERMAN: Nothing further, Your Honor.</p> <p>25 MS. VANDRUFF: Nothing further, Your Honor.</p> | 1468 | <p>1 CERTIFICATION OF REPORTER</p> <p>2</p> <p>3 DOCKET/FILE NUMBER: 9357</p> <p>4 CASE TITLE: LabMD, Inc.</p> <p>5 HEARING DATE: May 5, 2015</p> <p>6</p> <p>7 I HEREBY CERTIFY that the transcript contained</p> <p>8 herein is a full and accurate transcript of the notes</p> <p>9 taken by me at the hearing on the above cause before the</p> <p>10 FEDERAL TRADE COMMISSION to the best of my knowledge and</p> <p>11 belief.</p> <p>12</p> <p>13 DATED: MAY 6, 2015</p> <p>14</p> <p>15</p> <p>16 JOSETT F. WHALEN, RMR</p> <p>17</p> <p>18</p> <p>19 CERTIFICATION OF PROOFREADER</p> <p>20</p> <p>21 I HEREBY CERTIFY that I proofread the transcript</p> <p>22 for accuracy in spelling, hyphenation, punctuation and</p> <p>23 format.</p> <p>24</p> <p>25 ELIZABETH M. FARRELL</p> |

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