

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

COMMISSIONERS: **Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney**

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

ORDER CORRECTING ORAL ARGUMENT TRANSCRIPT

On May 4, 2016, Complaint Counsel filed an unopposed Motion to correct the transcript of the Oral Argument held in this proceeding on March 8, 2016. The Motion states that Complaint Counsel conferred with counsel for Respondent in a good faith effort to stipulate to the desired corrections, as prescribed by Commission Rule 3.52(i), 16 C.F.R. § 3.52(i), and that while Respondent has declined to join the Motion, Respondent agrees to the proposed corrections and will not oppose the Motion. Accordingly,

IT IS ORDERED THAT the Oral Argument Transcript be, and it hereby is, modified to adopt the two corrections requested by Complaint Counsel in the May 4 Motion, and to read as shown in the attached corrected copy.

By the Commission.

Donald S. Clark
Secretary

SEAL:
ISSUED: May 16, 2016

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13 March 8, 2016
14 1:00 p.m.
15 ORAL ARGUMENT
16

17 Federal Trade Commission
18 600 Pennsylvania Avenue, N.W.
19 Washington, D.C.
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22

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24 Reported by: Josett F. Whalen, Court Reporter
25

1 APPEARANCES:

2

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P R O C E E D I N G S

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CHAIRWOMAN RAMIREZ: Good afternoon, everyone.

The Commission is meeting today in open session to hear oral argument in the matter of LabMD, Docket Number 9357, on the appeal of counsel supporting the complaint from the initial decision issued by the Administrative Law Judge.

Complaint counsel are represented by Ms. Laura VanDruff, and the respondent is represented by Mr. Alfred J. Lechner, Jr.

During this proceeding, each side will have 45 minutes to present their arguments. Complaint counsel shall make the first presentation and will be permitted to reserve time for rebuttal, and then counsel for respondent will then make his presentation. Complaint counsel may conclude the argument with their rebuttal.

Ms. VanDruff, do you wish to reserve any time for rebuttal?

MS. VANDRUFF: I do. Thank you, Madam Chairwoman. Ten minutes, please.

CHAIRWOMAN RAMIREZ: You may begin.

MS. VANDRUFF: Thank you, Madam Chairwoman.

Madam Chairwoman, and may it please the

1 Commission.

2 This is a case about a company whose very
3 business model depended on collecting and maintaining
4 hundreds of thousands of consumers' most sensitive
5 categories of personal information, including names,
6 dates of birth, Social Security numbers, health
7 insurance information and medical diagnoses, but LabMD
8 did not put in place even the most basic protections to
9 secure that information from unauthorized disclosure.

10 LabMD's multiple, systemic and serious failures
11 violated section 5 of the FTC Act because they
12 unlawfully caused or likely caused substantial consumer
13 injury that consumers could not avoid and that was not
14 outweighed by countervailing benefits to consumers or
15 competition.

16 Applying the settled law of the Commission, this
17 is not a close case for the Commission in its de novo
18 review of the record on appeal. But before I review the
19 overwhelming evidence in this case, it's important to
20 first address the initial decision's three most
21 significant errors of law that complaint counsel is
22 challenging.

23 First, the initial decision was wrong in
24 holding that an act or practice that raises a
25 significant risk of concrete harm does not cause

1 substantial consumer injury.

2 This Commission has recognized that a practice
3 causes or likely causes substantial -- excuse me --
4 that -- this Commission has recognized that a practice
5 causes or is likely to cause substantial injury if it
6 raises a significant risk of concrete harm.

7 The Commission's holding is grounded in
8 Section 5(n), which codified the unfairness statement.
9 And the Commission's reasoning is affirmed by case law
10 applying primary sources. The standard is consistent
11 with the Commission's broad mandate to prevent acts or
12 practices that injure the public.

13 The initial decision's ruling to the contrary
14 cannot be reconciled with this authority, which is
15 controlling in this case and in any data security case
16 brought under the FTC's unfairness authority.

17 Second --

18 COMMISSIONER OHLHAUSEN: Counsel, could I just ask
19 you a question on that first prong, the
20 first "error," that you're arguing?

21 MS. VANDRUFF: Yes.

22 COMMISSIONER OHLHAUSEN: Are you saying that
23 raising a significant risk of concrete harm equals
24 substantial injury, or that it is likely to cause
25 substantial injury?

1 MS. VANDRUFF: Nothing about the law of
2 Section 5 has changed since the Commission issued its
3 opinion on the motion to dismiss in January of 2014.
4 And in that opinion, the Commission held that an act or
5 practice may cause substantial injury if it causes a
6 small harm to a large number of people or raises a
7 significant risk of concrete harm.

8 And to back up for a moment,
9 Commissioner Ohlhausen, the Commission's order on that
10 motion to dismiss also observed that actual, completed
11 economic harms are not necessary to substantiate that a
12 firm's data security activities caused or likely caused
13 consumer injury and thus constitute unfair acts or
14 practices.

15 Therefore, for data security practices to be
16 unfair without the occurrence of a breach, it must
17 follow that for -- that what makes poor data security
18 practices actionable under Section 5 is the risk of
19 concrete harm that they --

20 CHAIRWOMAN RAMIREZ: Counsel, I want to
21 spend a little bit of time here on the legal standard.

22 MS. VANDRUFF: Yes.

23 CHAIRWOMAN RAMIREZ: Can you tell me -- so
24 your position is that there was actual harm in
25 this case; correct?

1 MS. VANDRUFF: That's correct.

2 CHAIRWOMAN RAMIREZ: And could you outline for
3 me what that actual harm was.

4 MS. VANDRUFF: So to go back to
5 Commissioner Ohlhausen's question, the actual harm was
6 the significant risk of concrete harm that was created
7 by the data security practices and the failures of
8 adequate security that LabMD undertook in not
9 safeguarding adequately the sensitive personal
10 information for 750,000 consumers.

11 CHAIRWOMAN RAMIREZ: Counsel, I'd like you
12 to answer the question -- what does the likely --
13 likelihood piece of the unfairness standard mean?

14 Respondent is arguing that, if one were
15 to accept your position, you're effectively reading
16 out of the statute the word "likely," so can you explain
17 to me then, what is the meaning of that second part
18 of the unfairness test?

19 MS. VANDRUFF: It doesn't -- it doesn't render
20 "likely" moot at all. A likely substantial injury
21 remains cognizable also. There's no change to that
22 standard at all.

23 CHAIRWOMAN RAMIREZ: So
24 again, I'm just trying to understand what "likely
25 to cause" means, and is that distinct

1 from actual harm? Because you're arguing that risk -- a
2 significant risk of concrete harm -- constitutes actual
3 harm, correct?

4 MS. VANDRUFF: Yes.

5 CHAIRWOMAN RAMIREZ: So how distinct is the
6 "likely to cause substantial harm" prong of the
7 unfairness test? Does that mean
8 anything different?

9 MS. VANDRUFF: I want to make sure that I
10 understand your question.

11 A significant risk of concrete harm is itself
12 substantial injury. If that injury is -- occurs -- if
13 that injury is occurring at present, if the acts or
14 practices of a company cause that injury to occur, then
15 that risk occurs at present.

16 CHAIRWOMAN RAMIREZ: So let me frame it a
17 little bit differently. If your position is
18 that a significant risk of concrete harm is a completed
19 harm, tell me how you would go about establishing a
20 likelihood of substantial injury. I'm trying to see
21 if there's a distinction there.

22 MS. VANDRUFF: Right.

23 Well, I -- I want to --

24 CHAIRWOMAN RAMIREZ: It's a different standard,
25 right, it means something different. Does "actual harm"

1 mean something different than "likely to cause
2 substantial injury"? There's a different standard of
3 proof presumably under that piece of the --

4 MS. VANDRUFF: The likely, yes.

5 CHAIRWOMAN RAMIREZ: Yes.

6 MS. VANDRUFF: So to show that something would
7 be "likely" would suggest that it would occur in the
8 future, and so -- so that is --

9 CHAIRWOMAN RAMIREZ: So a temporal distinction.

10 MS. VANDRUFF: It's a temporal distinction, as
11 we set forth in our briefing, that is correct,
12 Madam Chairwoman, yes.

13 If there are no further questions on that
14 subject, then what I would move on to is the second
15 error in the initial decision, and that is that the
16 initial decision was wrong in holding that
17 Section 5 requires proof of known identity theft.

18 Indeed, this Commission in this proceeding has
19 held that the FTC permits the Commission to challenge
20 multiple and systemic data security failures even where
21 no breach has occurred.

22 And finally, the initial decision was wrong --

23 COMMISSIONER OHLHAUSEN: Counselor, can I ask, is
24 that --

25 MS. VANDRUFF: Yes.

1 COMMISSIONER OHLHAUSEN: -- because systemic
2 failures are likely to cause substantial
3 injury or that they themselves cause substantial
4 injury?

5 That is, complaint counsel doesn't have to show that
6 there's a breach because the failures are likely to
7 cause substantial injury?

8 MS. VANDRUFF: Commissioner Ohlhausen, I
9 believe that the reasoning for the Commission's
10 observation that complaint counsel need not show proof
11 of a breach is because a significant risk of concrete
12 harm is sufficient to show substantial injury, as I set
13 forth in response to your initial question.

14 And finally, the initial decision was wrong in
15 requiring complaint counsel to present expert testimony
16 quantifying the probability of injury.

17 Section 5 does not impose this requirement.
18 Rather, complaint counsel must present and did present
19 reasonably available evidence of the risk posed to
20 consumers by a company's poor data security practices.

21 LabMD's data security practices exemplify the
22 conduct against which the FTC Act protects consumers.
23 Its practices caused or were likely to cause significant
24 risk of the concrete harms of identity theft, medical

1 identity theft, and the unauthorized disclosure for
2 hundreds of thousands of consumers, most of whom had
3 probably never heard of LabMD.

4 CHAIRWOMAN RAMIREZ: Was there any other actual
5 harm other than the significant risk that you've already
6 cited?

7 MS. VANDRUFF: So at the outset, that's correct,
8 Madam Chairwoman, that there was a significant risk
9 created for 750,000 consumers.

10 CHAIRWOMAN RAMIREZ: Okay. So putting that
11 aside, was there any other --

12 MS. VANDRUFF: So putting that aside --

13 CHAIRWOMAN RAMIREZ: -- completed harm that the
14 evidence demonstrates, in your view?

15 MS. VANDRUFF: Right.

16 Putting aside the 750,000 consumers, that the
17 record shows that there was also a file of
18 9300 consumers that was exposed on the peer-to-peer
19 network.

20 CHAIRWOMAN RAMIREZ: So the exposure of the
21 1718 File itself is also actual, completed harm; is
22 that --

23 MS. VANDRUFF: That's correct.

24 CHAIRWOMAN RAMIREZ: And anything else?

25 MS. VANDRUFF: And in addition, there was a file

1 containing the sensitive personal information of
2 approximately 600 consumers found in the hands of
3 identity thieves in Sacramento, California.

4 COMMISSIONER McSWEENEY: Can I ask you a question
5 about the Sacramento file?

6 Do you agree with the ALJ's finding that there
7 is no evidence establishing that the Sacramento
8 documents were obtained from LabMD's computer network?

9 MS. VANDRUFF: So we are not conceding that the
10 Sacramento day sheets -- well, the evidence in the
11 record does not establish how the documents got from
12 LabMD to the identity thieves in Sacramento, but we
13 have established that they are LabMD documents containing
14 sensitive consumer information, and the fact that they
15 were obtained by identity thieves demonstrates exactly
16 the types of concrete injury that result from the
17 unauthorized disclosure of consumers' sensitive personal
18 information.

19 COMMISSIONER McSWEENEY: I understood that
20 Dr. Hill's testimony basically asserted that he found that
21 the physical security at LabMD was reasonable, or was not
22 unreasonable.

23 So is that relevant here for establishing where
24 these documents came from?

25 MS. VANDRUFF: Well, as an initial matter, I

1 would disagree with that characterization of
2 Professor Hill's opinion.

3 While the allegations of the complaint -- well,
4 first of all, Professor Hill's opinions do not relate to
5 physical security. And the allegations of the complaint
6 also relate primarily to failures of electronic
7 security, and those are the focus of Professor Hill's
8 opinions. But the principles of the complaint and the
9 principles of her opinions are equally applicable to
10 physical security.

11 So, for example, LabMD's failure to have a
12 written security --

13 CHAIRWOMAN RAMIREZ: Complaint Counsel, does
14 your complaint -- the allegations in the complaint, do
15 they relate to computer security or physical security?

16 The ALJ seemed to understand the
17 complaint to be and the allegations in the case to be
18 solely limited to computer security. Is that
19 inaccurate?

20 MS. VANDRUFF: The allegations of the complaint
21 relate to electronic security, but the principles are
22 equally applicable to physical security.

23 So, for example, Madam Chairwoman, the
24 allegations include a failure to have a written security
25 policy, and LabMD's failure to have a written security

1 plan or to perform risk assessments created an
2 environment in which significant risks to physical
3 security were possible.

4 CHAIRWOMAN RAMIREZ: So I want to make very
5 clear, notwithstanding the fact that the complaint in
6 paragraph 10 focuses on computer security, are you
7 saying the charges here and the evidence showed that
8 there were also lapses in physical security? Is that
9 what you're saying?

10 MS. VANDRUFF: I'm saying there's nothing
11 inconsistent about our proofs to not -- to foreclose
12 conclusions about physical security.

13 CHAIRWOMAN RAMIREZ: Okay. So you're also
14 including physical security, that's part of -
15 notwithstanding the language that's used in the complaint,
16 you're including lapses of physical security in the
17 charges.

18 MS. VANDRUFF: That's right. The "Among other
19 things" paragraph, Madam Chairwoman, is not an
20 exhaustive list, and so certainly those are examples of
21 the kinds of failures, and as examples, they extend to
22 the kinds of things, including physical security, that's
23 correct.

24 CHAIRWOMAN RAMIREZ: Okay.

25 MS. VANDRUFF: So LabMD's data security

1 practices exemplify the kinds of conduct against which
2 the FTC Act protects consumers, and its practices caused
3 or were likely to cause a significant risk of the kinds
4 of concrete harms like identity theft, medical identity
5 theft, and the unauthorized disclosure of sensitive
6 personal information.

7 And when a company's corporate network contains
8 hundreds of thousands of consumers' sensitive personal
9 information, Section 5 of the FTC Act requires a company
10 to take steps to protect it.

11 CHAIRWOMAN RAMIREZ: Counsel, so going back to
12 just focusing on the Sacramento documents --

13 MS. VANDRUFF: Yes.

14 CHAIRWOMAN RAMIREZ: -- as
15 the plaintiff in this matter, what obligation do you
16 have to establish a causal link between that exposure of
17 documents and the security practices of respondent, so
18 what amount of proof do you need to establish that
19 there's a link between that and the documents, and how
20 have you shown that?

21 MS. VANDRUFF: Right.

22 So we -- the record evidence, we have presented
23 evidence from the detectives in Sacramento that
24 demonstrate that the documents that came from LabMD
25 were found in the hands of identity thieves.

1 And while we have not been able to establish
2 how those documents came to -- from LabMD to be in the
3 hands of identity thieves, we have demonstrated that the
4 kinds of information that LabMD maintains are the kinds
5 of information that identity thieves value, and so it is
6 very much a concrete harm that consumers will suffer if
7 information that LabMD maintains is exposed without
8 authorization.

9 COMMISSIONER OHLHAUSEN: I have a
10 question that relates to that.

11 In your appeal brief on page 7, you said that
12 LabMD created a significant risk of harm by collecting,
13 storing and transferring consumer data in large volumes
14 on a daily basis.

15 Under your theory, is that a significant risk
16 equal to a substantial injury, or does there need to be
17 something more? Just the fact that they collected
18 sensitive health information, is that enough or does
19 there need to be more, if we're just looking at a
20 significant risk?

21 MS. VANDRUFF: The collection alone does not
22 create a significant risk. It's the failure to
23 adequately protect that data, the failure to safeguard
24 that data from unauthorized disclosure, and that is the
25 record that we have established in this case.

1 COMMISSIONER OHLHAUSEN: So that goes to
2 whether they took reasonable precautions; is that
3 right?

4 MS. VANDRUFF: That's correct.

5 COMMISSIONER OHLHAUSEN: Reasonable precautions?

6 And so in the Wyndham case, they
7 talk about a cost-benefit analysis that considers a
8 number of relevant factors, such as the -- I'm quoting
9 here -- "the probability and expected size of
10 reasonably unavoidable harms to consumers given a
11 certain level of cybersecurity and the costs to
12 consumers that would arise from an investment in
13 stronger cybersecurity."

14 So does your interpretation of 5(n) agree with
15 the Third Circuit's interpretation or does it differ in
16 some way?

17 MS. VANDRUFF: We are building on the
18 Commission's interpretation of Section 5(n), which I think is
19 entirely consistent with the unfairness statement.

20 COMMISSIONER OHLHAUSEN: And is that
21 interpretation you are relying on from Commissioner
22 Wright's decision denying respondent's motion to dismiss?

23 MS. VANDRUFF: That's correct,
24 Commissioner Ohlhausen, yes.

1 COMMISSIONER OHLHAUSEN: I have a question
2 about that.

3 MS. VANDRUFF: Yes.

4 COMMISSIONER OHLHAUSEN: In that opinion, the
5 Commission says that occurrences of actual data security
6 breaches or actual, completed economic harms are not
7 necessary to substantiate that the firm's data security
8 activities caused or are likely to cause consumer
9 injury and thus constituted unfair acts or practices,
10 and then it cites the unfairness statement, which says
11 what is substantial injury: small harm to a large
12 number of people or raises a significant risk of
13 concrete harm.

14 So is it your contention that a
15 significant risk of concrete harm equals substantial
16 injury? That's correct?

17 MS. VANDRUFF: That's correct.

18 COMMISSIONER OHLHAUSEN: But is it also possible
19 that when Congress interpreted the unfairness statement
20 and recast it in Section 5(n) -- it moved things
21 around, it reversed the order of some of the
22 prongs -- that a significant risk became likely to cause
23 and concrete harm became substantial injury? Is that
24 reading incorrect in some way or not in accord with what
25 Congress said about Section 5(n) or what the unfairness

1 statement said?

2 Do you see what I'm saying?

3 MS. VANDRUFF: No, I understand the question,
4 Commissioner Ohlhausen.

5 And what I would say is that we don't think
6 that the law has changed in any way since January of
7 2014 and since Commissioner Wright's opinion on behalf
8 of a unanimous Commission requiring the Commission to
9 change the law with respect to significant risk of
10 concrete harm, but the alternative formulation that you
11 suggest, which I think is that likely means significant
12 risk, would not affect the outcome in this case, as the
13 record demonstrates, because complaint counsel has shown
14 that LabMD's practices have caused a significant risk of
15 concrete harm whether you characterize that harm as
16 causing substantial injury or being likely to cause
17 substantial injury.

18 COMMISSIONER OHLHAUSEN: Thank you. And
19 that leads us to another question.

20 So assuming we're judging whether LabMD's
21 actions were likely to cause substantial injury, what
22 type and amount of evidence would meet this standard?
23 Is it a risk analysis, meaning that you need the
24 evidence of both probability of potential harm and
25 magnitude of potential harm, and does the record have

1 that kind of evidence?

2 MS. VANDRUFF: So I think what you're asking is
3 keyed off of the briefing from respondent about what
4 likely --

5 COMMISSIONER OHLHAUSEN: Well, I'm just
6 trying to interpret if we have to apply likely
7 to cause substantial injury, which is the statutory
8 language --

9 MS. VANDRUFF: Yes.

10 COMMISSIONER OHLHAUSEN: -- what type of evidence
11 would meet that standard?

12 MS. VANDRUFF: Right.

13 COMMISSIONER OHLHAUSEN: And where would
14 we find that in the record?

15 MS. VANDRUFF: Right.

16 Well, the term "likely" I don't think there's
17 any question is ambiguous because it is open to multiple
18 interpretations. And if given the interpretation that
19 you've offered, which again is not, in complaint
20 counsel's view, the better reading of the statute --
21 the better reading of the statute, as we've
22 offered in our briefing, is that significant --

23 CHAIRWOMAN RAMIREZ: Counsel, let's just put
24 aside what "likely" means. Let's just take your
25 position that the data security practices in this

1 case created some increased or undue risk of exposure of
2 sensitive information. Let's just -- just focus on
3 that, this concept of risk.

4 MS. VANDRUFF: Yes.

5 CHAIRWOMAN RAMIREZ: And just to
6 reframe the question so that you focus on what I
7 think we all care about --

8 MS. VANDRUFF: Okay.

9 CHAIRWOMAN RAMIREZ: -- so what evidence
10 establishes that the practice -- security
11 practices -- were what created that enhanced risk
12 or increased risk?

13 MS. VANDRUFF: I'd be delighted to address that
14 question.

15 CHAIRWOMAN RAMIREZ: I believe that's what you
16 were trying to get at.

17 COMMISSIONER OHLHAUSEN: That is what I'm trying
18 to get at.

19 Putting aside the statute versus the
20 unfairness statement and how that may have been
21 one translated into the other, what evidence do
22 we have that --

23 MS. VANDRUFF: Well, we presented evidence of
24 multiple, systemic and serious failures of data security
25 at LabMD that exposed 750,000 consumers' --

1 CHAIRWOMAN RAMIREZ: So walk us through just the
2 top data security practices that --

3 MS. VANDRUFF: I will.

4 CHAIRWOMAN RAMIREZ: -- you think were --

5 MS. VANDRUFF: And can you put our first slide
6 up on the screen.

7 CHAIRWOMAN RAMIREZ: And as you go through
8 those, I think one question that respondent has raised
9 is from what time frame should we even be looking at
10 this and against what benchmark are you comparing what
11 LabMD did as compared to what you would deem to be
12 reasonable and appropriate security measures.

13 MS. VANDRUFF: Right.

14 The testimony in this case and -- and the
15 record evidence I should say -- this is not limited
16 exclusively to our expert witness, but, rather, the
17 testimony in this case is that LabMD's failures spanned
18 really the period, and we're not limited in any way to
19 a narrow time period, as we addressed in our briefing.
20 A suggestion to the contrary is belied by the --

21 CHAIRWOMAN RAMIREZ: What's the relevant time
22 frame?

23 MS. VANDRUFF: The time period is from
24 2005 really through the present.

25 Now, some of the practices ended in 2010, as we

1 address in our briefing and in our findings of fact,
2 but many continue through the present. And we
3 certainly contend that LabMD's unlawful data security
4 practices continue through the present and that relief
5 is necessary to protect consumers from harm.

6 So because my time is limited, I'd like to
7 address the top three data security failures.

8 And those would include, at the outset, first,
9 that LabMD did not implement any recognizable password
10 policy and for years permitted weak passwords on its
11 workstations, servers and computers in physician
12 offices.

13 And when I describe these passwords as weak, I'm
14 not splitting hairs between 12 and 14-character
15 passwords. Instead, by way of an example, LabMD
16 permitted many of its employees to use "LabMD" as their
17 password.

18 Even LabMD's former IT director acknowledges
19 that its password practices were poor. That's his
20 testimony.

21 The company could have checked for passwords,
22 for strong passwords, and it chose not to.

23 Second, LabMD did not use available measures to
24 prevent or detect unauthorized access to personal
25 information.

1 Until at least late 2010, many employees had
2 the ability to download and install any software they
3 wanted to onto their work computers, including
4 unauthorized programs. The danger of this hole in
5 security is starkly demonstrated by the fact that an
6 employee downloaded LimeWire onto her workstation in
7 2005, but LabMD utterly failed to discover it for
8 years.

9 COMMISSIONER McSWEENEY: So can you just clarify
10 that for me?

11 MS. VANDRUFF: Sure.

12 COMMISSIONER McSWEENEY: When was the LimeWire
13 program installed? In 2005?

14 MS. VANDRUFF: That's correct.

15 COMMISSIONER McSWEENEY: Okay. And how long is
16 complaint counsel alleging it remained undetected?

17 MS. VANDRUFF: It was not detected until May of
18 2008.

19 COMMISSIONER McSWEENEY: And how was it detected?

20 MS. VANDRUFF: It was detected when LabMD
21 received a phone call from Tiversa.

22 COMMISSIONER McSWEENEY: And was it detected, then,
23 because there were programs in place to monitor whether
24 outside software was installed on computers? Or was it
25 detected by a physical inspection?

1 MS. VANDRUFF: It was -- no. It was
2 detected -- the testimony is that it was detected when
3 LabMD undertook to discover whether or not the reported
4 incidence of peer-to-peer software being installed on a
5 computer at LimeWire was in fact true -- excuse me -- at
6 LabMD was in fact true, and so they swept the
7 workstations and discovered that it was.

8 And if the security problem of allowing
9 employees to download software onto their workstations
10 from the Internet wasn't bad enough, LabMD explicitly
11 directed its employees to store copies of files
12 containing consumers' sensitive personal information
13 onto their workstations.

14 CHAIRWOMAN RAMIREZ: So, Counsel, just to go
15 back to my question about what the relevant benchmark to
16 use, so how should -- respondent raises an argument
17 about lack of appropriate notice about the standards
18 that they were required to maintain during the relevant
19 time frame. Explain to me how should they have known
20 to have strong passwords during this period, how should
21 they have known that they needed to have particular
22 mechanisms to ensure that a peer-to-peer program like
23 LimeWire would not be installed? What's the relevant
24 benchmark?

25 MS. VANDRUFF: Well, the relevant standard, of

1 course, is Section 5(n) in terms of the legal standard
2 in terms of fair notice.

3 But if your question is how were their IT
4 professionals to have known that they could have used
5 the Windows function to lock down workstations to
6 prevent individuals from downloading software from the
7 Internet, the answer is training and if they had
8 permitted their IT professionals or really any
9 professionals in their system to have undertaken regular
10 training, and that is one of our failures.

11 CHAIRWOMAN RAMIREZ: But the concept of
12 reasonableness has to be measured against something,
13 right, so what's the benchmark?

14 So understanding that you want your employees to be
15 trained appropriately as to the appropriate standards.
16 Where do we get those standards, and where are they
17 reflected in the record?

18 MS. VANDRUFF: So in the record, our data
19 security expert, Professor Hill from Indiana University,
20 describes a number of free resources that were
21 available.

22 So, for example, written data security
23 policies, examples of those were available as early as
24 1997, and they were not used by LabMD until -- until
25 2010.

1 And so that is but one example, but the record
2 is replete with examples throughout the time period of
3 LabMD failing to use available resources to secure its
4 network reasonably to protect the sensitive personal
5 information on its network from unauthorized
6 disclosure.

7 COMMISSIONER OHLHAUSEN: Counsel, assuming that they
8 failed to take these precautions, what evidence is in
9 the record about the probability of the harm or the
10 potential harm that consumers might suffer from these
11 failures and the magnitude of that harm?

12 MS. VANDRUFF: We presented -- I'm glad you
13 raise that question, Commissioner Ohlhausen, because I
14 would like to turn my attention, if I may, to the
15 evidence that complaint counsel presented of the -- the
16 record evidence that LabMD's failures caused or were
17 likely to cause substantial injury.

18 And the record evidence does establish that
19 LabMD's multiple, systemic and serious data security
20 failures caused a significant risk that sensitive
21 personal information over 750,000 consumers would be
22 disclosed without authorization.

23 The record -- there are three discrete concrete
24 harms that are at issue.

1 First is identity theft.

2 The record establishes that consumers suffer
3 out-of-pocket losses and lost-time harms following
4 identity theft.

5 And this risk is not abstract, as I discussed
6 earlier this afternoon. The LabMD documents seized from
7 identity thieves in Sacramento make concrete that
8 identity thieves value the kind of information LabMD
9 collected.

10 The second risk of concrete harm is medical
11 identity theft.

12 The record establishes that consumers suffer a
13 wide variety of harms from medical identity theft, which
14 would burden consumers with financial costs and serious
15 threats to health. And in addition, unlike identity
16 theft, there's no central medical identity bureau where
17 a consumer can set a medical fraud alert, making
18 remediation difficult.

19 Third, a disclosure itself constitutes a
20 concrete harm under Section 5.

21 Sensitive health information is the type of
22 personal information the Commission has sought to
23 protect since its earliest data security case in 2002,
24 Eli Lilly, through its fiftieth data security settlement
25 in GMR Transcription Services.

1 COMMISSIONER McSWEENEY: So can I ask a question
2 about this?

3 MS. VANDRUFF: Yes.

4 COMMISSIONER McSWEENEY: Are you saying that
5 there's injury from any exposure of any health
6 information?

7 MS. VANDRUFF: Not -- not necessarily, but the
8 kinds of information that could be stigmatizing. In
9 this case, there was information about testing for HIV,
10 testing for cancer, testing for other kinds of potentially
11 stigmatizing conditions.

12 I can imagine that there could be health
13 information that might be benign, but those aren't the
14 facts here. There are facts here -- the facts that are
15 in the record here are information that consumers would
16 necessarily want to be maintained as confidential.

17 COMMISSIONER OHLHAUSEN: Counsel, how does that
18 square with the unfairness statement, which talks about
19 substantial injury mainly involving monetary harm, but
20 emotional impact not ordinarily making a practice unfair?
21 How would you apply that to the disclosure of the medical
22 information that was disclosed in this case?

23 MS. VANDRUFF: While I -- the unfairness
24 statement certainly talks about the principal injury

1 being economic, I think that it recognizes that there
2 would be narrow cases, again, not trivial or
3 speculative or emotional harms but -- but the kinds of
4 concrete harms where consumers, you know, again suffer
5 the kinds of harms that result from the disclosure of
6 the most sensitive kinds of information, like being
7 tested for HIV or cancer. I do think that that is
8 different in kind and again has been recognized in our
9 own cases before the Commission.

10 CHAIRWOMAN RAMIREZ: What's the most closely
11 analogous case? You mentioned Eli Lilly.

12 MS. VANDRUFF: GMR Transcription from 2014 I
13 believe it is, yeah, August 2014, which was our
14 fiftieth -- the Commission's fiftieth data security
15 settlement by unanimous Commission.

16 COMMISSIONER OHLHAUSEN: One other
17 question.

18 You talked about the evidence of the
19 magnitude of the harm.

20 What evidence do you have that these practices
21 would -- were likely to lead to these harms, that the
22 data security, if they had these kinds of practices,
23 how likely was it that consumers' information
24 would be exposed or released?

25 MS. VANDRUFF: Well, the -- it was -- the

1 testimony -- well, I should say that our data security
2 expert, Professor Hill, demonstrated that the practices
3 of LabMD increased the risk of unauthorized disclosure
4 of information. And paired together with the evidence
5 of our identity theft experts, we have established that
6 those harms -- that there was an increased risk of those
7 concrete harms.

8 Now, respondent --

9 COMMISSIONER McSWEENEY: Can I ask one more
10 question? I just want to clarify something about the data
11 security practices you identified here.

12 MS. VANDRUFF: Yes.

13 COMMISSIONER McSWEENEY: To the extent that they
14 were tracking what was on employees' computers that
15 were attached to the network, were they doing that
16 through automated tools or were they doing that through
17 physical inspections or random inspections?

18 MS. VANDRUFF: The record is that through
19 2010 at least that the principal means of monitoring the
20 network and the software that appeared on employees'
21 computers was through what they called walk-around
22 inspections, and the record is further --

23 COMMISSIONER McSWEENEY: What is a walk-around
24 inspection?

1 MS. VANDRUFF: So -- and the record is further
2 that they would basically check in when computers
3 weren't working properly, and so if you had trouble
4 printing, you would call the person at the IT desk, and
5 he would come over and fix it. But it wasn't any kind
6 of routinized process, so it was very reactive, if you
7 will.

8 COMMISSIONER McSWEENEY: And were -- I think you're
9 out of time.

10 MS. VANDRUFF: And I'm out of time.

11 CHAIRWOMAN RAMIREZ: Go ahead. We can always go
12 over a little bit.

13 COMMISSIONER McSWEENEY: Were physicians who were
14 sending information in to the network doing
15 that without encryption tools or data security tools? Is
16 that right?

17 MS. VANDRUFF: The evidence is that it was over
18 a file transfer protocol and it is -- we don't contend
19 that it was unencrypted. It is -- there's -- the
20 record is mixed about exactly how protected that was,
21 but that is not a contention that complaint counsel
22 makes.

23 COMMISSIONER McSWEENEY: So the use of the file
24 transfer protocol during this period of time isn't
25 alleged by you to be an unreasonable security practice.

1 MS. VANDRUFF: There were vast quantities of
2 data being transferred, and there were issues about the
3 configuration of the firewall, but I don't think that
4 encryption is the concern.

5 COMMISSIONER McSWEENEY: Thank you.

6 CHAIRWOMAN RAMIREZ: So just one more question
7 for you, so let me just go back to one of
8 Commissioner Ohlhausen's questions about what evidence
9 establishes the likelihood of harm or probability of
10 harm, as she put it.

11 The ALJ was very persuaded by the absence of a
12 concrete example of ID theft in the time that had
13 elapsed between both the discovery and exposure of the
14 1718 File as well as the Sacramento documents.

15 What role does this, what one could call as a
16 shorthand ex post evidence, have in the way that we
17 evaluate whether data practices were likely to cause
18 substantial injury?

19 MS. VANDRUFF: I don't believe it has a role,
20 Madam Chairwoman.

21 CHAIRWOMAN RAMIREZ: Is it relevant at all?

22 MS. VANDRUFF: I don't believe it is relevant,
23 particularly in the case of identity theft, because, of
24 course, the ability of a consumer to tie up the
25 incidence of a particular breach to a particular

1 experience of identity theft is attenuated at best and
2 impossible in most circumstances, particularly here
3 where no consumer has received notice that the
4 information contained in the 1718 File was exposed on
5 the peer-to-peer network, so there's no ability
6 whatsoever for the 9300 consumers whose information was
7 contained -- was exposed on the peer-to-peer network for
8 eleven months to even know that there's a possibility
9 that --

10 CHAIRWOMAN RAMIREZ: Okay. Sure. And I think
11 what you're saying is that the ALJ -- that what he
12 required, which was showing that one of the 9300 people
13 who had been -- whose information had been exposed in
14 the 1718 File, for instance, the fact that there's no
15 evidence of one of those people having suffered medical
16 ID theft, that is of no relevance.

17 But the fact that there was the exposure of the
18 1718 File, the fact that the Sacramento documents were
19 found in the hands of identity thieves, of what
20 relevance is that to the analysis of whether or not the
21 data security practices were likely to cause substantial
22 injury?

23 Does that tell us anything about whether or not
24 the data security practices were reasonable or
25 unreasonable?

1 MS. VANDRUFF: Right. I think that the fact of
2 those exposures does suggest that -- I mean, there were
3 incidents of unauthorized disclosure, and so I think
4 that that does point us to -- it shows that the
5 increased risk was further magnified and that the
6 consumers --

7 CHAIRWOMAN RAMIREZ: So it is relevant.

8 MS. VANDRUFF: It is absolutely relevant, yes.

9 I'm sorry. I thought you were asking a
10 different question, Madam Chairwoman.

11 CHAIRWOMAN RAMIREZ: I probably made it too
12 convoluted.

13 Anyone else?

14 COMMISSIONER McSWEENEY: Sorry, I have one more
15 question.

16 MS. VANDRUFF: Yes.

17 COMMISSIONER McSWEENEY: How do you respond to
18 LabMD's argument that this investigation was triggered
19 by the receipt of the 1718 File from Tiversa, but that
20 Tiversa's actions in obtaining the file were unlawful?

21 MS. VANDRUFF: Tiversa is a witness upon whom
22 complaint counsel does not rely in this appeal to the
23 Commission and upon whom complaint counsel did not rely
24 in its briefing, post-trial briefing before the
25 Administrative Law Judge.

1 Its relevance in this appeal in the
2 Commission's de novo review is as a third party that
3 provided a tip to the Commission. The tip was that
4 LabMD was disclosing sensitive personal information on a
5 peer-to-peer network, a tip that proved to be true.

6 The Commission staff investigated that lead and
7 corroborated it with information provided by the
8 respondent.

9 COMMISSIONER McSWEENEY: Can I just ask --

10 MS. VANDRUFF: That is the end of the inquiry.

11 COMMISSIONER McSWEENEY: Can I just follow up on
12 this?

13 MS. VANDRUFF: Yes.

14 COMMISSIONER McSWEENEY: Is it the exposure on the
15 peer-to-peer network of the LabMD file that I should be
16 weighing here? Or is it the presence of LimeWire on the
17 employee computer that went undetected for two-plus
18 years?

19 MS. VANDRUFF: Both, Madam Commissioner.

20 COMMISSIONER McSWEENEY: Okay.

21 COMMISSIONER OHLHAUSEN: I have a
22 question about the peer-to-peer.

23 There's evidence that one entity
24 accessed or was able to access that file on the
25 peer-to-peer.

1 Do we know whether anyone else was able to
2 download or access the information?

3 MS. VANDRUFF: The record evidence is from --
4 from LabMD's own witness, Richard Wallace, that he was
5 able to use an ordinary computer and an ordinary
6 peer-to-peer client and download the 1718 File. He
7 downloaded it on behalf of his then employer, Tiversa,
8 who shared it with a researcher at Dartmouth University.

9 We don't have evidence of whether it was
10 otherwise shared because the hard drive on which the
11 LimeWire software was installed and the file -- from
12 which the file was being shared was destroyed during a
13 LabMD forensic investigation, so that is information
14 that complaint counsel was not able to obtain during its
15 investigation.

16 COMMISSIONER OHLHAUSEN: So if I understand what
17 you're saying, we know it was capable of being accessed
18 that way and we know somebody did access it that way.
19 We don't know whether others did because the hard drive
20 had been damaged.

21 MS. VANDRUFF: Correct.

22 COMMISSIONER OHLHAUSEN: Okay. Thank you.

23 CHAIRWOMAN RAMIREZ: Thank you, Counsel.

24 MS. VANDRUFF: Thank you.

25 CHAIRWOMAN RAMIREZ: You may begin when you're

1 ready, Mr. Lechner.

2 MR. LECHNER: May it please the Chairwoman and
3 Commissioners.

4 I would like to start with just some basic
5 information first.

6 Initially, Dr. Hill unequivocally testified that
7 the physical security at LabMD was adequate, so
8 statements to the contrary are not supported in the
9 record.

10 With regard to the Sacramento files, there is
11 absolutely no evidence that they came off of the LabMD
12 system, computer system, none at all, nothing to
13 support that. They were found in a house that was
14 raided because of a -- I believe it was utility theft,
15 and maybe it was electric or gas theft, and they found
16 these documents there by questionable individuals who
17 pleaded nolo contendere to a charge of identity theft,
18 but that's not established in the record either.

19 So there's nothing with regard to the
20 Sacramento documents to link it to the system. There is
21 simply no basis to suggest that that supports any
22 evidence of a --

23 CHAIRWOMAN RAMIREZ: So, Counsel, you heard
24 complaint counsel argue that the case is about more
25 than just electronic security and more than just

1 computer security and also includes physical security.

2 I take it you take issue with that?

3 MR. LECHNER: Well, sure, I do. There's nothing
4 in the complaint that says that.

5 I mean, we've been looking at a situation here
6 that's been changing with the filing of that complaint
7 right to the very moment now. Now we're told, although
8 there's been testimony that at least there's one period
9 of time from June of 2007 to May of 2008 is the relevant
10 period, then we were told I believe it was 2005 to 2010,
11 that six-year period, and now we're told it's a
12 twelve-year period from 2005 to 2016. It's a moving
13 target.

14 Dr. Hill has testified unequivocally. She
15 offered no testimony beyond 2010. There is nothing to
16 suggest anything beyond 2010. To expand it is simply
17 not supported in the record and argues off the record
18 and off the complaint.

19 CHAIRWOMAN RAMIREZ: Is it possible that the
20 Sacramento documents came from any other source other
21 than LabMD?

22 MR. LECHNER: I don't know where they could come
23 from. There's been no evidence. I can't speculate
24 where they came from. It's not my burden to disprove
25 that. It's their burden to prove it, and they haven't

1 offered any evidence, other than speculation, which
2 really I think is the key to their case. It's
3 speculation.

4 They -- I believe it was Commissioner Ohlhausen
5 who asked whether a likelihood of substantial injury, if
6 that's established, or a likelihood of raising a
7 concrete harm, the possibility of concrete harm, equals
8 an injury. And if I heard correctly -- and I think I
9 read it in the brief -- they argue it does. That makes
10 no sense.

11 CHAIRWOMAN RAMIREZ: Okay. Tell us what the
12 appropriate legal standard is.

13 MR. LECHNER: Well, I can tell you what the
14 statute says, and then we can talk about where they fell
15 short.

16 The statute is clear, Section 5(n) is clear that the
17 Commission cannot find something unreasonable unless --
18 that word "unless" is prominent -- it finds that there
19 was a harm that was caused in the past or likely that
20 the conduct would cause substantial injury.

21 "Likely to cause substantial injury" is
22 prospective - in the future. "Likely" equals probable.
23 There's no question about that. It is not ambiguous.

24 CHAIRWOMAN RAMIREZ: Let me start with the
25 actual harm prong of the unfairness standard.

1 MR. LECHNER: Sure.

2 CHAIRWOMAN RAMIREZ: Isn't there actual harm
3 here? Isn't the exposure of the 1718 File itself harm?

4 MR. LECHNER: Exposure to whom?

5 CHAIRWOMAN RAMIREZ: To, at a minimum, Tiversa.

6 MR. LECHNER: Well, Tiversa stole it, and they
7 tried to monetize it and they lied. There's no
8 question that the people from Tiversa lied, except for
9 Wallace, but the Commission has tried to backpedal
10 away --

11 CHAIRWOMAN RAMIREZ: Well, Tiversa didn't steal
12 the document; correct?

13 MR. LECHNER: Well, they broke --

14 CHAIRWOMAN RAMIREZ: Hold on.

15 MR. LECHNER: I'm sorry.

16 CHAIRWOMAN RAMIREZ: Tiversa accessed the
17 document via a peer-to-peer program that permits sharing
18 of files; isn't that true?

19 MR. LECHNER: Well, I'm not sure about that.
20 They were talking about using their Eagle Eye (sic)
21 program to break into it, which is supposed to be a lot
22 more sophisticated than normal peer-to-peer.

23 But in any event, they were not authorized.
24 They broke into it, and they broke into it for one
25 purpose, to try to blackmail the people that they broke

1 into, in this instance LabMD, to paying them money.
2 And when they didn't, then they partnered up with the
3 FTC and tried to have the FTC do their dirty work, as
4 Boback talked about, wait until you see what happens
5 next.

6 COMMISSIONER OHLHAUSEN: Counsel, let me ask
7 you, assume that we agree with you that Tiversa was a
8 bad actor.

9 MR. LECHNER: Yes.

10 COMMISSIONER OHLHAUSEN: How are we to evaluate
11 LabMD's data security practices that enabled this bad
12 actor to obtain sensitive information about patients?

13 MR. LECHNER: Well, there's no testimony, no
14 expert testimony, to establish that that in point of
15 fact is what happened.

16 You talk about many times, as the Chairwoman
17 mentioned, what is the standard. Well, the standard,
18 as was pointed out, changes. And in your own
19 memorandum of law dismissing our motion to dismiss, you
20 pointed out that this is a rapidly changing technology.

21 So when Dr. Hill testified, she did not offer
22 any testimony as to what the standard was from time to
23 time. And we know that these standards changed from
24 2005 to 2010, yet there was no basis, no benchmark, if
25 you will, as that term was used here this morning. But

1 there has to be that in order to demonstrate, number
2 one --

3 CHAIRWOMAN RAMIREZ: So the use of strong
4 passwords, you don't think that that was established as
5 of 2005 or 2010? Is that what your position is?

6 MR. LECHNER: Well, I think we're looking at in
7 retrospect right now what we know eleven to twelve years
8 later as to the strength of these passwords. And when
9 you go on a commercial site and you open up a site -- if
10 I could just --

11 CHAIRWOMAN RAMIREZ: Go ahead.

12 MR. LECHNER: I'm sorry -- they sometimes open
13 back and say this is strong or this is weak, this
14 password. They did not do it back in 2005. But you
15 can -- you could pick out one or two of these things and
16 say, in my view, this was not strong, but what
17 Professor Hill did not do is establish how that standard
18 was deviated from at the time in question from time to
19 time during that six-year period, and that's just one
20 instance there.

21 They had the obligation to prove that. These --
22 these allegations here have to be proved by expert
23 testimony. It can't be an ipse dixit from the
24 Commission that they see something that they don't
25 like, and therefore there's a problem, and therefore

1 there's a harm. This is speculation based upon
2 speculation.

3 COMMISSIONER OHLHAUSEN: So, Counsel, you're saying
4 that you looked at the standard of reasonableness at the
5 time that LabMD was operating under its various security
6 choices there, so you're not looking from the ten-year
7 vantage point back but at the time.

8 MR. LECHNER: Yes.

9 COMMISSIONER OHLHAUSEN: You're saying that
10 there's no expert testimony or no information about what
11 would have been reasonable data security practices in
12 2005; is that correct?

13 MR. LECHNER: With regard to --

14 COMMISSIONER OHLHAUSEN: Or 2005 to 2010.

15 MR. LECHNER: That's precisely what I'm saying.

16 And another point, just as an aside for one
17 moment just to support that, more than thirty times,
18 more than thirty times, Professor Hill was asked if she
19 formed an opinion about, for example, X or Y.
20 Professor Hill said, "Yes." The next question more than
21 thirty times was: "What was your conclusion?" She
22 responded, "My conclusion is." That testimony is
23 incompetent and can't be considered.

1 Case law is clear that an expert cannot offer
2 legal conclusions. That is for the trier of fact. That
3 was wrapped up at the end of this testimony when the
4 professor was asked, Based upon all -- on all of your
5 opinions, do you have a conclusion -- conclusion?
6 Excuse me. Yes. What was it? My conclusion is, and
7 then she offered that conclusion.

8 That testimony, frankly, is wrong. The counsel
9 was warned about that by the ALJ right in the middle of
10 that testimony and continued along those lines.

11 But to go back to the absence of the standards
12 here, in not one place does Professor Hill talk about a
13 deviation from established standard and how that
14 standard changed from time to time to time, and we have
15 a six-year period when the standards are changing, as
16 was pointed out by the Commission in their order
17 dismissing the motion to dismiss. That's a given, yet
18 there's no --

19 CHAIRWOMAN RAMIREZ: Don't LabMD's own policies
20 with regard to its network security tell us something
21 about what was considered reasonable at the time?

22 MR. LECHNER: Well, yes. There was a policy
23 there that these computers were not to be used for
24 personal use basis. They couldn't go on and look at
25 ESPN. They couldn't go on and use it for --

1 CHAIRWOMAN RAMIREZ: And you don't think it
2 would be reasonable for a company to have some form of
3 monitoring to ensure that those policies were followed?

4 MR. LECHNER: Well, there was testimony that
5 there was monitoring there, but that's the question,
6 why -- and there was no opinion as to what was wrong
7 with that monitoring compared to what the baseline was
8 from time to time to time.

9 There's just a broad brush. There's no attempt
10 to segregate this and look at it from period to period,
11 nor to look at it from whether paragraph 10(a) or right
12 through paragraph 10(g) and break it out seriatim as
13 each of those moved on from year to year to year.

14 COMMISSIONER McSWEENY: Let me just back up
15 because I am confused about this argument that there were
16 no standards in place during this period of time that
17 you could follow.

18 MR. LECHNER: I'm sorry?

19 COMMISSIONER McSWEENY: Aren't we talking
20 about HIPAA-covered documents, medical records, and
21 hopefully state standards here as well?

22 MR. LECHNER: Well, that's just the point.
23 Professor Hill said she was not familiar with HIPAA.
24 Professor Hill did not link any standard to this industry
25 in particular or to this business in particular, and the

1 reasonableness demands both.

2 You cannot use a broad brush with regard to the
3 industry in general. What industry would it be? The
4 security industry? Would it be the computer industry?
5 Or is it the industry of the accumulation of medical
6 data for legitimate purposes, as LabMD was involved in?

7 But that's another point that was not done
8 here. There are no base standards with regard to the
9 particular company involved. And as the Commission
10 pointed out, that's what has to be done in order to look
11 at what reasonableness is. It's based upon the
12 circumstances.

13 What are the circumstances? The company in
14 question, the size of it, what it does, how it does it,
15 what its business involved, and over what period of time
16 are we looking at it and how did those standards
17 change.

18 There was no testimony at even the basic
19 that the standards remained the same the whole time.

20 And I think it was acknowledged, again to go
21 back to your order on the motion to dismiss, that this
22 technology is rapidly changing, if not day to day, at
23 least much more quickly than one would expect.

24 CHAIRWOMAN RAMIREZ: Well, what I think the
25 Commission stated in its decision was that it's a

1 company's obligation to be constantly evaluating its
2 risks and placing appropriate security measures in
3 order to protect the information that's contained, so
4 that's the question that we're trying to determine,
5 whether LabMD did that, correct, so --

6 MR. LECHNER: And my point is, Madam Chair, is
7 that that's not my obligation to prove. My obligation
8 is to disprove I had notice of it, but there's no
9 testimony establishing what the standard was that we
10 deviated from from time to time with regard to each of
11 these particulars. There was general conclusion that
12 was offered to each of these areas but not an opinion
13 based upon a reasonable degree of probability.

14 CHAIRWOMAN RAMIREZ: Can any conclusion be drawn
15 from the existence of LimeWire on the LabMD network?
16 Does that tell us anything about the reasonableness of
17 the data security practices?

18 MR. LECHNER: Well, it's interesting. The
19 position of this body was that P2P networking and
20 programs were neutral. That was testified to in front
21 of a Congressional commission in July of 2007, that P2P
22 file sharing is neutral technology.

23 After that, the FTC position didn't change until
24 after 2008, and the FTC didn't give any notice of
25 warning businesses about the so-called dangers of P2P

1 until after it commenced the action against LabMD in
2 January 2010, so even the FTC's conduct here --

3 CHAIRWOMAN RAMIREZ: I've taken a look at that
4 testimony. I don't read it the way that you do, and so
5 I understood that the agency in fact was educating both
6 consumers and businesses at that time about the risks,
7 the potential risks, of peer-to-peer technology, and
8 encouraged businesses to evaluate those risks.

9 COMMISSIONER McSWEENEY: Let me frame that question
10 slightly differently, if I may.

11 CHAIRWOMAN RAMIREZ: Go ahead.

12 COMMISSIONER McSWEENEY: Is the existence of
13 unsanctioned, undetected software that was installed by
14 an employee on a computer something that we should take
15 into account in assessing whether reasonable security
16 practices were in place?

17 MR. LECHNER: By itself, no. It doesn't mean
18 anything. Because, number one, there's been no -- what
19 has to be done here -- just for argument sake, let's
20 just take that proposition as a given. All right? But
21 then the question is: Did that cause any harm? The
22 answer is no here. There's no allegation that any harm
23 was caused. The allegation is that it was likely to
24 cause substantial injury.

25 Now, there's no testimony with regard to the

1 probability of that -- assume for argument position --
2 was likely to cause substantial injury.

3 Now, if you wanted to use the new standard that
4 they are trying to allege now after the fact that they
5 did not allege until after their post-trial briefing that
6 we should read likely to cause substantial injury as
7 likely to raise a substantial risk of -- risk of
8 substantial -- of a concrete harm, that's even more
9 difficult to prove, because then you need expert
10 testimony of the likelihood that it's going to cause it,
11 what -- what the risk is, how the risk increased from
12 what to what, and we --

13 CHAIRWOMAN RAMIREZ: Counsel, if I may, and
14 just going back to this issue of what one can infer
15 from just even the existence of the LimeWire program
16 being placed on a computer, there is testimony from
17 Mr. -- Dr. Shields about the ease with which someone
18 could access files that have been made accessible via
19 peer-to-peer programs. Isn't that evidence
20 showing that that creates a risk of exposure of
21 sensitive information?

22 MR. LECHNER: Well, first of all, the LimeWire
23 was taken off promptly, as you know, back in 2008.

24 There's no testimony from him as to what period
25 of time he's talking about. We are just using this block

1 of time. Again, I go back to the same position that you
2 cannot look at this as a monolithic block with standards
3 not changing.

4 And third of all, it's speculative because
5 there's not one incident either from the Sacramento
6 documents nor one incident from the documents that were
7 taken by Tiversa without authority that anyone saw these
8 documents except Tiversa, and they gave it to this
9 professor and the FTC, who gave it to experts. Nobody
10 else saw this.

11 COMMISSIONER OHLHAUSEN: Counsel, we know that
12 Tiversa did access the file through peer-to-peer. We
13 don't know whether anyone else did. Is that correct?

14 MR. LECHNER: Well, we do know this, that LabMD
15 had two of its employees use their home computers and
16 tried repeatedly to use file-sharing programs and were
17 not able to locate it. That's in the record.

18 COMMISSIONER OHLHAUSEN: But can you explain
19 why they weren't able to determine that from the
20 hard drive with the forensic audit?

21 MR. LECHNER: I don't know. That's not my
22 burden. I simply don't know. I can't speculate as to
23 that, which is again --

24 CHAIRWOMAN RAMIREZ: What happened to that

1 computer? It's unclear from the record what happened to
2 that computer.

3 MR. LECHNER: I have no idea.

4 CHAIRWOMAN RAMIREZ: There's nothing in the
5 record about --

6 MR. LECHNER: Not that I'm aware of.

7 COMMISSIONER McSWEENEY: And it's also, I think, not
8 totally clear what other files might have been
9 accessible through LimeWire on the computer. Is that
10 right?

11 MR. LECHNER: Well, again, that's speculation.
12 You're correct. That's total speculation. There's no
13 factual testimony on that, no expert testimony on that,
14 rank speculation, yes, as far as that's concerned.

15 But to go back to the standard that's involved
16 here, we do have a migration of this right now from
17 likely to cause substantial injury to likely to raise a
18 significant risk of concrete harm. I suggest to you
19 that if you're going to use the second one, you need an
20 expert witness to opine as to what "likely" would mean,
21 what "substantial" and what "risk" means and what
22 "concrete harm" means.

23 Concrete harm certainly, as -- if you look at
24 the footnote in the fairness statement, does not mean
25 anything that could -- if somebody feels bad or has an

1 emotional problem. "Concrete" means, what has been
2 decided in every case that's been brought so far, an
3 actual injury, monetary injury.

4 Now, I'm not suggesting that you have to have
5 an actual injury to have a violation of 5(n), but you
6 need to prove -- and it's in the disjunctive -- either
7 the actual injury causes or it's likely to cause
8 substantial risk of concrete harm or raise that, so you
9 need that benchmark in there.

10 COMMISSIONER OHLHAUSEN: So is it your position
11 then under Section 5(n) that complaint counsel has to
12 establish the precise calculable risk of injury?

13 MR. LECHNER: What counsel has to do, just like
14 in the tort field, as this Commission has recognized,
15 this is an evolving standard, as is done in -- for
16 contracts and for torts, likewise here, too, that even
17 though there are no articulated standards per se out
18 there, that there would be testimony that would be
19 offered that this is the standard, that there's a
20 deviation from the standard, as a result of that
21 deviation that harm has been caused. You see that every
22 day in medical malpractice cases.

23 COMMISSIONER OHLHAUSEN: So you're not saying that
24 complaint counsel would have to show that there was a
25 52.3 percent --

1 MR. LECHNER: They have to show a probability.
2 No, I'm not suggesting it has to be numerical, but it
3 has to be probable.

4 COMMISSIONER OHLHAUSEN: And what would "probable"
5 mean? Would it mean --

6 MR. LECHNER: More likely than not.

7 COMMISSIONER OHLHAUSEN: So if a practice has a
8 25 percent probability of resulting in a loss of a
9 million dollars --

10 MR. LECHNER: That's not probable.

11 COMMISSIONER OHLHAUSEN: -- that wouldn't be
12 expected to be likely to cause substantial injury?

13 MR. LECHNER: That would be possible. That
14 would not be probable.

15 COMMISSIONER OHLHAUSEN: And then how does that
16 square with, say, for example, International Harvester,
17 where the Commission interpreted --

18 MR. LECHNER: Well, that case is
19 distinguishable. There were actual injuries in that
20 case. There were actual injuries in that case. That's
21 entirely different from this case where there are none.

22 In that case, there were actual injuries, and
23 they were talking about it in light of those actual
24 injuries there, so that probability was not required
25 there because you had an actual injury.

1 COMMISSIONER OHLHAUSEN: So you're saying that
2 "likely" means has to be probable.

3 MR. LECHNER: And that's what the case law says.
4 Absolutely.

5 COMMISSIONER OHLHAUSEN: But wouldn't you say that
6 at least the statute is ambiguous on that?

7 MR. LECHNER: No.

8 COMMISSIONER OHLHAUSEN: Then why doesn't it say
9 "probable"?

10 MR. LECHNER: Because likely is the equivalent
11 of probable. You look up any case in the
12 Eleventh Circuit --

13 CHAIRWOMAN RAMIREZ: So what cases are you
14 relying on?

15 MR. LECHNER: I'm sorry?

16 CHAIRWOMAN RAMIREZ: What cases are you relying
17 on when you say that --

18 MR. LECHNER: Oh, I can get you the cases. I
19 can make that representation to you. I know that as a
20 fact that likely is the substantial equivalent of
21 probable. Likely and probable means more likely than
22 not. It does not mean possible. Possible means not
23 impossible. Likely means more likely than not.

24 And that's the question for the trier of fact,
25 does it come to that? I am not suggesting that there

1 must be a numerical grade attached to this. No. The
2 expert has to testify that in her opinion, it's more
3 likely than not or probable that as a result of this
4 conduct, there is a chance of -- or, rather, a risk of
5 increased -- of substantial injury.

6 COMMISSIONER OHLHAUSEN: So what do we make of the
7 unfairness statement's discussion of avoiding
8 speculative injuries?

9 MR. LECHNER: Well, that's just it. That's why
10 it has to be probable.

11 COMMISSIONER OHLHAUSEN: So you say that if
12 something is nonspeculative, it means it has to be --
13 have a greater than 50 percent chance of occurring.

14 MR. LECHNER: Yes. And that's what the case law
15 says. That's what every case law in negligence talks
16 about, whether it's medical malpractice, architectural
17 malpractice --

18 COMMISSIONER OHLHAUSEN: But we're not
19 interpreting negligence torts here; right?

20 MR. LECHNER: But my point is, you used the
21 example of this standard evolving the same way the
22 definition of negligence has evolved, the same way
23 negligence standards have evolved. That's part of your
24 opinion in dismissing the motion to dismiss, that that
25 is an evolutionary process.

1 And because this Commission has not issued
2 standards -- and issuing standards is a long process.
3 There's public comment. People read it. You get input
4 from the industry. People are aware of what's going
5 on.

6 So the courts have allowed, in lieu of that, to
7 have this evolutionary process in the courts as to what
8 this would be, and that's what you have articulated in
9 the motion to dismiss. This is an evolutionary
10 process.

11 Now, to have that process move along absent
12 standards, there has to be some gradual
13 determination as to what happens from case to case
14 because, as you've said, it is a case-by-case
15 development.

16 In order to have that, there has to be the
17 establishment of standards for the period of time, for
18 the company in question, for the industry, and if that
19 period of time varies over a number of years, at least
20 the testimony that it's the same standard for all these
21 years or how it's changed, that there's a deviation from
22 that standard, and it's because of that deviation, as is
23 in this case, more likely than not or probable that that
24 conduct that has been called to be unreasonable has
25 increased the risk of substantial harm.

1 COMMISSIONER McSWEENEY: Can I focus on a period of
2 time here for just a second, because I am a little
3 confused about what period of time we're talking about.

4 In your brief, you focus, I think, on the 2007 to
5 2008 time frame. Dr. Hill's testimony focuses on
6 2005 to 2010. Complaint counsel has mentioned that you
7 still have a lot of sensitive information and some
8 ongoing issues, in their view, surrounding how that
9 information is being protected.

10 What steps is LabMD taking at this point
11 to ensure that highly sensitive information
12 is being protected? And in your view, what is the
13 relevant period of time that we should be considering?

14 MR. LECHNER: Well, it's my understanding that
15 LabMD is out of business now.

16 COMMISSIONER McSWEENEY: But it still has a huge
17 amount of patient information.

18 MR. LECHNER: I don't know how much it has left,
19 but it's not doing business right now as a result of the
20 expense and the problems with this case.

21 That's one of the problems. You know, when the
22 Commission brings something like this, a lot of these
23 cases end up --

24 COMMISSIONER McSWEENEY: Let's back up for just
25 a second.

1 MR. LECHNER: I'm sorry?

2 COMMISSIONER McSWEENEY: What is the relevant
3 period of time?

4 MR. LECHNER: The relevant period -- I'm sorry.
5 The relevant period of time I'd suggest to this body is
6 May of 2007 to -- June of 2007 to May of 2008.

7 I know that there's testimony offered to
8 through 2010, but there is absolutely nothing beyond
9 2010 other than rank speculation and argument. At worst
10 for us it's to 2010.

11 But more precisely, it's to 2008 because the
12 Sacramento documents are a red herring in this case.
13 And the only thing that we're talking about here is the
14 1718 File, which there is no testimony that it was
15 viewed by anybody other than Tiversa, Tiversa's
16 professor I think in Dartmouth, the FTC and the people
17 to whom the FTC gave it. That's the only testimony in
18 this case.

19 COMMISSIONER OHLHAUSEN: But doesn't that go back
20 to the idea that you have to show actual harm versus
21 likely harm?

22 MR. LECHNER: Yes. Well, that's the point. You
23 can either show actual harm, and if you can't show that,
24 we'll concede that the alternative, the "or" in the
25 disjunctive there, you know, that the alleged

1 unreasonable conduct likely increased the risk of
2 substantial injury or they're trying to cause now
3 concrete injury.

4 COMMISSIONER OHLHAUSEN: And what about the idea
5 that exposing someone's private health information for a
6 stigmatizing condition is in itself a harm?

7 MR. LECHNER: You know, that by itself, that
8 can't be. That just can't be because there's no injury
9 in that. There's no substantial injury, as you talked
10 about.

11 COMMISSIONER OHLHAUSEN: But going to the
12 unfairness statement --

13 MR. LECHNER: Yes.

14 COMMISSIONER OHLHAUSEN: -- it says,
15 generally it's monetary harm, but there could
16 be in some circumstances the type of harm that would be
17 if you can show that it would lead to some sort
18 of actual injury.

19 MR. LECHNER: Right. And that's what they --

20 COMMISSIONER OHLHAUSEN: Like harassment or
21 something like that.

22 MR. LECHNER: That's what they would have to
23 show. They haven't showed anybody has even complained,
24 number one, about this, much more that anybody has
25 viewed these documents other than people I've mentioned,

1 much more that anybody suffered any harassment or any
2 other type of soft injury. There's been nothing here.
3 Everything is total speculation.

4 COMMISSIONER OHLHAUSEN: But what if they showed
5 that exposing this type of information leads -- likely
6 leads to those kinds of harms?

7 MR. LECHNER: But they haven't shown that.

8 Look at the expert testimony of Kam and
9 Van Dyke. They used surveys five years after the fact
10 trying to extrapolate backwards, relying on Boback
11 testimony extensively. That methodology is completely
12 wrong. That methodology can't be relied upon.

13 There's nothing there to demonstrate, even on
14 the basis that you folks have established in some of
15 your cases, that the methodology is the first thing that
16 would have to be looked at. There was none in this case
17 by either Kam or Van Dyke.

18 And Professor Hill explicitly testified that she
19 was assuming harm. She didn't opine as to harm. She
20 was told to assume harm, so there's nothing from
21 Professor Hill on that either.

22 There is an absence of proof in this case, an
23 utter absence of proof in this case. It's speculative.

24 COMMISSIONER McSWEENEY: If more than Tiversa, the
25 FTC and the various investigators had viewed the

1 1718 File, would that be harm?

2 MR. LECHNER: Well, I don't know. It would
3 depend on the circumstances, as you point out. All the
4 circumstances in a particular case on a case-by-case
5 development have to be considered. And that's something
6 that the trial court would have had to consider, but in
7 this case there was nothing for him to consider. As he
8 pointed out, there was a total failure of proof in this
9 case.

10 Nobody else looked at it. After all these
11 years, after all of these years, not one person has come
12 forward. Even taking what Professor Kam -- or Mr. Kam
13 and Mr. Van Dyke talked about, the percentages there,
14 not once after seven years has anybody come -- and they
15 were talking about that percentage of each of those
16 instances within twelve months.

17 COMMISSIONER OHLHAUSEN: Counsel, does your
18 interpretation of Section 5(n) agree with the
19 Third Circuit's interpretation in Wyndham?

20 MR. LECHNER: Well, it seems to me that's
21 entirely different because there was concrete harm,
22 millions of dollars was run up, and they didn't really
23 focus on what we're focusing on here, so to say that
24 is --

25 COMMISSIONER OHLHAUSEN: But you're saying the

1 facts are different, but I'm asking you whether their
2 interpretation of the statute is correct.

3 MR. LECHNER: I don't recall exactly what they
4 said, but I think they recognized that the FTC has the
5 obligation to prove, in the disjunctive, either actual
6 harm or likelihood of increased risk of concrete harm,
7 if you want to use that secondary standard, which is a
8 deviation from the statute, or likely to cause
9 substantial harm in the future.

10 COMMISSIONER OHLHAUSEN: So the Wyndham court
11 talks about the probability and expected size of
12 reasonably unavoidable harms to consumers given a
13 certain level of cybersecurity and the costs to
14 consumers that would arise from an investment in
15 stronger cybersecurity, so they're talking about the
16 cost-benefit analysis and considered a number
17 of factors.

18 So the probability and expected size, how
19 does --

20 MR. LECHNER: They're talking about
21 probabilities there and they're talking about looking at
22 all of the circumstances. All the circumstances, the
23 company, the timing, the variations from time to time,
24 all that is part of the circumstances.

25 COMMISSIONER OHLHAUSEN: But aren't you also

1 saying that if there isn't a showing that there was an
2 actual harm that there's no violation?

3 MR. LECHNER: No, no, no, I'm not saying that at
4 all. I'm saying it's in the disjunctive. They can show
5 actual harm or they can show a likelihood that would
6 cause a substantial injury.

7 COMMISSIONER OHLHAUSEN: And if I recall
8 correctly, you're saying that that likelihood has to be
9 greater than 50 percent.

10 MR. LECHNER: Well, it has to be more probable
11 than not, yes. And by every definition that you've
12 looked at in every case, probability means more than
13 50 percent.

14 COMMISSIONER OHLHAUSEN: In unfairness cases?

15 MR. LECHNER: Well, if you're going to use the
16 word "probability," it can't -- you can't have a
17 10 percent chance of something happening and to say
18 that's probable, especially in light of the fact of the
19 recognition of this Commission that because those
20 standards were not issued, it's going to be a
21 case-by-case development, we're going to use the
22 protocol that's used in the case and in the courts of
23 this country, and invariably, in every single court, it
24 has never been sustained that the plaintiff has proved
25 his or her case without demonstrating a probability of

1 a cause -- of the injury being caused by the defendant.

2 CHAIRWOMAN RAMIREZ: So, Counsel, just to make
3 sure that I'm clear as to your position, we do know
4 that the record does establish, the evidence does
5 establish, that LimeWire was on the computer in LabMD's
6 network from approximately 2005 through May of 2007;
7 correct?

8 MR. LECHNER: Yes.

9 CHAIRWOMAN RAMIREZ: And we do also know that
10 the 1718 File was within the files that were accessible
11 via this peer-to-peer program; correct?

12 MR. LECHNER: Well, I wonder --

13 CHAIRWOMAN RAMIREZ: Is that correct?

14 MR. LECHNER: Well, I just want to challenge
15 that. I'm not sure it's peer-to-peer. It was their
16 Eagle Eye (sic) program. Maybe that's a distinction
17 without a difference. I don't know.

18 COMMISSIONER McSWEENEY: May I just clarify? I
19 think it was on the computer until May of 2008. Is that
20 correct?

21 MR. LECHNER: Yes. Yes. It was an eleven-month
22 period. Yes, you're right. June of 2007 to May of
23 2008, the eleven-month period, yes.

24 CHAIRWOMAN RAMIREZ: So that is correct; right?

25 MR. LECHNER: It was on there, yes. Yes.

1 CHAIRWOMAN RAMIREZ: And are you saying that
2 the availability of Social Security information as well
3 as sensitive medical information on a peer-to-peer --
4 through a peer-to-peer program, that that itself is not
5 either actual harm or likely to cause substantial harm?

6 MR. LECHNER: That's absolutely what I'm saying,
7 because if that were the case, there would be no reason
8 for this trial. There would be no reason. The
9 Commission through its complaint counsel would have
10 moved for summary judgment.

11 As you recognized, there were issues here, there
12 were fact issues, there were issues with regard to the
13 expert testimony here. The mere fact that something is
14 there does not mean by definition it equals an injury.
15 If there's --

16 CHAIRWOMAN RAMIREZ: So in your view,
17 complaint counsel had to establish access, that someone
18 accessed that file other than Mr. Wallace, in order to
19 show -- to prevail and show liability here; is that
20 right?

21 MR. LECHNER: They would have had to
22 demonstrate through expert testimony that it was more
23 likely than not that that one incident itself was
24 unreasonable and therefore that it was likely to cause
25 substantial injury in the future, which they didn't do.

1 CHAIRWOMAN RAMIREZ: Okay. Well, it's not an
2 incident; right? It's this file was available for a
3 period of --

4 MR. LECHNER: Well, if you want to call that,
5 yes. The eleven-month period, yes.

6 CHAIRWOMAN RAMIREZ: -- eleven months.

7 MR. LECHNER: Yes. I agree.

8 CHAIRWOMAN RAMIREZ: Let me turn to the parts of
9 the unfairness standard, and let's just assume for
10 purposes of argument -- I know that you take issue with
11 this -- that complaint counsel has established either
12 actual harm or a likelihood of substantial injury.

13 Tell me what your position is about the other
14 prongs of the unfairness standard, that is, whether such
15 harm was reasonably -- would have been reasonably
16 avoidable by consumers or whether it was outweighed by
17 countervailing benefits to either consumers or
18 competition.

19 MR. LECHNER: Well, as you know, in this case
20 it wasn't addressed because the judge found that there
21 was no injury established or -- and they did not
22 establish a likelihood of substantial injury in the
23 future. But if that were established, then clearly
24 under the statute under 5(n) those other two prongs
25 would have to be addressed. But those other two prongs

1 are dependent upon the existence of a harm or the
2 likelihood of harm.

3 CHAIRWOMAN RAMIREZ: So the ALJ -- you're
4 correct, the ALJ did not address those issues in his
5 opinion, but are there -- is there anything in the
6 record on those points?

7 MR. LECHNER: Not that I --

8 CHAIRWOMAN RAMIREZ: Is it your position that
9 consumers could have done something to alleviate any
10 unreasonable data security practices on LabMD's
11 network?

12 MR. LECHNER: I can't address that. I don't
13 know.

14 CHAIRWOMAN RAMIREZ: You don't know, not one way or the
15 other?

16 MR. LECHNER: No.

17 CHAIRWOMAN RAMIREZ: Anything further, Counsel?

18 MR. LECHNER: Well, let me just really quickly,
19 if I may, just look at my notes just to be sure that I
20 was able to cover the points I wanted to hit.

21 COMMISSIONER McSWEENEY: I do want to circle back
22 on one aspect here -- I understand you
23 don't know what information the company currently has,
24 but should I be concerned about how we can
25 ensure, absent an order, that sensitive information is

1 appropriately protected?

2 MR. LECHNER: Well, you know, of course, the --

3 COMMISSIONER McSWEENEY: Assuming I disagree with
4 the time frame that you put forward.

5 MR. LECHNER: I'm sorry?

6 COMMISSIONER McSWEENEY: I said, assuming that I
7 disagree with the time frame that you put forward.

8 MR. LECHNER: This Commission can offer
9 guidelines, can offer standards, can establish guides
10 along those lines here, but may I respectfully suggest
11 this is not the case to do it because there's not the
12 factual foundation to do it.

13 My colleague gave me -- if you want the cites to
14 the cases I talked about that likelihood is synonymous
15 with probability, I can give it to you.

16 CHAIRWOMAN RAMIREZ: Please.

17 MR. LECHNER: In re Terazosin Hydrochloride
18 Antitrust Litigation, 352 F.2d 1279, the word
19 "likelihood" is synonymous with "probability," citing
20 Shatel Corporation versus Mao Ta Lumber & Yacht,
21 697 F.2d 1352, Eleventh Circuit, 1983.

22 Again, in defining the word "probability," the
23 Eleventh Circuit has recognized that it is capable of
24 two definitions, a lower "reasonable probability"
25 standard or a higher "more likely than not" standard.

1 But ultimately, the definition that is most often cited
2 in the Eleventh Circuit precedent is the "more likely
3 than not" standard. And that goes back to Terazosin and
4 cites the Mercantile Tex. Corporation, 638 F.2d 1255,
5 Fifth Circuit, 1981; U.S. v. Marine Bancorp,
6 418 U.S. 602 (1974). That deals with the Clayton Act.
7 And it talks about there that it deals in probabilities,
8 not ephemeral probabilities (sic), quoting Brown Shoe,
9 370 U.S. 292 at 1962.

10 In either incident, the trial counsel --
11 complaint counsel -- excuse me -- in this case has not
12 carried the burden.

13 COMMISSIONER McSWEENEY: Just let me clarify. The
14 cases you were just citing are tort cases, a Clayton Act
15 case --

16 MR. LECHNER: I'm sorry?

17 COMMISSIONER McSWEENEY: These are tort cases --

18 MR. LECHNER: Well, one is a tort case, the
19 other are commercial cases, so I've tried to cover both,
20 yes. One is antitrust, and the other are tort cases, to
21 my understanding, yes, so...

22 And I realize this is not a tort as we use that
23 word in medical malpractice or architectural
24 malpractice, but the concept is the same. There's an
25 established standard, a deviation, both of which have to

1 be established on a basic -- on reasonable probability.
2 An expert cannot testify to speculation. And then there
3 has to be an opinion that because of that deviation, an
4 injury or damage occurred, none of which have happened
5 in this case.

6 Again, I go back to the fact that Dr. Hill only
7 testified with regard to her conclusion. She started
8 virtually every answer "It is my conclusion that."
9 That's simply not appropriate testimony, and I
10 respectfully suggest that it can't be considered as in
11 any way proof in this case.

12 If I could just have one second.

13 CHAIRWOMAN RAMIREZ: Sure.

14 (Pause in the proceedings.)

15 COMMISSIONER OHLHAUSEN: Counsel, I have one more
16 question.

17 MR. LECHNER: I'm sorry?

18 COMMISSIONER OHLHAUSEN: I have another
19 question.

20 MR. LECHNER: Sure.

21 COMMISSIONER OHLHAUSEN: So if complaint counsel
22 were to prove that or allege that the exposure of
23 medical information to an unauthorized third party was
24 substantial injury, so if they were to say that the
25 fact that LabMD's data security practices exposed the

1 1718 File to an unauthorized third party, which I think
2 is shown in the record, why isn't that substantial
3 injury?

4 MR. LECHNER: Well, if you look at all the
5 circumstances, it was exposed to Tiversa, which is not
6 a -- I assume, and there's nothing in the record to
7 suggest that it is, that it is an identity theft user of
8 these files.

9 Now, for argument sake, if we want to speculate
10 that suppose there was proof that --

11 COMMISSIONER OHLHAUSEN: But let's say, for
12 example, even if it wasn't for identity theft, they
13 had the information about people's private medical
14 medical diagnoses. Is that not an injury in
15 itself?

16 MR. LECHNER: I don't see how it is. I see that
17 it's a soft injury. It's not a substantial injury.
18 It's not a concrete harm.

19 And the Commission through its counsel has been
20 arguing that the standard they want to look at now is
21 that it's likely that it raises the risk of concrete
22 harm. Concrete harm is not, gee, I feel bad because
23 somebody has looked at one of my documents. And I don't
24 mean to sound callous on that.

25 But to go back to what you had asked before,

1 Commissioner, if there were proof that there were a
2 series of identity thieves that through their sites had
3 downloaded this, I think it might be a little bit more
4 easy with appropriate expert testimony to establish
5 that, but there is nothing here to suggest that.

6 Frankly, there's nothing here to suggest that
7 anyone read these documents other than the FTC and its
8 experts and perhaps that professor to whom Tiversa gave
9 it.

10 So to suggest this is really rank speculation on
11 rank speculation. Based on the facts of this case is
12 what we're constrained to look at right now.

13 If there's nothing further, I thank you for your
14 time.

15 CHAIRWOMAN RAMIREZ: Thank you, Counsel.

16 Ms. VanDruff, you used up all of your time, but
17 I know that you had reserved time for rebuttal, so --

18 MS. VANDRUFF: How would you like me to proceed,
19 Madam Chairwoman?

20 CHAIRWOMAN RAMIREZ: Why don't you go ahead.

21 MS. VANDRUFF: Okay. Thank you.

22 Respondent's counsel raised a number of issues
23 that I'd like to address in, unfortunately, no
24 particular order, if it pleases the Commission.

25 At the outset, respondent's counsel identified

1 Eagle Vision as something that was of particular
2 interest because it was sophisticated technology. And I
3 would just observe that that is something that is not in
4 the record except through the testimony of Mr. Boback, a
5 witness that the Administrative Law Judge found not to
6 be credible and a witness upon whom complaint counsel is
7 not relying.

8 And in fact, his testimony was contradicted by
9 respondent's witness, Mr. Wallace, and that testimony
10 can be found at complaint counsel's finding of fact
11 1394. It was Mr. Wallace's testimony that he found the
12 1718 File using a stand-alone computer and ordinary P2P
13 software.

14 And you'll forgive me that -- one of you on the
15 panel -- and I -- forgive me for not remembering
16 which -- asked what happened to the computer, and it
17 was respondent's counsel's response that it was
18 speculation. But that's belied by the testimony. And
19 in response to the question, I would direct the panel
20 to complaint counsel's finding of fact 1409, which
21 relates to the testimony of Mr. Daugherty, which
22 describes a forensic examination performed by LabMD and
23 what happened there.

24 LabMD is effectively out of business. That is
25 in fact true. But I think it's important for a variety

1 of reasons, including the relief that complaint counsel
2 is seeking, to note for the record that it intends to
3 resume operations -- it made that point clear in the
4 proceeding below -- and more importantly that when it
5 resumes operations, it intends to apply the same
6 protections to the data that it maintains for the
7 750,000 consumers. That is found at complaint counsel's
8 finding of fact 61.

9 And that relates also to the question of what
10 protections it has provided to data since 2010, a
11 question that came up repeatedly during respondent
12 counsel's presentation. And the weight of the evidence
13 demonstrates that LabMD's unlawful conduct again
14 continued after July of 2010.

15 I would direct the panel's consideration to
16 complaint counsel's responses to respondent's findings
17 of fact at paragraphs -- excuse me -- at findings 10(a)
18 and 11 but just as examples.

19 As recently as November of 2013, paper records
20 were stored in an unlocked, open garage at a personal
21 residence. Key personnel were using weak user
22 credentials, and critical vulnerabilities remained on
23 key servers after vulnerability scans were completed.

24 Professor Hill's opinions don't support a
25 contrary conclusion.

1 CHAIRWOMAN RAMIREZ: So, Counsel, let me
2 interrupt you and just get to some -- again go back to
3 some of the issues we already discussed with you but to
4 hone in on certain of the positions articulated by
5 respondent.

6 Respondent, as you know, argues that there
7 really is no benchmark here, that Dr. Hill did
8 not establish an appropriate measure by which to
9 determine that the practices were reasonable or
10 unreasonable, so what in the record should we be
11 looking to in addition to -- you dispute that about
12 Dr. Hill I know, but what else should we be looking to
13 in the record to determine what the appropriate
14 standard to apply here to determine reasonableness of
15 LabMD's data security practices?

16 MS. VANDRUFF: Well, again, the legal standard,
17 of course, is Section 5(n).

18 CHAIRWOMAN RAMIREZ: So I understand that.

19 MS. VANDRUFF: So with respect to that
20 information security standard, in her expert report,
21 she cites to a number of things, including a NIST
22 guidance that goes back to 2002, which certainly
23 predates any of the conduct that's challenged in this
24 case.

25 CHAIRWOMAN RAMIREZ: So I understand that.

1 MS. VANDRUFF: Yes.

2 CHAIRWOMAN RAMIREZ: What else?

3 MS. VANDRUFF: Yes.

4 I'm not sure what else is cited in her report
5 standing here, but I do believe that in her testimony
6 and in her report she cites to other materials that were
7 widely available and understood in the information
8 security --

9 CHAIRWOMAN RAMIREZ: So another argument that
10 respondent makes is that one needs to factor in the
11 size of the operations of respondent, and is there any
12 information about the cost of the reasonable security
13 measures that you contend should have been utilized by
14 LabMD?

15 MS. VANDRUFF: There is, yes. And
16 Professor Hill, her opinions and her testimony
17 addresses that. And all of the measures that she
18 recommends to safeguard the information that was at risk
19 of unauthorized disclosure were either at low or no cost
20 for LabMD to implement and would require low-cost
21 measures or staff time to have implemented.

22 So, for example, the failure of LabMD to have
23 locked down computers, to have prevented employees from
24 downloading software from the Internet, all that would
25 have required was limiting administrative access.

1 That's something that is available -- that the IT staff
2 could have done using a function through Windows, and it
3 just would have required staff time to have enabled that
4 function through Windows.

5 CHAIRWOMAN RAMIREZ: A couple more questions for
6 you.

7 MS. VANDRUFF: Yes, Madam Chairwoman.

8 CHAIRWOMAN RAMIREZ: Respondent also argues
9 that there is no evidence in the record that addresses
10 the other elements of the unfairness standard aside
11 from the question of injury, so can you tell me what is
12 in the record on reasonable avoidance as well as
13 countervailing benefits?

14 MS. VANDRUFF: Yes. I would be happy to address
15 that.

16 The record establishes that consumers could not
17 have reasonably avoided the significant risk of
18 concrete harm that we have described at length this
19 afternoon. In most cases, consumers had no way of
20 knowing that LabMD would receive their personal
21 information, much less any way of knowing --

22 CHAIRWOMAN RAMIREZ: And where do I look for
23 this? Is this also in --

24 MS. VANDRUFF: Yes. The testimony of the
25 physician practices. I regret that I cannot cite them to

1 you, but my colleague can (indicating).

2 No. This is the low-cost measures. Excuse me.

3 The testimony of the physician practices
4 demonstrates that consumers did not know that their
5 information was going to LabMD, that that was a
6 decision made by their physicians. And moreover,
7 consumers had no reason to know of the data security
8 practices that LabMD undertook because they didn't even
9 know that their data was going to LabMD.

10 And as suggested by your earlier question, the
11 fact that LabMD's data security failures could have been
12 remedied at little or no cost, their failures,
13 therefore, did not provide any countervailing benefits to
14 consumers or competition; therefore, the remaining
15 prongs of Section 5(n) are met.

16 CHAIRWOMAN RAMIREZ: One final question at my
17 end that relates to the Sacramento documents.

18 So respondent -- counsel for respondent argues
19 that we are limited to the allegations that are set
20 forth in the complaint. In particular, I believe it's
21 paragraph 10 that outlines data security practices with
22 regards to LabMD's computer network.

23 Tell me why counsel for respondent is incorrect
24 in that regard, that we're not limited to the
25 allegations in the complaint.

1 MS. VANDRUFF: Well, the allegations in
2 paragraph 10, again, are among other things. They are
3 examples of failures of reasonable security, and so I
4 think that the unfairness count is the gravamen of
5 the --

6 CHAIRWOMAN RAMIREZ: Are there allegations in
7 the complaint that relate more broadly to physical
8 security in the complaint?

9 MS. VANDRUFF: No. But the allegations in
10 paragraph 10 are consistent with allegations of
11 physical security.

12 One point, before I move on from Sacramento,
13 Madam Chairwoman, the respondent's counsel did say that
14 it would be speculation about whether or not the
15 Sacramento documents were from LabMD. Just as a matter
16 of clarification, respondent's counsel earlier in the
17 litigation, before respondent -- before Mr. Lechner
18 joined the case, did stipulate that those documents were
19 in fact LabMD's documents, just as a matter of
20 clarification.

21 COMMISSIONER OHLHAUSEN: Counsel, I have a
22 question.

23 MS. VANDRUFF: Yes.

24 COMMISSIONER OHLHAUSEN: So in the unfairness
25 statement, mostly it talks about financial

1 injury, but it also says, "In an extreme case, however,
2 where tangible injury could clearly be demonstrated,
3 emotional effects might possibly be considered as the
4 basis for a finding of unfairness."

5 So what evidence is in the record that the
6 exposure of medical information about perhaps a
7 stigmatizing condition to an unauthorized third party is
8 substantial injury that it might cause this kind of
9 tangible injury?

10 MS. VANDRUFF: May I have permission to respond
11 to Commissioner Ohlhausen's question?

12 CHAIRWOMAN RAMIREZ: Please.

13 MS. VANDRUFF: The testimony of Mr. Kam
14 addresses that question. He is an expert witness with
15 experience specifically in medical identity theft and
16 the harms that result from exposure of sensitive
17 medical information. And his report and his testimony
18 go to that question, and he describes the harms that
19 result from the exposure of sensitive medical
20 information and talks about exactly those kinds of
21 harms.

22 COMMISSIONER OHLHAUSEN: Okay. Thank you.

23 MS. VANDRUFF: You're welcome.

24 CHAIRWOMAN RAMIREZ: Is it necessary for there
25 to be actual harm for the information -- the medical

1 information that's exposed -- to be something that would be
2 potentially something that could stigmatize an
3 individual?

4 So let's just say the exposure has to do with
5 just routine blood tests. In your mind, would that
6 constitute actual harm?

7 Or is that a question that we don't need to
8 address?

9 MS. VANDRUFF: Well, it's a question that we
10 don't need to address in this case. That is certain.
11 In the -- because in this case the information that was
12 disclosed included potentially stigmatizing
13 information.

14 In the GMR case, the Commission alleged that
15 the information that was disclosed, which included
16 narrative notes from -- from physicians, could be
17 misused to cause substantial injury such as identity
18 theft and unauthorized access by disclosing sensitive
19 private medical information. We think that this is on
20 all fours with GMR.

21 MR. LECHNER: May I? I'm sorry.

22 CHAIRWOMAN RAMIREZ: Counsel?

23 MR. LECHNER: May I have leave just to make one
24 or two points?

25 CHAIRWOMAN RAMIREZ: Well, this is really out of

1 order, but given that we gave so much time to
2 Ms. VanDruff, I'll go ahead and allow you to make --

3 MR. LECHNER: Just two brief points.

4 CHAIRWOMAN RAMIREZ: Sure.

5 MS. VANDRUFF: Thank you, Madam Chairwoman.

6 MR. LECHNER: One point is that, to my
7 understanding, we did not stipulate that the Sacramento
8 documents came from our computer. We did not.

9 And secondly and the last point is, the Kam
10 opinion is bad based upon its bad methodology.

11 Those are the only two points. Thank you.

12 CHAIRWOMAN RAMIREZ: Thank you, Counsel.

13 Thank you very much.

14 We are adjourned. Thank you.

15 (Whereupon, the foregoing oral argument was
16 concluded at 2:37 p.m.)

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1 C E R T I F I C A T I O N O F R E P O R T E R

2

3 DOCKET/FILE NUMBER: 9357

4 CASE TITLE: LabMD, Inc.

5 HEARING DATE: March 8, 2016

6

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

12

13 DATED: MARCH 10, 2016

14

15

16 JOSETT F. WHALEN, RMR

17

18

19 C E R T I F I C A T I O N O F P R O O F R E A D E R

20

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

24

25

ELIZABETH M. FARRELL