

Transcript of the Testimony of **Daniel Kaufman**

Date: May 12, 2014

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



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

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

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DEPOSITION OF DANIEL KAUFMAN, VOLUME II

Washington, D.C.

Monday, May 12, 2014

REPORTED BY:

SARA A. WICK, RPR, CRR

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

10
 11 LAURA RIPOSO VAN DRUFF, ESQ.
 12 Federal Trade Commission
 13 Division of Privacy and Identity Protection
 14 600 Pennsylvania Avenue Northwest
 15 Mail Stop NJ-8100
 16 Washington, D.C. 20580
 17 202-326-2999
 18 lvandruff@ftc.gov
 19 On behalf of the Federal Trade Commission
 20
 21 -- continued --
 22

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1 APPEARANCES (continued):
 2
 3 WILLIAM SHERMAN, II, ESQ.
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 10 On behalf of Respondent
 11
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 19 On behalf of Respondent
 20
 21
 22

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1 PROCEEDINGS
 2 (Exhibit Kaufman 1 identified.)
 3 Whereupon,
 4 DANIEL KAUFMAN,
 5 was recalled as a witness and, having first been
 6 duly sworn, was examined and testified further as
 7 follows:
 8 EXAMINATION
 9 BY MR. SHERMAN:
 10 Q Good morning. Mr. Kaufman.
 11 A Good morning.
 12 Q It's your understanding and at least it's
 13 my understanding that this is a continuation of the
 14 deposition that we had begun earlier, and I had
 15 asked you certain questions about data security and
 16 data security standards. Your counsel objected. We
 17 filed a motion.
 18 And what I've handed you marked as RX-1
 19 for purposes of this deposition is the order
 20 granting Respondent's motion to compel testimony.
 21 Have you seen that document before?
 22 A No, I have not.

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1 Q Okay. I will submit to you that this
 2 order is the reason why we're here today. As I
 3 previously explained in the prior deposition, your
 4 counsel had objected to a certain line of
 5 questioning regarding data security, and the Court
 6 has since that time ruled that we do have the right
 7 to question you with regard to data security.
 8 Are you prepared today to testify with
 9 regard to data security standards that the Bureau or
 10 the FTC plans to use to support its allegations
 11 against LabMD?
 12 A Yes, I am.
 13 (Exhibit Kaufman 2 identified.)
 14 BY MR. SHERMAN:
 15 Q Mr. Kaufman, I've just handed you what's
 16 been marked for identification purposes for this
 17 deposition a document that's labeled RX-2, and it's
 18 entitled the "Complaint."
 19 Have you seen the complaint that was filed
 20 in this matter before?
 21 A Yes.
 22 Q I would ask that you turn to paragraph

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1 10(a) of the complaint, which can be found on page
 2 3. Paragraph 10 reads that "At all relevant times,
 3 Respondent engaged in a number of practices that,
 4 taken together, failed to provide reasonable and
 5 appropriate security for personal information on its
 6 computer networks. Among other things, Respondent,"
 7 and it goes into subparagraphs.
 8 Subparagraph (a) says that "Respondent did
 9 not develop, implement, or maintain a comprehensive
 10 information security program to protect consumers'
 11 personal information."
 12 Did I read that correctly?
 13 A Yes.
 14 Q Is it the Bureau's position that in order
 15 to comply with or to avoid violation of Section 5 of
 16 the Federal Trade Commission Act as it relates to
 17 data security, an entity must have in place a
 18 comprehensive information security program?
 19 A Are we talking about a deception
 20 allegation or an unfairness allegation?
 21 Q It's my understanding, and you correct me
 22 if I'm wrong, that the Bureau has accused LabMD of

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1 an unfair practice and that the Bureau has not
 2 alleged that LabMD has committed any deception.
 3 Is that your understanding?
 4 A That is my understanding.
 5 Q Okay. Then my questions will be limited
 6 to unfair practices as it relates to the allegations
 7 against LabMD.
 8 And so my question, then, in that regard
 9 is, is it the Bureau's position that in order to
 10 comply with Section 5 of the Federal Trade
 11 Commission Act, that an entity must have in place a
 12 comprehensive information security program?
 13 A Assessing whether certain data security
 14 practices are unfair under Section 5 of the FTC Act
 15 requires a case-by-case factual analysis of the
 16 situation. So whether a company has developed,
 17 implemented, or maintained a comprehensive
 18 information security program may be required under
 19 Section 5.
 20 Q Is it the Bureau's position that, based on
 21 its analysis of the facts in this case, that it will
 22 hold LabMD to the standard of requiring a

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1 comprehensive information security plan?
 2 MS. VAN DRUFF: I'm sorry. May I ask that
 3 that question be repeated.
 4 (Record read by the court reporter as
 5 requested.)
 6 MS. VAN DRUFF: And counsel, just for
 7 purposes of clarification, are you asking for an
 8 explanation of paragraph 10(a), or are you asking
 9 Mr. Kaufman whether 10(a) says what it says?
 10 MR. SHERMAN: I think we know what it
 11 says. I'm not asking him to explain what it says.
 12 I'm asking him a very direct question --
 13 THE WITNESS: Uh-huh.
 14 MR. SHERMAN: -- of whether or not, based
 15 on the analysis, case-by-case analysis in this
 16 particular case, whether the Bureau's position is
 17 that it will hold LabMD to the standard of having to
 18 have a comprehensive information security program in
 19 order to comply with Section 5.
 20 THE WITNESS: The Bureau will allege that
 21 one of LabMD's failings, among others, was the
 22 failure to have a comprehensive information security

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1 program.
 2 BY MR. SHERMAN:
 3 Q Has the Bureau published or otherwise
 4 informed the public that HIPAA-covered entities such
 5 as LabMD must have a written comprehensive
 6 information security program in place in order to
 7 comply with FTC or Bureau data security standards?
 8 A I am not sure whether the Commission has
 9 issued material specifically relating to the
 10 HIPAA-covered entities, but the Bureau has published
 11 a great deal of consumer and business education on
 12 the issue of what is reasonable data security.
 13 The Commission has testified on it on a
 14 number of occasions, and there's a lot of other
 15 publicly available information on what constitutes
 16 reasonable data security.
 17 Q Is it the Bureau's position that
 18 reasonable data security, as it has analyzed this
 19 case, as it does on a case-by-case basis, includes
 20 having in place a comprehensive information security
 21 plan?
 22 MS. VAN DRUFF: And counsel, are you

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1 asking -- sorry, that sounded like two questions,
 2 generally and as it relates to this case. Which is
 3 the question?
 4 MR. SHERMAN: As it relates to this case.
 5 THE WITNESS: Okay. Can I hear that back.
 6 (Record read by the court reporter as
 7 requested.)
 8 THE WITNESS: In this case the Bureau has
 9 alleged that LabMD should have had a comprehensive
 10 information security program in place.
 11 BY MR. SHERMAN:
 12 Q Is the Bureau's definition of a
 13 comprehensive information security program the same
 14 as the definition for a comprehensive information
 15 security program as set out in Dr. Raquel Hill's
 16 expert witness report?
 17 A I am not aware of a specific definition we
 18 have used for comprehensive information security
 19 program, but I can certainly look at her definition
 20 and see if it seems consistent with my general
 21 understanding.
 22 Q That's the only reason I brought it.

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1 A Okay.
 2 (Exhibit Kaufman 3 identified.)
 3 BY MR. SHERMAN:
 4 Q Mr. Kaufman, you've been handed what's
 5 been marked as RX-3 for identification purposes for
 6 this deposition. I submit to you that it is a copy
 7 of the expert witness report of Dr. Raquel Hill,
 8 without the exhibits that were attached to the
 9 original report.
 10 Have you seen this report before?
 11 A Yes.
 12 Q I'm going to ask you to turn to page 19 of
 13 the report and to look at paragraph 52. Paragraph
 14 52 reads "A comprehensive information security
 15 program is a plan that sets out an organization's
 16 security goals, the written policies that would
 17 satisfy those goals, the mechanisms that would be
 18 used to enforce the written policies, and how those
 19 mechanisms would be used to enforce the written
 20 policies."
 21 Did I read that correctly?
 22 A Yes.

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1 Q Is that the Bureau's definition of
 2 a comprehensive information security program?
 3 A I am not aware of the Commission having a
 4 definition for a comprehensive information security
 5 program. I know we have stated in business
 6 education materials generally what a comprehensive
 7 information security program would require.
 8 But what is written here in Professor
 9 Hill's report appears consistent with what we have
 10 said in the past. I think it's as a matter of
 11 semantics or different words that are probably being
 12 used here. But at its core, it seems quite
 13 consistent.
 14 Q Paragraph 52 goes on to say that "The best
 15 practices for developing a comprehensive information
 16 security program would include the seven principles
 17 that I." Dr. Hill referring to herself, "discuss in
 18 paragraph 31, above: Don't keep what you don't
 19 need, patch, ports, policies, protect, probe, and
 20 physical."
 21 Did I read that correctly?
 22 A Yes.

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1 Q Does the Bureau adhere to the notion that
 2 the best practices for developing a comprehensive
 3 information security program includes the seven
 4 principles set out in Dr. Hill's report?
 5 A I think the best practices for developing
 6 a comprehensive information security program is
 7 going to be fairly case specific, but the principles
 8 that she lays out here are, again, consistent with
 9 my understanding of what those best practices would
 10 be.
 11 Q Has the Bureau published any information
 12 which would indicate to HIPAA-covered entities like
 13 LabMD that they are expected to apply the seven
 14 principles of best practices as it relates to a
 15 comprehensive information security program as
 16 explained in Dr. Hill's report?
 17 A The Bureau has published a great deal of
 18 materials that provide guidance regarding
 19 comprehensive information security programs from the
 20 50 or so settlement orders that have been issued by
 21 the FTC that provide such information to business
 22 educational, to speeches, to Congressional

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1 testimony, and there's additional information
 2 available from other organizations as well.
 3 Q In any of that literature or the documents
 4 that you referenced, is the phrase "comprehensive
 5 information security program" used?
 6 A I'm not sure.
 7 Q In any of the information that you just
 8 referenced, do they contain the seven principles as
 9 stated in Dr. Hill's report with regard to best
 10 practices to establish a comprehensive security --
 11 I'm sorry, a comprehensive information security
 12 program and list those seven principles as don't
 13 keep what you don't need, patch, ports, policies,
 14 protect, probe, and physical?
 15 A The concepts that are set forth by the
 16 seven principles are very consistent with other
 17 information that I have seen in some of our
 18 materials, including our business educational
 19 materials.
 20 Q And when you are referencing the business
 21 education materials, when did the FTC start
 22 publishing business education materials as it

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1 relates specifically to data security?
 2 A My understanding is that the earliest
 3 business educational materials are from 2003.
 4 Q And has the FTC or the Bureau continued to
 5 publish business education materials related to data
 6 security from that time through the present?
 7 A Yes, we've done both written materials and
 8 videos.
 9 Q You mentioned 50 decisions, and I may be
 10 using the wrong word because I forgot what --
 11 A I said settlements.
 12 Q 50 settlements. In any of those
 13 settlements, to your knowledge, is the phrase
 14 "comprehensive information security program" used?
 15 A I would have to take a look. It would not
 16 surprise me if they were; it wouldn't surprise me if
 17 there was a similar term that was used. The concept
 18 is embedded within those orders. But again, I don't
 19 have the stack of 50 in front of me, but they're
 20 available on our Web site at ftc.gov.
 21 Q So is it your -- is it the Bureau's
 22 position that in order to discern or discover what

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1 data security requirements the Bureau or the FTC
 2 expects business entities to comply with regard
 3 to data security can be found on the FTC Web site?
 4 A Can I hear that again?
 5 MS. VAN DRUFF: Objection; misstates prior
 6 testimony.
 7 If you could repeat the question, please.
 8 (Record read by the court reporter as
 9 requested.)
 10 THE WITNESS: The Commission has
 11 consistently applied the unfairness test in
 12 assessing the adequacy of data security. A great
 13 deal of information about that is on the Web site.
 14 A great deal of information is also available from
 15 other sources.
 16 BY MR. SHERMAN:
 17 Q Has the Bureau or the FTC informed
 18 business entities that it should consult the FTC's
 19 Web site in order to discern what the Bureau or the
 20 FTC's data security requirements are?
 21 A Can I hear that back also.
 22 (Record read by the court reporter as

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1 requested.)
 2 A Yes, we have. The whole purpose of doing
 3 all the business education that we do is to get the
 4 information out there, and we get it out through
 5 whether it's speeches or media interviews or the
 6 like. There's been a great deal of focus on the
 7 availability of this kind of information on the
 8 FTC's Web site and on other sources.
 9 Q Has the FTC or the Bureau specifically
 10 informed HIPAA-covered entities that they, too,
 11 should refer to the FTC Web site, FTC settlements,
 12 and the other information that the FTC has published
 13 in order to discern what is required of them by the
 14 FTC or the Bureau in order to comply with data
 15 security requirements and the fairness doctrine as
 16 set out in Section 5?
 17 MS. VAN DRUFF: Objection; vague as to
 18 "fairness doctrine" and as to "HIPAA-covered
 19 entities."
 20 You may answer.
 21 THE WITNESS: Sure. I do not have a legal
 22 opinion as to what kind of entities are subject to

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

6 BY MR. SHERMAN:

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

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

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

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

1 entities, I am not aware of such material.

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

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

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

14 You may answer if you can.

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

18 BY MR. SHERMAN:

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

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

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

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

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

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

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

22 A Yes, that principle is clearly laid out in

1 our business educational materials.

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

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

8 You may answer.

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

12 BY MR. SHERMAN:

13 Q I didn't say that you did.

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

16 Q Sure.

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

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

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1 Q Is this one of the principles that the
 2 Bureau would look at in evaluating on a case-by-case
 3 basis whether or not an entity has complied with the
 4 Bureau or the Commission's data security standards?
 5 MS. VAN DRUFF: Mr. Sherman, I will permit
 6 Mr. Kaufman to answer that question generally, but
 7 as we get into specific applications, that gets into
 8 the mental processes of counsel.
 9 You're asking the question generally, I
 10 understand; is that correct?
 11 MR. SHERMAN: Yes.
 12 THE WITNESS: It's one of the areas we
 13 would look at in assessing whether data security
 14 practices were unfair under Section 5.
 15 BY MR. SHERMAN:
 16 Q Is it one of the principles that the
 17 Bureau would look at and consider each time that it
 18 is investigating as whether or not an entity's
 19 security practices were adequate?
 20 A It is something that we would frequently
 21 look at. Whether we've looked at it every single
 22 time, I can't say, but certainly, it's commonly

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1 looked at.
 2 Q And so consistent with your previous
 3 answers, these evaluations and considerations of
 4 adherence to these principles is analyzed on a
 5 case-by-case basis; is that fair to say?
 6 A We review each case on a case-by-case
 7 basis and do a fact-specific analysis.
 8 Q And in reviewing the case on a
 9 case-by-case basis, is it fair to say that the FTC
 10 looks at all seven principles as laid out in
 11 Dr. Hill's report?
 12 MS. VAN DRUFF: Counsel, are you asking
 13 Mr. Kaufman whether, in conducting the
 14 reasonableness inquiry that he's described, whether
 15 in every case the Bureau considers the principles
 16 set forth in paragraph 52 of Dr. Hill's report?
 17 MR. SHERMAN: I'm asking whether or not
 18 the Bureau considers the seven principles when they
 19 are evaluating a case on a case-by-case basis.
 20 THE WITNESS: I don't know that the seven
 21 principles are each considered on every case, but
 22 generally speaking, these principles are looked at

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1 on most cases.
 2 BY MR. SHERMAN:
 3 Q Has the --
 4 A For example, there might not be a reason
 5 to focus on physical in a certain case. So we might
 6 not actually look at that if we're just focused on
 7 electronic security.
 8 Q Has the Commission or the Bureau published
 9 any literature or made the public generally aware by
 10 any means or any of the means that you've previously
 11 mentioned that these seven principles for a
 12 comprehensive information data security program will
 13 be looked at in evaluating whether or not an entity
 14 is in compliance with the Commission's or the
 15 Bureau's data security standards?
 16 A Can I hear that one more time?
 17 (Record read by the court reporter as
 18 requested.)
 19 A That's a long question, but it is very
 20 consistent with what I've seen in business education
 21 materials, in speeches, in Congressional testimony,
 22 and in other similar materials.

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1 Q Has it been set out as principles, as the
 2 seven principles of best practices for a
 3 comprehensive information data security program?
 4 A As I said previously, I don't believe we
 5 have laid it out specifically as these seven
 6 principles, but these seven principles are very
 7 consistent with the principles that we have laid out
 8 within our materials. These are Dr. Hill's seven
 9 principles, and they are utterly consistent --
 10 consistent with what the FTC or the Bureau has
 11 stated.
 12 Q If we will go back to the complaint, I
 13 think you're still there. No, you're not. You're
 14 at Dr. Hill's report. Yes, the complaint, which is
 15 RX-2. Again, we're at page 3. Subparagraph (b)
 16 reads "did not use readily available measures to
 17 identify commonly known or reasonably foreseeable
 18 security risks and vulnerabilities on its networks.
 19 By not using measures such as penetration tests, for
 20 example, Respondent could not adequately assess the
 21 extent of the risks and vulnerabilities of its
 22 networks."

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1 Did I read that correctly?

2 A Yes.

3 Q Has the Commission or the Bureau published

4 information which indicates that an entity must use

5 penetration tests to identify commonly known or

6 reasonably foreseeable security risks or

7 vulnerabilities on its network?

8 A The Commission has, through all the

9 materials I've mentioned, said that companies need

10 to use readily available measures to identify

11 reasonably known security risks, and one of the

12 methods of doing that would be penetration tests.

13 Q Is the use of penetration tests a

14 requirement in order to -- in order for an entity to

15 comply with the Commission's or the Bureau's data

16 security standards?

17 A Whether or not a penetration test is

18 needed is something we would talk to a consulting

19 expert about in terms of assessing the

20 reasonableness of the data security. There might be

21 other means of identifying reasonably foreseeable

22 security risks, but penetration tests would be one

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1 means of doing that.

2 Q So is it fair to say that your testimony

3 is that whether or not an entity should use

4 penetration tests is determined on a case-by-case

5 basis?

6 A Yes.

7 Q Has the Commission or the Bureau published

8 information which informed entities that the use of

9 penetration tests in order to determine and identify

10 commonly known or reasonably foreseeable security

11 risks and vulnerabilities on its networks would be

12 determined on a case-by-case basis by the Bureau or

13 the Commission?

14 A Our business education materials have made

15 it clear that one means of assessing reasonably

16 foreseeable security risks is penetration tests and

17 lays out other means as well.

18 Q In those business materials or other

19 published materials, has the Commission or the

20 Bureau informed business entities that the use of

21 penetration tests in order to secure data would be

22 determined on a case-by-case basis?

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1 A We've made it clear that penetration tests

2 are one means of assessing reasonably foreseeable

3 security risks and that it's one of the tests or

4 procedures that companies should engage in in

5 developing their security plan.

6 Q Has the Commission or the Bureau informed

7 the public, business entities that deal with data

8 security that the data security requirements that

9 the Commission and the Bureau will look at in order

10 to determine whether or not that business entity is

11 in compliance with Section 5 will be done on a

12 case-by-case basis?

13 A Yes. I've seen a number of Commission

14 materials that have made it clear that we do a

15 case-by-case assessment to determine whether data

16 security practices are reasonable, from speeches, to

17 Congressional testimony, to business educational

18 materials.

19 Q Do you have a date range for when the

20 Commission or the Bureau began advising business

21 entities that these determinations would be made on

22 a case-by-case basis?

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1 A I know our business educational materials

2 started as early as 2003, and I'm sure people were

3 providing speeches to business at or about that time

4 as well. But I would have to look at specific

5 documents to see, you know, what's contained in the

6 speeches or testimony or business ed or consumer ed.

7 Q So it's your belief as we sit here

8 currently that from 2003 on it's been the stated

9 policy of the Commission or the Bureau to inform

10 business entities that a determination of the data

11 security requirements as they relate to compliance

12 with Section 5 will be determined on a case-by-case

13 basis?

14 MS. VAN DRUFF: Objection; vague as

15 to "stated policy."

16 You may answer.

17 THE WITNESS: I'm not sure if I can answer

18 that. I mean, we brought our first unfairness test

19 involving data security in 2005. So prior to that,

20 the focus might have been more on the deception

21 analysis in terms of representations that companies

22 made regarding their data security.

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1 And I know we've been talking primarily
 2 about unfairness. So prior to 2005, I'm not quite
 3 sure what the materials would have said, but
 4 certainly, I've seen many materials that have made
 5 it clear to business that we assess these things on
 6 a case-by-case basis and that there's
 7 no-one-size-fits-all data security plan.
 8 BY MR. SHERMAN:
 9 Q Has the Bureau or the Commission published
 10 information that would inform business entities that
 11 a comprehensive information security program and the
 12 seven principles of best practice that apply to it
 13 would be determined on a case-by-case basis?
 14 MS. VAN DRUFF: Objection; vague.
 15 You may answer.
 16 THE WITNESS: Yes, my understanding is
 17 those concepts have been laid out clearly in
 18 speeches, business educational materials,
 19 Congressional testimony, and through -- that's it.
 20 BY MR. SHERMAN:
 21 Q Let's go back to RX-2, subparagraph C,
 22 which reads "did not use adequate measures to

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1 prevent employees from accessing personal
 2 information not needed to perform their jobs."
 3 Did I read that correctly?
 4 A Yes.
 5 Q Has the Commission or the Bureau published
 6 information to the general public and business
 7 entities that in order to comply with the data
 8 security standards as the Commission or the Bureau
 9 sees it under Section 5, that they should use
 10 adequate measures to prevent employees from
 11 accessing personal information not needed to perform
 12 their jobs?
 13 MS. VAN DRUFF: Objection; lack of
 14 foundation.
 15 You may answer.
 16 THE WITNESS: Yes, that is a principle
 17 that I have seen in business educational materials,
 18 speeches, Congressional testimony.
 19 It's also certainly consistent with
 20 information that's been in the 50 or so different
 21 FTC -- some of the 50 or so different FTC
 22 settlements involving data security matters.

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1 BY MR. SHERMAN:
 2 Q Has the Commission or the Bureau published
 3 information that informs business entities that they
 4 should review Commission settlements in order to
 5 determine what the data security standards the
 6 Commission or the Bureau would expect entities to
 7 adhere to?
 8 MS. VAN DRUFF: Objection; misstates prior
 9 testimony.
 10 You may answer.
 11 THE WITNESS: Yes, certainly, I've seen a
 12 number of speeches to industry where we discuss
 13 specific cases and data security issues that were at
 14 stake, and we emphasized that the complaints and
 15 orders that the Commission has issued are highly
 16 informative on a wide variety of areas.
 17 BY MR. SHERMAN:
 18 Q And do you have a time frame in which the
 19 Commission or the Bureau began advising the public
 20 that -- and let's talk about unfairness, since
 21 that's what this case is about -- that the
 22 settlements are a proper source for them to look at

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1 to determine what data security standards are
 2 expected of them by the Commission and/or the
 3 Bureau?
 4 A You know, I would have to look at specific
 5 documents. But I can certainly state that I started
 6 working for Chairman Majoris as one of her advisors
 7 in May 2005, and I worked on a number of speeches
 8 that she delivered to industry in a wide variety of
 9 fora, and she would routinely discuss data security
 10 matters and specific data security cases that the
 11 Commission has brought.
 12 Q Would she discuss the fact that looking at
 13 settlements between the Commission and/or the Bureau
 14 is a good source for businesses to reference when
 15 they are trying to determine what data security
 16 standards or expectations the Commission or the
 17 Bureau would have of them?
 18 A I haven't looked at her speeches in many
 19 years, but it would surprise me if that concept did
 20 not appear in some or many of her speeches about
 21 data security.
 22 I will emphasize that she always wanted us

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

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

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

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

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

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1 fashions.

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

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

12 Q What about testimony before Congress?

13 A It's all on our Web site.

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

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

22 And I should say that I'm quite familiar

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

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

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

7 Q Absolutely.

8 A Thanks.

9 (Recess.)

10 BY MR. SHERMAN:

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

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

22 A Consistent with what I've said previously,

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

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

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

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

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1 programs, or using two-factor authentication."
 2 Did I read that correctly?
 3 A Yes.
 4 Q Are there materials out there that have
 5 been published by the Commission or the Bureau
 6 indicating that entities will be required to employ
 7 authentication-related security measures,
 8 periodically changing their passwords, prohibiting
 9 the use of same passwords across applications, and
 10 using two-factor authentication in order to comply
 11 with Section 5?
 12 A I know the materials I've looked at have
 13 discussed the importance of good password practices.
 14 Whether each of them has gone into the specificity
 15 of each of the items you mentioned, I'm not sure,
 16 but the general concept of changing passwords and
 17 making sure they're complex and two-factor
 18 authentication for remote access is certainly
 19 embedded in many of those materials.
 20 Q Is there published information by the
 21 Commission or the Bureau which lets business
 22 entities know that this type of -- these types of

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1 security-related measures as listed in subparagraph
 2 (e) are the type that the Commission and the Bureau
 3 will look at on a case-by-case basis in order to
 4 determine compliance with Section 5?
 5 A Yes, through speeches, business education,
 6 Congressional testimony, articles, blog entries,
 7 these concepts have been laid out pretty clearly in
 8 Commission materials, as well as other FTC
 9 settlements in the data security area.
 10 Q Subparagraph (f) reads "did not maintain
 11 and update operating systems of computers and other
 12 devices on its networks. For example, on some
 13 computers Respondent used operating systems that
 14 were unsupported by the vendor, making it unlikely
 15 that the systems would be updated to address newly
 16 discovered vulnerabilities."
 17 Do you see that?
 18 A Yeah.
 19 Q Again, is there published materials out
 20 there by the Commission or the Bureau which
 21 indicates that these particular factors would be
 22 looked at in assessing whether or not a business

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1 entity is in compliance with Section 5?
 2 A Certainly, I've seen this concept in our
 3 business education materials, emphasizing the
 4 importance of maintaining and updating operating
 5 systems. That concept certainly appears in there
 6 and probably in other materials as well, but
 7 business ed is what jumps at me first.
 8 Q In terms of subparagraph (g), "did not
 9 employ readily available measures to prevent or
 10 detect unauthorized access to personal information
 11 on its computer networks. For example, Respondent
 12 did not use appropriate measures to prevent
 13 employees from installing on computers applications
 14 or materials that were not needed to perform their
 15 jobs or adequately maintain or review records of
 16 activity on its networks."
 17 Did I read that correctly?
 18 A Yes.
 19 Q Is there published information out there
 20 from the Commission or the Bureau that capsulizes
 21 these concepts as well?
 22 A Sure. I'm pretty sure those concepts

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1 appear in our business educational materials as
 2 well.
 3 Q So is it the Bureau's position that LabMD
 4 could have learned of each of these requirements in
 5 the subparagraphs of paragraph 10 of the complaint
 6 by researching the published business literature
 7 from the Commission, looking at the Commission's
 8 testimony before Congress, researching speeches made
 9 by commissioners, tracking the blogs of the
 10 commissioner, and generally following the
 11 information that was published by the Commission?
 12 MS. VAN DRUFF: Objection; misstates prior
 13 testimony.
 14 You may answer.
 15 THE WITNESS: I would say that the
 16 Commission has consistently applied the three-part
 17 test in assessing whether practices were unfair.
 18 We've published a great deal of information
 19 providing guidance and information about certain
 20 data security practices, and that information has
 21 been publicly available. But at its core, it is all
 22 about reasonableness under Section 5.

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1 BY MR. SHERMAN:
 2 Q And the three-part test that you're
 3 referring to is what?
 4 A It is the unfairness test, which in order
 5 to assess whether a practice is unfair, we have to
 6 show that it causes or likely to cause
 7 substantial -- causes or likely to cause substantial
 8 injury that is, two, not reasonably avoidable by
 9 consumers themselves and, three, that is not
 10 outweighed by countervailing benefits to consumers
 11 or competition.
 12 Q That's better than you did the first time.
 13 A Yes, much better than I did last time.
 14 Thank you for pointing that out. You caught me off
 15 guard last time, and my brain was not working. It
 16 was painful reading that back in the transcript. I
 17 wanted to correct it, but it was what I said.
 18 Q I gave you the opportunity, and you did
 19 well. In your testimony, we've talked about a lot
 20 of different sources from which the information
 21 could have been gleaned by LabMD as to what data
 22 security practices or standards would have been

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1 acceptable to the Commission.
 2 What we have in front of us is the
 3 complaint, which we've gone through each of the
 4 subsections of the main allegations. I will call it,
 5 but we also have Dr. Hill's expert witness report.
 6 And my question is whether it's the
 7 Bureau's position that LabMD should have taken each
 8 action as outlined in Dr. Hill's report.
 9 A I can't state that every single action
 10 that's stated in her report was required. Clearly,
 11 Dr. Hill has done a thorough analysis of the
 12 programs or lack thereof that were in place by LabMD
 13 and has had significant problems with what they did,
 14 but I can't say that one in isolation would sort of,
 15 per se, have been a problem. I just can't point to
 16 one in particular, if that answers your question.
 17 Q Is Dr. Hill's report a fair example of
 18 what the Commission and the Bureau mean by each case
 19 will be evaluated on a case-by-case basis?
 20 MS. VAN DRUFF: Objection; vague as
 21 to "fair example."
 22 You may answer.

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1 THE WITNESS: I would say in most of our,
 2 if not all of our data security cases, we work with
 3 outside experts to assess the reasonableness of the
 4 practices. Obviously, the Dr. Hill report has been
 5 put into writing. So it's probably different than
 6 what we do in a lot of cases where it is not
 7 necessarily put into writing. So it is different in
 8 that sense.
 9 But we will talk to experts about
 10 certainly many, if not all of the issues that are
 11 raised by Dr. Hill's report in other cases.
 12 BY MR. SHERMAN:
 13 Q Is Dr. Hill's report and the concepts and
 14 principles set out therein the standard, the data
 15 security standard that the Commission and/or the
 16 Bureau will hold LabMD to meet?
 17 A At its core, unfairness requires
 18 reasonableness, and what Dr. Hill has done here is a
 19 much more granular analysis of LabMD's practices
 20 that apply to LabMD and the case-specific analysis
 21 for LabMD. So I can't generalize what she has said
 22 here to other entities.

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1 Q And that's fair, and what I'm -- the
 2 question was, is this the standard that will be
 3 applied to LabMD. You've already testified that
 4 each case will be assessed on a case-by-case basis,
 5 and obviously, this is, as you stated, a granular
 6 analysis of LabMD's data security practices.
 7 The question is, is this the standard to
 8 which the Commission believes LabMD should have had
 9 its data security practices, and anything less the
 10 Commission would have deemed unreasonable?
 11 MS. VAN DRUFF: Counsel, by "this," are
 12 you referring to Dr. Hill's report or the Section 5
 13 reasonable analysis that Mr. Kaufman testified
 14 about?
 15 MR. SHERMAN: Dr. Hill's report.
 16 THE WITNESS: The standard is Section 5
 17 and reasonableness. Dr. Hill is the expert who will
 18 be or has provided testimony and report explaining
 19 why LabMD's practices were not reasonable.
 20 BY MR. SHERMAN:
 21 Q I guess what I'm trying to find out is
 22 whether or not the Bureau is adopting Dr. Hill's

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1 report as what would have been reasonable for LabMD
 2 to do, and anything less than what she has set out
 3 would have been considered unreasonable by the
 4 Bureau?
 5 MS. VAN DRUFF: Objection; asked and
 6 answered.
 7 You may answer.
 8 THE WITNESS: I don't think we're opining
 9 on a hypothetical situation where if LabMD did A,
 10 but not B and C, would it have been reasonable.
 11 That's not what she's opining on. She looked at
 12 their data security practices as a whole and has
 13 reached the conclusion that they were not
 14 reasonable.
 15 BY MR. SHERMAN:
 16 Q So she's reached the conclusion that they
 17 were not reasonable based on the information that
 18 she reviewed?
 19 A She sets forth a lot of information that
 20 she reviewed, correct.
 21 Q So if some other entity looks at
 22 Dr. Hill's report as it relates to the LabMD case,

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1 is it the Commission's position that the report and
 2 the facts in this case will be instructive to a
 3 similarly situated entity as to what is expected by
 4 the Commission or the Bureau with regard to data
 5 security?
 6 MS. VAN DRUFF: Objection, Counsel. With
 7 respect -- may I actually have the question read
 8 back.
 9 (Record read by the court reporter as
 10 requested.)
 11 MS. VAN DRUFF: Counsel, I think it's
 12 clear that the Court's ruling in this case allows
 13 you to inquire of Mr. Kaufman about the legal
 14 standards applied in this case, but it also makes
 15 clear that the mental processes of staff, including
 16 Bureau staff and Commission staff with respect to
 17 other investigations, is not a proper line of
 18 inquiry.
 19 So possibly I misunderstand your question,
 20 but if you can restate it, and then perhaps I can
 21 let Mr. Kaufman answer it.
 22 BY MR. SHERMAN:

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1 Q Well, Mr. Kaufman, you've testified that
 2 the source for information for a company like LabMD
 3 that has been published are settlements, speeches,
 4 blogs, the business educational materials that are
 5 on the Web site.
 6 My question is, if that information is
 7 instructive as to what the Commission would expect
 8 of an entity, would you also consider Dr. Hill's
 9 report to be instructive in terms of an entity
 10 looking at that and trying to discern what the FTC
 11 expects in terms of data security?
 12 MS. VAN DRUFF: Without revealing the
 13 legal reasoning or mental processes of staff or the
 14 Commission, you may answer the question.
 15 THE WITNESS: I would say that there
 16 are -- it would be instructive to other entities to
 17 look at her report and get a sense of the kind of
 18 issues that the Commission looks at. I will leave
 19 it at that. And I should say that the Bureau looks
 20 at, because I'm testifying for the Bureau.
 21 BY MR. SHERMAN:
 22 Q Are there other reports like Dr. Hill's

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1 that have been published on the Commission Web site?
 2 MS. VAN DRUFF: Objection; vague as
 3 to "like Dr. Hill's."
 4 MR. SHERMAN: Expert witness reports
 5 outlining deficiencies found in an entity's data
 6 security.
 7 THE WITNESS: I'm not aware of an expert
 8 report at the level of detail like Professor Hill's.
 9 That said, our complaints do provide a
 10 good deal of information regarding the adequate data
 11 security practices that were the subject of an FTC
 12 lawsuit.
 13 BY MR. SHERMAN:
 14 Q So it's the Commission's or the Bureau's
 15 position that an entity reading the LabMD complaint
 16 could find instructive information in terms of data
 17 security expectations of the Commission?
 18 A I think it is one of the things they could
 19 certainly look at, as well as other materials and
 20 other source documents that exist outside of the
 21 FTC's Web site.
 22 Q What kind of other source documents are

1 you referring to?

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

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

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

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

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

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

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

1 proposition you're starting with there.

2 BY MR. SHERMAN:

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

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

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

16 BY MR. SHERMAN:

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

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

22 MR. SHERMAN: Can we take ten minutes?

1 THE WITNESS: Sure.
2 (Recess.)

3 BY MR. SHERMAN:

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

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

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

13 A No, it does not.

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

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1 MS. VAN DRUFF: Objection; calls for a
 2 legal conclusion, vague.
 3 You may answer.
 4 THE WITNESS: These are among the items
 5 that exist where businesses can get a better sense
 6 of how the Commission applies its reasonableness
 7 standard, but I'm sure there are other sources as
 8 well that exist.
 9 BY MR. SHERMAN:
 10 Q So is it fair to say that there is maybe
 11 contained in a speech somewhere this idea has been
 12 communicated to business entities that all of the
 13 sources I named in the prior question should be
 14 consulted when that business entity is trying to
 15 determine what data security it should put in place
 16 in order to comply with the reasonableness standard
 17 of the Act?
 18 Can you read that back, please.
 19 A Yes. Thank you.
 20 (Record read by the court reporter as
 21 requested.)
 22 MS. VAN DRUFF: Objection; calls for a

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1 legal conclusion, vague.
 2 You may answer.
 3 THE WITNESS: The Bureau has consistently
 4 made it clear that those are materials that exist
 5 that businesses can look at to get a better sense of
 6 how the Commission evaluates what is reasonable data
 7 security.
 8 BY MR. SHERMAN:
 9 Q It's correct, isn't it, that the FTC or
 10 the Bureau determines whether a business entity's
 11 data security practices were reasonable by
 12 investigating what those practices were prior to
 13 filing its formal complaint?
 14 MS. VAN DRUFF: I caution Mr. Kaufman that
 15 he may respond to the question as a general matter,
 16 but the reasoning or mental processes of the Bureau
 17 regarding its reasonableness determinations in any
 18 given case is privileged.
 19 THE WITNESS: Can I hear the question
 20 again, please.
 21 (Record read by the court reporter as
 22 requested.)

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1 THE WITNESS: Yes, the Bureau will
 2 investigate the reasonableness of an entity's data
 3 security practices before filing a complaint --
 4 before seeking Commission authority to file a
 5 complaint, I should say.
 6 BY MR. SHERMAN:
 7 Q And the Bureau, similar to the business
 8 entities, do not have one set of documents that it
 9 looks to when determining the reasonableness of a
 10 business's security practices? In fact, the Bureau
 11 must do what you've suggested the business entities
 12 do, which is to consult with all of the various
 13 sources that are out there in order to make that
 14 determination?
 15 MS. VAN DRUFF: Objection; misstates prior
 16 testimony. You may answer.
 17 THE WITNESS: The sources that are out
 18 there that we've been talking about are pretty
 19 consistent in how they describe the Commission's
 20 approach to assessing reasonableness and data
 21 security.
 22 There was something else I wanted to say,

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1 but it just escaped my mind, if I could hear the
 2 question again.
 3 (Record read by the court reporter as
 4 requested.)
 5 THE WITNESS: Yeah, I would just add that,
 6 obviously, the issue of data security is an issue
 7 that is fact specific, and that changes fairly
 8 frequently. So it's not something that there is
 9 just a list that exists.
 10 BY MR. SHERMAN:
 11 Q It's correct that the FTC has not
 12 promulgated regulations with regard to data security
 13 for personal identifying information?
 14 A In connection with Section 5 of the FTC
 15 Act, that is correct. We have, nevertheless,
 16 consistently applied Section 5 and the unfairness
 17 test to assess the reasonableness of the security
 18 practices.
 19 Q But that's not promulgation of regulation;
 20 is that correct?
 21 A Yes. Sorry.
 22 Q And it's also correct that the Commission

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1 nor the Bureau has specifically taken into
 2 consideration any different data security standards
 3 for HIPAA-covered entities;
 4 A Can I hear that back.
 5 (Record read by the court reporter as
 6 requested.)
 7 MS. VAN DRUFF: Objection; vague as
 8 to "different."
 9 MR. SHERMAN: Let me reword that.
 10 THE WITNESS: Okay. Thanks.
 11 BY MR. SHERMAN:
 12 Q That in terms of applying the fairness
 13 standard and looking at the published information
 14 out there to determine whether an entity's data
 15 security practices comply with Section 5, the
 16 Commission nor the Bureau give any special
 17 consideration as to whether or not that entity is a
 18 HIPAA-covered entity?
 19 MS. VAN DRUFF: Objection; vague as
 20 to "fairness standard" and "special consideration."
 21 You may answer.
 22 THE WITNESS: As I said earlier, I'm not

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1 aware of any materials that specifically focus on
 2 HIPAA entities.
 3 But that said, our materials deal with the
 4 reasonableness of data security with respect to
 5 sensitive personal information, of which the kind of
 6 information that HIPAA entities have certainly comes
 7 within the ambit of sensitive personal information.
 8 BY MR. SHERMAN:
 9 Q And so the same analysis would apply to,
 10 for example, a Neiman-Marcus, which is high-end
 11 retail and doesn't deal with personal health
 12 information, as it would to a LabMD, which is a
 13 medical lab that solely deals with personal health
 14 information?
 15 MS. VAN DRUFF: Objection, Counsel. Can I
 16 ask you to rephrase the question so it doesn't
 17 relate to a specific entity to the extent that
 18 they're -- it may raise concerns for Mr. Kaufman in
 19 responding?
 20 MR. SHERMAN: That's true. I didn't
 21 think --
 22 THE WITNESS: How about ACME Tool and Die?

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1 Let's go to Roadrunner.
 2 BY MR. SHERMAN:
 3 Q Can we change Neiman-Marcus to ACME Tool
 4 and Die, have some fun with this?
 5 A If both companies were being looked at
 6 from --
 7 MS. VAN DRUFF: I'm sorry to interrupt,
 8 Mr. Kaufman.
 9 Just so the record is clear, can I ask you
 10 to restate the question so that there's a clean Q
 11 and A?
 12 MR. SHERMAN: Yes.
 13 BY MR. SHERMAN:
 14 Q So is it fair to say that the data
 15 security standards that you would apply to a
 16 company, for example ACME Tool and Die which
 17 specifically deals with retail and the personal
 18 identifying information that they receive regarding
 19 a purchase at retail, it would be the same analysis
 20 that you would do for a company like LabMD, who is a
 21 medical laboratory and all of the personal
 22 identifying information that it receives is

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1 protected health information? The analysis would be
 2 the same?
 3 MS. VAN DRUFF: Objection; lacks
 4 foundation.
 5 You may answer.
 6 THE WITNESS: The reasonableness analysis
 7 that is a part of Section 5 would require a
 8 case-by-case analysis of the specific facts of both
 9 entities, but they would both be subject to the same
 10 reasonableness analysis. But again, it is case
 11 specific based on different factors.
 12 BY MR. SHERMAN:
 13 Q And therefore, the fact that an entity
 14 like LabMD has HIPAA regulations to comply with is
 15 not a factor that is taken into consideration when
 16 the Bureau is analyzing its fairness standard?
 17 MS. VAN DRUFF: Objection; misstates prior
 18 testimony, lack foundation.
 19 You may answer.
 20 THE WITNESS: Can I hear that one more
 21 time.
 22 (Record read by the court reporter as

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1 requested.)

2 THE WITNESS: I'm not quite sure how to

3 answer that. Certainly, our analysis ultimately is

4 the unfairness test and reasonableness, but I just

5 don't know how to answer it beyond that.

6 BY MR. SHERMAN:

7 Q Well, you are aware that it is the

8 Bureau's position in this case that HIPAA and HITECH

9 regulations are irrelevant; correct?

10 MS. VAN DRUFF: Objection, Counsel. Do

11 you want to point Mr. Kaufman to a specific

12 document?

13 MR. SHERMAN: No. I'm asking if he is

14 aware that that is the Bureau's position.

15 MS. VAN DRUFF: I'm sorry. I thought you

16 were asserting that it is the Bureau's position.

17 THE WITNESS: I am aware that we are

18 bringing this action under the FTC Act and not under

19 HIPAA or HITECH. So to the extent that the focus is

20 on the FTC Act, that is the focus of the case and

21 not other acts that we're not litigating under.

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

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1 have. Kent? That's it.

2 THE WITNESS: Okay.

3 MS. VAN DRUFF: Thank you.

4 (Whereupon, at 11:26 a.m., the deposition

5 was concluded.)

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1 I HEREBY CERTIFY that I have read this

2 transcript of my deposition and that this transcript

3 accurately states the testimony given by me, with

4 the changes or corrections, if any, as noted.

5

6 X _____

7 Witness

8

9

10

11 Subscribed and sworn to before me this day of

12 , 20 .

13

14 X

15 Notary Public

16

17 My commission expires: .

18

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2

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9 EXHIBITS

10

11 EXHIBIT NUMBER IDENTIFIED

12

13 Kaufman 1 - order granting Respondent's

14 motion to compel testimony 162

15 Kaufman 2 - complaint 163

16 Kaufman 3 - Hill expert report 169

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