

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**Illumina, Inc.,
a corporation,**

and

**GRAIL, Inc.,
a corporation.**

DOCKET NO. 9401

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENTS’ MOTION *IN LIMINE*
TO EXCLUDE IMPROPER LAY WITNESS OPINION TESTIMONY**

This Court has informed the parties that all “[m]otions *in limine* are strongly discouraged.” Scheduling Order ¶ 13. In particular, this Court has a longstanding practice—which it has repeatedly described in open court—of deferring ruling on objections to specific deposition and investigational hearing testimony until such time as that testimony is cited and, in effect, designated, in post-hearing briefs. Respondents have ignored the Court’s directives and practices and filed *seven* motions *in limine*, including this motion asking the Court to rule on objections to isolated testimony contained in twenty-three different deposition and investigational hearing transcripts. That testimony has not yet been designated by any party in findings of fact or conclusions of law and Respondents’ objections are premature. Moreover, Respondents have not shown that the testimony is inadmissible for all purposes. Accordingly, Respondents’ Motion *In Limine* to Exclude Improper Lay Witness Opinion Testimony (hereinafter “Mot.”) should be denied.

BACKGROUND

One of the central issues in this case is whether the acquisition of GRAIL, Inc. (“Grail”) by the dominant provider of next generation sequencing (NGS), Illumina, Inc. (“Illumina”), is likely to harm innovation in the market for multi-cancer early detection (MCED) tests.¹ Third parties have testified that { [REDACTED]

[REDACTED] } Third parties have also testified that

{ [REDACTED]

[REDACTED] } Finally, third parties have testified about { [REDACTED] } Respondents’ Motion seeks to exclude testimony on each of these topics.

ARGUMENT

I. Respondents’ Objections are Premature

This Court has repeatedly explained to parties that, prior to the adjudicative hearing, entire transcripts of depositions and investigational hearings should be submitted as exhibits. Pursuant to this Court’s longstanding practice, designations and objections to designations are

¹ Complaint at ¶ 1.

² [REDACTED]

³ [REDACTED]

⁴ See, e.g., { [REDACTED] }

⁵ See, e.g., { [REDACTED] }

not made at the time of submission but are made during post-hearing briefing.⁶ For example, at the final prehearing conference in *In re LabMD, Inc.* this Court explained:⁷

So just so everybody is clear, submit the entire deposition transcript for any witness whose testimony you want to submit by deposition, meaning those that have been designated. When we get to posttrial briefing, if you want to cite to a depo, then you designate what you're referring to in your proposed finding. And then the other side, if they wish to object to that, they can do that in their reply to the proposed finding.

As this Court stated, its practice conserves the Court's resources as many objections will not require a ruling at all.⁸

I have found over time that the way I just described it some moments ago is the best way to deal with this, because I could sit here and rule on these objections for days, but a lot of them are going away anyway by the time this is done. When we get to that final briefing, you're looking at the trial transcript, and a lot of it goes away. That's why it's more efficient just to wait and deal with it in a posttrial brief.

Here, Complaint Counsel has followed the established procedures of this Court and included on its exhibit list entire transcripts of depositions and investigational hearings. The inclusion of a transcript on Complaint Counsel's exhibit list does not signal that Complaint Counsel intends to rely upon every line of testimony contained therein. Rather, Complaint Counsel will cite portions of the transcripts in post-hearing briefing and Respondents will have the opportunity to raise any objections to the testimony cited by Complaint Counsel after Complaint Counsel has cited it. This Court should reject Respondents' request, made in a

⁶ See, e.g., Exhibit A, *In re LabMD, Inc.* (Dkt. No. 9357), Transcript of Final Prehearing Conference (May 15, 2014) at 39:7-40:5.

⁷ *Id.* at 39:22-40:5.

⁸ *Id.* at 41:11-19; see also Exhibit B, *In re Altria Group and JUUL Labs, Inc.* (Dkt. No 9393), Transcript of Final Prehearing Conference (June 1, 2021) at 40:4-13 ("This is how this works after many years of experience. It's absurd for me to rule on objections that are in depositions or investigational hearing transcripts during the trial. I deal with those post-trial. So if you have objections to particular testimony from depositions, from excerpts that are cited by a party in a post-hearing proposed finding, the opposing party should note any objection it has, regardless of whether it was raised in the deposition, and that should be raised in your reply to the proposed finding.")

“strongly discouraged” pretrial motion, that it rule on objections to portions of transcripts that have yet to be designated by any party.

II. Respondents Have Not Established that the Challenged Testimony is Inadmissible for All Purposes

Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. Scheduling Order ¶ 13; *see also In re POM Wonderful LLC*, 2011 FTC LEXIS 79, at *6-8 (May 6, 2011). In bench trials, even prejudicial and irrelevant evidence need not be excluded because the Court is capable of assigning appropriate weight to evidence. Scheduling Order ¶ 13; *see also Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994) (noting pre-trial motions to exclude allegedly prejudicial evidence in a bench trial constitutes a “useless procedure”); *United States v. Brown*, 415 F.3d 1257, 1268-69 (11th Cir. 2005) (stating in a bench trial “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself”); *Cramer v. Sabine Transportation Co.*, 141 F. Supp. 2d 727, 733 (S.D. Tex. 2001) (explaining a motion to exclude prejudicial testimony in a bench trial is “asinine on its face”).

Respondents have the burden of establishing that the challenged testimony is inadmissible on all grounds but have not attempted to do so. To the contrary, much of the testimony listed in Appendix A to Respondents’ Motion is not cited in Respondents’ Motion at all.⁹ Instead of explaining why the challenged testimony is inadmissible, Respondents use their Motion to argue about the appearance of the word “hypothetical” or “speculate” in depositions and investigational hearings. Yet Respondents are not seeking exclusion of testimony on that ground and are not even seeking the exclusion of the particular questions and answers quoted in

⁹ *See* Mot. Appendix A (listing testimony from the following transcripts not referenced in the text of the Motion: PX7046, PX7047, PX7050, PX7053, PX7055, PX7080, PX7100, PX7105, PX7109, PX7094, PX7110, PX7111, PX7077, PX7116, and PX7121).

the text of the Motion.¹⁰ In any event, Respondents cite no authority for the proposition that the appearance of the word “speculate” or “hypothetical” in a question or answer is determinative of admissibility.¹¹

Respondents cite Rule 701 generally as grounds for the exclusion of the third-party testimony listed in Appendix A, but Rule 701 does not prohibit lay witnesses from testifying about their opinions, it merely requires that those opinions be grounded in personal knowledge, be helpful to the court, and not be based upon specialized or scientific knowledge within the meaning of Rule 702. Fed. R. Evid. 701. The testimony that Respondents’ seek to exclude is admissible under Rule 701.

First, Respondents do not dispute that the testimony they challenge is “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” Fed. R. Evid. 701(b). Nor could they. The testimony they seek to exclude is precisely the kind of testimony that Courts routinely admit and rely upon in cases brought under Section 7 of the Clayton Act. *See, e.g., Fed. Trade Comm’n v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 345-46 (3d Cir. 2016) (citing insurer testimony that the merger would increase the bargaining leverage of the defendants, that insurers would have to accept a price increase if defendants demanded it post-merger, and that insurers could not market a plan without the merging hospitals); *ProMedica Health Sys., Inc. v. FTC.*, 749 F.3d 559, 571 (6th Cir. 2014) (citing third-party testimony about the anticipated effect of the merger on negotiations); *Fed. Trade Comm’n v. Peabody Energy*

¹⁰ *See* Mot. at 6 (quoting in the text a question from PX7091 and a question from page 243 of PX7085, even though Respondents are not seeking exclusion of the questions or responses to the questions).

¹¹ *See, e.g., United States v. Powers*, 578 Fed. Appx. 763, 772 (10th Cir. 2014) (noting that there is no rule or authority that prohibits lay witnesses from offering opinion testimony based on their personal experience in response to hypothetical questions).

Corp., 492 F. Supp. 3d 865, 904 (E.D. Mo. 2020) (citing customers testifying they would not stop buying SPRB coal if the price increased 5-10%).

Second, Respondents make no effort to show that all of the testimony listed in Appendix A is speculative and could not do so.¹² Respondents' Appendix A includes the following:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

¹² To the extent that any of the testimony is truly speculative, the Court is unlikely to have to rule on any objection since no party is likely to cite it in post-hearing briefings.

¹³ [REDACTED]

¹⁴ { [REDACTED] }

¹⁵ { [REDACTED] }

¹⁶ { [REDACTED] }

¹⁷ { [REDACTED] }

[REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]

[REDACTED]

[REDACTED]

Respondents cannot credibly argue—and do not argue—that these witnesses lack personal knowledge on these topics or that, to the extent that the testimony on these topics contain opinion, those opinion are so divorced from the witnesses’ personal knowledge as to be inadmissible under Rule 701. To the extent that any of the testimony in Appendix A is truly speculative, this Court is unlikely to have to rule on Respondents’ objections because no party is likely to cite such testimony in post-hearing briefing.

Third, Respondents seek the exclusion of testimony from Bill Getty, the VP of Commercial, Cancer Screening Core, at Guardant, in which Mr. Getty mentions “market research,” “behavioral research” or “analyst reports.” Mot. at 6-7. According to Respondents, that testimony is inadmissible because lay opinion witnesses are not permitted to rely on hearsay. *Id.* Yet Respondents cite no authority for the proposition that a lay witness can never refer to hearsay evidence without running afoul of Rule 701 and Respondents fail to make any argument

18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]

specific to this administrative hearing, in which reliable hearsay is generally admissible. *See* Rule 3.43(b).

Finally, Respondents argue that some of the testimony they challenge relates to the “scope of competition and the market” and that testimony “pertaining to market dynamics and competitive effects” is “inadmissible” from witnesses not designated as experts. Mot. at 7-8. In support of this argument, Respondents cite a string of wholly irrelevant cases, none of which support the proposition that testimony relating to the scope of market competition is inadmissible under Rule 701. *See Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991) (Court gives “little weight” to “conclusory assertion” from party executives that “the relevant geographic market is Tuscon” where the witnesses were not qualified to testify as economic experts and the court found “no record evidence that could support their conclusion.”) *Kentucky Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 919 (6th Cir. 2009) (affirming exclusion of unreliable expert testimony and, because the remaining evidence was insufficient, affirming summary judgment); *Colsa Corp. v. Martin Marietta Servs. Inc.*, 133 F.3d 853, 855 n.4 (11th Cir. 1998) (affirming summary judgment and noting, in dicta, that lay opinion testimony from two witnesses offered by plaintiff would not be sufficient to define an antitrust market); *Water Craft Mgmt., L.L.C. v. Mercury Marine*, 361 F. Supp. 2d 518, 543 (M.D. La. 2004) (“the Court finds that the expert testimony and the factual evidence in this case fails to prove a product or product market as required by the jurisprudence”); *Cogan v. Harford Mem’l Hosp.*, 843 F. Supp. 1013, 1020 (D. Md. 1994) (“Looking at the evidence in the light most favorable to the plaintiff, no reasonable jury could determine the relevant market based on the evidence presented.”)

CONCLUSION

For these reasons, Complaint Counsel respectfully requests that the Court deny Respondents' Motion *In Limine* To Exclude Improper Lay Witness Opinion Testimony.

Dated: August 18, 2021

Respectfully submitted,

/s/ Jennifer Milici
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Counsel Supporting the Complaint

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

**Illumina, Inc.,
a corporation,**

and

**GRAIL, Inc.,
a corporation.**

DOCKET NO. 9401

[PROPOSED] ORDER

Upon Respondents' Motion *In Limine* to Exclude Improper Lay Witness Opinion Testimony, it is hereby:

ORDERED that Respondents' motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August _____, 2021

Exhibit A

In the Matter of:

LabMD, Inc.

May 15, 2014
Final Prehearing Conference

Condensed Transcript with Word Index



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

1

1 FEDERAL TRADE COMMISSION
 2 I N D E X
 3 IN RE LABMD, INC.
 4 FINAL PREHEARING CONFERENCE
 5 MAY 15, 2014
 6
 7
 8 EXHIBITS FOR ID IN EVID IN CAMERA STRICKEN/REJECTED
 9 JX
 10 Number1 38
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2

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

4

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5	<p>1 PROCEEDINGS</p> <p>2 - - - - -</p> <p>3 JUDGE CHAPPELL: Call to order Docket 9357,</p> <p>4 In Re LabMD.</p> <p>5 This is our final prehearing conference.</p> <p>6 We're having technical problems, but I'm going</p> <p>7 to go ahead and start.</p> <p>8 I'm going to begin with the appearances of the</p> <p>9 parties, and we'll start with the government.</p> <p>10 MS. VANDRUFF: Good morning, Your Honor.</p> <p>11 Laura VanDruff, complaint counsel.</p> <p>12 JUDGE CHAPPELL: All right.</p> <p>13 MR. SHEER: Good morning, Your Honor. I'm</p> <p>14 Alain Sheer, complaint counsel.</p> <p>15 JUDGE CHAPPELL: Do you want to identify the</p> <p>16 people at your counsel table?</p> <p>17 MS. VANDRUFF: Certainly, Your Honor.</p> <p>18 Joining us today at counsel table is Jarad Brown</p> <p>19 and Maggie Lassack and then our trial support technician</p> <p>20 Jon Owens.</p> <p>21 JUDGE CHAPPELL: Thank you.</p> <p>22 And for respondents?</p> <p>23 MR. SHERMAN: Good morning, Your Honor.</p> <p>24 William Sherman on behalf of LabMD.</p> <p>25 Would you like for me to introduce --</p>	7	<p>1 Each side has submitted a final proposed</p> <p>2 witness list. I'm looking at about 44 for the</p> <p>3 government and about 34 for respondent. Some of those</p> <p>4 are listed on both. I'm hoping that's not serious.</p> <p>5 How many witnesses do you actually plan to</p> <p>6 call? Let's start with the government.</p> <p>7 MS. VANDRUFF: If I may, Your Honor. Yes, the</p> <p>8 complaint counsel intends to call four live witnesses in</p> <p>9 its case in chief.</p> <p>10 JUDGE CHAPPELL: That's much better.</p> <p>11 MS. VANDRUFF: All are expert witnesses,</p> <p>12 Your Honor. We have Professor Hill, Mr. Van Dyke,</p> <p>13 Mr. Kam, and Professor Shields.</p> <p>14 JUDGE CHAPPELL: Okay. Respondent, do you have</p> <p>15 some idea of how many witnesses you actually are going</p> <p>16 to call?</p> <p>17 MR. SHERMAN: Yes, Your Honor. We plan to call</p> <p>18 approximately nine to ten witnesses live.</p> <p>19 JUDGE CHAPPELL: Okay. All right. Thank you.</p> <p>20 I've got some objections to witnesses, starting</p> <p>21 out with complaint counsel filed objections to four</p> <p>22 witnesses.</p> <p>23 Have any of these objections been resolved?</p> <p>24 MS. VANDRUFF: Yes, Your Honor. With respect to</p> <p>25 Mr. Kaufman, I believe that our objections were resolved</p>
6	<p>1 JUDGE CHAPPELL: Yes. I'd like to know who is</p> <p>2 at counsel table.</p> <p>3 MR. SHERMAN: At counsel table is</p> <p>4 Kent Huntington, who's co-counsel from Cause of Action,</p> <p>5 also representing LabMD; my partner, who is</p> <p>6 Reed Rubinstein from Dinsmore & Shohl, also representing</p> <p>7 LabMD; and Mike Pepson, who is also co-counsel from</p> <p>8 Cause of Action, also representing LabMD.</p> <p>9 JUDGE CHAPPELL: Okay. Thank you.</p> <p>10 You need to stand and speak. That's the</p> <p>11 practice here. But also you need to try to lean over to</p> <p>12 the microphone.</p> <p>13 And I need to let you know we have an elevator</p> <p>14 issue in the building. The elevators we normally take</p> <p>15 are out of service. They say July, but don't bet on</p> <p>16 it.</p> <p>17 We're going to be taking probably a freight</p> <p>18 elevator, so when -- I'm telling you this because when</p> <p>19 we take a break, let's say I plan to be back at 2:00, I</p> <p>20 may not be back at 2:00. If there's someone moving</p> <p>21 freight between floors below me, we're going to be</p> <p>22 awhile, so I'm going to do my best to be here when I say</p> <p>23 I'll be here, but I need a waiver, I need an elevator</p> <p>24 waiver.</p> <p>25 Let's talk about witnesses.</p>	8	<p>1 by your ruling on our motion in limine.</p> <p>2 JUDGE CHAPPELL: I thought so. Okay.</p> <p>3 MS. VANDRUFF: With respect to Mr. Gormley, we</p> <p>4 understand that respondent's counsel intends to call</p> <p>5 him live. If that is the case, our objection is</p> <p>6 obviated.</p> <p>7 JUDGE CHAPPELL: Okay.</p> <p>8 MS. VANDRUFF: And then with respect to</p> <p>9 Officer Lapides, respondent's counsel, subsequent to the</p> <p>10 time of our filing of our objections, clarified that</p> <p>11 they would be calling him live, and so our objection is</p> <p>12 mooted.</p> <p>13 Likewise, they also indicated that with respect</p> <p>14 to Mr. Garcia that they had no intention of calling him,</p> <p>15 and therefore, our objection is mooted.</p> <p>16 JUDGE CHAPPELL: Is one of these witnesses</p> <p>17 incarcerated?</p> <p>18 MR. SHERMAN: Your Honor, Mr. Garcia -- we</p> <p>19 don't know. He's been incarcerated from time to time.</p> <p>20 We do not intend to call him, but he would be the only</p> <p>21 one that incarceration would be an issue.</p> <p>22 JUDGE CHAPPELL: If he is, he would love flying</p> <p>23 over here to testify. Wearing a suit and a tie? He'd</p> <p>24 love that.</p> <p>25 MR. SHERMAN: I'm sure --</p>

9

1 JUDGE CHAPPELL: I'd love hearing him
 2 questioned, but --
 3 MR. SHERMAN: We don't find his testimony to be
 4 necessary.
 5 JUDGE CHAPPELL: Okay. Thank you.
 6 As a former prosecutor, I just have to comment
 7 on things like that.
 8 All right. So now we're down to respondent's
 9 objections to complaint counsel witnesses. I've got a
 10 couple objections, one as to the designated testimony of
 11 Curt --
 12 MR. SHERMAN: Kaloustian.
 13 JUDGE CHAPPELL: -- Kaloustian -- thank you --
 14 the nonpublic hearing taken in the Phase II
 15 investigation of LabMD, otherwise known here as an
 16 investigational hearing transcript or IHT.
 17 The rule has been changed recently, 3.43(b), and
 18 IHTs are now admissible. I'm not saying I agree with
 19 that, but that's the rule.
 20 Respondent also objects to complaint counsel's
 21 expert witness Professor Hill's heavy reliance on
 22 Mr. Kaloustian's uncross-examined testimony.
 23 Again, IHT testimony is admissible, but be
 24 advised that -- first of all, your objection goes to
 25 the weight, not the admissibility, so I'm going to

10

1 overrule that objection. But the parties are advised
 2 that although they are admissible, they're taken
 3 without counsel, without respondent present, don't
 4 expect them to be given a lot of weight in this
 5 proceeding.
 6 When they are cited in posttrial findings, the
 7 opposing side is encouraged to point out in their
 8 responses that it was taken from an IHT.
 9 Let me talk about motions to quash.
 10 Two nonparties have filed motions to quash the
 11 trial subpoenas served on them by respondent,
 12 Eric Johnson --
 13 (Pause in the proceedings.)
 14 JUDGE CHAPPELL: And the second is
 15 Robert Boback.
 16 MR. SHERMAN: "Boback."
 17 JUDGE CHAPPELL: "Boback."
 18 Their objections seem to be based on scheduling
 19 issues and rely principally on the fact that they
 20 already testified by deposition and shouldn't be
 21 required to come here live.
 22 I've got respondent's opposition to
 23 Eric Johnson's motion.
 24 Does complaint counsel intend to file a response
 25 or do you want to address that motion now?

11

1 MS. VANDRUFF: Thank you, Your Honor.
 2 Complaint counsel does not intend to take a
 3 position as to either motion, although we would just
 4 note that while we had listed Mr. Boback as a potential
 5 live witness, we're satisfied with having submitted to
 6 the court his deposition testimony.
 7 Likewise, as indicated in Mr. Boback's motion,
 8 we have also consented to the alternative relief that
 9 Mr. Boback requested, which is that he appear by
 10 videoconference.
 11 JUDGE CHAPPELL: Did you mean to be talking
 12 about Boback the whole time there, because you said
 13 likewise Mr. Boback?
 14 MS. VANDRUFF: Yes, Your Honor.
 15 JUDGE CHAPPELL: You're not addressing
 16 Eric Johnson.
 17 MS. VANDRUFF: With respect to Mr. Johnson,
 18 complaint counsel is not taking a position.
 19 JUDGE CHAPPELL: No position at all. But with
 20 Boback, you're not intending to call him live.
 21 MS. VANDRUFF: We are not taking a position with
 22 respect to the motion and we are not intending to call
 23 him live. That's correct, Your Honor.
 24 JUDGE CHAPPELL: Okay. Which takes care of the
 25 subpoena, if possible.

12

1 Does that change your position if he's not going
 2 to be called live?
 3 MR. SHERMAN: No, it doesn't, Your Honor.
 4 JUDGE CHAPPELL: You still want him here.
 5 MR. SHERMAN: We want him here. We believe that
 6 it is of significant benefit to the trier of fact to
 7 have the witness here to be observed as he testifies for
 8 all the benefits of live interaction between humans, as
 9 the judge is well aware.
 10 JUDGE CHAPPELL: I'm going to take this under
 11 advisement. I'll rule on this motion later -- actually
 12 two motions later.
 13 Well, let me talk about --
 14 MR. SHERMAN: Oh, Your Honor, may I?
 15 JUDGE CHAPPELL: Yeah. Actually I've got your
 16 response on Johnson but not on Boback.
 17 Do you intend to file a written response?
 18 MR. SHERMAN: Today.
 19 JUDGE CHAPPELL: Good. Then I'll hold off until
 20 I get your response.
 21 MR. SHERMAN: Thank you, Your Honor.
 22 JUDGE CHAPPELL: All right. I'll ask my staff
 23 to make note of that.
 24 All right. Let's talk about exhibits and
 25 objections thereto.

13	<p>1 On May 14, the parties filed a document titled</p> <p>2 Joint Stipulations on Admissibility of Evidence, which</p> <p>3 was labeled JX 2.</p> <p>4 In paragraph 1 of that stip, the parties</p> <p>5 stipulated that the exhibits listed in attachment A are</p> <p>6 admitted without objection. I'm glad to see that the</p> <p>7 parties were able to work out a number of objections to</p> <p>8 many of the proposed exhibits.</p> <p>9 As to the remaining exhibits, let's talk about</p> <p>10 how those are going to be handled.</p> <p>11 If I'm understanding this correctly, the parties</p> <p>12 have made two proposals relating to exhibits not</p> <p>13 appearing in attachment A.</p> <p>14 First, the parties are proposing that if such</p> <p>15 materials are relied upon in posttrial briefing, any</p> <p>16 party may reassert an objection to such material at that</p> <p>17 stage. The objection may be made in reply briefs or in</p> <p>18 any appropriate form.</p> <p>19 Second, the parties are proposing that if such</p> <p>20 material is used during the hearing for any reason, a</p> <p>21 party may elect to seek a ruling or object at that time</p> <p>22 or defer objecting.</p> <p>23 Nice try, but if I accepted that, we wouldn't</p> <p>24 even be here today, because we're here today to deal</p> <p>25 with documents and exhibits that are objected to, so</p>	15	
14	<p>1 understand.</p> <p>2 MS. VANDRUFF: Yes, Your Honor.</p> <p>3 So what are not agreed to are a subset of</p> <p>4 respondent's exhibits, fewer than a quarter, to which</p> <p>5 complaint counsel has an objection, and then with the</p> <p>6 exception of the complaint counsel exhibits that appear</p> <p>7 on both the complaint counsel's exhibit list and</p> <p>8 respondent's exhibit list, it is all of complaint</p> <p>9 counsel's exhibits.</p> <p>10 I believe it is the position of respondent's</p> <p>11 counsel, though I will let Mr. Sherman address this,</p> <p>12 that it was premature to address the admissibility of</p> <p>13 any of complaint counsel's exhibits with the exception</p> <p>14 of those that are also identified on the respondent's</p> <p>15 counsel's exhibit list.</p> <p>16 JUDGE CHAPPELL: Are these all exhibits you plan</p> <p>17 to offer or you just listed them on an exhibit list</p> <p>18 prior to trial?</p> <p>19 MS. VANDRUFF: No, Your Honor. We do intend to</p> <p>20 present for admission the documents that are listed on</p> <p>21 our exhibit list.</p> <p>22 JUDGE CHAPPELL: And do you plan to have</p> <p>23 testimony to tie up what these documents are to connect</p> <p>24 to them?</p> <p>25 MS. VANDRUFF: Both live testimony and</p>	16	
14	<p>1 we're not going to say that's fine and move along. I've</p> <p>2 got to know more about what these documents are. I</p> <p>3 don't have enough to deal with it or make a ruling right</p> <p>4 now.</p> <p>5 But if I agree with this stipulation, today</p> <p>6 would be meaningless, and we would be interrupted during</p> <p>7 trial at any time. When I get a witness on the stand --</p> <p>8 that's why I do this today -- I want it to</p> <p>9 move (indicating). I want to have questions and</p> <p>10 answers. I don't want to be interrupted with objections</p> <p>11 on exhibits and evidence we can deal with now. That's</p> <p>12 why we're here.</p> <p>13 I'm going to -- we're going to take a recess</p> <p>14 here in a little while, and I'm going to let you talk</p> <p>15 about this category of documents that are not yet agreed</p> <p>16 to.</p> <p>17 I can't tell from this stipulation -- anybody</p> <p>18 can answer this. How many exhibits are at issue in this</p> <p>19 category?</p> <p>20 MS. VANDRUFF: I'd be happy to address that,</p> <p>21 Your Honor.</p> <p>22 With respect to attachment A, it represents</p> <p>23 the --</p> <p>24 JUDGE CHAPPELL: No, no. I mean the ones that</p> <p>25 aren't agreed to. Attachment A is agreed to, as I</p>	<p>1 designated testimony, yes, Your Honor.</p> <p>2 JUDGE CHAPPELL: Okay.</p> <p>3 MR. SHERMAN: Well, Your Honor, complaint</p> <p>4 counsel is correct. I had reservations based on my</p> <p>5 experience in stipulating to the admissibility of</p> <p>6 documents or exhibits based on some of the questions</p> <p>7 you just asked, the fact that no foundation has been</p> <p>8 laid for them. And in my opinion, it's the province of</p> <p>9 the court as to whether or not any document is</p> <p>10 admissible.</p> <p>11 It appeared to me -- and I was a bit confused,</p> <p>12 because I've never appeared before this honorable court,</p> <p>13 as to how we would actually agree to the admissibility.</p> <p>14 What is on Exhibit A are exhibits to which we</p> <p>15 do not have an objection. They have no objection to</p> <p>16 our exhibits. We have no objection to their exhibits.</p> <p>17 I made a general objection to every exhibit</p> <p>18 based upon the presentation of proofs as it occurs</p> <p>19 during the hearing, whether or not of course there was</p> <p>20 foundation, whether or not the exhibit was actually</p> <p>21 identified by a witness and therefore subject to the</p> <p>22 court's consideration as the court considers the</p> <p>23 evidence that was produced during the trial.</p> <p>24 Now it's my understanding that this court would</p> <p>25 prefer that if we can agree that those exhibits then be</p>	16

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1 admitted, if I'm understanding what the court is
 2 saying.
 3 JUDGE CHAPPELL: Well, I'm not saying I'm going
 4 to admit them if you don't agree to it. If you don't
 5 admit them, I'll hear objections to it.
 6 But I'll tell you what, have a seat, and let me
 7 go over some general rules here.
 8 The commission's rule governing admissibility of
 9 evidence, rule 3.43(b), is a fairly relaxed standard.
 10 We don't have a jury here. I'm not going to be worried
 11 about seeing something and deciding later it's worthless
 12 or I don't need to consider it. We don't have to worry
 13 about the jury issue.
 14 I expect the parties to be judicious with
 15 objections, pose only objections that are truly
 16 necessary and valid.
 17 We will have a recess later. During that
 18 recess, I'll have the parties get together and agree to
 19 some categories of documents, hopefully.
 20 And what I'm talking about is, a lot of these,
 21 in my experience, are going to be what are called
 22 business records. That's a big category, and you can
 23 throw them all in there and deal with that at one time.
 24 I don't have to hear -- if there are 500 documents that
 25 are business records, I don't have to hear

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1 500 objections.
 2 The party who wishes to offer these exhibits is
 3 going to have to give me their theory of admissibility,
 4 and the party opposing, I'll hear them on why they
 5 shouldn't be allowed.
 6 If the parties aren't able to agree after our
 7 break, I'm going to deal with the objections today to
 8 the extent possible and not during trial.
 9 Keep this in mind, though. Although the rules
 10 are somewhat relaxed, if either side has withheld
 11 documents from the other side during discovery, withheld
 12 documents will not be admitted over objection. Now, I
 13 say "over objection" because I don't know if I'm going
 14 to hear an objection.
 15 If a document is not admitted today, the
 16 offering party may reurge admission of a document. And
 17 I'm talking about if you've offered a document and I
 18 haven't allowed it. You may reurge that only if you
 19 have a witness who takes the stand who you think may
 20 demonstrate foundation, reliability, those kind of
 21 things, so I will allow that exception to something I
 22 have not allowed.
 23 Any questions based on that on what I expect
 24 regarding these exhibits?
 25 Although before, let me tell you this also.

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1 Are you at respondent's counsel table familiar
 2 with something called the Lenox rule?
 3 MR. SHERMAN: No, sir.
 4 JUDGE CHAPPELL: The Lenox rule is tailor-made
 5 for the government. Basically it says documents in
 6 respondent's files are going to be admissible, and maybe
 7 that will help with some of the objections.
 8 MR. SHERMAN: Well, just to clarify, we have a
 9 specific objection to only one of their documents. The
 10 other objections were, as I stated before, those
 11 objections which may come as a result of how the
 12 exhibits are presented during the proofs. That's it.
 13 That's our position.
 14 And I'm still not quite clear whether, if we
 15 agree to the admissibility, whether there's any
 16 opportunity to object to whether or not the exhibit is
 17 admitted no matter how it comes across during the
 18 presentation of the proofs.
 19 JUDGE CHAPPELL: Well, I suggest, when you meet
 20 during the recess, you discuss this and tell me how you
 21 want to proceed with that issue. It could be that they
 22 can tell you what they plan to do and you can decide how
 23 to proceed from there.
 24 Were you going to say something?
 25 MS. VANDRUFF: No, Your Honor. You had raised

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1 the question of whether the parties were clear, and
 2 complaint counsel is clear about your expectation,
 3 Your Honor.
 4 JUDGE CHAPPELL: Are you prepared to address the
 5 issue he just raised, how you intend to introduce a
 6 document?
 7 MS. VANDRUFF: The specific document?
 8 JUDGE CHAPPELL: Or a category of documents?
 9 MS. VANDRUFF: Forgive me. I believe that
 10 Mr. Sherman is addressing a single spreadsheet that he
 11 raised in the objections that were filed with
 12 Your Honor. But in case I'm mistaken, I would
 13 appreciate Mr. Sherman's confirmation that that is the
 14 one document?
 15 MR. SHERMAN: Well, that is the one document,
 16 but, as you know, I posted a general objection to all
 17 exhibits depending upon how they are presented during
 18 the presentation of --
 19 JUDGE CHAPPELL: I think I understand, but give
 20 me an example.
 21 MR. SHERMAN: Well, an example would be, for
 22 example, if no witness even testifies about the
 23 document. If we've, you know, pretrial agreed that the
 24 document is admitted for the court's consideration, but
 25 during the proofs, no witness has testified as to that

21	<p>1 document, identified that document, and it has not been 2 identified or testified to by designated testimony in 3 any of the depositions, then I would like to be able to 4 object to that exhibit being admitted for the court's 5 consideration. 6 JUDGE CHAPPELL: Well, I understand your point. 7 I've been in your shoes, and I've been on this side of 8 the table. But you need to defend your client, and you 9 don't want to have to do that after trial with a 10 thousand documents that weren't discussed, because if 11 you know what's happening during trial, you can defend 12 your client during trial. 13 We don't want to get in a position where 14 respondent has to defend themselves after the record 15 closes. And I think you told me, though, that that 16 shouldn't be a concern. You plan to have someone 17 connect or sponsor all the documents you intend to use. 18 MS. VANDRUFF: That's correct, Your Honor. Not 19 necessarily through live testimony. 20 For example, we have business -- in responding 21 to your question, Your Honor, we do intend to tie up all 22 of the documents that we intend to introduce as 23 evidence. Not all of that will be done through live 24 testimony. 25 JUDGE CHAPPELL: No. I understand that. If</p>	23
22	<p>1 he's objected to. 2 And if you're ready, I'll go ahead and hear that 3 right now. What is that document? 4 MR. SHERMAN: That document is a -- 5 JUDGE CHAPPELL: Wait a minute. Who's offering 6 it? 7 MR. SHERMAN: Complaint counsel is offering it. 8 JUDGE CHAPPELL: Let me have your offer and your 9 theory of admissibility. 10 MS. VANDRUFF: Certainly, Your Honor. 11 Just to be clear, Mr. Sherman, we are talking 12 about RX -- excuse me -- CX 451; is that correct? 13 MR. SHERMAN: That's correct. 14 MS. VANDRUFF: Okay. And bear with me, 15 Your Honor. I'll just find my notes. 16 So CX 451 is a document that was created by an 17 investigator at the direction of complaint counsel. It 18 is a document that supports paragraph 21 of our 19 complaint. 20 And in particular, what we directed our 21 investigator to do -- this is an individual who's been 22 deposed by counsel for respondent -- was to determine 23 whether Social Security numbers found in LabMD documents 24 that were seized by the Sacramento Police Department had 25 been used by individuals with different names.</p>	24
21	<p>1 you're using the affidavit that comports with the 2 federal rule on business records, that's going to come 3 in. 4 MR. SHERMAN: And in fact, Your Honor, I think 5 we agreed even as late as yesterday that I would not 6 even require them to bring in the individual to say 7 that this document is a business record kept in the 8 normal course and an exact-copy duplicate, don't want to 9 waste the court's time with those type of formal 10 requirements. 11 My point is that it was just unfamiliar to me 12 to say let's look at all the documents that you intend 13 to introduce as evidence at trial and say okay, they're 14 admitted, no matter what happens during -- 15 JUDGE CHAPPELL: Regardless of what you might 16 have gathered in pretrial proceedings, we're here now, 17 and this is all about fairness and truth. That's where 18 we are now. There's not going to be anything unfair 19 going on in front of me. 20 MR. SHERMAN: I've only objected to one 21 document, Your Honor. 22 JUDGE CHAPPELL: And that goes both ways. 23 So I think we don't know enough now to know if 24 this is going to be an objection or not to these other 25 categories of documents. We know there's one document</p>	24
22	<p>1 He ran a search through a commercially available 2 database that is made available by Thomson Reuters, and 3 the results of the search is what we intend to introduce 4 at CX 0451. 5 We believe that that -- that the authenticity of 6 that document has been demonstrated through the 7 examination of our witness, Mr. Wilmer, and that it 8 falls within the residual exception to the hearsay rule 9 because it has indicia of reliability. 10 JUDGE CHAPPELL: Well, give me a summary of what 11 the document says. Did he find the Social Security 12 numbers being used by others? Because if he did not, I 13 don't know why you're offering it. 14 MS. VANDRUFF: Thank you, Your Honor. Yes. 15 While he is not offering an opinion because he 16 is a lay witness, Mr. Wilmer, through the course of his 17 investigatory work, the results of that search are -- 18 does support the conclusion that the Social Security 19 numbers on the LabMD documents found by the 20 Sacramento Police Department in October of 2012 are 21 being used, some of them, are being used by people with 22 different names. 23 JUDGE CHAPPELL: All right. 24 MR. SHERMAN: I think there are two problems 25 with this exhibit.</p>	24

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1 One is that the only person who is going to
 2 testify as to the contents of the exhibit is
 3 Mr. Wilmer. Mr. Wilmer testified in his deposition
 4 that the information in the document was populated by
 5 this third party, I'll say Thomson Reuters.
 6 JUDGE CHAPPELL: Hang on a second.
 7 Is this witness going to be called?
 8 MS. VANDRUFF: Your Honor, Mr. Wilmer has sat
 9 for a deposition, and we were intending to produce his
 10 testimony, submit his testimony to Your Honor by
 11 designation. If you would prefer, we can call him
 12 live.
 13 JUDGE CHAPPELL: Well, let's see.
 14 Go ahead.
 15 MR. SHERMAN: The information in the document
 16 was populated by information contained on
 17 Thomson Reuters' commercially available search product
 18 called CLEAR.
 19 Mr. Wilmer testified that what he did was he
 20 formulated a list of all of the Social Security numbers
 21 and then ran them through CLEAR.
 22 Our objection is that, first of all, we think
 23 that it's -- we need to test the information's
 24 reliability. We think it's unreliable. There's no one
 25 from Thomson Reuters or CLEAR to even come in and

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1 explain how the technology works.
 2 JUDGE CHAPPELL: So you're saying hearsay within
 3 hearsay.
 4 MR. SHERMAN: Hearsay upon hearsay, Judge.
 5 And secondly, I don't think that the information
 6 proves anything. It's far more prejudicial than
 7 probative.
 8 JUDGE CHAPPELL: What's your summary of what it
 9 shows, the document?
 10 MR. SHERMAN: The summary of what it shows is
 11 that there are Social Security numbers that are
 12 associated with people who have different names. It
 13 doesn't say when those persons began using those
 14 Social Security numbers. It doesn't even say whether
 15 the Social Security numbers that appear on the LabMD
 16 documents were being used fraudulently.
 17 JUDGE CHAPPELL: Well, I was just going to ask
 18 for that.
 19 Are you prepared to demonstrate that the
 20 Social Security numbers were accurate as they were
 21 listed in the LabMD documents? Maybe someone made an
 22 error when they entered a Social Security number.
 23 MS. VANDRUFF: So just to be fair, Your Honor,
 24 your question is whether complaint counsel has evidence
 25 that Social Security numbers in the documents found by

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1 the Sacramento Police Department were correctly linked
 2 to the names in the documents found by --
 3 JUDGE CHAPPELL: What I'm saying is, if you're
 4 asking me to assume that every name and every
 5 Social Security number associated with that name was
 6 correct, do you have any evidence demonstrating that
 7 they were correct, other than you want me to assume
 8 that?
 9 MS. VANDRUFF: Well, Your Honor, we're not
 10 going to ask you to make a finding that any specific
 11 individual was individually -- that his or her
 12 Social Security number was misused but rather that the
 13 Social Security numbers that were identified in the
 14 LabMD documents found by the Sacramento Police
 15 Department were used by people with different names, and
 16 then we have an expert witness who's prepared to offer
 17 the opinion that that may be an indication of identity
 18 theft, Your Honor.
 19 JUDGE CHAPPELL: May be an indication? That's
 20 pretty weak. May be an indication or is an indication?
 21 MS. VANDRUFF: Well, Your Honor, our expert
 22 witness will testify on exactly that subject.
 23 JUDGE CHAPPELL: That it may be an indication of
 24 possible identity theft? I think I read that in the
 25 summary. I believe that's what I read.

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1 MS. VANDRUFF: I don't have his expert report in
 2 front of me, but I believe it is his opinion that it may
 3 be an indication of identity theft, Your Honor.
 4 JUDGE CHAPPELL: So let me boil this down.
 5 You're saying that your position is, these
 6 Social Security numbers, whether they're accurate or not
 7 as to the person whose name was on that original
 8 document, your position is, those Social Security
 9 numbers may have been used by someone else.
 10 MS. VANDRUFF: Well, we think that Your Honor
 11 can assess --
 12 JUDGE CHAPPELL: Did I miss something there?
 13 MS. VANDRUFF: I'm sorry?
 14 JUDGE CHAPPELL: Did I miss something on what
 15 you're asking me to do bottom line? Assume they're
 16 correct or just say -- well, basically it boils down to
 17 this. These Social Security numbers, whether they're
 18 correct or not, may have been used by others.
 19 MS. VANDRUFF: Well, what we're asking
 20 Your Honor to do is to make a determination that relates
 21 to paragraph 21 of our complaint that indeed the
 22 Social Security numbers that are identified in the LabMD
 23 documents --
 24 JUDGE CHAPPELL: Well, you don't need to keep
 25 referring to paragraph 21. Whether it's relevant or

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1 not, we're past that, so I don't care what paragraph it
 2 relates to. I'm getting to reliability here.
 3 So go ahead.
 4 MS. VANDRUFF: Well, with respect to
 5 reliability, we think that there are indicia of
 6 reliability. Mr. Wilmer, again, used a commercially
 7 available database. He was subject to examination at
 8 length by counsel for respondent. And we think that the
 9 output of his work is something that Your Honor can
 10 evaluate.
 11 For example, you will see that certain
 12 Social Security numbers, they are being used by people
 13 of different names, at different locations, different
 14 genders and different ages, and what weight Your Honor
 15 chooses to give to that is certainly within the province
 16 of the court.
 17 JUDGE CHAPPELL: And these were the numbers, if
 18 memory serves, that were found in a dumpster in
 19 California?
 20 MS. VANDRUFF: No, Your Honor. They were found
 21 in the hands of identity thieves by the
 22 Sacramento Police Department.
 23 MR. SHERMAN: I would just contend that they
 24 weren't found in the hands of identity thieves.
 25 These --

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1 JUDGE CHAPPELL: Am I incorrect? Is there a
 2 dumpster involved here somewhere?
 3 MR. SHERMAN: There's not a dumpster involved.
 4 JUDGE CHAPPELL: Okay.
 5 MR. SHERMAN: There's a house in Sacramento.
 6 JUDGE CHAPPELL: I read that in some pleading.
 7 I guess somebody was embellishing, but go ahead.
 8 MR. SHERMAN: The Sacramento Police Department
 9 got wind of somebody stealing electricity -- gas and
 10 electric.
 11 JUDGE CHAPPELL: Do we have an agreement on how
 12 these documents were found?
 13 MR. SHERMAN: By the Sacramento Police
 14 Department as they did a raid on this house.
 15 JUDGE CHAPPELL: Oh, a raid on a house. Okay.
 16 MR. SHERMAN: For people stealing gas and
 17 electric.
 18 JUDGE CHAPPELL: Okay.
 19 MR. SHERMAN: And they found these documents.
 20 There's evidence that there's communication
 21 between the Sacramento Police Department and the FTC
 22 which says, Well, we'll let you know if these guys had
 23 any connection with the receipt of the LabMD documents,
 24 so there's really no connection between these
 25 individuals who were arrested and pled --

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1 JUDGE CHAPPELL: Someone needs to turn that
 2 phone off.
 3 MS. VANDRUFF: If I knew how to do it,
 4 Your Honor, I'd be happy to do it.
 5 JUDGE CHAPPELL: Someone is calling our
 6 speakerphone? Just rip that cord out of there.
 7 MR. SHERMAN: I thought you were getting ready
 8 to get kicked out of the courtroom.
 9 JUDGE CHAPPELL: That was timed to throw you off
 10 your game.
 11 MR. SHERMAN: There's been no connection between
 12 the individuals who were arrested and pled and these
 13 documents. There's no connection between the fact that
 14 these documents are being used -- the Social Security
 15 numbers on these documents are being used by other
 16 people and the fact that these documents appeared in
 17 Sacramento.
 18 This document that they wish to present doesn't
 19 say when these Social Security numbers were being used
 20 by more than one person. It could have very well
 21 happened five years ago, prior to this document being
 22 found outside of LabMD's possession.
 23 And as I stated before, the person who got
 24 services from LabMD, they could have been using someone
 25 else's Social Security number, so there's really no

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1 connection between the fact that these day sheets were
 2 found in Sacramento and these Social Security numbers
 3 are being used by more than one person.
 4 JUDGE CHAPPELL: So your objection is hearsay,
 5 but it boils down to reliability.
 6 MR. SHERMAN: Absolutely.
 7 JUDGE CHAPPELL: Okay.
 8 So you're asking me to basically accept an
 9 opinion from a lay witness.
 10 MS. VANDRUFF: No, Your Honor. The lay witness
 11 is not offering any opinion. He performed a task at the
 12 direction --
 13 JUDGE CHAPPELL: He's offering an opinion that
 14 these Social Security numbers were used by someone else
 15 based on research you told him to do?
 16 MS. VANDRUFF: No. No, Your Honor. His
 17 conclusion is that the output of his database search is
 18 that there are certain numbers that are being used by
 19 people with different names, and he is drawing that
 20 conclusion from the face of the document. It is not an
 21 opinion, Your Honor.
 22 JUDGE CHAPPELL: Have you read what I wrote
 23 about Mr. Johnson, Eric Johnson?
 24 MS. VANDRUFF: Yes, Your Honor. Your ruling
 25 on --

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1 JUDGE CHAPPELL: You're not dancing around the
 2 edges there, are you?
 3 MS. VANDRUFF: I don't intend to, Your Honor,
 4 no.
 5 JUDGE CHAPPELL: Because I will not accept that
 6 type of opinion from someone who's not designated an
 7 expert because it's not fair.
 8 MS. VANDRUFF: I understand.
 9 JUDGE CHAPPELL: It's not been vetted, hasn't
 10 been through the ringer, so...
 11 All right. I'll consider this. I'll take it
 12 under advisement, and we'll deal with it after the
 13 break.
 14 MS. VANDRUFF: Thank you, Your Honor.
 15 JUDGE CHAPPELL: I'm pretty sure someone
 16 referred to that as a flophouse. Am I correct?
 17 MR. SHERMAN: That's correct, Your Honor.
 18 JUDGE CHAPPELL: And maybe somebody referred to
 19 a dumpster, I don't know, but I do remember flophouse
 20 for sure.
 21 MR. SHERMAN: There's a dumpster in another case
 22 that's been cited repeatedly, the Revco case.
 23 JUDGE CHAPPELL: All right. I knew there was
 24 something about a dumpster.
 25 So just so I'm clear, police carried out a

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1 warrant-based search, a legal search? Any dispute
 2 there?
 3 MS. VANDRUFF: There's no dispute about that,
 4 Your Honor.
 5 JUDGE CHAPPELL: They find in there the people
 6 they're targeting, maybe serving an arrest warrant as
 7 well; correct?
 8 MR. SHERMAN: No, they were not. It was a
 9 probation search. I think Mr. --
 10 JUDGE CHAPPELL: Someone is on probation, a very
 11 relaxed standard. Okay. But anyway, while there, they
 12 found --
 13 MR. SHERMAN: He's a known drug addict,
 14 Your Honor.
 15 JUDGE CHAPPELL: -- they found some documents
 16 and some of them were what we call day sheets.
 17 MS. VANDRUFF: That's right, Your Honor. The
 18 documents had the LabMD insignia on them.
 19 JUDGE CHAPPELL: All right.
 20 So getting back to where we are when we take a
 21 break, that's the objection to the specific document.
 22 Then you're aware of what you need to do to talk about
 23 any other documents that were not on Exhibit A, for
 24 example, whether she's going to have a sponsoring
 25 witness, et cetera.

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1 MS. VANDRUFF: Complaint counsel understands,
 2 Your Honor.
 3 MR. SHERMAN: I now understand, Your Honor.
 4 JUDGE CHAPPELL: Okay.
 5 MR. SHERMAN: I think that, however, there are a
 6 number of objections on -- that complaint counsel has --
 7 and we can discuss these off the record if that's more
 8 appropriate, too -- to our exhibits, which a lot of
 9 which will be resolved by bringing in witnesses live,
 10 bringing in the witnesses that we intend to bring in
 11 live.
 12 JUDGE CHAPPELL: So we're still talking about
 13 your objection to their exhibits.
 14 MR. SHERMAN: Her objections to my exhibits.
 15 JUDGE CHAPPELL: I was going to get to that. I
 16 forgot to mention that.
 17 What about your objection to their exhibits?
 18 MS. VANDRUFF: Thank you, Your Honor.
 19 JUDGE CHAPPELL: That weren't on Exhibit A.
 20 MS. VANDRUFF: Certainly.
 21 And what I can tell Your Honor is that we have
 22 been prepared to meet and confer with respondent with
 23 respect to our objections to respondent's exhibits for
 24 some time, but this has been a discussion that, as
 25 Mr. Sherman described for you, he thought was

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1 inappropriate prior to the presentation of proof, so we
 2 have not had an opportunity to --
 3 JUDGE CHAPPELL: Well, this is his first trip to
 4 this rodeo, so I'm not holding that against him.
 5 MS. VANDRUFF: I understand.
 6 JUDGE CHAPPELL: So let's forget about the
 7 attempt to meet and confer. Let's move on.
 8 MS. VANDRUFF: Okay. What would you like to
 9 hear from us, Your Honor?
 10 JUDGE CHAPPELL: Are you prepared to put your
 11 documents in categories so you can talk about what's
 12 remaining after the break?
 13 MS. VANDRUFF: Absolutely, Your Honor.
 14 JUDGE CHAPPELL: Okay. And eventually those
 15 documents that are agreed to that are not now on
 16 Exhibit A you'll need to put into another exhibit.
 17 We'll have yet another joint exhibit, perhaps
 18 Joint Exhibit 2, that will contain the documents you're
 19 going to agree to today. Okay?
 20 Anything else on the objected-to exhibits?
 21 MR. SHERMAN: No, Your Honor. Thank you.
 22 MS. VANDRUFF: No, Your Honor. Thank you.
 23 JUDGE CHAPPELL: Let me talk about deposition
 24 designations.
 25 Let me make sure I'm correct on this. We have

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1 Exhibit A is going to be JX 1, and a new list of
2 documents that I expect you to agree to will be JX 2.

3 And by the end of the day, I think you may need
4 to resubmit your joint stipulation with the changes I'm
5 telling you I'm not -- the items I'm not accepting in
6 your paragraph 2 of that stipulation.

7 MS. VANDRUFF: May I be heard, Your Honor?

8 With respect to the stipulation, you're talking
9 about the stipulation --

10 JUDGE CHAPPELL: For Exhibit A.

11 MS. VANDRUFF: -- on the admissibility of
12 exhibits; is that correct?

13 JUDGE CHAPPELL: Right.

14 MS. VANDRUFF: Thank you.

15 JUDGE CHAPPELL: I think you asked your question
16 because you had submitted another -- previously a
17 stipulation on facts; correct?

18 MS. VANDRUFF: That's correct, Your Honor. The
19 parties yesterday submitted a joint stipulation of law,
20 facts and authenticity.

21 JUDGE CHAPPELL: That can be JX 1.

22 MS. VANDRUFF: Yes, Your Honor. That is how it
23 is marked.

24 JUDGE CHAPPELL: And then what we can do with
25 the exhibits, since I'm going to probably have you

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1 withdraw your other stipulation since I'm not agreeing
2 to the terms, then what we might do is have a JX 2 that
3 includes Exhibit A plus what's agreed to today. Okay?

4 MS. VANDRUFF: Yes, Your Honor. Thank you.

5 JUDGE CHAPPELL: And at this time I'm going to
6 admit JX 1 into the record, so that's done with.

7 (Joint Exhibit Number 1 was admitted into
8 evidence.)

9 JUDGE CHAPPELL: Deposition designations.

10 Based on what's been filed with OALJ, I can't
11 tell if complaint counsel did or did not designate only
12 specific lines of testimony it seeks to introduce. In
13 the final proposed exhibit list, complaint counsel
14 listed various deposition transcripts as proposed
15 exhibits.

16 Respondent submitted under a counter-designation
17 list -- or they submitted a counter-designation list
18 which lists the entire deposition.

19 Are there other submissions relating to
20 deposition designations that I'm not aware of?

21 MS. VANDRUFF: May I be heard, Your Honor?

22 So with respect to the deposition designations,
23 the parties, in an effort to maximize efficiency, we
24 have come to an agreement to submit to the court, with
25 Your Honor's permission, marked-up transcripts that

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1 delineate complaint counsel's designations, respondent's
2 designations, and where there's overlap a separate color
3 for that. We think that that would be most efficient
4 for Your Honor to review the evidence that's been
5 designated.

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

7 JUDGE CHAPPELL: And as a matter of fact,
8 although the rules talk about deposition designations,
9 and therefore I've got that in my scheduling order,
10 additional provisions I believe, the rules also now
11 clearly allow deposition transcripts to be admitted, so
12 I would prefer, submit the entire deposition transcript,
13 and then you're in effect designating what you want to
14 use in your posttrial briefs.

15 At that time, when you respond to that brief,
16 make any objection you want to make, and I'll deal with
17 it accordingly. Because I'm not going to hear
18 objections to depositions or deposition designations
19 today because I find a lot of those get lost and by the
20 time we're at the end of the trial very few of them come
21 up again.

22 So just so everybody is clear, submit the
23 entire deposition transcript for any witness whose
24 testimony you want to submit by deposition, meaning
25 those that have been designated. When we get to

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1 posttrial briefing, if you want to cite to a depo, then
2 you designate what you're referring to in your proposed
3 finding. And then the other side, if they wish to
4 object to that, they can do that in their reply to the
5 proposed finding.

6 MS. VANDRUFF: May I ask a question,
7 Your Honor?

8 JUDGE CHAPPELL: Yes.

9 MS. VANDRUFF: With respect to the designations
10 the parties have already exchanged, am I correct in
11 understanding that you do not wish to see those
12 designations; is that correct?

13 JUDGE CHAPPELL: I would prefer to see, if it's
14 John Brown's designation, just submit the whole
15 deposition.

16 MS. VANDRUFF: The entire transcript.

17 JUDGE CHAPPELL: Right.

18 MS. VANDRUFF: Unmarked, unannotated.

19 JUDGE CHAPPELL: What I'm saying is, I've got
20 your designations I've seen filed, but what's important
21 to me is what you want to urge at the end of the case in
22 your posttrial brief, in your proposed findings.

23 So what I'm saying is, you're not disallowed
24 from using any designation you want. I'm not going to
25 make that ruling today.

41	<p>1 So hopefully this is clear. If you want to use 2 any deposition testimony in this case in your posttrial 3 briefing to support any point or cause, submit the 4 entire transcript. How's that?</p> <p>5 MS. VANDRUFF: Thank you, Your Honor. 6 MR. SHERMAN: That's good, Your Honor. 7 And just for clarity, complaint counsel served 8 us late last night with specific objections to our 9 deposition designations, and I -- in my mind, what you 10 just said, your ruling here makes those moot.</p> <p>11 JUDGE CHAPPELL: Yes. I have found over time 12 that the way I just described it some moments ago is the 13 best way to deal with this, because I could sit here and 14 rule on these objections for days, but a lot of them are 15 going away anyway by the time this is done. When we get 16 to that final briefing, you're looking at the trial 17 transcript, and a lot of it goes away. That's why it's 18 more efficient just to wait and deal with it in a 19 posttrial brief.</p> <p>20 And nobody is harmed there, nobody is 21 prejudiced, because everybody knows what we're doing. 22 It's out in the open.</p> <p>23 Any objection to me doing it that way? 24 MR. SHERMAN: Absolutely not. 25 MS. VANDRUFF: No, Your Honor. Thank you.</p>	43	<p>1 going to proceed in here with in camera information if 2 you haven't been here before.</p> <p>3 You're instructed to be aware of the documents 4 and any information derived from those documents that 5 have been granted in camera treatment. If you wish to 6 question a witness about that document or that 7 information, you need to ask me, you need to request to 8 move into an in camera session. At that point I will 9 clear the courtroom of persons who are not authorized to 10 be in here.</p> <p>11 And in keeping with the least amount of 12 disruption possible, you shall segregate your 13 questioning, your examining of witnesses, so that any 14 section on in camera materials is grouped together so 15 that I'm not clearing the courtroom and bringing people 16 back in more than necessary.</p> <p>17 I have found that the best way to do this, 18 whoever calls the witness reserves in camera issues 19 until the end of their examination, and then the person 20 conducting cross-exam conducts their in camera portion 21 of questioning at the beginning of their examination. 22 In addition, counsel shall instruct witnesses to 23 ensure they do not disclose in camera testimony in open 24 session. We really don't want anything bleated out by a 25 witness who may or may not know what's in camera.</p>
42	<p>1 JUDGE CHAPPELL: Let's talk about in camera 2 issues.</p> <p>3 I don't know if you noticed when you walked in, 4 we've got a sign out there. And when the parties 5 request it, we'll go into in camera session, and then 6 I'll remove everyone from the courtroom who's not 7 subject to the protective order. And we have a sign we 8 will turn to keep people from wandering in.</p> <p>9 And our bailiff Ironsides, he is the enforcer. 10 Ironsides will make sure no one comes in who's not 11 supposed to be here during an in camera session.</p> <p>12 I saw three joint motions for in camera 13 treatment. By orders dated May 6, 2014, permanent 14 in camera treatment was granted to exhibits 15 containing sensitive personal information and also 16 in camera treatment for a period of six years to the 17 fraud survey questions of Mr. Van Dyke and 18 Javelin Strategy & Research.</p> <p>19 On May 14, I saw an additional motion for 20 in camera treatment seeking permanent in camera 21 treatment for one exhibit containing sensitive personal 22 information. I'm going to grant that motion, and an 23 order will issue shortly regarding that.</p> <p>24 MS. VANDRUFF: Thank you, Your Honor. 25 JUDGE CHAPPELL: Let's talk about how we're</p>	44	<p>1 Any questions on how we're going to handle 2 in camera info?</p> <p>3 MS. VANDRUFF: No, Your Honor. 4 MR. SHERMAN: No, Your Honor. 5 JUDGE CHAPPELL: Ironsides, can you come up when 6 you get a minute.</p> <p>7 I have a pending motion filed by respondent on 8 May 2, 2014 seeking to limit the relevant time period 9 concerning adequacy of respondent's data security 10 practices.</p> <p>11 Now, it may appear that I'm reading to you, but 12 I'm going to make a bench ruling, so I am going to be 13 reading from my script here.</p> <p>14 So the motion involves adequacy of respondent's 15 data security practices to the time period analyzed by 16 Dr. Raquel Hill, complaint counsel's proffered expert, 17 which is January 2005 to July of 2010.</p> <p>18 Respondent is questioning what is the relevant 19 time period and seeks not only to limit Dr. Hill's 20 testimony to this time period, 2005 to 2010, but also to 21 exclude any other witness from the FTC from providing 22 evidence concerning adequacy of LabMD's security 23 practices after July 2010.</p> <p>24 Complaint counsel filed an opposition on May 13, 25 2014 and acknowledged Dr. Hill's report and her opinions</p>

45	<p>1 are limited to the time period January 2005 through 2 July 2010, and complaint counsel agrees it will not 3 elicit testimony from Dr. Hill outside of that time 4 frame.</p> <p>5 However, complaint counsel argues, simply 6 because Dr. Hill's opinion is limited does not mean 7 complaint counsel is precluded from presenting other 8 evidence concerning the adequacy of respondent's data 9 after July 2010.</p> <p>10 Complaint counsel also argues that evidence of 11 the data security practices after July 2010 and through 12 the end of discovery remains relevant to the 13 allegations in the complaint and the proposed 14 injunctive remedy.</p> <p>15 Complaint counsel also notes that the motion is 16 untimely because respondent failed to file by 17 April 22, 2014, the deadline for motions in limine 18 covered by the scheduling order.</p> <p>19 I've reviewed the parties' filings and fully 20 considered the issue. This is my ruling.</p> <p>21 Respondent's motion is untimely under the 22 scheduling order, and there appears to be no 23 justification for the failure to file it before the 24 deadline, given that the expert report was served on or 25 about March 18, 2014. However, that's not why I'm going</p>	47	<p>1 16 days each.</p> <p>2 As I instructed the parties at the initial 3 conference, the parties are charged with keeping track 4 of the time allotted.</p> <p>5 Have you developed a system?</p> <p>6 MR. SHERMAN: I have not, Your Honor. But we 7 will do so prior to the beginning of the hearing.</p> <p>8 MS. VANDRUFF: Correct, Your Honor. We will 9 work with respondent's counsel to do that.</p> <p>10 JUDGE CHAPPELL: And it's not required if you 11 are absolutely sure we will come under the wire and not 12 need the full amount of time, which I would encourage if 13 possible.</p> <p>14 Let's talk about trial dates.</p> <p>15 Because we all have numerous other matters to 16 attend to, we generally will be in court four days a 17 week. Normally that's going to be a Monday or Friday 18 out of court to better accommodate those from out of 19 town.</p> <p>20 I have the following dates that I'm blocking as 21 of today:</p> <p>22 May 26, which is a holiday. 23 June 2. 24 June 9. 25 June 16.</p>
46	<p>1 to overrule your motion or deny your motion.</p> <p>2 Respondent has failed to demonstrate that 3 evidence of respondent's data security practices during 4 the time period after July 2010 and through the end of 5 discovery is not relevant and clearly inadmissible for 6 all purposes, which is our motion in limine standard. 7 At a minimum, this later time period is relevant to the 8 proposed relief in this case.</p> <p>9 Accordingly, respondent's motion to limit 10 evidence to the time frame of complaint counsel's expert 11 report is denied.</p> <p>12 However, Dr. Hill's testimony is limited to the 13 opinions expressed in her report and thus to the time 14 period January 2005 through July 2010.</p> <p>15 Any questions?</p> <p>16 MR. SHERMAN: None whatsoever, Your Honor.</p> <p>17 MS. VANDRUFF: No, Your Honor. Thank you.</p> <p>18 JUDGE CHAPPELL: Let's talk about trial timing.</p> <p>19 Pursuant to rule 3.41(b), this hearing is 20 limited to no more than 210 hours. Assuming 21 six-and-a-half-hour days, which generally we have after 22 our breaks are taken out, this equates to about 32 total 23 days of trial.</p> <p>24 Under that same rule, 3.41(b)(4), each side is 25 allotted no more than half of the time. That's about</p>	48	<p>1 June 23.</p> <p>2 Those are all Mondays. If we are still in trial 3 beyond those dates, we will revisit scheduling. And I 4 can tell you, if we're still here in July, which I hope 5 we're not, we also will not be here July 14.</p> <p>6 Do the parties have any particular dates you 7 need to line out that you're aware of today?</p> <p>8 Let's start with respondent.</p> <p>9 MR. SHERMAN: I am not aware of them today. Is 10 it possible, however, Your Honor, that we could be given 11 an opportunity to check on dates and submit that to the 12 court -- I don't know how many --</p> <p>13 JUDGE CHAPPELL: How long do you need? 14 I mean, is this today or is this --</p> <p>15 MR. SHERMAN: Oh, absolutely, I can do it by the 16 end of the day. But --</p> <p>17 JUDGE CHAPPELL: I generally am not going to put 18 this in a written motion.</p> <p>19 MR. SHERMAN: I want to stay married.</p> <p>20 JUDGE CHAPPELL: That's a worthy goal, so... 21 Are you aware of any dates you think you need 22 off?</p> <p>23 MS. VANDRUFF: Given the schedule that 24 Your Honor just described, then no, Your Honor, we don't 25 anticipate there being any issues on our side.</p>

49	<p>1 JUDGE CHAPPELL: Generally there's at least one 2 wedding between everybody involved, but hopefully not 3 this time. 4 This is what we'll do. You are aware of the 5 e-mail address OALJ? 6 MR. SHERMAN: I am. 7 JUDGE CHAPPELL: By the end of the day, if you 8 think you need a day off, tell me why and tell me what 9 day it is. Otherwise, I'll assume we have nothing 10 further to deal with there. Okay? 11 MR. SHERMAN: And I will copy complaint counsel 12 on anything submitted to the court in -- 13 JUDGE CHAPPELL: Yes. Anything to OALJ needs to 14 go to everyone. 15 Opening statements. 16 Each side is permitted to make an opening 17 statement that's no more than two hours in duration. 18 I'd like to hear from the parties as to how much 19 time you think you will need for your opening. 20 MS. VANDRUFF: Your Honor, for complaint counsel 21 we think 90 minutes or thereabouts. 22 JUDGE CHAPPELL: Okay. 23 MR. SHERMAN: Half that time probably. 24 JUDGE CHAPPELL: Excellent. 25 MR. SHERMAN: Maybe an hour.</p>	51	
50	<p>1 MR. SHERMAN: I think we will know rather 2 quickly whether or not we can agree or agree to 3 disagree. 4 JUDGE CHAPPELL: All right. Then when we come 5 back, I will get an update, and then if there are still 6 objections, I'll hear them at that time. 7 And also I'm going to resolve the objection over 8 the exhibit about Social Security numbers. 9 Anything further before we recess? 10 MR. SHERMAN: Nothing, further, Your Honor. 11 MS. VANDRUFF: Nothing further, Your Honor. 12 Thank you. 13 JUDGE CHAPPELL: Okay. 14 Okay. We will reconvene at 1:00 p.m. 15 We're in recess. 16 (Recess) 17 JUDGE CHAPPELL: Back on the record. 18 I'm going to set aside for now the issue of 19 CX 451. 20 Let's get back to the exhibits and objections 21 thereto for those documents that were not previously 22 agreed to. 23 Have the parties been able to work out some 24 agreement or arrangement? 25 MR. SHERMAN: Your Honor, we have.</p>	52	
50	<p>1 JUDGE CHAPPELL: Okay. 2 At this time I'm going to give the parties 3 time -- you'll be given time to work together on 4 narrowing the objections regarding the exhibits as we 5 discussed some moments ago. 6 And be advised, I'm not looking for a final 7 joint exhibit today. Hopefully the meetings will be 8 fruitful. And I will need that final joint exhibit 9 let's say 10:00 when we reconvene on Tuesday, and then I 10 can accept an offer of it at that time. 11 And you're probably aware that when you offer a 12 joint exhibit there needs to be no signature line for 13 the judge. If I accept it, it will be admitted; if I 14 don't, you'll know why and you'll need to resubmit it. 15 How much time do you think you need to talk 16 about exhibits? 17 MS. VANDRUFF: I would hope, Your Honor, that we 18 could resolve this relatively quickly, but I'm looking 19 to Mr. Sherman. 20 MR. SHERMAN: Your Honor, we've usually been 21 able to work pretty cooperatively together. Half an 22 hour would -- 23 JUDGE CHAPPELL: I don't want to rush -- what if 24 I say we'll reconvene at 1:00? 25 MS. VANDRUFF: That would be fine by us.</p>	<p>1 This previously was the list of 2 exhibits (indicating). It was several pages that they 3 were objecting to, and I'm proud to say we're down to 4 four. 5 JUDGE CHAPPELL: Four pages or four exhibits? 6 MR. SHERMAN: Four exhibits. 7 JUDGE CHAPPELL: That's better. 8 All right. And what about -- 9 MS. VANDRUFF: And Your Honor, I think that what 10 Mr. Sherman is representing is that of all of the 11 parties' exhibits that there are four outstanding 12 objections as well as the objection that you heard 13 argument on this morning with respect to CX 451. 14 JUDGE CHAPPELL: And are those documents that 15 are in one category or are they -- 16 MS. VANDRUFF: There are two categories, 17 Your Honor. These are respondent's exhibits to which 18 complaint counsel objects, and the categories are 19 twofold. One, affidavits that were submitted by 20 witnesses who either will testify live or have been 21 deposed, and one of those affidavits contains an 22 opinion. 23 And the second is the requests for admission, 24 that you granted a motion for complaint counsel to amend 25 that document, respondent would like to keep the prior</p>	52

53	<p>1 responses as an exhibit.</p> <p>2 So those are the two categories.</p> <p>3 JUDGE CHAPPELL: Okay. So all of these are</p> <p>4 documents being offered by respondent?</p> <p>5 MR. SHERMAN: That's correct, Your Honor.</p> <p>6 JUDGE CHAPPELL: So let me hear your offer and</p> <p>7 your legal basis.</p> <p>8 MR. SHERMAN: Your Honor, we have three</p> <p>9 affidavits. All of them are from prior employees of</p> <p>10 LabMD with regard to LabMD's data security practices,</p> <p>11 policies and procedures that were in place during the</p> <p>12 relevant time period.</p> <p>13 These affidavits were submitted to complaint</p> <p>14 counsel I think during part of their investigation, and</p> <p>15 they were submitted in May of 2011.</p> <p>16 JUDGE CHAPPELL: Are any of these witnesses</p> <p>17 going to testify?</p> <p>18 MR. SHERMAN: We are hopeful that John Boyle,</p> <p>19 who is in Denver, will be able to come out and testify.</p> <p>20 We're hopeful that Allen Truett, who is in</p> <p>21 Atlanta, will be able to come out and testify.</p> <p>22 Chris Maire will not be asked to come live.</p> <p>23 Complaint counsel has --</p> <p>24 JUDGE CHAPPELL: How many affidavits are there?</p> <p>25 MR. SHERMAN: Excuse me?</p>	55	
54	<p>1 JUDGE CHAPPELL: What's the total affidavits?</p> <p>2 MR. SHERMAN: Three.</p> <p>3 JUDGE CHAPPELL: Three?</p> <p>4 MR. SHERMAN: Three affidavits.</p> <p>5 And they basically go through what these</p> <p>6 individuals knew and had personal knowledge of with</p> <p>7 regard to LabMD's policies, practices, procedures,</p> <p>8 hardware, software, configurations, and things of that</p> <p>9 nature.</p> <p>10 Complaint counsel has had the opportunity to</p> <p>11 cross-examine these witnesses after the receipt of these</p> <p>12 affidavits, and we believe that should -- these</p> <p>13 affidavits are not -- they're not a surprise, the</p> <p>14 information in them is not a surprise, and that they</p> <p>15 should be in fact admitted into evidence.</p> <p>16 JUDGE CHAPPELL: All right. Response?</p> <p>17 MS. VANDRUFF: Thank you, Your Honor.</p> <p>18 So the three affidavits, it is true that we've</p> <p>19 had them for some time, and it is also true that the</p> <p>20 witnesses have been deposed.</p> <p>21 JUDGE CHAPPELL: What's your objection?</p> <p>22 MS. VANDRUFF: Our objection is that they are</p> <p>23 rank hearsay, Your Honor. They are being offered for</p> <p>24 the truth of the matter asserted.</p> <p>25 The testimony -- or I should say the matters</p>	<p>1 that are addressed in the affidavits, to the extent</p> <p>2 that respondent wishes to introduce that evidence to</p> <p>3 this court, it should do so through the testimony of</p> <p>4 those witnesses, not through these out-of-court</p> <p>5 statements.</p> <p>6 JUDGE CHAPPELL: Are you going to continue your</p> <p>7 objection if the witness takes the stand?</p> <p>8 MS. VANDRUFF: To the admission of the</p> <p>9 declaration or to the facts that are in the</p> <p>10 declaration --</p> <p>11 JUDGE CHAPPELL: To the exhibit. If the witness</p> <p>12 takes the stand, are you still going to maintain your</p> <p>13 objection?</p> <p>14 MS. VANDRUFF: It would be complaint counsel's</p> <p>15 position, Your Honor, that the testimony should be</p> <p>16 elicited if the witness is present in the courtroom as</p> <p>17 opposed to the document received as the witness'</p> <p>18 testimony.</p> <p>19 JUDGE CHAPPELL: And I'll ask you, Mr. Sherman,</p> <p>20 why do you need the affidavit if the witness testifies?</p> <p>21 MR. SHERMAN: Your Honor, I may not need the</p> <p>22 affidavit if the witness testifies, but as I said</p> <p>23 before, these witnesses are -- one is in Denver. One is</p> <p>24 in Atlanta. We're in contact with them. Final</p> <p>25 arrangements have not been made for their travel. It is</p>	56

<p style="text-align: right;">57</p> <p>1 appearing.</p> <p>2 MR. SHERMAN: That's correct. Chris Maire.</p> <p>3 JUDGE CHAPPELL: So address that one.</p> <p>4 MS. VANDRUFF: With respect to Mr. Maire,</p> <p>5 Your Honor, he was deposed, and so to the extent that</p> <p>6 his testimony should be admissible, it should be the</p> <p>7 testimony that he offered at deposition that was subject</p> <p>8 to cross-examination as opposed to the out-of-court</p> <p>9 statement that respondent would like to offer for the</p> <p>10 truth of the matter.</p> <p>11 JUDGE CHAPPELL: Was the information in the</p> <p>12 affidavit not covered in the deposition?</p> <p>13 MR. SHERMAN: I don't think it was covered as</p> <p>14 cogently and succinctly as it is in the affidavit,</p> <p>15 Your Honor.</p> <p>16 JUDGE CHAPPELL: What came first, the depo or</p> <p>17 the affidavit?</p> <p>18 MR. SHERMAN: The affidavit. The affidavit came</p> <p>19 first.</p> <p>20 And I mean, if I could, you know, assist the</p> <p>21 court with section 3.43, which indicates that you may</p> <p>22 make a finding upon the motion of a party to have these</p> <p>23 exhibits admitted such that the prior testimony not be</p> <p>24 duplicative, would not present unnecessary hardship to</p> <p>25 any party or delay to the proceedings and would aid the</p>	<p style="text-align: right;">59</p> <p>1 If I may, there's one additional issue that we</p> <p>2 have that I have not had the opportunity to raise with</p> <p>3 Your Honor, which is, with respect to one of the</p> <p>4 declarations or affidavits that is of Mr. Truett, whom</p> <p>5 Mr. Sherman has described as a former contractor for</p> <p>6 LabMD, I think arguably one of the paragraphs of his</p> <p>7 affidavit also provides an opinion, and so it should not</p> <p>8 be admitted on that separate ground because he has not</p> <p>9 been designated as an expert witness.</p> <p>10 JUDGE CHAPPELL: Tell me specifically what that</p> <p>11 opinion is.</p> <p>12 MS. VANDRUFF: Certainly.</p> <p>13 Paragraph 9 of his affidavit concludes that the</p> <p>14 security measures taken by LabMD were consistent with</p> <p>15 those used by other customers of a similar size and</p> <p>16 security needs profile.</p> <p>17 JUDGE CHAPPELL: So it sounds like you've got</p> <p>18 yourself an opinion there. What do you have to say?</p> <p>19 MR. SHERMAN: Well, I would just say that all</p> <p>20 lay opinion is not necessarily inadmissible.</p> <p>21 He is in fact basing that on his experience as</p> <p>22 a -- one who provides data security for any of a variety</p> <p>23 of companies. And his testimony, as he was</p> <p>24 cross-examined or examined in his deposition, he was</p> <p>25 asked about how many medical-type companies he provided</p>
<p style="text-align: right;">58</p> <p>1 determination of the matter. Statements or testimony by</p> <p>2 a party opponent if relevant shall be admitted.</p> <p>3 I submit that these are --</p> <p>4 JUDGE CHAPPELL: But that's actually used by the</p> <p>5 government against respondent. We're talking about an</p> <p>6 affidavit by your own client. The party opponent rule</p> <p>7 doesn't apply to your own people.</p> <p>8 MR. SHERMAN: Very well. But I would submit</p> <p>9 that these statements are relevant. They do not present</p> <p>10 any hardship.</p> <p>11 JUDGE CHAPPELL: Well, we're past relevance. We</p> <p>12 need reliability.</p> <p>13 MR. SHERMAN: And I believe that they are</p> <p>14 reliable. They are sworn statements.</p> <p>15 These statements have been used in other</p> <p>16 litigation to support motions. In fact, the -- is it</p> <p>17 Northern District of Atlanta -- of Georgia -- I'm</p> <p>18 sorry -- these affidavits were also used, so --</p> <p>19 JUDGE CHAPPELL: Let me ask this.</p> <p>20 Do you think -- are there details in these</p> <p>21 affidavits you don't like, or is this a matter of</p> <p>22 principle objection because they're hearsay? I'm trying</p> <p>23 to find some common ground here.</p> <p>24 MS. VANDRUFF: No, no, I understand. Certainly</p> <p>25 this is a principle objection.</p>	<p style="text-align: right;">60</p> <p>1 this service to, and he basically said, you know, it was</p> <p>2 a high percentage of his business, maybe 60 or</p> <p>3 70 percent of his customers.</p> <p>4 JUDGE CHAPPELL: Isn't that the same thing you</p> <p>5 were objecting to with Mr. Johnson?</p> <p>6 MR. SHERMAN: I don't think so, Your Honor,</p> <p>7 because what they are asking Mr. Johnson to do is to</p> <p>8 give an opinion which is very consistent with what</p> <p>9 their experts have given an opinion as to, which is the</p> <p>10 likelihood of harm or the type of harm that was likely</p> <p>11 to occur, which goes directly to the proof in their</p> <p>12 case.</p> <p>13 JUDGE CHAPPELL: Let me ask this.</p> <p>14 What if you take a black marker to it and you</p> <p>15 excise certain portions of the affidavit? Is there any</p> <p>16 chance of an agreement if certain things are redacted,</p> <p>17 including what I consider to be a lay opinion right</p> <p>18 now?</p> <p>19 MS. VANDRUFF: Thank you, Your Honor, for that.</p> <p>20 It would remain complaint counsel's position</p> <p>21 that the affidavits should not be admitted because they</p> <p>22 constitute rank hearsay. But to the extent that they</p> <p>23 are admitted, we certainly would take the position that</p> <p>24 the lay opinions as we've held should not be admitted on</p> <p>25 that separate ground.</p>

61	<p>1 MR. SHERMAN: In terms of I think it's</p> <p>2 paragraph 9, we wouldn't object to it being redacted</p> <p>3 from the affidavit.</p> <p>4 JUDGE CHAPPELL: And you still would renew your</p> <p>5 objection without paragraph 9.</p> <p>6 MS. VANDRUFF: We would, Your Honor.</p> <p>7 JUDGE CHAPPELL: Okay. Anything else on the</p> <p>8 affidavits?</p> <p>9 MR. SHERMAN: No, Your Honor.</p> <p>10 JUDGE CHAPPELL: All right. Then what's left?</p> <p>11 MS. VANDRUFF: Your Honor, there's one other</p> <p>12 document that's left, and that is respondent's</p> <p>13 initial -- excuse me -- complaint counsel's initial</p> <p>14 responses to requests for admission.</p> <p>15 JUDGE CHAPPELL: And it's whose document?</p> <p>16 MS. VANDRUFF: Sorry. Respondent wishes to --</p> <p>17 JUDGE CHAPPELL: They're offering it?</p> <p>18 MS. VANDRUFF: Yes, Your Honor.</p> <p>19 JUDGE CHAPPELL: Go ahead.</p> <p>20 MR. SHERMAN: Your Honor, it's the initial</p> <p>21 responses to requests for admissions. And we believe</p> <p>22 that what it reflects is the cavalier attitude that the</p> <p>23 government has had about this case all along, that,</p> <p>24 you know, they don't have to answer requests for</p> <p>25 admissions, they don't have to give us a 3.33 witness,</p>	63	<p>1 discovery responses against you, do you think it's fair</p> <p>2 to hold against your client what you as an attorney may</p> <p>3 have done?</p> <p>4 MR. SHERMAN: I do not, Judge.</p> <p>5 JUDGE CHAPPELL: Then how is this different?</p> <p>6 MR. SHERMAN: Well --</p> <p>7 JUDGE CHAPPELL: Because they're attorneys</p> <p>8 representing the FTC.</p> <p>9 MR. SHERMAN: Well, that's right. But I think</p> <p>10 it's different because I believe that the government</p> <p>11 should be held to a higher standard.</p> <p>12 And when you're representing the United States</p> <p>13 government, you have more power than any other litigant</p> <p>14 in our judicial system, and that power should be wielded</p> <p>15 I think with a lot of discretion, and it should not be</p> <p>16 cavalierly thrown about to make the lives and the work</p> <p>17 of the attorneys and the other litigants on the other</p> <p>18 side more difficult than they have to be.</p> <p>19 I think we've had to file motions that in</p> <p>20 any -- in an Article III court would have been -- I</p> <p>21 think sanctions may have been levied. But I think that</p> <p>22 this document reflects that attitude, and I believe</p> <p>23 that it should be admissible and it should be admitted.</p> <p>24 JUDGE CHAPPELL: Are there other discovery</p> <p>25 response documents that are agreed to as exhibits?</p>
62	<p>1 and if they do, they don't have to identify him. They</p> <p>2 don't have to give us standards.</p> <p>3 When the FTC represents the United States</p> <p>4 government, Your Honor, and in terms of the initial</p> <p>5 responses, they pretty much just refused to admit</p> <p>6 anything, even facts that were clear on their face that</p> <p>7 they should have admitted -- now, they later go back and</p> <p>8 even in their -- even in their amended admissions, they</p> <p>9 couch them in long objections and at the very end they</p> <p>10 finally admit to the proposed admission.</p> <p>11 And so I think it's relevant when the FTC</p> <p>12 representing the government puts their witness on the</p> <p>13 stand that they be asked to explain why, you know, this</p> <p>14 was the manner in which they chose not only to</p> <p>15 investigate this particular incident but how they chose</p> <p>16 to give information as it relates to discovery, how they</p> <p>17 fought us tooth and nail for everything we've basically</p> <p>18 asked for. And this is just an example of it,</p> <p>19 Your Honor.</p> <p>20 And I think that it's an exhibit that can be</p> <p>21 used to impeach Mr. Kaufman should he get on the stand</p> <p>22 and say something that's inconsistent with it.</p> <p>23 JUDGE CHAPPELL: Let me ask you this.</p> <p>24 If the shoe were on the other foot, if you had</p> <p>25 answered discovery and the government wanted to use your</p>	64	<p>1 MS. VANDRUFF: Yes, Your Honor, there are.</p> <p>2 JUDGE CHAPPELL: Is it everything but this one?</p> <p>3 MR. SHERMAN: Yes, Your Honor.</p> <p>4 JUDGE CHAPPELL: All right. That's his offer.</p> <p>5 What's your objection?</p> <p>6 MS. VANDRUFF: Our objection, Your Honor, is</p> <p>7 that when the concerns of respondent were brought to the</p> <p>8 attention of complaint counsel that we immediately moved</p> <p>9 to amend our --</p> <p>10 JUDGE CHAPPELL: Well, let's talk about how the</p> <p>11 requests for admission response, the previous one, is to</p> <p>12 be treated differently than any other, the one that came</p> <p>13 before it, the one that came after it, why is it</p> <p>14 different than the later -- I think you've said you</p> <p>15 amended it -- why would that be treated differently, if</p> <p>16 you agreed to other discovery documents being in</p> <p>17 evidence as exhibits.</p> <p>18 MS. VANDRUFF: Okay. I think I understand your</p> <p>19 question, Your Honor, and please correct me if I'm</p> <p>20 addressing the wrong issue.</p> <p>21 But with respect to other discovery responses</p> <p>22 that are on respondent's exhibit list to which we have</p> <p>23 no objection, it's because they have not been superseded</p> <p>24 by subsequent responses by complaint counsel.</p> <p>25 Here, we sought the leave of Your Honor to amend</p>

65	<p>1 our discovery responses, and that was granted, and so to</p> <p>2 the extent that the prior responses are probative of</p> <p>3 anything, it's not probative of any claim, defense or</p> <p>4 relief.</p> <p>5 Indeed, the purposes for which Mr. Sherman just</p> <p>6 described using them I don't think are proper before</p> <p>7 Your Honor with respect to why or how decisions were</p> <p>8 made by complaint counsel either in the investigation or</p> <p>9 discovery in this matter.</p> <p>10 JUDGE CHAPPELL: So your legal basis for your</p> <p>11 objection is the document is not probative.</p> <p>12 MS. VANDRUFF: Yes, Your Honor. We don't think</p> <p>13 it's probative of any claim, defense or relief in this</p> <p>14 answer.</p> <p>15 JUDGE CHAPPELL: And your legal basis for your</p> <p>16 theory of admissibility is what again?</p> <p>17 MR. SHERMAN: It's a sworn statement,</p> <p>18 Your Honor. Requests for admissions are sworn</p> <p>19 statements. It was submitted to the court. It was</p> <p>20 filed.</p> <p>21 JUDGE CHAPPELL: What pending issue that needs</p> <p>22 to be determined is it relevant to?</p> <p>23 MR. SHERMAN: I'm not sure --</p> <p>24 JUDGE CHAPPELL: On the merits of what issue is</p> <p>25 it relevant to?</p>	67	<p>1 reasoning.</p> <p>2 MR. SHERMAN: I'm not questioning the court's</p> <p>3 reasoning on any of the motions or the orders that have</p> <p>4 been ruled upon.</p> <p>5 What I said here is that --</p> <p>6 JUDGE CHAPPELL: What I'm saying is --</p> <p>7 MR. SHERMAN: -- this issue is --</p> <p>8 JUDGE CHAPPELL: -- I don't know that the ruling</p> <p>9 on that issue to make -- to force the government I guess</p> <p>10 to modify that response, I'm not sure what you're</p> <p>11 looking for isn't contained in that order that dealt</p> <p>12 with the very issue.</p> <p>13 Did I not make a ruling on this issue requiring</p> <p>14 an amendment?</p> <p>15 MR. SHERMAN: You did. You did. And they</p> <p>16 amended it. But the fact that there needed to be a</p> <p>17 motion filed on requests for admissions --</p> <p>18 JUDGE CHAPPELL: And that motion is in the</p> <p>19 record.</p> <p>20 MR. SHERMAN: It is.</p> <p>21 MS. VANDRUFF: Your Honor, if I may, may I just</p> <p>22 revisit the procedural history here, because I want to</p> <p>23 make sure there's no misunderstanding with the court.</p> <p>24 But there was a motion filed by counsel for</p> <p>25 respondent without having met and conferred with us.</p>
66	<p>1 MR. SHERMAN: I'm not sure that it goes</p> <p>2 directly to any one particular issue. I do believe</p> <p>3 that it is reflective of generally what's going on in</p> <p>4 this case.</p> <p>5 And broadly what's going on in this case -- and</p> <p>6 people may disagree about it -- is that the</p> <p>7 Federal Trade Commission is seeking to expand its</p> <p>8 authority to govern, to regulate and to enforce data</p> <p>9 security as it relates to personal identifying</p> <p>10 information, and it will stop at nothing to do this.</p> <p>11 JUDGE CHAPPELL: You think what's going on in</p> <p>12 this case hasn't been appropriately documented in the</p> <p>13 public orders that have been issued.</p> <p>14 MR. SHERMAN: I think it's been -- I think it's</p> <p>15 been appropriately documented. Right? I believe that</p> <p>16 this document --</p> <p>17 JUDGE CHAPPELL: By the way, when I say "what's</p> <p>18 going on in this case," I don't mean one side or the</p> <p>19 other.</p> <p>20 MR. SHERMAN: I understand.</p> <p>21 JUDGE CHAPPELL: But there are orders that have</p> <p>22 been issued dealing with discovery issues that explain</p> <p>23 how we got there and what we're arguing about and why</p> <p>24 certain rulings have been made. I don't ever issue an</p> <p>25 order without reasoning, background, arguments and</p>	68	<p>1 Immediately upon receipt of that motion, we</p> <p>2 moved to amend our responses as well as opposing their</p> <p>3 motion to deem as admitted.</p> <p>4 And the ruling of the court was to allow our</p> <p>5 amendments and to deny as moot their request to deem as</p> <p>6 admitted.</p> <p>7 So I just wanted to clarify that for the</p> <p>8 record.</p> <p>9 MR. SHERMAN: That's accurate.</p> <p>10 Your Honor, we did not meet and confer because</p> <p>11 we were not asking complaint counsel to do anything. We</p> <p>12 were asking the court to rule that the -- that their</p> <p>13 responses be deemed admissions.</p> <p>14 JUDGE CHAPPELL: Well, I understand you want to</p> <p>15 defend your position, but there's no need. That's long</p> <p>16 past. We're past all that.</p> <p>17 MR. SHERMAN: I understand.</p> <p>18 JUDGE CHAPPELL: Let me have the exhibit</p> <p>19 numbers. What are the exhibit numbers of the</p> <p>20 affidavits?</p> <p>21 MS. VANDRUFF: Certainly, Your Honor. And I can</p> <p>22 hand up copies if that would be helpful.</p> <p>23 JUDGE CHAPPELL: I just want the numbers.</p> <p>24 MS. VANDRUFF: Certainly, Your Honor. It is</p> <p>25 RX 313, 314, which contains the opinion of Mr. Truett,</p>

69	<p>1 and RX 315.</p> <p>2 Then with respect to the requests for admission,</p> <p>3 the initial responses to the requests for admission,</p> <p>4 that appears at RX 520.</p> <p>5 JUDGE CHAPPELL: And does that exhibit contain</p> <p>6 the full discovery response or just the one RFA?</p> <p>7 MS. VANDRUFF: It contains the full discovery</p> <p>8 response, Your Honor. With respect to the requests for</p> <p>9 admissions of course.</p> <p>10 JUDGE CHAPPELL: Is your objection just to the</p> <p>11 one RFA or the entire exhibit?</p> <p>12 MS. VANDRUFF: Well, the entire exhibit,</p> <p>13 Your Honor, is superseded by our amended RFAs which</p> <p>14 address --</p> <p>15 JUDGE CHAPPELL: And remember, I don't read</p> <p>16 these unless there's a dispute and they're attached to a</p> <p>17 motion.</p> <p>18 So did you then file an entirely new response to</p> <p>19 the request for admissions?</p> <p>20 MS. VANDRUFF: We did, Your Honor, that</p> <p>21 addressed every request for admission from respondent.</p> <p>22 That's correct.</p> <p>23 JUDGE CHAPPELL: And again, your objection is to</p> <p>24 the whole thing or just the one RFA?</p> <p>25 MS. VANDRUFF: Our objection is to the whole</p>	71	<p>1 JUDGE CHAPPELL: Yes. Leave her a copy.</p> <p>2 MS. VANDRUFF: Thank you, Your Honor.</p> <p>3 JUDGE CHAPPELL: So those four exhibits are the</p> <p>4 only exhibits that we have a dispute over; is that</p> <p>5 correct?</p> <p>6 MR. SHERMAN: That's correct.</p> <p>7 MS. VANDRUFF: As well as the exhibit that --</p> <p>8 JUDGE CHAPPELL: 451. In addition.</p> <p>9 MS. VANDRUFF: Correct, Your Honor.</p> <p>10 And I wanted to ask Your Honor if I may be</p> <p>11 heard.</p> <p>12 That, Your Honor didn't have an opportunity to</p> <p>13 review. We would be happy to display it. It is a large</p> <p>14 document. It is also subject to your in camera motion,</p> <p>15 but if it would be useful to the court in ruling on</p> <p>16 Mr. Sherman's oral motion, we are prepared to display it</p> <p>17 if that would be helpful.</p> <p>18 JUDGE CHAPPELL: I have a pretty good idea of</p> <p>19 the spreadsheet. I don't need to see that.</p> <p>20 MS. VANDRUFF: Okay. Thank you, Your Honor.</p> <p>21 JUDGE CHAPPELL: All right. We're going to take</p> <p>22 a short recess. We'll reconvene at 2:15.</p> <p>23 (Recess)</p> <p>24 JUDGE CHAPPELL: Let's go back on the record.</p> <p>25 So we know this, starting on Tuesday, I'll need</p>
70	<p>1 thing.</p> <p>2 There were several RFAs that we amended -- I'm</p> <p>3 sorry -- several responses to respondent's requests for</p> <p>4 admission that were amended in our subsequent RFA</p> <p>5 answers, and so we think that allowing the prior</p> <p>6 answers, which have been superseded by Your Honor's</p> <p>7 ruling, serves no purpose. It's not probative of any</p> <p>8 fact in dispute in this case.</p> <p>9 JUDGE CHAPPELL: So the next iteration, the</p> <p>10 amended RFAs, those are an exhibit.</p> <p>11 MS. VANDRUFF: Yes, Your Honor.</p> <p>12 JUDGE CHAPPELL: Anything further?</p> <p>13 MR. SHERMAN: Nothing further, Your Honor.</p> <p>14 MS. VANDRUFF: No, Your Honor.</p> <p>15 JUDGE CHAPPELL: And you have copies of the</p> <p>16 affidavits?</p> <p>17 MS. VANDRUFF: I do, Your Honor. Would it be</p> <p>18 helpful for me to approach and hand these up?</p> <p>19 JUDGE CHAPPELL: Yes.</p> <p>20 MS. VANDRUFF: May I approach?</p> <p>21 JUDGE CHAPPELL: Yes.</p> <p>22 You know what, just hand them to Ms. Arthaud.</p> <p>23 MS. VANDRUFF: Certainly.</p> <p>24 (Pause in the proceedings.)</p> <p>25 Your Honor, would you like the RFAs as well?</p>	72	<p>1 everybody to speak up a little bit and lean closer to</p> <p>2 the microphones. I'm having trouble hearing especially</p> <p>3 your side (indicating).</p> <p>4 MS. VANDRUFF: Very well, Your Honor.</p> <p>5 JUDGE CHAPPELL: And if anyone can't hear me,</p> <p>6 let me know. I tend to push this away because it rings</p> <p>7 sometimes and we don't want the ringing</p> <p>8 noise (indicating).</p> <p>9 Let me deal with, first of all, the motions to</p> <p>10 quash. I'm waiting on a response to one of those. That</p> <p>11 will be today.</p> <p>12 MR. SHERMAN: Yes, sir.</p> <p>13 JUDGE CHAPPELL: So I'm not going to be able to</p> <p>14 get those rulings out today.</p> <p>15 However, because those parties are obligated to</p> <p>16 be here on the 20th, I expect someone who issued those</p> <p>17 subpoenas to inform those parties or their attorneys</p> <p>18 they will not have to be here before May 27, pending a</p> <p>19 ruling on these motions.</p> <p>20 Someone take care of that?</p> <p>21 MR. SHERMAN: Yes, sir.</p> <p>22 JUDGE CHAPPELL: I'm basing that on the fact</p> <p>23 that I'm assuming that your case will take at least next</p> <p>24 week for the government?</p> <p>25 MS. VANDRUFF: Yes, Your Honor. We believe that</p>

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1 our case will take three to four days.
 2 JUDGE CHAPPELL: And if we get lucky and they
 3 are finished, you wouldn't call these two witnesses in
 4 the beginning of your case, would you?
 5 MR. SHERMAN: No, I would not, as I've said over
 6 and over again to them and their attorneys that I would
 7 work with them to accommodate their schedules as best I
 8 could.
 9 JUDGE CHAPPELL: That part was left out of the
 10 motions, as I recall. Okay?
 11 MR. SHERMAN: It's a fact.
 12 JUDGE CHAPPELL: All right. Let's talk about
 13 these exhibits.
 14 Let me start with the affidavits, RX 313, 314,
 15 315.
 16 Those are clearly out-of-court statements
 17 offered for the truth of the matter asserted without
 18 sufficient indicia of reliability.
 19 The deposition transcripts are in the record,
 20 and two of the affiants are expected to appear to
 21 testify.
 22 Those exhibits are not admitted.
 23 And if it helps, I've never admitted an
 24 affidavit as long as I've been here as far as I know.
 25 MR. SHERMAN: I don't take it personally,

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1 Your Honor.
 2 JUDGE CHAPPELL: Okay.
 3 RFA RX 520.
 4 After hearing the argument and considering both
 5 sides, my finding is that respondents have not offered a
 6 sufficient legal basis for admissibility to overcome the
 7 objection of the government. Therefore, RX 520 is not
 8 admitted.
 9 However, I do note, I believe the issues that
 10 respondent raised have been documented in the pleadings
 11 and orders that have been issued in this case.
 12 Let's talk about CX 451, the Wilmer
 13 spreadsheet.
 14 Is that right, Wilmer?
 15 MS. VANDRUFF: Your Honor, it was prepared by
 16 Mr. Kevin Wilmer, that's correct.
 17 JUDGE CHAPPELL: Okay.
 18 The spreadsheet regarding the issue of
 19 Social Security numbers generated from Thomson Reuters,
 20 I have concerns about the reliability of the data
 21 comprising the spreadsheet, which in turn reflects on
 22 the reliability of the spreadsheet itself, any
 23 conclusions that can be drawn from it, how accurate is
 24 the Thomson Reuters database, et cetera.
 25 I'm not admitting that exhibit today. However,

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1 the government has the opportunity to call Mr. Wilmer
 2 and reoffer CX 451 and attempt to lay a proper
 3 foundation, at which time respondent will then be able
 4 to test the reliability under cross-examination.
 5 Any questions on those rulings?
 6 MS. VANDRUFF: Just one, Your Honor.
 7 If I may, earlier today we represented that we
 8 would be calling four live witnesses. In light of
 9 Your Honor's ruling, we may reconsider that with
 10 Your Honor's permission.
 11 JUDGE CHAPPELL: Oh, no. You said four
 12 certainly. I'm not holding you to that.
 13 MS. VANDRUFF: Thank you, Your Honor.
 14 JUDGE CHAPPELL: Yes. If I did that, trials
 15 would go a lot quicker, but...
 16 Oh, let's talk about the elevator. I want
 17 everybody to know that during the repair of the
 18 elevators in the back of the building that I and my
 19 staff normally use, we are using an elevator, it's not
 20 where you are, but it's just around the corner, so I can
 21 hear things.
 22 So please be advised and tell everybody, don't
 23 talk about the case in the elevator lobby and especially
 24 don't disparage the judge in the elevator lobby, because
 25 I don't want to hear anything I shouldn't hear in the

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1 hallway.
 2 I think that concludes it.
 3 Do we have anything further from either party?
 4 MR. SHERMAN: Nothing further from respondents,
 5 Your Honor.
 6 MS. VANDRUFF: Nothing from complaint counsel,
 7 Your Honor.
 8 JUDGE CHAPPELL: Right. You will reconfigure
 9 what will become JX 2, and it will be comprised
 10 basically of the stip you offered last night. I think
 11 paragraph 2 will be gone now. That was the one about
 12 conditional admissions, but the rest sounds good.
 13 Hearing nothing further, on Tuesday -- hang on a
 14 second. I need to procedurally do something.
 15 At this time I'm going to conclude the final
 16 prehearing conference, and until Tuesday at 10:00 a.m.
 17 we are adjourned.
 18 (Whereupon, the foregoing final prehearing
 19 conference was concluded at 2:26 p.m.)
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 21
 22
 23
 24
 25

1 CERTIFICATION OF REPORTER

2

3 DOCKET/FILE NUMBER: 9357

4 CASE TITLE: In Re LabMD, Inc.

5 HEARING DATE: May 15, 2014

6

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

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13 DATED: MAY 20, 2014

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

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

In the Matter of:)
ALTRIA GROUP, INC.,)
a corporation;) Docket No. 9393
and)
JUUL LABS, INC.,)
a corporation.)
-----)

Virtual Proceeding Via Zoom
Tuesday, June 1, 2021
2:00 p.m.
Final Prehearing Conference
PUBLIC RECORD

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge

Reported by: Susanne Bergling, RMR-CRR

Final Prehearing Conference
Altria Group and JUUL Labs

6/1/2021

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Final Prehearing Conference
Altria Group and JUUL Labs

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Final Prehearing Conference
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Final Prehearing Conference
Altria Group and JUUL Labs

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Final Prehearing Conference
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PUBLIC

Final Prehearing Conference
Altria Group and JUUL Labs

6/1/2021

1	C O N T E N T S				
2					
3	WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS VOIR
4	None				
5					
6					
7	EXHIBITS	FOR ID		IN EVID	
8	PX				
9	None				
10					
11	RX				
12	None				
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14	JX				
15	Number 1			91	
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Altria Group and JUUL Labs

6/1/2021

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

2 - - - - -

3 (Proceeding called to order at 2:23 p.m.)

4 THE COURT: Let me call to order Docket 9393.

5 This is the final prehearing conference regarding Altria
6 Group, Inc., and JUUL Labs, Inc. I'll start with the
7 appearances of the parties, the Government first.

8 MR. RODGER: Good afternoon, Your Honor.

9 Stephen Rodger for Complaint Counsel.

10 THE COURT: And for Respondents?

11 MS. WILKINSON: Good afternoon, Your Honor.

12 Beth Wilkinson for Altria.

13 MR. GELFAND: Good afternoon, Your Honor. David
14 Gelfand for JLI.

15 THE COURT: All right. I have got a number of
16 agenda items to go over, and I am going to be looking
17 down at notes because this is the first virtual trial,
18 and we have some separate issues to deal with as we just
19 discovered.

20 You have previously received an FAQ document and
21 been through some training sessions, so I hope you
22 understand the process, hopefully better than I do, as
23 far as the technology.

24 Here are some points I want to emphasize or
25 additional issues relating to the virtual or remote

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1 trial, and I am going to use the word "virtual trial" or
2 "remote trial" interchangeably.

3 As far as recording, the official court reporter
4 is the only individual permitted to record the trial,
5 and accordingly, do not record by video, by audio, do
6 not broadcast, televise, stream, screenshot, photograph,
7 or otherwise copy the trial or any portion or parts of
8 the trial. There should be no exceptions to this rule.

9 Again, I'm reiterating some things you probably
10 know already. Who can be present at trial? As you have
11 been informed, this trial has not been publicly
12 broadcast; however, it is available by phone dial-in for
13 any member of the public to monitor. The only persons
14 who are authorized to view the trial can do so via the
15 Zoom link they are sent. You are not to share your Zoom
16 link with anyone who is not authorized. You are not to
17 shoulder-surf to view the trial. If you are authorized
18 and want to view the trial, you must do so through your
19 own Zoom link. Anyone else who wants to access the
20 trial may do so over the telephone option that was
21 issued by the press office.

22 Also, if you're not one of the designated
23 counsel who is speaking today, you must have your audio
24 and video off at all times. If someone speaks and I
25 need to view them, I will let you know. For example, if

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1 you're talking to a lead paralegal or anyone, I will let
2 you know. And be advised, any time during this trial,
3 the court reporter may ask you to repeat something or
4 speak up, and I may do the same thing, and that goes for
5 you. If one attorney can't hear the other attorneys,
6 let us know. If you are counsel who are speaking today,
7 you must have your video on while you're speaking and
8 your audio on only when you are speaking.

9 What witnesses are allowed in the virtual or
10 remote courtroom? Expert witnesses will be permitted in
11 the virtual courtroom. When they are not testifying,
12 they shall turn off their video and mute themselves so
13 they are not displayed or heard.

14 Now, that doesn't go for if you want to
15 communicate with your witness, that's up to you, but
16 it's -- you should -- I think you were told in the FAQ,
17 you need to set that up yourself. That's outside the
18 Zoom platform. I'm not telling you you can't talk to
19 your own expert, just so I'm clear.

20 Fact witnesses may not access the virtual
21 courtroom through the Zoom link or otherwise observe
22 proceedings when they are not testifying. So, in
23 effect, I'm invoking the rule.

24 Let's talk about in camera, and I am -- I have
25 some concerns about in camera because I can't eyeball

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1 everyone like I do in the courtroom, and, number one, I
2 want to protect the in camera information of the
3 parties, the Respondents' information, but I'm more
4 concerned about third parties who have no skin in this
5 game, no axe to grind, and they are pulled into this by
6 virtue of discovery and other reasons. So I have got an
7 obligation and a duty to protect their in camera
8 information, and since they are not here, I am going to
9 be more strict in that regard.

10 I have granted in camera treatment to a number
11 of party and nonparty documents. Counsel are instructed
12 to be aware of the documents that are under an order
13 providing in camera treatment. Also, I issued an order
14 that denied without prejudice a number of motions. So
15 those are pending and they may come back, and this
16 information may well be in camera, but we have a way to
17 deal with that.

18 If you wish to use a document that I haven't had
19 the time yet to rule on or that motion hasn't been
20 refiled for some reason, I may grant provisional in
21 camera treatment for documents or information to allow
22 you to treat them as in camera until the order can be
23 issued. Does everyone understand that?

24 If counsel wish to counsel a witness about the
25 confidential contents of a document that is in camera or

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1 has provisional in camera status, counsel need to
2 request through the Court that we move into an in camera
3 session. Now, I will try to be on the lookout for this,
4 but I have noticed a lot of times it's the trial
5 attorneys that have a really good grasp, and I have had
6 an attorney stand up and say, "Your Honor, I think this
7 is in camera." So let's all be on guard, because
8 witnesses may not know exactly what they can talk about
9 and not talk about. So speak up even if in doubt,
10 because we are going to err on the side of protecting in
11 camera information.

12 To create the least disruption of the trial
13 process, counsel shall segregate their questioning in
14 such a manner that all questions for in camera materials
15 will be grouped together and dealt with in one in camera
16 session. That works better if you ask any questions
17 related to the in camera information at the beginning or
18 end of your examination.

19 For those that haven't done this before, just as
20 an example, let's say the Government calls a witness,
21 and on direct exam, they've got a 20-minute portion
22 that's in camera information. Well, at the end of their
23 direct exam, we go into in camera session. They ask
24 those questions. We don't jump in and out.

25 Now, that happens at times I know. I have tried

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1 many cases. You can't -- no matter how well you're
2 prepared, there will be surprises, as every trial lawyer
3 knows. So segregate at the end if you are on direct
4 exam and, if possible, because you know a lot about what
5 you're going to cross, you know what the witnesses are
6 going to say, and it's better when you stand up to do
7 cross if you have your in camera portion that you know
8 is going to be in camera right there while the Court is
9 in an in camera session.

10 And don't worry about the flow. There's no
11 jury. There's me. There's us. We are going to have a
12 record, and the key is to get in the record what you
13 want in the record, and the order doesn't have to flow
14 logically because you will make it flow logically in
15 your post-trial briefs, and I want everyone to
16 understand that.

17 There's not a jury that we have to lead down a
18 path. We're about making a record and getting to the
19 truth. So, again, don't worry that it won't flow for
20 you to do your cross exam of in camera first and then
21 move to the rest of your cross. It will be in the
22 record.

23 When we move into an in camera session, persons
24 who are not allowed to see or hear in camera material,
25 such as Respondent's in-house counsel or corporate

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1 representative, will be moved out of the virtual or
2 remote courtroom into a virtual waiting room, where
3 there will be no audio or video feed. As I've said
4 earlier, experts may remain in the virtual courtroom.

5 Once we move into in camera, I will need the
6 lawyers for each party to verify for me that the people
7 who are accessing this information have a right to do
8 so, they're in the right place, so we don't have any
9 mistakes. If you have never been in one of my trials, I
10 have you to look around behind you and tell me, do you
11 see anyone who's not subject to the protective order, et
12 cetera.

13 Here it's going to be more difficult, so I need
14 you, attorneys, to monitor this for me since I'm not
15 sure who's out there. So we're going to all need to
16 work together to protect in camera information.

17 Let me go over some issues regarding trial
18 dates, et cetera.

19 MR. GELFAND: Your Honor, may I just interject
20 on one point?

21 THE COURT: Yes.

22 MR. GELFAND: I want to advise the Court that
23 the two parties have reached an agreement to allow
24 certain in-house counsel of each other to see party in
25 camera information. So we would propose that this be an

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1 exception to that rule so that -- so that when the in
2 camera information, for example, is in camera
3 information of JLI, there are certain Altria in-house
4 counsel who may remain in the proceeding.

5 THE COURT: So, in other words, among the two
6 Respondents, you have agreed to a waiver to let your
7 in-house counsel view the in camera information of that
8 other Respondent?

9 MR. GELFAND: Yes, designated in-house counsel
10 who are involved in the litigation. That is correct.

11 THE COURT: Right.

12 MR. GELFAND: For specific information.

13 THE COURT: And I'm going to ponder this, and if
14 I don't give you an answer first thing tomorrow, let me
15 know, because the trial starts tomorrow.

16 MR. GELFAND: Okay.

17 THE COURT: I am going to tell you this, during
18 opening statements, make sure you don't refer to any in
19 camera information. We don't do that during opening
20 statements.

21 MR. GELFAND: Understood. Your Honor, I also
22 want to let you know, as you ponder that, we have a
23 similar agreement with two third parties who were
24 willing to reach a similar agreement with us, that
25 our -- that the same designated in-house counsel can be

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1 present during their testimony, and they have agreed not
2 to use the information for any business purpose, not to
3 take copies of the documents, et cetera, but just so
4 they can represent their clients, their in-house clients
5 at the trial. So we have that agreement with two third
6 parties as well.

7 THE COURT: Right. Well, let's do this first.
8 We have counsel for Altria and JUUL right here. Among
9 the Respondents, that's a correct representation of your
10 agreement?

11 MS. WILKINSON: It is, Your Honor, and we will
12 be in charge of policing that for each other. So we
13 will make sure only our clients who are listed there and
14 are party to that agreement will be able to listen to
15 that in camera information about JLI, or vice versa
16 about Altria. So we will -- if you allow it, we will
17 take care of that ourselves.

18 THE COURT: Okay, I heard that, but you'll
19 try -- you'll need to move closer to the microphone, but
20 I heard that.

21 MS. WILKINSON: Yes, sir.

22 THE COURT: Now, what are the names of the
23 nonparties?

24 MR. GELFAND: The two nonparties who have
25 reached this agreement with us are Sheetz, S-H-E-E-T-Z,

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1 and Wawa, W-A-W-A.

2 THE COURT: Okay, and I -- right, and I think
3 that was acknowledged in one of my orders, so that's on
4 the record, and I'm going to trust you to police that
5 and make sure that you limit it to your agreement with
6 those parties. I'm going to go ahead and okay that
7 right now.

8 MR. GELFAND: Thank you very much, Your Honor.
9 We're grateful for that.

10 THE COURT: Okay. Anything else on in camera?

11 MS. WILKINSON: No, Your Honor.

12 THE COURT: And for a lot of this, I'm repeating
13 what you saw in what I'm calling the logistics email
14 memo. When we're in session, we're going to expect to
15 go until about 5:30. Should counsel need more time, for
16 example, to finish testimony of a witness, the hours may
17 be extended with prior approval, depending on how the
18 events of the day unfold.

19 We will -- by the way, the prior approval means
20 that -- and the parties have been really good about this
21 in the past. You have a pretty good idea of how much
22 time a witness is going to take, and if you think we are
23 going to need to punch in until 6:00 or so, just let me
24 know the day before.

25 There are a lot of people involved here. It's

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1 not just OALJ and staff. Not as many people are
2 involved here as there are when we are in the courtroom
3 with the air conditioning, heat, and everything else,
4 and the guards, but still, we need advance notice to go
5 past 5:30. I understand, we'll probably end up going
6 until 5:45 many days with no problem, but there is no
7 way we are going to go past 6:00 without prior approval.
8 Is that understood?

9 MS. WILKINSON: Yes, Your Honor.

10 THE COURT: All right.

11 MR. GELFAND: Yes, Your Honor.

12 THE COURT: Depending on how the events of the
13 day unfold, on a normal day, we will take a one-hour
14 lunch break and a ten-minute break in the morning and
15 afternoon. Now, there are going to be times when we
16 start -- and we will start at 9:45, except for tomorrow,
17 10:00 tomorrow for day one -- and there may be times
18 where we punch on for two hours and take a lunch break.
19 When we do that, we will still get our ten-minute breaks
20 and go until 5:30. So generally we are not stuck
21 without a break for more than two hours.

22 And if anybody needs a break, speak up. This is
23 not -- you know, nobody's chained to the monitor, and I
24 know that sometimes you had too much coffee, whatever,
25 you need a break, so let me know. Again, we don't have

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1 a jury. We don't have to worry about appearances for a
2 jury. And if you do jury trials, you know what I mean.
3 Bench trial versus jury trial, a whole different
4 ballgame, assuming you have an understanding judge.

5 Now if you -- are you able to give me -- we
6 have -- we have a rule that says our trial time is
7 limited, you know, to so many days and hours and all
8 that, and I'm hoping we're not going to have to worry
9 about that. If we do, the parties are going to have to
10 devise your own system, because I'm not keeping a clock
11 here, but in that regard, do you have any idea, an
12 estimate of how long you think your case will take to
13 present?

14 We'll start with the Government.

15 MR. RODGER: Thank you, Your Honor. We expect
16 to be done in the early part of the week of June 14th.
17 So we will go this week, all of next week, and depending
18 how long the exams go, I don't expect we would be much
19 longer than that Wednesday, knowing that the following
20 Thursday is a day the Court has indicated we'll be off.

21 THE COURT: Okay, thank you. That sounds
22 hopeful.

23 Respondents?

24 MS. WILKINSON: Your Honor, we should be shorter
25 than that. Obviously, it depends on the case that

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1 Complaint Counsel presents.

2 THE COURT: Right.

3 MS. WILKINSON: But we have about eight
4 witnesses, plus an expert, so that will depend. These
5 are witnesses we thought the FT -- the Complaint Counsel
6 was going to call, but they are going to be streamlined.
7 So I would say, depending on how long you sit, maybe,
8 you know, if you sit four days a week, we should be done
9 that week and a half. There are probably five to eight
10 trial days and closer to five than eight.

11 THE COURT: Okay. And JUUL is -- are you part
12 of that or do you have your own estimate?

13 MR. GELFAND: Yes, Your Honor. We're part of
14 that.

15 THE COURT: Okay. And if you've noticed on the
16 schedule, my intent is to do four days a week because we
17 all have other things to do. We don't have the pleasure
18 of only working on this case. I remember when I was in
19 your position, I'd be in court all day in downtown
20 Houston, and I would go back to the firm, and there were
21 15 things stacked in my chair. On a good day, there's
22 only 15 things.

23 So we are going to try to take one day off each
24 week. Sometimes it might be a federal holiday, which
25 still I like to press on, and in that regard, I have

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1 gone over some days that we're not going to be in trial.

2 Does anyone have anything pending that you can
3 tell me right now you need to have another day off?
4 We'll start with the Government.

5 MR. RODGER: The only issue, Your Honor, relates
6 to the email we jointly sent the Court late in the day
7 on Friday regarding this particular Friday --

8 THE COURT: I'll get to that. I'll get to that.
9 Thank you.

10 MR. RODGER: Apart from that, none, Your Honor.

11 MS. WILKINSON: None on behalf of Altria, Your
12 Honor.

13 THE COURT: Okay.

14 MR. GELFAND: None on behalf of JLI, Your Honor.
15 I might have a personal issue one day during the week of
16 June 21st that would pull me away for an hour or two,
17 but I will advise the Court of that well in advance, and
18 it will not interfere with the entire day, but I just --
19 I might have one issue one day that week, Your Honor.

20 THE COURT: Now, would someone step in for you
21 or would we need to recess?

22 MR. GELFAND: I believe that someone could step
23 in for me. I don't want to disrupt the proceeding.

24 THE COURT: Okay. By the way, do you prefer
25 being called JUUL or JLI?

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1 MR. GELFAND: The company is called JLI, JUUL
2 Labs, Inc. The product is called JUUL, Your Honor.

3 THE COURT: Do you have a preference of how
4 you're referred to?

5 MR. GELFAND: JLI, I believe.

6 THE COURT: I assume Altria?

7 MS. WILKINSON: That's correct, Your Honor.

8 THE COURT: The former Phillip Morris?

9 MS. WILKINSON: Correct.

10 THE COURT: I remember many times driving down
11 the interstate and seeing the big poster, the big
12 cigarette near Richmond. So, what, 2003, it became
13 Altria?

14 MS. WILKINSON: Right. They spun off Philip
15 Morris International, and now we have the domestic
16 company, Philip Morris USA, and now we have the fancy
17 square with pretty colors instead of the old sign.

18 THE COURT: Yes.

19 MS. WILKINSON: Exactly.

20 THE COURT: And I know you say Henrico County,
21 so it's not in the City of Richmond?

22 MS. WILKINSON: Some of the buildings are in the
23 city, but the headquarters is not technically in the
24 city.

25 THE COURT: And JLI, where are you

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1 headquartered?

2 MR. GELFAND: We are currently headquartered in
3 Washington, D.C.

4 THE COURT: Oh, okay.

5 I want to make a few notes about our days off --
6 by the way, let me first cover that witness on the 4th,
7 and I appreciate the advance notice on that. That's how
8 things should work. If the parties cannot arrange for
9 another witness that afternoon, we will adjourn early.
10 And also, before we adjourn, if we have any admin or
11 procedural issues to deal with, we will deal with those
12 on that afternoon, okay? But I would like to know, as
13 soon as you know that week, whether you've been able to
14 plug in some -- actually, that's a -- let me look at my
15 calendar.

16 That is this week, all right. So do you know
17 definitively right now if you've got another witness or
18 do you need a day or two to try to arrange someone else?

19 MR. RODGER: At the moment, Your Honor, we do
20 not have another witness.

21 THE COURT: Right. So we will plan on an early
22 release on Friday. I'm not sure when it will be. There
23 will be another witness Friday morning, correct?

24 MR. RODGER: Assuming -- we have a -- one
25 witness scheduled for after opening statements, Your

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1 Honor, and we have three on deck for Thursday. We
2 believe that's going to spill over into Friday based on
3 best expectations.

4 THE COURT: If it doesn't, will Respondents have
5 a witness you can call? And by the way, we don't have
6 to go in order here. I know that somebody -- the
7 Government can rest their case and all that, but we can
8 take witnesses out of order to help move things along.

9 MS. WILKINSON: Your Honor, we are happy to
10 bring in a witness, and I know Mr. Gelfand can bring a
11 witness that he can move up that Complaint Counsel wants
12 to question anyway. So we can do that. I think
13 Complaint Counsel -- it is not clear to me it is going
14 to go into Friday morning -- obviously they know their
15 case better than I do -- but we are happy to take one of
16 our witnesses.

17 THE COURT: Yes. I don't want a day off on the
18 first week, so if you can speak to them and see --

19 MS. WILKINSON: We will speak to Mr. Rodger and
20 his co-counsel when we're done and get back to the
21 Court.

22 THE COURT: Let's talk about witnesses. When we
23 call a witness, I expect everyone to question the
24 witness. We're not going to call the witness for the
25 Government's case and then Respondent's case. We are

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1 going to do it one time, just so everybody knows that.

2 Well, I was going to go over something here on a
3 couple days. On June 23rd, that's a Wednesday -- I have
4 to double-check my days because I've got this unusual
5 calendar that I've never had anything like this where
6 the left begins on Monday. I don't know if you've ever
7 had a calendar like that, but it's not Sunday. So I've
8 got to double-check. On the 2 --

9 MS. WILKINSON: Uh-oh, Judge, we lost you. I
10 don't know if others...

11 SCOTT: Judge Chappell, this is Scott from Open
12 Exchange. You have frozen, so we didn't hear any part
13 of that last comment. If you can hear me, when you
14 unfreeze, you will have to start that comment from the
15 beginning.

16 THE COURT: I have a couple matters to deal
17 with -- can everyone hear me now?

18 SCOTT: Yes, Judge. You will have to start from
19 where you left off, or your last comment, you will have
20 to start from the beginning. I apologize.

21 THE COURT: Is that Scott?

22 SCOTT: Yes. You froze.

23 THE COURT: So, Scott, you can hear me when I
24 freeze?

25 SCOTT: I can hear you -- when you freeze, I

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1 cannot hear you, so that's why I'm saying you will have
2 to go back to where you started.

3 THE COURT: Well, since this is the first time
4 it's happened, Scott, I just want to let you know, I
5 could hear you tell me that I froze, that my picture was
6 frozen, so that helps.

7 SCOTT: Happy to hear it.

8 THE COURT: And just so all of you know, when
9 you see the other people freeze, it's you, so that's how
10 you know.

11 As I was saying, I have a couple things on --
12 we're going to have trial these days, but on June 23rd,
13 I've got something that begins at 11:30 a.m., so we
14 might do an early lunch. What I'm talking about is
15 maybe a lunch of an hour and a half at most. We are
16 going to do at least an hour anyway. So I will right
17 now tell you that we will probably break for lunch
18 earlier than usual on the 23rd, still should be an hour,
19 hour or so.

20 And then on the 29th, we might go later, our
21 lunch may start later. So that's the 23rd and the 29th,
22 but we're still going to be in trial those days.

23 I'm going to go ahead and run over the dates
24 that -- you should have them already -- that we're not
25 in court. June 10, 17, 24, 30, July 5, which is a

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1 holiday, and July 15th. If it looks like we're going to
2 be going past July 15th, you'll be provided additional
3 dates that we won't be in trial when we near that date.
4 We should be able to project that once we get into early
5 July.

6 Let me talk about expert witnesses, and, again,
7 feel free to interrupt. This is our -- this is a formal
8 prehearing conference, but we're also learning how to
9 work this system, but do remember, people that dialed in
10 can hear us. So we're still formal.

11 The parties have reported that Complaint Counsel
12 intends to submit a trial deposition of its expert,
13 Dr. Rothman, in lieu of live video testimony, which I
14 encourage basically and I appreciate that.

15 Respondents are also encouraged to submit a
16 trial depo of their expert in lieu of live testimony
17 during the trial. That's your choice, but I'm
18 encouraging that to move things along. I have been in
19 court with an expert witness on the stand for three or
20 more days. It is mind-numbing, and I do not think
21 anyone's capable of that via Zoom. So keep that in
22 mind. Let's get out the information we need to get out
23 into the record and no more.

24 And we've talked about this already, but this is
25 where it is in my agenda, about fact witnesses. I see

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1 Complaint Counsel's listed 25 and Respondents have
2 listed 19. I'm guessing we're not going to have to hear
3 that many witnesses, correct?

4 MS. WILKINSON: Correct.

5 MR. GELFAND: That's correct, Your Honor.

6 MR. RODGER: That's right.

7 THE COURT: Go ahead, Mr. Rodger.

8 MR. RODGER: Thank you, Your Honor. Complaint
9 Counsel intends to call 13 fact witnesses, and we
10 indicated to Respondents a couple of weeks ago our
11 likely intention, and that's where we still currently
12 stand, Your Honor.

13 THE COURT: Lucky 13?

14 MR. RODGER: Correct.

15 THE COURT: Okay. And Respondents, based on
16 those 13?

17 MS. WILKINSON: Your Honor, together with JLI,
18 we intend to call no more than eight fact witnesses,
19 and, again, we'll re-assess that as we go along, and if
20 we don't need those witnesses, as you alluded to with
21 the expert, we want to streamline our case, we may not
22 call all of them.

23 THE COURT: Okay, thank you.

24 Just something else to go over here because we
25 have two Respondents. I'm going to need you to

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1 coordinate the direct and the cross when both
2 Respondents will be examining a witness to prevent
3 duplication in the record. I am fine with a -- if
4 Altria wants to cross a witness or direct a witness and
5 then JLI wants to cross or direct a witness. I don't
6 know what -- if you have a common defense plan or
7 whatever.

8 I've had multiple Respondents where, you know,
9 three of them want to question a witness. It gets
10 unruly, but if we have to do that, we do that. But what
11 I mean is, you know, obviously if you both are going to
12 question a witness, let me know, or when I say, "Is
13 there any redirect," jump up -- I'm used to being in a
14 court -- jump up, you know, speak up and say, "Wait a
15 minute, I have some questions," okay?

16 And in that regard, I don't know if you've
17 talked about this. Do you -- do you have a plan where
18 one of you, as a Respondent, will handle a witness
19 because you know what to ask, or do you think you're
20 going to each examine each witness separately
21 yourselves?

22 MS. WILKINSON: No, Your Honor. We are very
23 well coordinated, and Mr. Gelfand and I have worked on
24 this. His team will present one witness. We'll present
25 another. I think it would be very rare, except for in

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1 the expert case, where we would both even cross examine
2 a witness. I can't promise, but as for the witnesses
3 we're presenting, it will either be presented by a JLI
4 attorney or an Altria attorney, not by both.

5 THE COURT: Okay, great.

6 And, Mr. Rodger, were you going to say
7 something?

8 MR. RODGER: No, Your Honor.

9 THE COURT: Okay. And in that regard,
10 Mr. Rodger, what I normally do -- and I don't think this
11 is going to happen -- but if you have two Respondents, I
12 will let them both do their cross and then you'll do
13 your redirect after both have questioned the witness, if
14 that happens.

15 MR. RODGER: Understood, Your Honor. Thank you.

16 THE COURT: So plan accordingly for that. And
17 just, again, to let you know that when a witness is
18 through testifying, we will be finished with that
19 witness, and I don't plan to recall that witness. Keep
20 that in mind.

21 Let me go over the objections to witnesses.
22 Let's see, the Government didn't submit any objections
23 to Respondents' witness list. Respondents had noted an
24 objection to one witness, but that's been resolved by my
25 order on the motion in limine.

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1 Regarding cross exam, based on my experience,
2 it's my job to make sure the trial moves along without
3 undue delay, and in that regard, should I find that one
4 side is abusing a reasonable time for cross, for
5 example, by taking two or more times the time taken on
6 direct, I will impose limits on cross. And if I am
7 going to do that, I will notify you that there will be
8 limits, and so you will know ahead of time. I don't
9 foresee that happening, but I'm letting you know it
10 could happen.

11 Let's talk about rebuttal witnesses. Rebuttal
12 witnesses are difficult to prove to me that they're
13 justified. I'm talking about fact witnesses. I want to
14 caution the parties, if you wish to offer a rebuttal
15 fact witness, that request shall be made in writing in
16 the form of a motion to request a rebuttal witness as
17 soon as you know you're going to need that.

18 And just so we're clear, that motion shall
19 include the name of any witness being proposed and a
20 detailed description of the rebuttal evidence being
21 offered. And this is another important point. That
22 motion shall include a cite to the record by page and
23 line number to the evidence you intend to rebut.

24 So I'm just making sure, if you want a rebuttal
25 witness, you're telling me what you're rebutting. We

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1 are not going to play any games. I have had this
2 stretched beyond limit in the past. So I've gotten real
3 strict about it. And that motion shall demonstrate that
4 the witness the party seeks to call has previously been
5 designated on its witness list or some very, very, very
6 good reason why not, and if the witness hasn't been
7 listed, you might have a problem.

8 Now, this is something that I'm not sure how to
9 handle. I'm open to suggestions. When we're in
10 trial -- have all of you been in the FTC courtroom?

11 MS. WILKINSON: No, Your Honor.

12 THE COURT: That's Ms. Wilkinson.

13 Mr. Rodger, have you?

14 MR. RODGER: Yes, I have, Your Honor.

15 THE COURT: How do pronounce your name, David
16 what?

17 MR. GELFAND: "Gelfand."

18 THE COURT: Just like it's spelled, "Gelfand."

19 Mr. Gelfand, have you been in the FTC courtroom?

20 MR. GELFAND: I have not.

21 THE COURT: Normally we have a witness stand,
22 and before a witness takes the stand, both sides will
23 put binders up there, binders full of exhibits you're
24 going to refer to with the witness, and then you'll say,
25 "Can you pull out binder" -- there's usually more than

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1 one, unfortunately -- "Can you pull out Binder 1 and go
2 to Tab 1," or whatever, and we wait and the witness
3 turns to it, and then you also will put the document on
4 the screen.

5 A lot of witnesses -- and I'll allow the witness
6 to make up their mind -- they will say, "You know what,
7 I will just read it on the screen. I don't want to mess
8 with a binder." I think you can see where I'm going.

9 Well, this is remote. I'm open to suggestions
10 how that's going to happen remotely, that we don't take
11 all day directing a witness to a document that would
12 have been in a binder in front of the witness.

13 Now, I was thinking, to the extent possible,
14 maybe -- you know, I don't expect there's any smoking
15 guns. Maybe you can get your binder to the witness
16 ahead of time or something like that. Let me have your
17 thoughts on this.

18 First of all, you understand the problem, right?

19 MS. WILKINSON: Yes.

20 MR. GELFAND: We do.

21 MS. WILKINSON: Yes. Some of us are older and
22 that's the only way we remember doing it, putting the
23 real document in front of the witness. We have arranged
24 at least with some of the third-party witnesses that are
25 coming to send the notebook in advance, and they have

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1 agreed not to look at it before the questioning begins,
2 but it will replicate what you're talking about. They
3 will have a binder in front of them.

4 I don't know what Complaint Counsel's intent
5 was. We tried to do that during depositions. They
6 wouldn't agree to it, but I don't know what they are
7 planning on doing during trial.

8 THE COURT: We are going to find out now.

9 MR. RODGER: Sure. Your Honor, with third
10 parties, we're doing something similar to Respondents'
11 counsel, providing those witnesses the documents in
12 advance that we may use, and we have had some
13 preliminary conversations with Respondents' counsel
14 regarding how to deal with the party-witnesses and
15 the -- the gist of those conversations thus far, Your
16 Honor, is that we would provide those documents
17 electronically a couple of hours in the morning before
18 trial, so the lawyers can sort of prepare and have in
19 the room with their respective client witnesses full
20 copies of the documents, that they have access to see
21 the whole copy of the document during the examination.

22 It's my understanding, Your Honor, that during
23 the exam, when we share the screen, we're only -- the
24 witness and Your Honor and counsel are only going to see
25 the page that's being shown, and so this is what we were

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1 thinking might work in order that counsel and the
2 witness have the access to the complete document, just
3 in case.

4 THE COURT: All right. Let me ask a couple
5 questions. Is everyone in Washington, D.C.?

6 MS. WILKINSON: Yes, Your Honor. Right now,
7 we -- all of -- on the Respondents' side, we are all
8 here, and the witnesses will be coming to our virtual
9 courtroom here at our offices in D.C.

10 THE COURT: All right. And, Mr. Rodger, are you
11 in D.C.?

12 MR. RODGER: I am, Your Honor.

13 THE COURT: Since that's the case, what about a
14 courier, couriating the binders over, and you'll treat
15 them -- because they're the other side's documents,
16 nobody's going to look at them. They are just not going
17 to be the secret formula to Coke. You know, Coca-Cola
18 can still keep their secret locked up in Atlanta, but,
19 you know, you're members of the Bar and officers of the
20 Court.

21 And so, for example, Mr. Rodger, you could have
22 someone take over the binders to a witness who's going
23 to be at their virtual courtroom, and that way at least
24 the witness has their hands on them. Does that make
25 sense?

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1 MR. RODGER: It does, Your Honor, and we can
2 certainly arrange that.

3 THE COURT: Right. Look, I'm encouraging you
4 three to -- if you figure out something better, as long
5 as you agree to it, I'm fine with it. If you need me to
6 get involved, I will, but if not, that's fine. You're
7 free to work out whatever agreement you want to.

8 I just don't want to have to spend all day
9 waiting for a particular page to be put up on the
10 screen, and I don't know if you've tried this, but it's
11 very distracting when there's a document up on half the
12 screen or three-fourths of the screen and then these
13 boxes get smaller.

14 So we are going to have to get a feel for that,
15 and there might be times where I am going to say -- by
16 the way, when I'm in my courtroom, I've got a large
17 monitor beside me, plus we have them all over the
18 courtroom -- but I will say, "Put that document back
19 up," so be advised that I'm going to be saying that
20 probably during this trial.

21 So let your person know -- and hopefully you've
22 got one key person who's going to be driving that system
23 to put documents up -- and let them know that if the
24 Judge asks for a document to be put up, don't look to
25 the attorney for permission, because I want to see the

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1 document back up, okay?

2 MS. WILKINSON: Your Honor, can I ask you a
3 question about the exchange of the binders?

4 THE COURT: Yes.

5 MS. WILKINSON: We can work it out with
6 Mr. Rodger where they send it to us electronically and
7 we print out a copy, but what about getting you binders?
8 Would you like binders so you have copies of the
9 exhibits?

10 THE COURT: Good question, but I do not want the
11 binders. I am surrounded by a -- by documents, binders.
12 If I need to know more -- that's why I was just saying,
13 that I am going to say I want to see the document again.
14 I make notes, make mental notes, I write things down. I
15 do not need the binder.

16 I think there's some information about binders
17 later in my agenda, to get binders to my staff, but I
18 don't want to be distracted by the binders. I figure
19 what you're talking to the witness about, I'm looking
20 at, and that's what I need to know.

21 And you were talking about electronically
22 downloading them, and if you want to do that, that's
23 fine, but I was envisioning, if it's easier and
24 Mr. Rodger already has a copy, he could just send the
25 physical binders to you, but whatever you want to work

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1 out, that's fine.

2 MS. WILKINSON: Okay. Well, many paralegals
3 thank you for not making us make binders for you.

4 THE COURT: Right, and the trees thank me.

5 Let's talk about demonstrative exhibits. First,
6 let's say straight out, demonstrative exhibits are not
7 encouraged. They lead to a lot of confusion after
8 trial. People mistakenly cite them for evidence and
9 they're not. They're not admitted into evidence.
10 They're demonstratives. So if they're used with a
11 witness, the exhibit will be marked and referred to as a
12 demonstrative exhibit for identification only.

13 That's important, a demonstrative exhibit for
14 identification only, and any demonstrative exhibits
15 referred to by any witness will be included in the trial
16 record, but they will not be in evidence, and they may
17 not be cited to support any disputed fact -- did
18 everyone hear that bell or just me?

19 MS. WILKINSON: We didn't hear it, Your Honor.

20 THE COURT: That's an annoying part of this
21 laptop. To be able to hear you, I have to turn the
22 microphone on, and when an email comes in, I hear an
23 annoying harp sound. So at least you don't have to hear
24 that.

25 All right, let me get back to where I was. Any

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1 demonstrative exhibits referred to by any witness will
2 be included in the trial record, but they will not be in
3 evidence and may not be cited to support any disputed
4 fact. I say that because when the post-trial briefs
5 come in, if someone cites to a demonstrative exhibit to
6 support a fact that's in dispute in your reply and you
7 point that out, because that's not valid evidence. Just
8 a tip there. And I'll let my staff know to put that
9 line back in my agenda, because it's missing.

10 Withheld documents. If either side has withheld
11 documents from the other side during discovery, such
12 withheld documents will not be admitted. We're getting
13 ready to get to the meat of this where we're going to
14 talk about objections and documents.

15 Let's talk about objections to depositions.
16 Both sides have stated their objections to exhibits,
17 that their objections to depositions incorporate the
18 objections that were raised during those depositions.
19 In our system, depositions and investigational hearing
20 transcripts in this matter are generally deemed
21 admissible, and just so you know how I'll work here, as
22 to objections to particular testimony, if it's referred
23 to in trial, I'm not going to rule on objections.

24 If you're questioning a witness about prior --
25 whatever, a prior statement or anything, inconsistent,

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1 and you say there's a question and answer and there's an
2 objection, don't read the objection. You may say, "and
3 there's an objection," and move on.

4 This is how this works after many years of
5 experience. It's absurd for me to rule on objections
6 that are in depositions or investigational hearing transcripts
7 during the trial. I deal with those post-trial. So if
8 you have objections to particular testimony from
9 depositions, from excerpts that are cited by a party in
10 a post-hearing proposed finding, the opposing party
11 should note any objection it has, regardless of whether
12 it was raised in the deposition, and that should be
13 raised in your reply to the proposed finding. If I
14 don't see or hear an objection to a proposed finding,
15 then I will consider you've waived your objection,
16 assuming you made it at the deposition.

17 And just to be clear, there might be 200
18 objections in a depo, in all the depo excerpts that
19 we're going to see when going through the record. I am
20 not going to spend my time or the public's time putting
21 those in the decision. The ones that matter you will
22 know about and we will note that, but if you don't hear
23 anything about them, you will know they didn't rise to
24 the level of needing to be mentioned. Is that
25 understood?

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1 MS. WILKINSON: Yes, Your Honor.

2 MR. GELFAND: Yes, Your Honor.

3 THE COURT: All right. Now, let's get to the
4 objections regarding exhibits, which is something we
5 have to clear up today.

6 MR. GELFAND: Your Honor, if I could interject?

7 THE COURT: Yes, you may.

8 MR. GELFAND: I have two questions on cross
9 examination from what you just went through, if I might.

10 THE COURT: Go ahead.

11 MR. GELFAND: One point you made, which I
12 completely understand, is that if someone were to cross
13 examine a witness for too long, for example, two times
14 the amount of the direct, that's an indication that
15 there needs to be a restraint on that cross examination,
16 and I fully respect that, of course, Your Honor.

17 Some of the witnesses that the Government is
18 going to call here, that Complaint Counsel will call,
19 are our witnesses, and because we're not bringing
20 witnesses back, we're going to go ahead and do our
21 direct, in effect, after Complaint Counsel goes. So
22 they might only have 15 minutes of questions for one of
23 our employees, and they might just want to ask that
24 person about a specific issue. We might want to ask
25 that person about five other issues.

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1 And so my point of clarification, Your Honor, is
2 just when you refer to cross examination, I assume --
3 but correct me if I'm wrong -- that you're referring to
4 a traditional cross examination of a witness that the
5 Government calls, not one of our employees. In other
6 words -- well, you understand the point, Your Honor.

7 THE COURT: Right, exactly, and I'm glad you
8 brought that up, and I also am going to ask my staff to
9 put this point back in or in my agenda.

10 When the other side calls one of your witnesses,
11 you're going to have the right to do your direct of that
12 witness and any mop-up cross you think you need to do,
13 but -- and this is the point -- you need to let us know,
14 "I'm doing a cross portion now," so the other side
15 doesn't need to object to leading questions.
16 Understand?

17 MR. GELFAND: Yes, Your Honor.

18 THE COURT: You're free to lead on your cross
19 portion, but you're clearly not allowed to lead on the
20 direct portion of that witness.

21 MR. GELFAND: Okay, very well.

22 THE COURT: And you would have figured that out,
23 but it makes it -- it helps the other side to know, and
24 that means you need to segregate your examination,
25 because, you know, you've got your direct laid out

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1 already, and you need to say, "I'm going to move into a
2 cross portion," and the other side knows, all right,
3 he's going to be able to lead now under the rules.

4 Understood?

5 MR. GELFAND: Yes. Very well, Your Honor, and
6 I'm -- I completely understand, yes.

7 THE COURT: I'm glad you brought that up because
8 I like to make the parties aware of that. Sometimes I
9 don't get to it until the trial's started and I hear
10 objections for leading, but now we have got that out of
11 the way.

12 MR. GELFAND: I have one other question, Your
13 Honor.

14 THE COURT: Yes.

15 MR. GELFAND: The Complaint Counsel will be
16 taking a trial deposition of their expert. If we're
17 cross examining the expert and the expert -- the expert
18 is not answering our questions, if the expert is just
19 difficult with us and we have a simple yes/no question
20 and they keep saying, "Well, I need to explain a bunch
21 of things," and we can't get a straight yes or no out of
22 the expert -- I don't know if this is going to happen --
23 but if it happens, would you prefer that we inform the
24 Court so that Your Honor can get involved in the
25 deposition as it's taking place and give an appropriate

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1 instruction to the witness, or would you rather that
2 transcript just come to you and their unwillingness to
3 answer a question will just go to weight or credibility
4 of the witness? I'm not -- I know we're not going to
5 come back and do it again, so it seems to me those would
6 be the two options for that situation.

7 MS. WILKINSON: Your Honor, before you answer,
8 can I add to that?

9 THE COURT: Yes.

10 MS. WILKINSON: It is going to happen, and
11 Mr. Gelfand is being very nice, but Complaint Counsel's
12 expert, the only expert they are calling in this case,
13 was very difficult during deposition, and we think one
14 of the reasons they're not calling him live, not only to
15 accommodate your strong request that there be these
16 video depositions, but because he refuses to answer
17 questions.

18 So Mr. Gelfand and I are concerned that what
19 would normally happen, we would be in front of you and
20 you would either, you know, tell the witness to answer
21 or tell me to move on, whatever, you know, the correct
22 response; but we are not going to be able to get any
23 realtime feedback from you to keep the witness in line,
24 and it was very difficult during that deposition.

25 And I normally don't complain, that's our job,

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1 but he really was recalcitrant and unwilling to answer
2 questions. So if there's some procedure you could
3 suggest for us, we don't want to, you know, whine to the
4 Court, but this was unusual, in my long experience, to
5 have a witness this unwilling to answer questions.

6 THE COURT: All right. I'm going to address
7 that, and if I don't address everything, let me know. I
8 am going to handle this like I would in court, and by
9 that I mean, I would not recommend that an expert be
10 evasive and obviously avoid answering questions that
11 should be answered. If they do that, they do that at
12 their own peril, and, you know, the rule is you can tell
13 a witness, give me yes or no only, but, you know, the
14 witness wants to say something else, and you understand
15 that once you -- you can make him say yes or no, but
16 then on redirect, they get to explain it anyway.

17 So actually it saves time to let them explain,
18 but I'm talking about, you know, your average witness.
19 You have been through that. All of you have had that
20 happen. You are not going to prevent that explanation
21 because there's something called redirect.

22 But I will -- I don't need to do this live,
23 because if I'm in court, I'm not going to be telling an
24 expert to answer the question. If I have to do that,
25 there's a problem. So all you need to do is make a

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1 record of someone not being cooperative when something
2 should be answered, and I'm not saying I'm assuming or
3 ruling on anything right now, but I'm going to look at
4 the record and I'll get a good feel for whether I think
5 a witness is being, let's just say, honest and
6 forthright, or are they trying to hide something, and
7 that's every witness, expert or fact.

8 So just make sure you make the record you want
9 to make, and if you want to say for the record, "I would
10 object here that you're not answering my question," so
11 that it's clear, but if I'm sitting there, I'm not
12 really going to get involved, because I don't have to
13 get involved. I'm not in the business of ordering a
14 paid -- a hired gun to answer questions.

15 They need to know how to do their job. They're
16 being paid money. And if they're the Government's
17 witness, they're being paid taxpayers' money to work on
18 this case, and I expect them to be honest, truthful, and
19 to give answers they should give.

20 MR. GELFAND: Thank you, Your Honor.

21 THE COURT: This is not to impugn any particular
22 witness. I haven't read any testimony. Trial hasn't
23 started. I barely know -- I just read the name today.
24 So I'm not prejudging anything. So what I'm trying to
25 do is give you I guess what I would call preemptive

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1 feedback.

2 And because we're talking about a government
3 witness, I'll let Mr. Rodger respond if he wants to.

4 MR. RODGER: Thank you, Your Honor.

5 Complaint Counsel certainly takes exception to
6 Respondents' counsel's characterization of Dr. Rothman's
7 willingness to answer the questions that were being
8 posed during his deposition. That said, we
9 understand --

10 THE COURT: Just to be clear, I understand that
11 and I expected that, and that's why I made it very
12 clear, until I read everything, I'm making no -- I'm not
13 making any decision or having any opinions one way or
14 the other. I'm open-minded.

15 MR. RODGER: And Complaint Counsel certainly
16 appreciates that, Your Honor, and we will certainly --

17 THE COURT: And let me tell you what, I have
18 heard many, many experts in my time, and they all like
19 to talk. They all like to fill the room with their
20 knowledge, whether they really have it or not, okay?
21 And so you've got the ones that won't stop rambling or
22 you've got the ones that don't want to cooperate, and
23 usually that's an expert that hasn't been an expert very
24 long. They don't have a lot of experience or they don't
25 have a lot of experience winning cases.

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1 So, you know, there are a lot of things that go
2 into this, and because it's an expert, I'm not that
3 concerned about looking at judging credibility and
4 demeanor, because I can figure out the credibility of
5 the expert opinions without eyeballing somebody.

6 Fact witnesses, I want to look at them to get an
7 idea, but experts are not there to talk about facts. I
8 don't care if they say the light was red or green,
9 because they've got opinions, and opinions, unless
10 they're backed up, are worthless. And I'll tell you
11 right now, I ignore any opinion that I don't think is
12 properly supported on either side in any case.

13 Go ahead, Mr. Rodger.

14 MR. RODGER: Complaint Counsel completely
15 understands. We will certainly take that into account.
16 We simply wanted to add that, as Your Honor is certainly
17 aware, sometimes questions aren't capable of being
18 answered yes or no, and while Complaint Counsel
19 certainly agrees that expert witnesses need to answer
20 the question that's posed, on occasion, explanation is
21 necessary, and we hear you loud and clear.

22 THE COURT: Now, that's a good point. I clearly
23 allow an expert to say, "I cannot answer that question
24 yes or no," and I expect you to let that expert tell me
25 why, because I want to see why they won't answer it,

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1 give them a chance to explain, and that's both sides.

2 MR. GELFAND: Very well, Your Honor.

3 THE COURT: And I'm glad to talk about this in
4 general without an expert on the stand, because what I'm
5 telling you applies to all experts that I see or hear.

6 MR. RODGER: Understood, Your Honor.

7 MR. GELFAND: We understand as well, Your Honor.
8 The issue here was not explanation. The issue was,
9 "That's not the right question, let me tell you what I
10 want to tell you." But we'll present the transcript to
11 you after the trial deposition, Your Honor.

12 THE COURT: Okay.

13 Now you've piqued my intrigue and my expectation
14 here. Don't disappoint me.

15 MR. GELFAND: All right.

16 THE COURT: I want these experts to be
17 knock-outs, okay?

18 MR. GELFAND: Well, I hope he doesn't do the
19 same thing.

20 THE COURT: And since I don't read anything
21 before trial, I've got an open mind. I don't even know
22 this. How many experts do Respondents have, one?

23 MS. WILKINSON: Only one, Your Honor.

24 THE COURT: Okay, good.

25 MS. WILKINSON: We have heard how much you like

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1 or don't like experts.

2 THE COURT: Well, a lot of it comes from sitting
3 on the Bench many, many years, and a lot of it comes
4 from being a trial lawyer for many, many years and
5 hiring my own expert witnesses, and that goes a long way
6 toward understanding how it all works, is all I'll say.
7 You can find someone to say whatever you want someone to
8 say. Let's just leave it at that. And if I may say,
9 maybe not credibly, but someone will say what you want
10 them to say if you keep looking.

11 I've got objections to exhibits. I've got a lot
12 of things I can go into here to school you on how things
13 work here in my court, and I guess I should ask first --
14 because sometimes I go over this whole spiel for five
15 minutes and then the attorneys say, "Well, we've worked
16 all these out" -- so give me a status on objections to
17 exhibits before I go into what I want to say and decide
18 whether to say it.

19 Go ahead, Government first.

20 MR. RODGER: Sure, Your Honor. Thank you.

21 As you may have seen, both Complaint Counsel and
22 Respondents' counsel sent your office updated objections
23 yesterday in order to indicate to the Court that some
24 progress and, in fact, a great deal of progress has been
25 made.

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1 In terms of the state of play, I'm going to
2 divide things into Respondents' general objections and
3 specific objections. So within the specific objections,
4 by Complaint Counsel's count, there are only 30
5 documents that Respondents' counsel are currently
6 objecting to. They fall into approximately four
7 categories, but setting that aside, the issue that
8 Complaint Counsel would most likely -- most want you to
9 address is their general objections.

10 Respondents' counsel have asserted a general
11 objection to approximately 1700 exhibits that are on
12 Complaint Counsel's exhibit list, and so to be clear,
13 these are exhibits for which they haven't asserted any
14 other objection under the Part 3 rules for relevance,
15 hearsay, et cetera.

16 In conversations with Respondents, they have
17 taken the position that unless a document is used at the
18 hearing with a witness, it should not be admissible, and
19 that's created complications in putting together the
20 JX 2. We worked cooperatively, and so I can certainly
21 say that, and we've winnowed, like I said, our specific
22 objections down, but the significant obstacle to putting
23 together the JX 2 and moving forward is the general
24 objections.

25 THE COURT: All right, that's an overview. Do

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1 Respondents want to reply to that or do you want me to
2 go ahead and tell you what I have to say?

3 MS. WILKINSON: Your Honor, we're prepared to
4 address the general and the specific, but I think it
5 might help us to hear what you have to say to get
6 schooled before we respond.

7 THE COURT: All right. Now, a lot of things I'm
8 going to say, keep in mind, there are a lot of people
9 listening in that have no idea how this works. So I'm
10 going to talk about things that you probably know some
11 of this, but I don't think you know all of this, or I
12 wouldn't see all the objections I'm seeing.

13 There's a general objection by Respondents to
14 the en masse proffered exhibits. That's the big -- the
15 big group, the document dump, and as he said, about --
16 that must be admitted only through a testifying witness.
17 In Commission proceedings, documents are generally
18 admitted en masse. That's what we're doing today.
19 That's why we're here.

20 I don't know if you've tried cases -- let's say
21 there's two versions. There's the one where a judge
22 does a prehearing/pretrial conference and you deal with
23 the exhibits. There's the other kind of trial where
24 every five minutes there's an objection to a document
25 that should have been dealt with before you ever started

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1 the trial with witnesses.

2 Well, we do it the first way. We are not going
3 to have interruptions all day. When a witness is on the
4 stand, they are going to testify, and we are not going
5 to be caught up, unless it's absolutely necessary,
6 dealing with objections to exhibits. So we're doing
7 that now.

8 So here exhibits are admitted en masse, that's
9 why we're here, and you don't need a testifying witness.
10 But I will say this, that it's common sense, if a
11 witness discusses an exhibit, that probably makes it a
12 stronger exhibit for you. So these things will be taken
13 into consideration.

14 But we don't need a sponsoring witness, in other
15 words, for an exhibit, but you might want to sponsor an
16 exhibit if it's an important exhibit to you. Just word
17 to the wise.

18 If there are particular exhibits that
19 Respondents feel cannot be admitted without the context
20 of a witness, you can object to those, but I'm not going
21 to exclude those exhibits based on that objection, not
22 today.

23 Let me give you an example how this could work.
24 Let's say a witness is called at trial, and you think,
25 okay, with this witness, I can bring out information to

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1 show you that that exhibit is not reliable and should
2 not be in evidence. Then make a -- re-urge a motion for
3 me to strike that exhibit. Fair enough?

4 MS. WILKINSON: Yes, Your Honor.

5 THE COURT: We're not stuck with these exhibits
6 that come in, okay? They're in evidence, but they could
7 be attacked during trial, and their credibility could go
8 up or down when it's all said and done at the end, after
9 the post-trial briefs, after all the testimony is in.

10 As you know, we have a fairly relaxed standard
11 of admissibility, and it basically comes down -- and you
12 should be aware of this, if not, there are the rules you
13 can read -- but generally it boils down to reliability.
14 And if you know hearsay, you know there are all the
15 exceptions, and there's a book full of them, but it all
16 boils down to, is this statement admitted for the truth,
17 something that can be relied on?

18 And you need to know as a trial lawyer -- if you
19 don't, I'm just going to educate people who are
20 listening in -- you need to show that that statement can
21 be relied upon as being truthful and honest, and if you
22 don't do that, a judge or a fact-finder is not going to
23 rely on that document. They're just not going to
24 consider it.

25 And so I want you to know, even if there's

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1 10,000 exhibits, that doesn't mean they're all going to
2 support a verdict in this case or a ruling in this case,
3 because it all comes down to what can be relied upon.

4 I hope that you can work out the objections you
5 have to the remaining documents that I've heard about
6 you're objecting to, considering our fairly relaxed
7 standard and considering that just because they're
8 admitted today doesn't mean they're going to support a
9 ruling in this case, and you can try the case
10 accordingly, attacking documents or supporting documents
11 as you think you need to.

12 And, again, when I look at the record, if
13 something should be considered, it will be considered.
14 If a witness is untruthful, I'm not going to consider
15 anything I think is untruthful. If a document is not
16 reliable, I'm not going to consider a document that's
17 not reliable. And it's -- you have free rein to point
18 out and attack these things in post-trial briefs and
19 tell me why things are not reliable. Even though they
20 might be admitted, again, it doesn't mean they're going
21 to support a ruling or a holding in this case.

22 We're going to take a recess here shortly, and
23 during the recess, I -- the parties -- you're going to
24 get together and you're going to try to work out your
25 remaining objections, and then we're going to come back,

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1 and you're going to let me know just what objections
2 remain, and I will deal with them today after the break
3 or first thing tomorrow morning, but I'm going to
4 encourage you to work out your objections, figure out
5 what to do, withdraw objections that you know I'm going
6 to overrule based on what I've told you.

7 It's not a jury. I keep telling -- letting you
8 know that, because, yeah, a judge's job when there's a
9 jury -- and that's why we have rules of evidence, one of
10 the reasons -- you don't let something get in front of a
11 jury that's going to affect a verdict that's not fair,
12 and that's why you have very strict rules.

13 Well, here, we all know the rules, and we all
14 know whether something's reliable or not. So, again, I
15 don't care what I read, what I hear. If I don't think
16 it's reliable, I don't consider it. So you're not
17 losing the case based on anything that comes in today.

18 MS. WILKINSON: Your Honor, may I ask one
19 question for clarification?

20 THE COURT: Yes, you may.

21 MS. WILKINSON: I hear you, and, of course, we
22 will talk to Complaint Counsel during the break and work
23 most of these out. I'll tell you what our real concern
24 is, because there's so many documents --

25 THE COURT: Can you lean into the mic?

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1 MS. WILKINSON: Yes, sir. I'm sorry.

2 Because there are so many documents, there are
3 some -- and we've seen them already in Complaint
4 Counsel's brief -- where they say it stands for one
5 thing, there's an example of an outline of talking
6 points for a meeting -- before a meeting. Complaint
7 Counsel says in their pretrial brief that it actually
8 proves what was said at the meeting.

9 And what I'm concerned about, there's no witness
10 that's coming to trial that's on that email. So there's
11 no one they could show it to that could verify it, but
12 what I understand -- and this is my first time appearing
13 in front of you and appearing in this type of
14 proceeding -- is that even if they don't show it to a
15 witness, they can submit it to you and argue why it
16 supports their case.

17 But then if there's an appeal to the Commission,
18 they don't even have to have presented it to you. They
19 can present it to the Commission and say this supports
20 their theory. So that's the really -- the only thing
21 we're concerned about.

22 I think we can work out most of these, but when
23 there's a document -- and we've already seen them, in
24 our view, and, you know, maybe there's some
25 misunderstanding -- but it seems to misrepresent what it

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1 says and there's no basis to ask a witness about it,
2 because they're not on the document, I don't see how
3 we'll be able to show you that it's not reliable, I
4 guess other than just asserting that in a pretrial
5 brief, but it still doesn't address if they don't use it
6 with you, but they were to use it with the Commission.

7 THE COURT: And in your example, Counselor, are
8 you saying that that document doesn't state within the
9 four corners of the document what the Government's
10 proposing it states?

11 MS. WILKINSON: Absolutely, Your Honor. It
12 states it's an outline --

13 THE COURT: Then if I'm correct, how in the
14 world would that support a finding on that issue if you
15 can point out that it doesn't say that and there's no
16 witness to talk about it? How can they -- how have they
17 carried their burden on that?

18 MS. WILKINSON: I don't understand. I don't
19 understand how it was -- you know, it was used as a cite
20 to support the statement they made in the brief. So,
21 again, I don't know, and I hear you, which is make that
22 point, whether it's in writing or at trial, if they do
23 present it to a witness.

24 THE COURT: Well, let me tell you this. The
25 place to make that argument is in the reply in the

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1 post-trial briefs. Let me tell you something, cases are
2 won or lost in those replies, and I'm just telling you
3 right now, at the front of the case, you need to focus
4 on your reply.

5 You're going to say what you want in your
6 post-trial brief, and these are the facts I'm proposing
7 and conclusions of law, et cetera, et cetera, but all of
8 those can be totally annihilated in a well-written
9 reply. The replies mean more to me than any post-trial
10 brief. That's where you can point these things out.

11 Now, let me tell you about -- let me address
12 some of your other concerns.

13 MR. RODGER: May I be heard, Your Honor?

14 THE COURT: Well, I'm just answering her
15 question, but go ahead.

16 MR. RODGER: Well, if you are continuing, by all
17 means, Your Honor.

18 THE COURT: Yeah. Regarding whether the
19 Commission might rely on an exhibit on an appeal,
20 there's something called an appeal of my initial
21 decision. I'm just going to say it's called an appeal,
22 but if that appeal doesn't go your way, you can appeal
23 to an actual federal appellate court, you know, and have
24 an appeal that you're used to having, where rules of
25 evidence are more strictly enforced. I'm just

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1 speculating. I don't know. There are a number of
2 courts in the country.

3 I worked in the Fifth Circuit, so I'm very
4 familiar with how they work, but what I'm getting at is
5 you need to know this: Once a document is offered, if
6 it's not admitted, it's part of the record. It's not
7 part of the record I'm going to consider, but what I
8 say -- what I call upstairs, the Commissioners on an
9 appeal may consider it because it's in the record. They
10 do their thing. I do my thing.

11 I look at the law, the facts, and I -- and I
12 make a ruling. I can't control what happens after that.
13 But I can tell you that courts of appeal at times look
14 at what the trial judge did and look at what a
15 Commission did, and they weigh that, and they look at
16 explanations, and I try my best to explain and put
17 reasoning in rulings I make.

18 Now, I will say before I came to the Commission,
19 I found that a lot of the decisions were just bluntly
20 made and there wasn't any supporting reasoning, so a
21 court of appeals had nothing to turn to on why the judge
22 did certain things. I do my best to make sure they have
23 something to turn to, and that's for both sides. I'm
24 not looking at one side or the other.

25 So keep in mind, I have no control over what the

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1 Commission will review on any appeal to them, but if I
2 don't admit it, I don't consider it. That's what I can
3 tell you.

4 And I don't know -- did I answer your question?

5 MS. WILKINSON: You did, Your Honor. In other
6 words, the ultimate decision on admissibility is in the
7 reply briefs. You're admitting it, but if we want to
8 make a motion later or if we point out later that it's
9 not reliable, you could still consider that even up to
10 the point of your decision.

11 THE COURT: Oh, absolutely. And let me throw
12 out this phrase that you've heard too many times.
13 Objections in our system basically go to the weight, not
14 the admissibility, and the weight matters a lot with
15 this judge, meaning is it reliable? Does it support the
16 proposition it's put forth to prove?

17 And I can just tell you that for both sides
18 either an exhibit is going to prove something or it
19 doesn't. So, again, admissibility is not the end of the
20 game. Go ahead, Mr. Rodger.

21 MR. GELFAND: And, Judge -- oh, I'm sorry.
22 Please, Mr. Rodger.

23 MR. RODGER: Thank you, Your Honor. Just a
24 quick point. We certainly understand and Complaint
25 Counsel is familiar with the Part 3 process and reply

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1 findings and we certainly appreciate you setting forth
2 all of that to all counsel today.

3 Just a couple of points for the record. We
4 certainly disagree with Respondents' counsel's
5 characterization of our brief. We think the --

6 THE COURT: And you can say that, but it goes
7 without saying. We're just talking law and rules here.
8 Nobody's ruling on anything right now. It's just an
9 example. And I'm sure she didn't intend it to be
10 something argued as if we had an oral motion going here.

11 MR. RODGER: I certainly agree. I'm sure there
12 will be plenty of discussion about that document and
13 others as the trial proceeds.

14 THE COURT: Unfortunately, I'm sure there will
15 be. Go ahead.

16 MR. RODGER: Just one other point, Your Honor.
17 I want to make two points. The first is that the number
18 of documents in this case, even if you look at both
19 sides, is not remotely out of the ordinary. In Part 3
20 cases or in federal court cases that are dealing with
21 antitrust issues, cases brought by the FTC under the FTC
22 Act or Clayton Act, just to cite a few examples -- and
23 just to give you context, in this case right now,
24 looking at all the documents, there's about 2400 if you
25 add both Complaint Counsel and Respondents' counsel.

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1 And in the Benco case, which you heard, there
2 were over 5000, in Otto Bock there were over 3000, and,
3 again, this is completely consistent with what federal
4 courts see. To just cite Your Honor a few examples, in
5 the Wilhelmsen case, which was tried in federal court,
6 over 4000 documents were admitted. In the Staples case,
7 which was also tried in federal court, nearly 4000
8 exhibits. And one more example in the Sysco matter,
9 over 3500 exhibits. So, in fact, I think we're well
10 below what we often see.

11 And while we certainly -- Complaint Counsel
12 certainly disagrees with the position that Respondents'
13 counsel have taken over the last several months
14 regarding exhibits, we have worked I think productively
15 to narrow things down to the point where Complaint
16 Counsel actually withdrew approximately 20 percent of
17 the exhibits that were originally on its exhibit list as
18 a result of the conversations with Respondents' counsel.

19 And so I'll leave it at that, Your Honor.

20 THE COURT: Well, let me just say this about
21 that. I don't keep some running statistic of, you know,
22 there's a nice sweet spot of how many exhibits. And let
23 me just say this about that as well. We all know that
24 it doesn't matter how many exhibits or documents there
25 are. It's how many pages there are.

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1 You may have a thousand exhibits that are one
2 page each. You may have a thousand exhibits that are
3 200 pages each. You see my point? So the number of
4 exhibits is worthless to me, but I get your point, that
5 by comparison, this doesn't seem to be a lot of
6 exhibits.

7 Mr. Gelfand?

8 MR. GELFAND: Thank you, Your Honor. I have
9 just a couple of questions, and maybe this is my lack of
10 familiarity with the proceedings. It is a large number
11 of exhibits in a case --

12 THE COURT: Do you have a microphone there you
13 can lean into?

14 MR. GELFAND: Yes. Can you hear me, Your Honor?

15 THE COURT: That's better.

16 MR. GELFAND: All right. It seems like a large
17 number of exhibits to me, but that's my own personal
18 experience in other cases, including antitrust cases.
19 This is a relatively straightforward case. The issues
20 are relatively straightforward, but here's my concern.

21 THE COURT: Is there really such a thing as a
22 straightforward case?

23 MR. GELFAND: I think so, Your Honor, but maybe
24 not.

25 THE COURT: Let me tell you, if it's

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1 straightforward, it's settled already. I'm not here.
2 But go ahead.

3 MR. GELFAND: Well, that's fair. I hadn't
4 thought about that. That might be the litmus test.

5 So, Your Honor, they have 1900 exhibits.
6 There's 2400 combined, so almost all theirs, mostly
7 theirs. I have --

8 THE COURT: They also have the burden of proof.

9 MR. GELFAND: Fair. That's fair.

10 I understand the idea that when there is
11 post-trial briefing, we can respond in our reply brief,
12 and that is a very important document. I understand
13 that, Your Honor. A lot of times the response is not in
14 the record already.

15 So let's take Ms. Wilkinson's example. It's a
16 document before a meeting offered to prove what happened
17 at the meeting. If we don't know that that document is
18 going to be used at some point, we're not going to call
19 a witness in the case to talk about all 1900 documents.
20 We're not going to anticipate every point they might
21 want to make post-trial with every single document.

22 THE COURT: But you are going to -- you are
23 going to know every single point they make in their
24 post-trial brief, and you are going to have a chance to
25 attack it, reply to it, blast it, whatever you want to

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1 do.

2 I'm not going to make a ruling right now on a
3 document based on conjecture, but, for example, if
4 someone says in your scenario -- and I don't know
5 anything about these exhibits --

6 MR. GELFAND: Of course.

7 THE COURT: -- but if someone says, just for
8 example, there's an email saying there's a meeting
9 tomorrow, here's what we're going to discuss, and that's
10 all that's offered, well, at best, that proves there was
11 an email about what was planned to be discussed.

12 So, you know, that -- even if I accept it as
13 reliable, that's all it proves in that hypothetical, and
14 if someone tries to purport that it says more than that
15 and there's nothing in the record, that's a tough sell.

16 MR. GELFAND: Well, that's fair, Your Honor, but
17 my question is, how do we supplement the record
18 post-trial? How do we put in a declaration or a sworn
19 statement from somebody who's going -- can we do
20 that? -- that will say that never got discussed, that
21 was wrong, there was a typo in that email, or whatever
22 the -- whatever the explanation might be?

23 We might not have that in the record of the case
24 already, and we might want to respond to that with
25 additional evidence that would have come out had it been

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1 discussed at trial. So that's my first point.

2 THE COURT: Well, let me address your first
3 point. If someone has the burden of proof and they
4 think a document is important enough to support a
5 proposition or something on which they have the burden
6 of proof, they better make sure that's brought out in
7 trial. If somebody thinks they're going to hide behind
8 the log and paper the case after the record's closed,
9 they might be disappointed in what happens.

10 And I'm not going to require an affidavit or a
11 declaration. You're officers of the Court. I expect
12 attorneys to be honest with me. And if an attorney says
13 that's all that says, it doesn't say anything else, you
14 know, and for all we know, this is what happened, you
15 know, I'm just saying, you can -- first of all, that
16 document is clearly hearsay as you described it unless
17 there's some exception.

18 Now, we don't apply that rule strictly, but what
19 that means is, is it really reliable? And if nobody
20 says, yeah, that's my email and, oh, yeah, we had the
21 meeting and we talked about all that, that's a pretty
22 weak document. In the hypothetical I'm giving you, this
23 is not to do with any actual document in this case, but
24 if that happens in a post-trial brief, I understand what
25 you're saying.

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1 Let's just say there's 500 documents and 100 are
2 talked about at trial. Well, I would suggest someone
3 better talk about the documents that matter during this
4 trial, when we're on the record, where I can question
5 witnesses and you can cross examine witnesses, because
6 if they fail to do that -- and that's for either side --
7 that's at their peril.

8 MR. GELFAND: Thank you, Your Honor. That's
9 helpful guidance.

10 THE COURT: And in my example, if they talk
11 about 100 and there's 500 and they talk about 400 in
12 their post-trial brief and you've heard of none of them,
13 that's not a strong case they're making.

14 MR. GELFAND: I understand, Your Honor.

15 THE COURT: I'm not ruling on anything right
16 now.

17 MR. GELFAND: Of course. Of course.

18 THE COURT: This to me, what I'm saying right
19 now, is common sense for any fact-finder.

20 MR. GELFAND: Okay. The other concern I have,
21 Your Honor --

22 THE COURT: Also, let me add -- let me add, it's
23 common sense and to me it's just plain fairness that you
24 don't get ambushed after the record's closed with, well,
25 I didn't know that document was going to be purported to

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1 say that or I could have brought John Brown in to say he
2 was at the meeting and that's BS.

3 MR. GELFAND: Right.

4 THE COURT: I understand that there's a fairness
5 aspect here, and I will tell you one thing I will do, I
6 will make sure this is a fair proceeding.

7 MR. GELFAND: We are very grateful for that,
8 Your Honor. This is exactly my concern.

9 THE COURT: And that goes for both sides. I'm
10 not pointing to one side or the other. I am objective.
11 I'm independent.

12 Let me just tell you something. I work at the
13 FTC. I treat it as I work at the FTC, not for the FTC.
14 Everybody gets a fair trial here.

15 MR. GELFAND: Thank you, Your Honor. I'm very
16 grateful for that.

17 The other -- the other point I was going to
18 make, Your Honor -- and I think that kind of guidance is
19 very helpful to us as we do this further
20 meet-and-confer -- but I do have a concern about the
21 ambush, honestly.

22 So, for example, two days ago, we got
23 supplemental responses to an interrogatory that we
24 served a long time ago, and now Complaint Counsel's
25 identifying hundreds of new documents, hundreds, that

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1 supposedly support one proposition or another, and I
2 don't have the human capability, Your Honor, of
3 memorizing or understanding 1900 documents. I'm a
4 pretty smart trial lawyer, but I don't know how to
5 understand or comprehend all --

6 THE COURT: If you do say so.

7 MR. GELFAND: I don't know how to do it. I
8 don't know how to do it. So I need some way to know,
9 what am I shooting at? When is it coming in? How is it
10 being used? And I have a concern, Your Honor, that
11 we're going to see some what I call litigation by sound
12 bite, and I do intend to show you a couple of examples
13 of this tomorrow during the opening statement, where we
14 get these long footnotes or we just get, you know, "JLI
15 said such and such," and it's a phrase out of a
16 document, and if you just looked at the whole sentence
17 or even the next line, you would see that that's a
18 mischaracterization.

19 And I hope Your Honor will give guidance to both
20 sides -- us, too, I hold myself and my own team
21 responsible the same way -- that if somebody's going to
22 drop a footnote in a post-trial brief and say here's 20
23 documents that support this proposition and do a little
24 quote in a parenthetical, that there be an obligation on
25 that lawyer, as an officer of the Court, that they

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1 accurately represent what that document says in context,
2 that they not take a quote out of context and try and
3 say they've got 20 documents supporting something when
4 they don't have a single one that supports it. They're
5 just taking sound bites from 20 documents that didn't
6 even come up at trial.

7 So I know Your Honor will give us that guidance.
8 That's my concern, that how do we -- how do we respond,
9 but also this just litigation by volume of sound bite.
10 Thank you for listening to that, Your Honor. I
11 appreciate that.

12 THE COURT: Well, first, let me say this about
13 that. The Judge in your case is someone who during his
14 entire legal career has had the opinion, in any written
15 filing, if something's important, you don't say it in a
16 footnote. Footnotes are not for important points.
17 Footnotes don't prove anything. Footnotes are
18 afterthoughts. That's why they're called footnotes.

19 So I'll let everybody know, don't expect
20 footnotes to have a lot of sway with this Judge. Keep
21 that in mind when you're drafting your paperwork, your
22 documents and filings.

23 Unfortunately, they have got to be used. That's
24 how the law works. There are certain things that have
25 to go in a footnote, kind of in passing. I'm not sure

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1 how to address, without more, the concern you're raising
2 of where you're now just being told with supplements
3 that perhaps there are more witnesses that you might
4 need for your case. Is that what I heard?

5 MR. GELFAND: Well, we don't want to slow this
6 train down, Your Honor. We are ready to demonstrate to
7 you that there was no violation of law and that --

8 THE COURT: Well, we're already on the ride, and
9 until it stops, we're not getting off, okay?

10 MR. GELFAND: So I don't know what the solution
11 is to it. I've never had an adversary drop 500 new
12 documents -- the documents aren't new. To be clear,
13 they're in the record. They're exhibits. It's just
14 these were interrogatories that said, tell us, what is
15 your evidence that supports -- that supports point X?
16 What's your evidence that supports point Y?

17 And we just got a long list, really hundreds of
18 new citations to documents. We didn't even get the
19 context. We just got Bates numbers, like -- it's just
20 page after page --

21 THE COURT: Well, are you anticipating that the
22 other side is going to try to prove elements of the case
23 with interrogatory responses? Is that what you're
24 saying?

25 MR. GELFAND: No, Your Honor.

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1 THE COURT: That's not something that they can
2 rely on. We know who wrote the interrogatories in the
3 case.

4 MR. GELFAND: We know how they are going to
5 prove their case. That's what discovery is for, and
6 that's why we asked their interrogatory, and we thought
7 we knew what they intended until two days ago when we
8 got 500 new citations.

9 MR. RODGER: Your Honor, may I be heard?

10 THE COURT: I heard two people.

11 MS. WILKINSON: Your Honor, I just wanted to
12 give an even more practical example of what Mr. Gelfand
13 is talking about.

14 THE COURT: All right.

15 MS. WILKINSON: We have these interrogatories.
16 There's Interrogatory 8 that we asked them if there is
17 anything JLI did after we left the market with regard to
18 price, tell us. We get an answer two days ago, which
19 includes that because JLI was under investigation, they
20 might have done something different about price. We
21 have never heard that allegation before. So Mr. Gelfand
22 and I could not ask their expert about it. No fact
23 witnesses have been asked about it.

24 So my concern is that it's not just dropping the
25 documents. It's kind of a new argument, a new

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1 allegation. I don't know any testimony that supports
2 it. In a courtroom, like you've alluded to, where the
3 rules are enforced, you know, that would normally be
4 excluded. You're telling us too late. We can't get to
5 ask the witnesses about it.

6 I'm not sure how to remedy it here in front of
7 you. It doesn't seem fair that they can come up with
8 this new argument that we couldn't depose their expert
9 on or any fact -- I assume they're saying their expert
10 is going to say it, but there is no citation, there is
11 no support, other than some documents.

12 So that's the example of I think what we're
13 struggling with to understand when we get these
14 supplements this late in the game, how we're supposed to
15 address them this close -- or while we're in trial,
16 because we're in trial now.

17 THE COURT: Well, first off -- first off, there
18 will be no new opinion from any expert. Expert opinions
19 are locked, and some expert may think they are going to
20 give new opinions, but I can assure you, they are not.
21 The opinions are what they are in writing, and any
22 attempt to get around that, we'll deal with.

23 But also in the example you gave me -- and I'm
24 assuming it's a hypothetical -- but as far as I'm
25 concerned, if you want to address that, you're calling

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1 fact witnesses, and someone can take the stand, "I'm
2 Joe, I'm so and so officer, and that never happened.
3 That's incorrect." I don't need an expert to refute
4 what sounds like a factual proposition. You're not
5 locked in.

6 The only people locked in are the experts, and
7 we do that just so things can work. You know, that's
8 the only way the proceeding will work, is I am not going
9 to have a continual battle of new expert opinions until
10 we're all blue in the face, until we're just
11 mind-numbed, okay? But fact witnesses can say what they
12 want, but keep in mind, if they change something they
13 said before, they can be impeached.

14 But you can have a witness that's been deposed
15 that gave us ten facts, and when they take the stand,
16 they can give us 110 facts. That's why we're having a
17 trial.

18 Does that help?

19 MS. WILKINSON: Yes, Your Honor, very much so.

20 THE COURT: And I'm not going to tell anybody
21 how to try their case. Obviously I know the law firms
22 you're with, and the representatives of the Government,
23 you certainly know what you're doing, and you know how
24 to do this. And so I would say address what you can,
25 and what you can't address, let me know why you can't

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1 address it.

2 Now, if you're telling me, Ms. Wilkinson, that
3 you would liked to have known this to run it by your
4 expert, well, that's why I say expert opinions are
5 locked in, because whatever those opinions are, the
6 Government's expert, well, you did know that, and your
7 expert got to respond to those opinions. You see what I
8 mean? To keep it fair, you don't need your expert to
9 address things that aren't expert opinions of the other
10 side.

11 MS. WILKINSON: Understood. No, I would -- I'm
12 with you, Judge. The fewer experts the better. I don't
13 want my expert to say anything more. I don't understand
14 any basis for this, that's my point, but I hear you. We
15 can bring in a fact witness that says, you know, X and Y
16 did not happen despite what is written down in this
17 response to an interrogatory.

18 So I -- you're right, I know how to do that. I
19 am not as good as Mr. Gelfand, or I won't say I am, but
20 I know how to do it.

21 THE COURT: Well, I can tell you right now, in a
22 hypothetical scenario, if you have -- if you have a
23 witness on the stand, either side, and you say:

24 "Do you understand that there's been an
25 allegation or an assertion that X, Y, and Z happened in

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1 2020, do you -- are you aware of that allegation.

2 "Yes.

3 "Are you aware of that situation?

4 "Yes."

5 You know, just lay a foundation and let the
6 witness testify, just like you would for any factual
7 point.

8 Mr. Rodger, go ahead.

9 MR. RODGER: Thank you, Your Honor. We just
10 want to respond to a couple of points.

11 THE COURT: And by the way, before you speak, I
12 understand this might sound one-sided, but, you know,
13 you know how the system works a lot more than they do,
14 and I'm not, you know, letting anyone cast aspersions on
15 any witness or anything about this case, okay? But I
16 know you're going to need to defend some things. Go
17 ahead.

18 MR. RODGER: Understood, and over the past
19 several months, my colleagues and I have done our best
20 to try to do some explanation, and clearly we haven't
21 done it as well as Your Honor, so I just want to make a
22 couple of quick points about the validation --

23 THE COURT: Wait, I didn't hear that. Were you
24 giving me a compliment there? I missed that.

25 MR. RODGER: Absolutely. Always, always.

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1 THE COURT: Go ahead.

2 MR. RODGER: With regard to --

3 MR. GELFAND: In case you didn't hear it, Your
4 Honor, I gave you a lot of compliments.

5 THE COURT: I'll be reading the transcript
6 later.

7 MR. RODGER: Mr. Gelfand is very savvy in that
8 way.

9 The allegation of litigation by ambush, just to
10 be clear, Your Honor, we're talking about --

11 THE COURT: To be fair, I introduced the word
12 "ambush." I'm the one who interjected that.

13 MR. RODGER: Just to talk about the context,
14 these are contention interrogatories, and as I indicated
15 before, we have actually cut the number of exhibits --

16 THE COURT: And as trial lawyers, don't we love
17 contention interrogatories, all of us? Go ahead.

18 MR. RODGER: So we get these broad
19 interrogatories that say, give us all your evidence, you
20 need to supplement. So you're in a situation where you
21 don't supplement and it's a big "Ah-ha." You receive an
22 interrogatory that says give us all your evidence, so
23 we -- my colleagues and I, Complaint Counsel did our
24 best to list that evidence.

25 These are all documents that Complaint Counsel

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1 has had for months. These are documents that are cited
2 in our expert's report and they are cited in our
3 pretrial brief. There is nothing new here, and these
4 are documents that Respondents' counsel and the many
5 attorneys on their team have all read many times over,
6 and so we take exception to that generally.

7 We certainly understand Your Honor's point about
8 experts. We've been before Your Honor, and we
9 understand there's going to be no additional expert
10 opinion, and we appreciate that. Thank you for letting
11 me respond.

12 THE COURT: All right. And I suppose, to be
13 fair, there -- it's not like how long someone's had the
14 documents. If I understood it -- and, again, this is
15 hypothetical, I don't have a motion pending right now --
16 but -- and I really hate speculating -- but if someone
17 has just, for example, yesterday said, "Okay, yeah,
18 you've got those 400 documents," and for the first time,
19 I'm saying, "Well, they also support this contention,"
20 that's new, to be fair. That's new. And so they're
21 going to have to respond to that if they want to. They
22 don't have to, but they have the right to, just so we're
23 clear.

24 MR. RODGER: Understood, Your Honor.

25 MR. GELFAND: Your Honor, just a simple point,

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1 but I don't think I've ever seen a party do a
2 supplementation and say there's nothing new here. If
3 there wasn't anything new, it wouldn't need to be
4 supplemented.

5 THE COURT: Well, that -- you have just stated a
6 truism. I don't know how you would like for me to
7 respond to a truism.

8 MR. GELFAND: Well, it's new. That's why they
9 supplemented.

10 THE COURT: By definition. That is a good
11 point.

12 And I think Mr. Rodger, though, is going to
13 respond to that. Go ahead.

14 MR. RODGER: The response is when the
15 interrogatories were served and Complaint Counsel had to
16 respond, at the time they responded, there had been
17 additional discovery, and the issues had been narrowed.
18 And so when you get a contention interrogatory that asks
19 for all of the evidence, Complaint Counsel certainly did
20 the best we could at the time the interrogatories were
21 due, and we supplemented them, you know, as appropriate
22 under the Part 3 rules.

23 THE COURT: Well, no, and just so -- and I like
24 to be very clear that I'm fair on the record. A truism
25 is not anything regarding the merit or the content, but

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1 the fact that a supplement is filed means there was
2 something to supplement or to say about it. I
3 understood that to be his point.

4 Am I correct?

5 MR. GELFAND: Yes, Your Honor. That was my
6 point.

7 THE COURT: You don't have to say yes unless
8 it's -- it is correct.

9 MR. GELFAND: No, it is correct. Don't worry.
10 I'm not bashful. Sometimes I'm a little bashful.

11 THE COURT: And you are a great trial lawyer, I
12 was told by you, so --

13 MR. GELFAND: Well, I think I --

14 MR. RODGER: Ah, I believe Ms. Wilkinson said
15 it, not Mr. Gelfand.

16 THE COURT: Well, you know, I'm not sure, but,
17 you know, this is a prehearing -- a prehearing
18 conference, so no -- none of this is evidence, and we're
19 just talking law. We're getting to know each other,
20 because we're going to be spending a lot of time
21 together, and we're probably going to be sick of each
22 other before this is over.

23 I hope I'm not sick of you-all, and I hope
24 you're not sick of me, but we're getting ready to spend
25 a lot of time together, and for some I feel like this is

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1 more up close in my face than when I'm on the bench
2 looking down from my lofty perch. I like that angle
3 better, so --

4 MS. WILKINSON: Your Honor, when you say that --
5 and I know you are going to say no and it would be
6 impossible -- but is there any way we could come live
7 for the openings in your courtroom? I'm concerned about
8 this technology, and I've tried to design ways to show
9 the exhibits as easily as possible, but what you said
10 earlier is something I've been obsessed with, where if I
11 put that on the screen -- and maybe this will make you
12 happy -- I shrink down to a little box and I'm trying to
13 talk to you directly, but I'm also trying to show you
14 the evidence. If we were in a real courtroom, as you
15 know, it would be on the screen, and you and I could
16 look back and forth to the exhibit, and I could take it
17 down, I could be talking to you or you could ask me
18 questions.

19 Is there any way we could come to the courtroom
20 just for openings?

21 THE COURT: Well, if we could do the opening, we
22 could do the trial, and even though things are opening
23 up and the world seems to be getting better, that light
24 at the end of the tunnel, the Federal Trade Commission
25 Headquarters Building is not there yet, and there would

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1 be too many logistics problems to try to go live.

2 There would be people panicking up and down
3 Pennsylvania Avenue, and I'm just not going to do that
4 to the people, and there's still people that don't want
5 to ride Metro.

6 MS. WILKINSON: Understood.

7 THE COURT: They're just -- but I understand the
8 basis for that, but everybody is going to be heard and
9 seen equally here. That's why it's fair, because
10 everybody will be in a little box or a big box, and I
11 have learned some -- Mr. Scott, who's the guru, he's
12 flying the plane, and doing a great job, and Mr. Scott
13 has shown me some tricks so that I can make sure that --
14 you know, the boxes can be manipulated by me and become
15 larger, if need there be.

16 So, again, tomorrow's opening statement, there's
17 no evidence yet, and by the time we're finished, I will
18 have a better idea of how to manipulate the boxes to see
19 who I want to see and not see who I don't want to see.

20 Now, with that, I think this is a good breaking
21 point for you to get -- to go and work out your
22 objections, and then we will reconvene at some point.
23 And I suppose you can contact Dana Gross by email when
24 you're ready to reconvene. I will wait to hear from
25 you.

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1 MS. WILKINSON: I don't think it will take long,
2 Your Honor. I don't think -- Mr. Rodger has been good
3 about getting on the phone with us. We can do that
4 right away. I don't think it will take more than a few
5 minutes.

6 THE COURT: Okay. We have been going about two
7 hours, so we're going to go ahead and take at least 15
8 minutes, so -- and I'll still wait to hear that we're
9 ready to go.

10 So right now, I'm going to -- we are going to
11 take a short break of at least 15 minutes, and by my
12 clock, that's until at least 4:12, but it's going to be
13 beyond that, because I will wait to hear that the
14 parties are ready to talk. And with that, we're in
15 recess.

16 MS. WILKINSON: Thank you, Your Honor.

17 MR. GELFAND: Thank you, Your Honor.

18 MR. RODGER: Thank you, Your Honor.

19 SCOTT: If everyone would mute their microphone
20 and camera, I would appreciate it. Thank you.

21 (A brief recess was taken.)

22 THE COURT: Let's go back on the record.

23 One thing I want to mention, when we go on a
24 recess, we have a recess for lunch or a break, as well
25 as when we're in camera, the people listening on the

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1 phone are supposedly not hearing anything, and that's
2 the way it's set up. I know this is new and we're
3 trying to figure out how it's going to work, but I've
4 made it clear that -- so that when we're in recess,
5 people that are listening on the phone, that's another
6 entity.

7 I'm told they're put into some kind of room here
8 to make it work, but they're not supposed to hear
9 anything, and I don't know when I leave what -- if
10 you-all are talking just like you are here, so that if
11 the feed wasn't cut, people would hear you talking. So
12 I'm just letting you know, they're supposed to be cut
13 and not hear when we're on a break. Nobody hears
14 anything, okay?

15 Who wants to give me an update?

16 MS. WILKINSON: I do, Your Honor. It's going to
17 shock you to know that we heard you and we have good
18 news to report. Complaint Counsel agreed to withdraw
19 some documents, and so we are withdrawing all of our
20 remaining objections in light of what you told us
21 earlier today?

22 THE COURT: I'm sorry. Did I mis -- did you
23 just say you're withdrawing all the objections?

24 MS. WILKINSON: Yes, sir.

25 THE COURT: That's what I like to hear.

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1 MS. WILKINSON: Yes, sir.

2 THE COURT: So does the Government have any
3 objections?

4 MR. RODGER: We don't, Your Honor. We've worked
5 with Respondents' counsel and dropped the few remaining
6 objections that we had, and we can work together tonight
7 to get the JX 2 all put together and proceed however you
8 wish.

9 THE COURT: I really, really appreciate that,
10 that's excellent news, and I appreciate attorneys
11 listening to what I had to say, that there's going to be
12 fairness, regardless of what's admitted or not admitted.
13 Something is going to be weighed for whether its
14 credible and trustworthy or not.

15 Let me try to jump back to my agenda. Let me go
16 back to talk about the joint exhibit, and I don't know
17 if this has been gone over. I can't remember if this
18 was in an email or not, but now that you have a list of
19 documents that both sides have agreed to and no longer
20 oppose, you can develop a list that sets forth those
21 exhibits. This list shall be designated a joint exhibit
22 with a JX number.

23 Now, I believe we have a stipulation already,
24 which is JX 1, I believe. Am I correct?

25 MR. RODGER: That's correct, Your Honor, the

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1 joint stipulations we marked as JX 1.

2 THE COURT: So this next one will be JX 2, and
3 just a few things I want to say about it. You don't
4 need to rename any of the exhibits in the joint exhibit.
5 You know, JX 2 will have the exhibit numbers, but
6 there's no JX for each exhibit on that joint exhibit.

7 And also -- and you -- the parties usually
8 figure this out, but a lot of times there's an exhibit
9 marked by Respondent and marked by the Complaint Counsel
10 with two different markings and it's the same document.
11 So please take your time and eliminate duplication.

12 And I can tell you, when we go through the
13 trial, when someone refers to Respondent's Exhibit or
14 Complaint Counsel's Exhibit, that does not matter to me.
15 It's an exhibit. So if somebody says, "Well, wait a
16 minute, that's a JX or a Respondent's Exhibit," that
17 doesn't matter to me. So don't get hung up on whose
18 number is on the exhibit. We just don't want
19 duplication.

20 Let me see here. I think I covered this. If,
21 for example, the Government wants to offer CX 100 and
22 there's no objection, it would be called CX 100 on that
23 JX 2, and then any JX after that will have the
24 sequential number, like JX 3.

25 And I want to say this, joint exhibits shall not

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1 include a signature line for the judge. I do not need
2 to sign a joint exhibit on these exhibits. I don't need
3 to do that.

4 I also want to say -- well, I don't think this
5 applies now, but in the event a document was not
6 admitted today, someone can re-urge admission later, but
7 it sounds like I don't need to go into that.

8 And I've already told you this, exhibits that
9 are offered and are not admitted today or during the
10 trial, they do become part of the record, so no offer of
11 proof is needed.

12 Regarding providing OALJ with exhibits, at the
13 conclusion of this conference, after the exhibits are
14 admitted, I'd like for -- and once you have got the
15 JX finished -- it doesn't have to be done today, it
16 needs to be done whenever -- and when it's concluded,
17 you're to provide an electronic version to my staff at
18 OALJ. You can get in touch with Dana to work on
19 logistics. We do not need a hard copy of exhibits
20 unless I ask for them specifically.

21 And here's another thing that needs to be added
22 back into my agenda or I'm simply missing it. The
23 process of agreeing to stipulations and JXs, joint
24 exhibits, that does not end today. I encourage the
25 parties to continue to try to work on joint stipulations

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1 until post-trial briefs are filed.

2 And one thing that really helps is there are
3 going to be terms that are unique to the e-cigarette
4 industry, for example, and I don't know why the parties
5 would have a dispute on how to define certain things.
6 So that's a real good way to knock out a lot of things
7 to stipulate to certain definitions and anything you can
8 stipulate to, and everything you stipulate to we don't
9 need to have a witness testify about it. It's done, and
10 that can help streamline things for all of us.

11 And remember, this is about a complete record.
12 Don't care who sponsors a document, don't care if it's a
13 joint exhibit or a stip, whatever. I'm going to look at
14 it all, and I'm going to consider what weight to give
15 everything when it's all over.

16 We're now going to move into joint stipulations,
17 unless there's a question so far.

18 MR. RODGER: Yes, Your Honor. I have a quick
19 procedural question just about the JX 2. In the Court's
20 scheduling order with regard to exhibit lists, I believe
21 there was a provision that indicated that the numbers
22 should be consecutive, and if there's a blank, it should
23 say "intentionally left blank." For the JX 2, do you
24 mind -- because some -- Respondents have withdrawn some
25 exhibits, we've withdrawn some exhibits. Is it fine

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1 with you if there are -- you know, they're in numeric
2 order, but if there are gaps because exhibits have been
3 withdrawn, is that fine with the Court?

4 THE COURT: Yes. I mean, it's up to you-all to
5 list what the exhibits are. If you want to say, you
6 know, CX 100 through 150 were not included or if you
7 want to just jump from 100 to 150 or 151, that's fine,
8 too. So it's on you to just make sure I've got all the
9 exhibits. Either way is fine.

10 MR. RODGER: Okay.

11 THE COURT: All I care about is I can follow
12 them and you've got everything in there.

13 MR. RODGER: Understood, Your Honor. Thank you.

14 THE COURT: Okay. Let me talk about joint
15 stipulations. Under the scheduling order, you were
16 directed to meet and confer prior to this conference
17 regarding proposed stipulations of law, facts,
18 authenticity of exhibits, et cetera, et cetera.

19 I did receive the joint stipulation, and I'm not
20 sure I reviewed everything today, but -- and that would
21 be JX 1, and does someone want to offer JX 1 into
22 evidence and then I will admit it today? Who wants to
23 offer JX 1? Anybody?

24 MR. RODGER: Your Honor, Complaint Counsel
25 offers JX 1 into evidence.

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1 THE COURT: Any objection?

2 MS. WILKINSON: No, Your Honor.

3 MR. GELFAND: No.

4 THE COURT: JX 1 is admitted.

5 (Joint Exhibit Number 1 was admitted into
6 evidence.)

7 THE COURT: And as I said earlier, you are
8 encouraged to continue to confer and agree to additional
9 stipulations so that a lot of things won't have to be
10 addressed in trial and in the post-trial briefs.

11 Now, unless anyone has anything else on exhibits
12 and stipulations, I am going to move on. Any further
13 questions on those?

14 MS. WILKINSON: No, Your Honor.

15 THE COURT: All right.

16 And I understand there was some request to my
17 staff about headphones?

18 MS. WILKINSON: Yes, Your Honor. We have
19 conferred with Complaint Counsel, and both sides have
20 had their virtual courtrooms wired in such a way that
21 putting on headphones would be very difficult. So we've
22 tried to improve our sound quality, and we would ask the
23 Court to reconsider the order to go get our headphones
24 and see if we can try it tomorrow.

25 We talked to the court reporter. She could hear

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1 us, you know, once we figured out our microphones, and
2 if you would just reconsider until tomorrow to see if we
3 can convince you or that you can hear us properly.

4 THE COURT: Mr. Gelfand, say something.

5 MR. GELFAND: I join that motion
6 enthusiastically, Your Honor.

7 THE COURT: And Mr. Rodger?

8 MR. RODGER: Complaint Counsel agrees to it and
9 would appreciate it as well, Your Honor.

10 THE COURT: I've considered your motion for
11 reconsideration and it's granted.

12 MS. WILKINSON: Thank you.

13 MR. RODGER: Thank you, Your Honor.

14 THE COURT: Yeah. I don't think this is any fun
15 either. I have got to wear this thing on my head all
16 day, but I don't want to lean up to the microphone. But
17 be advised that, if necessary, this will change. We'll
18 see how it goes. It has helped that you're leaning
19 toward the microphone. I have determined that I need to
20 see that microphone to be able to hear you. So let it
21 be part of the picture. I don't know what Mr. Rodger is
22 doing, but his is working without me seeing the
23 microphone, so...

24 Let's talk about opening statements. Each
25 side -- each side, not each party -- is permitted up to

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1 two hours, and like I often say, that is a limit, not a
2 goal. And I'd like to hear from the parties if you have
3 some idea of how much time you're going to need. I'll
4 start with the Government.

5 MR. RODGER: Your Honor, I don't expect to go
6 longer than 75 minutes.

7 THE COURT: Sounds good.

8 And for Respondents?

9 MS. WILKINSON: For Altria, Your Honor, I'm
10 aiming for an hour, hour and ten minutes.

11 MR. GELFAND: I did -- Your Honor, this is David
12 Gelfand. I did a dry run today, and it took about a
13 half an hour, give or take five minutes.

14 THE COURT: All right. And that's -- you know,
15 both Respondents are going to make opening statements.
16 Am I correct?

17 MS. WILKINSON: Yes, Your Honor.

18 THE COURT: Whoever goes first, just remember,
19 you better leave time for whoever goes second.

20 MS. WILKINSON: I'll be going first, Your Honor.
21 Mr. Gelfand has already reminded me of that.

22 Your Honor, can I ask who will be doing the
23 opening for Complaint Counsel?

24 THE COURT: Yes.

25 Do we have an answer?

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1 MR. RODGER: Yes, Your Honor. I will be doing
2 the opening.

3 MS. WILKINSON: Good. Thank you, Mr. Rodger.

4 THE COURT: Does that give you a feeling of
5 comfort?

6 MS. WILKINSON: It does.

7 THE COURT: All right, good.

8 See, as for me, whoever stands up, I've got to
9 listen to them, so it doesn't matter to me.

10 MS. WILKINSON: Well, as I said, Your Honor, we
11 have had lots of these pretrial conversations, and
12 Mr. Rodger has been very gracious to talk to us on
13 numerous occasions. So I'm happy it's him.

14 THE COURT: I do like when the parties are
15 agreeing on things. That makes everything goes along
16 nice.

17 Now, tomorrow, we are going to hear the opening
18 statements -- 9, 10, 11 -- let's see, 10, 11, 12 -- I
19 expect there will be a witness available to fill the
20 rest of the day. Is that -- everybody -- you are going
21 to have somebody ready, correct?

22 MR. RODGER: We have somebody ready, Your,
23 Honor, yes.

24 THE COURT: And you expect that person to go
25 until 5:30? If not, you will have witness number two

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1 ready?

2 MR. RODGER: We do not have a witness number two
3 ready.

4 THE COURT: Okay.

5 MS. WILKINSON: Your Honor, we did work out
6 during the break that we have a witness for Friday, so
7 Mr. Rodger agrees that JLI will have Mr. Pritzker there,
8 and Mr. Rodger is calling him. So we will use the time
9 on Friday.

10 THE COURT: Did you say "Rodgers" with an S?

11 MS. WILKINSON: Mr. Rodger -- in other words,
12 Complaint Counsel will call them. The witness' name is
13 Pritzker, Mr. Pritzker.

14 THE COURT: Okay. It is Rodger without an S,
15 right?

16 MR. RODGER: Yes, Your Honor.

17 THE COURT: All right, thank you. That's -- I'm
18 glad to hear that.

19 Do we have anything else before we conclude the
20 final prehearing conference?

21 MS. WILKINSON: Not on behalf of Altria.

22 MR. RODGER: Nothing from Complaint Counsel.

23 MR. GELFAND: Nothing from JUUL Labs, Inc.

24 THE COURT: Thank you for your attention and
25 cooperation and especially for your agreeing on those

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1 contested exhibits.

2 Hearing nothing further, this concludes the
3 final prehearing conference. We are adjourned until
4 10:00 a.m. tomorrow for opening statements.

5 MS. WILKINSON: Thank you, Your Honor.

6 MR. GELFAND: Thank you, Your Honor. Have a
7 good evening.

8 MR. RODGER: Thank you, Your Honor.

9 (Whereupon, at 4:51 p.m., the proceedings were
10 adjourned.)

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CERTIFICATE OF REPORTER

I, Susanne Bergling, do hereby certify that the foregoing proceedings were recorded by me via stenotype and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of the action.



SUSANNE BERGLING, RMR-CRR-CLR

PUBLIC**CERTIFICATE OF SERVICE**

I hereby certify that on August 18, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
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 Federal Trade Commission
 600 Pennsylvania Ave., NW, Rm. H-113
 Washington, DC 20580
 ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
 Administrative Law Judge
 Federal Trade Commission
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 Washington, DC 20580

I also certify that I caused the foregoing document to be served via email to:

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/s/ Jennifer Milici
 Jennifer Milici

Counsel Supporting the Complaint