PUBLIC

UNITED STATES OF AMERICA
BEFORE THE 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 INVESTIGATIONAL HEARING TRANSCRIPTS

Respondents' Motion *In Limine* to Exclude all Investigational Hearing Transcripts ("Motion") disregards the FTC Rules of Practice. Respondents' Motion seeks a blanket exclusion of evidence that is expressly admissible under Rule 3.43(b). There can be no valid basis for such a sweeping exclusion in contravention of the plain text of the rules. The investigational hearings ("IHs") are relevant, material, and reliable, as recognized by Respondents' own experts when they cited these transcripts throughout their expert reports. Accordingly, this Court should deny Respondents' Motion.

Factual Background

{[redacted]}

{[redacted]}

Argument

I. The FTC Rules Explicitly Recognize the Admissibility of IH Transcripts

Respondents' Motion seeks to exclude all IH transcripts from evidence for a variety of reasons, claiming that their admission would violate Respondents' "rights to object, cross-examine and present evidence," would be "cumulative and wasteful," and would somehow allow the FTC to "vastly (and asymmetrically) expand its effective trial time." Respondents also argue that this Court should not admit IHs "the truth of the matter asserted" and that third-party IHs constitute "improper hearsay."[1] These arguments explicitly ignore the text of Rule 3.43(b) and the precedent of this Court. Respondents provide no reason why the Court should deviate from its prior practice as well as the clear language of Rule 3.43(b) and exclude all IH testimony.

Rule 3.43(b) requires admission of all evidence that is "relevant, material, and reliable," unless that evidence is more prejudicial than probative, or its presentation would cause "undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b). Significantly, the Commission amended Rule 3.43(b) in 2009 to add language that expressly allows for the admission of IH transcripts:

> "If otherwise meeting the standards for admissibility described in this paragraph, depositions, ***investigational hearings***, prior testimony in Commission or other proceedings, expert reports, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay."

[1] Motion at 1.

74 Fed. Reg. 1804-01, 1831 (Jan. 13, 2009) (emphasis added). In addition, Rule 3.43(b) requires admission of all relevant party-opponent statements. 16 C.F.R. § 3.43(b) ("Statements or testimony by a party-opponent, if relevant, *shall* be admitted.") (emphasis added). The IH transcripts in this case are plainly admissible under Rule 3.43(b).

II. IH Testimony Is Reliable Evidence

In amending Rule 3.43(b) explicitly to include IH testimony in the list of admissible evidence, the Commission recognized that IH testimony is generally reliable. Respondents provide no argument supporting the position that the IH testimony in this case is so uniquely unreliable that all of it should be excluded in its entirety. The IHs were not conducted in any unusual manner but were conducted in accordance with all applicable Rules: pursuant to Rule 2.9, a court stenographer recorded the IH testimony and administered an oath; all witnesses were provided the opportunity to review and correct their transcripts; all witness were entitled to have counsel present during the IH, and the vast majority of witnesses were, in fact, represented by counsel at their IH.

Recognizing the reliability of the resulting testimony, Respondents' {[redacted]} undermining any argument that these IHs are inherently unreliable or duplicative. Furthermore, this Court has long recognized the reliability of IH testimony and routinely admits both party and non-party IH testimony into evidence. *See, e.g., In re LabMD,* Docket No. 9357, Final Prehearing Conference (May 15, 2014) at 9:17-10:8 (attached as Exhibit G) (noting the that

[2] {[redacted]}

Rule 3.43(b) has been changed to allow IH Testimony into evidence); *In re McWane, Inc.,* Docket No. 9351 (attached as Exhibit I), Order Denying Respondent's Motion to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial (Aug. 15, 2012); *see also FTC v. Thomas Jefferson Univ.,* No. 2:20-cv-01113-GJP, ECF #224 (attached as Exhibit H) (E.D. Pa. Sept. 10, 2020) (denying defendant's motion to exclude IH testimony in a federal court preliminary injunction proceeding).

Although Respondents raise several claims about the purported unfairness of the rules governing FTC investigations, none of these arguments sufficiently undermines the reliability of IH testimony to justify their wholesale exclusion from evidence. Specifically, Respondents claim that because IHs are conducted *ex parte*, opposing counsel is denied the opportunity to cross examine witnesses or object to questions. But this argument rings hollow. As explained above, Respondents had the opportunity to depose and question each of the third-party witnesses during discovery. Moreover, Respondents were present during their clients' investigational hearings, had the opportunity to object and, in fact, did so hundreds of times. To the extent Respondents believed there were issues that needed clarification, they were free to submit either an errata or declaration correcting any alleged deficiency.[3]

Respondents' Motion also mischaracterizes both the applicable rules and the record in this matter. Contrary to Respondents' claim, Rule 2.9(b)(2) does not require counsel to limit objections to only objections made on the basis of scope or privilege. Instead, the rule states

[3] Respondents' arguments confuse the gathering of testimonial evidence during an investigation or discovery with trial testimony. The fact that rules governing IHs differ from the rules governing FTC adjudicative proceedings is not surprising—rules governing trials and discovery often differ—and has no bearing on the relevance, reliability, or ultimate admissibility of IH transcripts. The 60-year-old case cited by Respondents for the proposition that investigational evidence is not incorporated into the adjudicatory process, *Hannah v. Larche*, 363 U.S. 420, 446 (1960), merely states that the FTC investigatory rules provide due process because the adjudicative proceeding provides traditional judicial safeguards. It does not suggest that IH testimony gathered during this investigation, or generally, is unreliable.

"[a]ny objection during a deposition or investigational hearing shall be stated concisely on the hearing record in a non-argumentative and nonsuggestive manner" and that the witness shall answer except when asked to "divulge information protected by the claim of protected status." 16 C.F.R. § 2.9 (b)(2). For the fifteen IHs of party witnesses, Respondents' own counsel was present and aggressively objected, including objections to the form of the question[4] and to questions purportedly asked and answered.[5] {[redacted]}

Respondents also claim that because some of the IH transcripts contain allegedly leading or speculative questions, all of the IH transcripts should be excluded in their entirety. Respondents, however, do not attempt to identify specific testimony that is unreliable. Respondents will have the opportunity post-trial to object to any testimony that Complaint Counsel relies upon in its proposed findings of fact, including on grounds of reliability. Respondents cite no authority nor explain how IH testimony is either generally unreliable or specifically unreliable in this case. To the extent any of Respondents' arguments have merit,

[4] {[redacted]}

[5] {[redacted]}

they merely go to the weight a fact finder may assign to specific IH testimony, not its admissibility.[6]

Lastly, Respondents' claim that "[t]he trial will not provide an adequate opportunity for Respondents to remedy the unfairness of the IHTs" and impermissibly allow the FTC "more than 100 hours of [additional] trial time" is completely baseless. The relevant rules explicitly allow the admission of IH transcripts without limitation despite Rule 3.41(b) stating that the "hearing … should be limited to no more than 210 hours." 16 C.F.R. § 3.41(b). Moreover, neither the Rules nor this Court's Scheduling Order provide any limit on the number of depositions that Respondents could conduct. Thus, Respondents had ample opportunity to supplement their trial testimony with deposition testimony if they wanted to do so.

III. The IH Testimony Is Not Cumulative

Respondents' argue that the IH testimony should be excluded as cumulative because of the large volume of transcripts. While some of the IH witnesses also were deposed, the depositions covered many different topics, including {[redacted]} The mere fact that the same witness testified on more than one occasion does not mean that the testimony is wholly, or partially, duplicative.

Respondents argue repeatedly, however, that because the FTC is seeking to admit these IH transcripts in their entirety as opposed to designated portions, the testimony is inherently cumulative and that it would be "unfair and prejudicial to force Respondents to use their own

[6] As the Scheduling Order in this Matter notes "the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence." *In re Illumina, Inc., Grail*, Docket No. 9401, Scheduling Order ¶ 13 (Apr. 26, 2021).

scarce trial time to respond to over 6,000 pages of IH testimony."[7] Of course, much of the IH testimony is from the parties' own executives given in the presence of Respondents' counsel.

In any event, Respondents cannot credibly claim both that the IH testimony is so cumulative as to be inadmissible and simultaneously claim that the admissibility of IHs is the same as granting, "over 100 hours of … questioning into the record" to Complaint Counsel such that it would be "unfair and prejudicial" to Respondents to use their "scarce" trial time to respond. Responding to truly duplicative evidence would not add to Respondents' trial burden. It also does not make sense for any court to decide how much evidence is cumulative any one issue prior to a trial before evidence has been admitted or considered.

Respondents attempt to distinguish this Court's decision in *McWane* from the present matter on the basis that the IH testimony proffered in *McWane* was merely excerpts and not the entirety of the transcript. Unlike in *McWane*, however, the Scheduling Order in this matter as well as numerous other recent matters including *In re Altria Group, Inc.,* Docket No. 9393, *In re Otto Bock HealthCare North America, Inc.*, Docket No. 9378, and *In re Tronox Limited,* Docket No. 9377 (attached as exhibits J,K, and L), requires neither IH nor deposition transcript designations.[8] In accordance with this Court's longstanding practice, Respondents can object to the portions of any IH testimony that Complaint Counsel relies on in its post-trial proposed findings of fact in Respondents' own reply findings of fact. To the extent this Court considers any portions of IH testimony not cited in Complaint Counsel's proposed findings of fact, this Court is capable of assessing the reliability of such testimony and assigning the appropriate weight.

[7] Motion at 6.
[8] *See also* Exhibit G, *In re LabMD,* Docket No. 9357, Final Pretrial Prehearing Conference (May 15, 2014) at 39:7-40:5; 41:11-41:23.

IV. The IH Transcripts Are Not Inadmissible Hearsay

Lastly, Respondents' assert that "IH testimony should not be admitted to prove the truth of the matters addressed therein"[9] and that non-party IH transcripts should be excluded because they contain hearsay.[10] Both arguments lack merit. Rule 3.43(b) states that, if they otherwise meet the standards of admissibility under the rule, "investigational hearings . . . and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay." Rule 3.43(b). Rule 3.43(b) further states that "Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted." Therefore, based on the plain meaning of Rule 3.43(b), any evidence, including IH transcripts of party and third-party witnesses, that is hearsay but "otherwise meet[s] the standards for admissibility" under the rule can be offered "to prove the truth of the matters addressed therein."

Conclusion

For the above reasons, Complaint Counsel respectfully requests that this Court deny Respondent's Motion.

Date: August 18, 2021

Respectfully submitted,

s/ Stephanie C. Bovee

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Counsel Supporting the Complaint

[9] Motion at 6.
[10] Motion at 9.

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 Investigational Hearing Transcripts, it is hereby:

ORDERED that Respondents' motion is DENIED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August _____, 2021

Exhibit A

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit B

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit C

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit D

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit E

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit F

(CONFIDENTIAL – REDACTED IN ENTIRETY)

Exhibit G

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

FEDERAL TRADE COMMISSION
I N D E X
IN RE LABMD, INC.
FINAL PREHEARING CONFERENCE
MAY 15, 2014

EXHIBITS	FOR ID	IN EVID	IN CAMERA	STRICKEN/REJECTED
JX Number1		38		

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)
)
LabMD, Inc., a corporation,) Docket No. 9357
)
Respondent.)
---)

May 15, 2014
10:20 a.m.
FINAL PREHEARING CONFERENCE

BEFORE THE HONORABLE D. MICHAEL CHAPPELL
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C.

Reported by: Josett F. Whalen, Court Reporter

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P R O C E E D I N G S

- - - - -

JUDGE CHAPPELL: Call to order Docket 9357, In Re LabMD.

This is our final prehearing conference.

We're having technical problems, but I'm going to go ahead and start.

I'm going to begin with the appearances of the parties, and we'll start with the government.

MS. VANDRUFF: Good morning, Your Honor. Laura VanDruff, complaint counsel.

JUDGE CHAPPELL: All right.

MR. SHEER: Good morning, Your Honor. I'm Alain Sheer, complaint counsel.

JUDGE CHAPPELL: Do you want to identify the people at your counsel table?

MS. VANDRUFF: Certainly, Your Honor.

Joining us today at counsel table is Jarad Brown and Maggie Lassack and then our trial support technician Jon Owens.

JUDGE CHAPPELL: Thank you.

And for respondents?

MR. SHERMAN: Good morning, Your Honor. William Sherman on behalf of LabMD.

Would you like for me to introduce --

JUDGE CHAPPELL: Yes. I'd like to know who is at counsel table.

MR. SHERMAN: At counsel table is Kent Huntington, who's co-counsel from Cause of Action, also representing LabMD; my partner, who is Reed Rubinstein from Dinsmore & Shohl, also representing LabMD; and Mike Pepson, who is also co-counsel from Cause of Action, also representing LabMD.

JUDGE CHAPPELL: Okay. Thank you.

You need to stand and speak. That's the practice here. But also you need to try to lean over to the microphone.

And I need to let you know we have an elevator issue in the building. The elevators we normally take are out of service. They say July, but don't bet on it.

We're going to be taking probably a freight elevator, so when -- I'm telling you this because when we take a break, let's say I plan to be back at 2:00, I may not be back at 2:00. If there's someone moving freight between floors below me, we're going to be awhile, so I'm going to do my best to be here when I say I'll be here, but I need a waiver, I need an elevator waiver.

Let's talk about witnesses.

Each side has submitted a final proposed witness list. I'm looking at about 44 for the government and about 34 for respondent. Some of those are listed on both. I'm hoping that's not serious.

How many witnesses do you actually plan to call? Let's start with the government.

MS. VANDRUFF: If I may, Your Honor. Yes, the complaint counsel intends to call four live witnesses in its case in chief.

JUDGE CHAPPELL: That's much better.

MS. VANDRUFF: All are expert witnesses, Your Honor. We have Professor Hill, Mr. Van Dyke, Mr. Kam, and Professor Shields.

JUDGE CHAPPELL: Okay. Respondent, do you have some idea of how many witnesses you actually are going to call?

MR. SHERMAN: Yes, Your Honor. We plan to call approximately nine to ten witnesses live.

JUDGE CHAPPELL: Okay. All right. Thank you.

I've got some objections to witnesses, starting out with complaint counsel filed objections to four witnesses.

Have any of these objections been resolved?

MS. VANDRUFF: Yes, Your Honor. With respect to Mr. Kaufman, I believe that our objections were resolved

by your ruling on our motion in limine.

JUDGE CHAPPELL: I thought so. Okay.

MS. VANDRUFF: With respect to Mr. Gormley, we understand that respondent's counsel intends to call him live. If that is the case, our objection is obviated.

JUDGE CHAPPELL: Okay.

MS. VANDRUFF: And then with respect to Officer Lapides, respondent's counsel, subsequent to the time of our filing of our objections, clarified that they would be calling him live, and so our objection is mooted.

Likewise, they also indicated that with respect to Mr. Garcia that they had no intention of calling him, and therefore, our objection is mooted.

JUDGE CHAPPELL: Is one of these witnesses incarcerated?

MR. SHERMAN: Your Honor, Mr. Garcia -- we don't know. He's been incarcerated from time to time. We do not intend to call him, but he would be the only one that incarceration would be an issue.

JUDGE CHAPPELL: If he is, he would love flying over here to testify. Wearing a suit and a tie? He'd love that.

MR. SHERMAN: I'm sure --

JUDGE CHAPPELL: I'd love hearing him questioned, but --

MR. SHERMAN: We don't find his testimony to be necessary.

JUDGE CHAPPELL: Okay. Thank you.

As a former prosecutor, I just have to comment on things like that.

All right. So now we're down to respondent's objections to complaint counsel witnesses. I've got a couple objections, one as to the designated testimony of Curt --

MR. SHERMAN: Kaloustian.

JUDGE CHAPPELL: -- Kaloustian -- thank you -- the nonpublic hearing taken in the Phase II investigation of LabMD, otherwise known here as an investigational hearing transcript or IHT.

The rule has been changed recently, 3.43(b), and IHTs are now admissible. I'm not saying I agree with that, but that's the rule.

Respondent also objects to complaint counsel's expert witness Professor Hill's heavy reliance on Mr. Kaloustian's uncross-examined testimony.

Again, IHT testimony is admissible, but be advised that -- first of all, your objection goes to the weight, not the admissibility, so I'm going to

overrule that objection. But the parties are advised that although they are admissible, they're taken without counsel, without respondent present, don't expect them to be given a lot of weight in this proceeding.

When they are cited in posttrial findings, the opposing side is encouraged to point out in their responses that it was taken from an IHT.

Let me talk about motions to quash.

Two nonparties have filed motions to quash the trial subpoenas served on them by respondent, Eric Johnson --

(Pause in the proceedings.)

JUDGE CHAPPELL: And the second is Robert Boback.

MR. SHERMAN: "Boback."

JUDGE CHAPPELL: "Boback."

Their objections seem to be based on scheduling issues and rely principally on the fact that they already testified by deposition and shouldn't be required to come here live.

I've got respondent's opposition to Eric Johnson's motion.

Does complaint counsel intend to file a response or do you want to address that motion now?

MS. VANDRUFF: Thank you, Your Honor.

Complaint counsel does not intend to take a position as to either motion, although we would just note that while we had listed Mr. Boback as a potential live witness, we're satisfied with having submitted to the court his deposition testimony.

Likewise, as indicated in Mr. Boback's motion, we have also consented to the alternative relief that Mr. Boback requested, which is that he appear by videoconference.

JUDGE CHAPPELL: Did you mean to be talking about Boback the whole time there, because you said likewise Mr. Boback?

MS. VANDRUFF: Yes, Your Honor.

JUDGE CHAPPELL: You're not addressing Eric Johnson.

MS. VANDRUFF: With respect to Mr. Johnson, complaint counsel is not taking a position.

JUDGE CHAPPELL: No position at all. But with Boback, you're not intending to call him live.

MS. VANDRUFF: We are not taking a position with respect to the motion and we are not intending to call him live. That's correct, Your Honor.

JUDGE CHAPPELL: Okay. Which takes care of the subpoena, if possible.

Does that change your position if he's not going to be called live?

MR. SHERMAN: No, it doesn't, Your Honor.

JUDGE CHAPPELL: You still want him here.

MR. SHERMAN: We want him here. We believe that it is of significant benefit to the trier of fact to have the witness here to be observed as he testifies for all the benefits of live interaction between humans, as the judge is well aware.

JUDGE CHAPPELL: I'm going to take this under advisement. I'll rule on this motion later -- actually two motions later.

Well, let me talk about --

MR. SHERMAN: Oh, Your Honor, may I?

JUDGE CHAPPELL: Yeah. Actually I've got your response on Johnson but not on Boback.

Do you intend to file a written response?

MR. SHERMAN: Today.

JUDGE CHAPPELL: Good. Then I'll hold off until I get your response.

MR. SHERMAN: Thank you, Your Honor.

JUDGE CHAPPELL: All right. I'll ask my staff to make note of that.

All right. Let's talk about exhibits and objections thereto.

On May 14, the parties filed a document titled Joint Stipulations on Admissibility of Evidence, which was labeled JX 2.

In paragraph 1 of that stip, the parties stipulated that the exhibits listed in attachment A are admitted without objection. I'm glad to see that the parties were able to work out a number of objections to many of the proposed exhibits.

As to the remaining exhibits, let's talk about how those are going to be handled.

If I'm understanding this correctly, the parties have made two proposals relating to exhibits not appearing in attachment A.

First, the parties are proposing that if such materials are relied upon in posttrial briefing, any party may reassert an objection to such material at that stage. The objection may be made in reply briefs or in any appropriate form.

Second, the parties are proposing that if such material is used during the hearing for any reason, a party may elect to seek a ruling or object at that time or defer objecting.

Nice try, but if I accepted that, we wouldn't even be here today, because we're here today to deal with documents and exhibits that are objected to, so

we're not going to say that's fine and move along. I've got to know more about what these documents are. I don't have enough to deal with it or make a ruling right now.

But if I agree with this stipulation, today would be meaningless, and we would be interrupted during trial at any time. When I get a witness on the stand -- that's why I do this today -- I want it to move (indicating). I want to have questions and answers. I don't want to be interrupted with objections on exhibits and evidence we can deal with now. That's why we're here.

I'm going to -- we're going to take a recess here in a little while, and I'm going to let you talk about this category of documents that are not yet agreed to.

I can't tell from this stipulation -- anybody can answer this. How many exhibits are at issue in this category?

MS. VANDRUFF: I'd be happy to address that, Your Honor.

With respect to attachment A, it represents the --

JUDGE CHAPPELL: No, no. I mean the ones that aren't agreed to. Attachment A is agreed to, as I

understand.

MS. VANDRUFF: Yes, Your Honor.

So what are not agreed to are a subset of respondent's exhibits, fewer than a quarter, to which complaint counsel has an objection, and then with the exception of the complaint counsel exhibits that appear on both the complaint counsel's exhibit list and respondent's exhibit list, it is all of complaint counsel's exhibits.

I believe it is the position of respondent's counsel, though I will let Mr. Sherman address this, that it was premature to address the admissibility of any of complaint counsel's exhibits with the exception of those that are also identified on the respondent's counsel's exhibit list.

JUDGE CHAPPELL: Are these all exhibits you plan to offer or you just listed them on an exhibit list prior to trial?

MS. VANDRUFF: No, Your Honor. We do intend to present for admission the documents that are listed on our exhibit list.

JUDGE CHAPPELL: And do you plan to have testimony to tie up what these documents are to connect to them?

MS. VANDRUFF: Both live testimony and

designated testimony, yes, Your Honor.

JUDGE CHAPPELL: Okay.

MR. SHERMAN: Well, Your Honor, complaint counsel is correct. I had reservations based on my experience in stipulating to the admissibility of documents or exhibits based on some of the questions you just asked, the fact that no foundation has been laid for them. And in my opinion, it's the province of the court as to whether or not any document is admissible.

It appeared to me -- and I was a bit confused, because I've never appeared before this honorable court, as to how we would actually agree to the admissibility.

What is on Exhibit A are exhibits to which we do not have an objection. They have no objection to our exhibits. We have no objection to their exhibits.

I made a general objection to every exhibit based upon the presentation of proofs as it occurs during the hearing, whether or not of course there was foundation, whether or not the exhibit was actually identified by a witness and therefore subject to the court's consideration as the court considers the evidence that was produced during the trial.

Now it's my understanding that this court would prefer that if we can agree that those exhibits then be

admitted, if I'm understanding what the court is saying.

JUDGE CHAPPELL: Well, I'm not saying I'm going to admit them if you don't agree to it. If you don't admit them, I'll hear objections to it.

But I'll tell you what, have a seat, and let me go over some general rules here.

The commission's rule governing admissibility of evidence, rule 3.43(b), is a fairly relaxed standard. We don't have a jury here. I'm not going to be worried about seeing something and deciding later it's worthless or I don't need to consider it. We don't have to worry about the jury issue.

I expect the parties to be judicious with objections, pose only objections that are truly necessary and valid.

We will have a recess later. During that recess, I'll have the parties get together and agree to some categories of documents, hopefully.

And what I'm talking about is, a lot of these, in my experience, are going to be what are called business records. That's a big category, and you can throw them all in there and deal with that at one time. I don't have to hear -- if there are 500 documents that are business records, I don't have to hear

500 objections.

The party who wishes to offer these exhibits is going to have to give me their theory of admissibility, and the party opposing, I'll hear them on why they shouldn't be allowed.

If the parties aren't able to agree after our break, I'm going to deal with the objections today to the extent possible and not during trial.

Keep this in mind, though. Although the rules are somewhat relaxed, if either side has withheld documents from the other side during discovery, withheld documents will not be admitted over objection. Now, I say "over objection" because I don't know if I'm going to hear an objection.

If a document is not admitted today, the offering party may reurge admission of a document. And I'm talking about if you've offered a document and I haven't allowed it. You may reurge that only if you have a witness who takes the stand who you think may demonstrate foundation, reliability, those kind of things, so I will allow that exception to something I have not allowed.

Any questions based on that on what I expect regarding these exhibits?

Although before, let me tell you this also.

Are you at respondent's counsel table familiar with something called the Lenox rule?

MR. SHERMAN: No, sir.

JUDGE CHAPPELL: The Lenox rule is tailor-made for the government. Basically it says documents in respondent's files are going to be admissible, and maybe that will help with some of the objections.

MR. SHERMAN: Well, just to clarify, we have a specific objection to only one of their documents. The other objections were, as I stated before, those objections which may come as a result of how the exhibits are presented during the proofs. That's it. That's our position.

And I'm still not quite clear whether, if we agree to the admissibility, whether there's any opportunity to object to whether or not the exhibit is admitted no matter how it comes across during the presentation of the proofs.

JUDGE CHAPPELL: Well, I suggest, when you meet during the recess, you discuss this and tell me how you want to proceed with that issue. It could be that they can tell you what they plan to do and you can decide how to proceed from there.

Were you going to say something?

MS. VANDRUFF: No, Your Honor. You had raised

the question of whether the parties were clear, and complaint counsel is clear about your expectation, Your Honor.

JUDGE CHAPPELL: Are you prepared to address the issue he just raised, how you intend to introduce a document?

MS. VANDRUFF: The specific document?

JUDGE CHAPPELL: Or a category of documents?

MS. VANDRUFF: Forgive me. I believe that Mr. Sherman is addressing a single spreadsheet that he raised in the objections that were filed with Your Honor. But in case I'm mistaken, I would appreciate Mr. Sherman's confirmation that that is the one document?

MR. SHERMAN: Well, that is the one document, but, as you know, I posted a general objection to all exhibits depending upon how they are presented during the presentation of --

JUDGE CHAPPELL: I think I understand, but give me an example.

MR. SHERMAN: Well, an example would be, for example, if no witness even testifies about the document. If we've, you know, pretrial agreed that the document is admitted for the court's consideration, but during the proofs, no witness has testified as to that

document, identified that document, and it has not been identified or testified to by designated testimony in any of the depositions, then I would like to be able to object to that exhibit being admitted for the court's consideration.

JUDGE CHAPPELL: Well, I understand your point. I've been in your shoes, and I've been on this side of the table. But you need to defend your client, and you don't want to have to do that after trial with a thousand documents that weren't discussed, because if you know what's happening during trial, you can defend your client during trial.

We don't want to get in a position where respondent has to defend themselves after the record closes. And I think you told me, though, that that shouldn't be a concern. You plan to have someone connect or sponsor all the documents you intend to use.

MS. VANDRUFF: That's correct, Your Honor. Not necessarily through live testimony.

For example, we have business -- in responding to your question, Your Honor, we do intend to tie up all of the documents that we intend to introduce as evidence. Not all of that will be done through live testimony.

JUDGE CHAPPELL: No. I understand that. If

you're using the affidavit that comports with the federal rule on business records, that's going to come in.

MR. SHERMAN: And in fact, Your Honor, I think we agreed even as late as yesterday that I would not even require them to bring in the individual to say that this document is a business record kept in the normal course and an exact-copy duplicate, don't want to waste the court's time with those type of formal requirements.

My point is that it was just unfamiliar to me to say let's look at all the documents that you intend to introduce as evidence at trial and say okay, they're admitted, no matter what happens during --

JUDGE CHAPPELL: Regardless of what you might have gathered in pretrial proceedings, we're here now, and this is all about fairness and truth. That's where we are now. There's not going to be anything unfair going on in front of me.

MR. SHERMAN: I've only objected to one document, Your Honor.

JUDGE CHAPPELL: And that goes both ways.

So I think we don't know enough now to know if this is going to be an objection or not to these other categories of documents. We know there's one document

he's objected to.

And if you're ready, I'll go ahead and hear that right now. What is that document?

MR. SHERMAN: That document is a --

JUDGE CHAPPELL: Wait a minute. Who's offering it?

MR. SHERMAN: Complaint counsel is offering it.

JUDGE CHAPPELL: Let me have your offer and your theory of admissibility.

MS. VANDRUFF: Certainly, Your Honor.

Just to be clear, Mr. Sherman, we are talking about RX -- excuse me -- CX 451; is that correct?

MR. SHERMAN: That's correct.

MS. VANDRUFF: Okay. And bear with me, Your Honor. I'll just find my notes.

So CX 451 is a document that was created by an investigator at the direction of complaint counsel. It is a document that supports paragraph 21 of our complaint.

And in particular, what we directed our investigator to do -- this is an individual who's been deposed by counsel for respondent -- was to determine whether Social Security numbers found in LabMD documents that were seized by the Sacramento Police Department had been used by individuals with different names.

He ran a search through a commercially available database that is made available by Thomson Reuters, and the results of the search is what we intend to introduce at CX 0451.

We believe that that -- that the authenticity of that document has been demonstrated through the examination of our witness, Mr. Wilmer, and that it falls within the residual exception to the hearsay rule because it has indicia of reliability.

JUDGE CHAPPELL: Well, give me a summary of what the document says. Did he find the Social Security numbers being used by others? Because if he did not, I don't know why you're offering it.

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

While he is not offering an opinion because he is a lay witness, Mr. Wilmer, through the course of his investigatory work, the results of that search are -- does support the conclusion that the Social Security numbers on the LabMD documents found by the Sacramento Police Department in October of 2012 are being used, some of them, are being used by people with different names.

JUDGE CHAPPELL: All right.

MR. SHERMAN: I think there are two problems with this exhibit.

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One is that the only person who is going to testify as to the contents of the exhibit is Mr. Wilmer. Mr. Wilmer testified in his deposition that the information in the document was populated by this third party, I'll say Thomson Reuters.

JUDGE CHAPPELL: Hang on a second.

Is this witness going to be called?

MS. VANDRUFF: Your Honor, Mr. Wilmer has sat for a deposition, and we were intending to produce his testimony, submit his testimony to Your Honor by designation. If you would prefer, we can call him live.

JUDGE CHAPPELL: Well, let's see.

Go ahead.

MR. SHERMAN: The information in the document was populated by information contained on Thomson Reuters' commercially available search product called CLEAR.

Mr. Wilmer testified that what he did was he formulated a list of all of the Social Security numbers and then ran them through CLEAR.

Our objection is that, first of all, we think that it's -- we need to test the information's reliability. We think it's unreliable. There's no one from Thomson Reuters or CLEAR to even come in and

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explain how the technology works.

JUDGE CHAPPELL: So you're saying hearsay within hearsay.

MR. SHERMAN: Hearsay upon hearsay, Judge.

And secondly, I don't think that the information proves anything. It's far more prejudicial than probative.

JUDGE CHAPPELL: What's your summary of what it shows, the document?

MR. SHERMAN: The summary of what it shows is that there are Social Security numbers that are associated with people who have different names. It doesn't say when those persons began using those Social Security numbers. It doesn't even say whether the Social Security numbers that appear on the LabMD documents were being used fraudulently.

JUDGE CHAPPELL: Well, I was just going to ask for that.

Are you prepared to demonstrate that the Social Security numbers were accurate as they were listed in the LabMD documents? Maybe someone made an error when they entered a Social Security number.

MS. VANDRUFF: So just to be fair, Your Honor, your question is whether complaint counsel has evidence that Social Security numbers in the documents found by

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the Sacramento Police Department were correctly linked to the names in the documents found by --

JUDGE CHAPPELL: What I'm saying is, if you're asking me to assume that every name and every Social Security number associated with that name was correct, do you have any evidence demonstrating that they were correct, other than you want me to assume that?

MS. VANDRUFF: Well, Your Honor, we're not going to ask you to make a finding that any specific individual was individually -- that his or her Social Security number was misused but rather that the Social Security numbers that were identified in the LabMD documents found by the Sacramento Police Department were used by people with different names, and then we have an expert witness who's prepared to offer the opinion that that may be an indication of identity theft, Your Honor.

JUDGE CHAPPELL: May be an indication? That's pretty weak. May be an indication or is an indication?

MS. VANDRUFF: Well, Your Honor, our expert witness will testify on exactly that subject.

JUDGE CHAPPELL: That it may be an indication of possible identity theft? I think I read that in the summary. I believe that's what I read.

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MS. VANDRUFF: I don't have his expert report in front of me, but I believe it is his opinion that it may be an indication of identity theft, Your Honor.

JUDGE CHAPPELL: So let me boil this down. You're saying that your position is, these Social Security numbers, whether they're accurate or not as to the person whose name was on that original document, your position is, those Social Security numbers may have been used by someone else.

MS. VANDRUFF: Well, we think that Your Honor can assess --

JUDGE CHAPPELL: Did I miss something there?

MS. VANDRUFF: I'm sorry?

JUDGE CHAPPELL: Did I miss something on what you're asking me to do bottom line? Assume they're correct or just say -- well, basically it boils down to this. These Social Security numbers, whether they're correct or not, may have been used by others.

MS. VANDRUFF: Well, what we're asking Your Honor to do is to make a determination that relates to paragraph 21 of our complaint that indeed the Social Security numbers that are identified in the LabMD documents --

JUDGE CHAPPELL: Well, you don't need to keep referring to paragraph 21. Whether it's relevant or

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not, we're past that, so I don't care what paragraph it relates to. I'm getting to reliability here.

So go ahead.

MS. VANDRUFF: Well, with respect to reliability, we think that there are indicia of reliability. Mr. Wilmer, again, used a commercially available database. He was subject to examination at length by counsel for respondent. And we think that the output of his work is something that Your Honor can evaluate.

For example, you will see that certain Social Security numbers, they are being used by people of different names, at different locations, different genders and different ages, and what weight Your Honor chooses to give to that is certainly within the province of the court.

JUDGE CHAPPELL: And these were the numbers, if memory serves, that were found in a dumpster in California?

MS. VANDRUFF: No, Your Honor. They were found in the hands of identity thieves by the Sacramento Police Department.

MR. SHERMAN: I would just contend that they weren't found in the hands of identity thieves. These --

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JUDGE CHAPPELL: Am I incorrect? Is there a dumpster involved here somewhere?

MR. SHERMAN: There's not a dumpster involved.

JUDGE CHAPPELL: Okay.

MR. SHERMAN: There's a house in Sacramento.

JUDGE CHAPPELL: I read that in some pleading. I guess somebody was embellishing, but go ahead.

MR. SHERMAN: The Sacramento Police Department got wind of somebody stealing electricity -- gas and electric.

JUDGE CHAPPELL: Do we have an agreement on how these documents were found?

MR. SHERMAN: By the Sacramento Police Department as they did a raid on this house.

JUDGE CHAPPELL: Oh, a raid on a house. Okay.

MR. SHERMAN: For people stealing gas and electric.

JUDGE CHAPPELL: Okay.

MR. SHERMAN: And they found these documents.

There's evidence that there's communication between the Sacramento Police Department and the FTC which says, Well, we'll let you know if these guys had any connection with the receipt of the LabMD documents, so there's really no connection between these individuals who were arrested and pled --

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JUDGE CHAPPELL: Someone needs to turn that phone off.

MS. VANDRUFF: If I knew how to do it, Your Honor, I'd be happy to do it.

JUDGE CHAPPELL: Someone is calling our speakerphone? Just rip that cord out of there.

MR. SHERMAN: I thought you were getting ready to get kicked out of the courtroom.

JUDGE CHAPPELL: That was timed to throw you off your game.

MR. SHERMAN: There's been no connection between the individuals who were arrested and pled and these documents. There's no connection between the fact that these documents are being used -- the Social Security numbers on these documents are being used by other people and the fact that these documents appeared in Sacramento.

This document that they wish to present doesn't say when these Social Security numbers were being used by more than one person. It could have very well happened five years ago, prior to this document being found outside of LabMD's possession.

And as I stated before, the person who got services from LabMD, they could have been using someone else's Social Security number, so there's really no

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connection between the fact that these day sheets were found in Sacramento and these Social Security numbers are being used by more than one person.

JUDGE CHAPPELL: So your objection is hearsay, but it boils down to reliability.

MR. SHERMAN: Absolutely.

JUDGE CHAPPELL: Okay.

So you're asking me to basically accept an opinion from a lay witness.

MS. VANDRUFF: No, Your Honor. The lay witness is not offering any opinion. He performed a task at the direction --

JUDGE CHAPPELL: He's offering an opinion that these Social Security numbers were used by someone else based on research you told him to do?

MS. VANDRUFF: No. No, Your Honor. His conclusion is that the output of his database search is that there are certain numbers that are being used by people with different names, and he is drawing that conclusion from the face of the document. It is not an opinion, Your Honor.

JUDGE CHAPPELL: Have you read what I wrote about Mr. Johnson, Eric Johnson?

MS. VANDRUFF: Yes, Your Honor. Your ruling on --

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JUDGE CHAPPELL: You're not dancing around the edges there, are you?

MS. VANDRUFF: I don't intend to, Your Honor, no.

JUDGE CHAPPELL: Because I will not accept that type of opinion from someone who's not designated an expert because it's not fair.

MS. VANDRUFF: I understand.

JUDGE CHAPPELL: It's not been vetted, hasn't been through the ringer, so...

All right. I'll consider this. I'll take it under advisement, and we'll deal with it after the break.

MS. VANDRUFF: Thank you, Your Honor.

JUDGE CHAPPELL: I'm pretty sure someone referred to that as a flophouse. Am I correct?

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

JUDGE CHAPPELL: And maybe somebody referred to a dumpster, I don't know, but I do remember flophouse for sure.

MR. SHERMAN: There's a dumpster in another case that's been cited repeatedly, the Revco case.

JUDGE CHAPPELL: All right. I knew there was something about a dumpster.

So just so I'm clear, police carried out a

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warrant-based search, a legal search? Any dispute there?

MS. VANDRUFF: There's no dispute about that, Your Honor.

JUDGE CHAPPELL: They find in there the people they're targeting, maybe serving an arrest warrant as well; correct?

MR. SHERMAN: No, they were not. It was a probation search. I think Mr. --

JUDGE CHAPPELL: Someone is on probation, a very relaxed standard. Okay. But anyway, while there, they found --

MR. SHERMAN: He's a known drug addict, Your Honor.

JUDGE CHAPPELL: -- they found some documents and some of them were what we call day sheets.

MS. VANDRUFF: That's right, Your Honor. The documents had the LabMD insignia on them.

JUDGE CHAPPELL: All right.

So getting back to where we are when we take a break, that's the objection to the specific document. Then you're aware of what you need to do to talk about any other documents that were not on Exhibit A, for example, whether she's going to have a sponsoring witness, et cetera.

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MS. VANDRUFF: Complaint counsel understands, Your Honor.

MR. SHERMAN: I now understand, Your Honor.

JUDGE CHAPPELL: Okay.

MR. SHERMAN: I think that, however, there are a number of objections on -- that complaint counsel has -- and we can discuss these off the record if that's more appropriate, too -- to our exhibits, which a lot of which will be resolved by bringing in witnesses live, bringing in the witnesses that we intend to bring in live.

JUDGE CHAPPELL: So we're still talking about your objection to their exhibits.

MR. SHERMAN: Her objections to my exhibits.

JUDGE CHAPPELL: I was going to get to that. I forgot to mention that.

What about your objection to their exhibits?

MS. VANDRUFF: Thank you, Your Honor.

JUDGE CHAPPELL: That weren't on Exhibit A.

MS. VANDRUFF: Certainly.

And what I can tell Your Honor is that we have been prepared to meet and confer with respondent with respect to our objections to respondent's exhibits for some time, but this has been a discussion that, as Mr. Sherman described for you, he thought was

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inappropriate prior to the presentation of proof, so we have not had an opportunity to --

JUDGE CHAPPELL: Well, this is his first trip to this rodeo, so I'm not holding that against him.

MS. VANDRUFF: I understand.

JUDGE CHAPPELL: So let's forget about the attempt to meet and confer. Let's move on.

MS. VANDRUFF: Okay. What would you like to hear from us, Your Honor?

JUDGE CHAPPELL: Are you prepared to put your documents in categories so you can talk about what's remaining after the break?

MS. VANDRUFF: Absolutely, Your Honor.

JUDGE CHAPPELL: Okay. And eventually those documents that are agreed to that are not now on Exhibit A you'll need to put into another exhibit. We'll have yet another joint exhibit, perhaps Joint Exhibit 2, that will contain the documents you're going to agree to today. Okay?

Anything else on the objected-to exhibits?

MR. SHERMAN: No, Your Honor. Thank you.

MS. VANDRUFF: No, Your Honor. Thank you.

JUDGE CHAPPELL: Let me talk about deposition designations.

Let me make sure I'm correct on this. We have

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

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

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

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

JUDGE CHAPPELL: For Exhibit A.

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

JUDGE CHAPPELL: Right.

MS. VANDRUFF: Thank you.

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

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

JUDGE CHAPPELL: That can be JX 1.

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

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

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

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

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

(Joint Exhibit Number 1 was admitted into evidence.)

JUDGE CHAPPELL: Deposition designations.

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

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

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

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

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

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

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

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

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

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.

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

JUDGE CHAPPELL: Yes.

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

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

MS. VANDRUFF: The entire transcript.

JUDGE CHAPPELL: Right.

MS. VANDRUFF: Unmarked, unannotated.

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

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

So hopefully this is clear. If you want to use any deposition testimony in this case in your posttrial briefing to support any point or cause, submit the entire transcript. How's that?

MS. VANDRUFF: Thank you, Your Honor.

MR. SHERMAN: That's good, Your Honor.

And just for clarity, complaint counsel served us late last night with specific objections to our deposition designations, and I -- in my mind, what you just said, your ruling here makes those moot.

JUDGE CHAPPELL: Yes. 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.

And nobody is harmed there, nobody is prejudiced, because everybody knows what we're doing. It's out in the open.

Any objection to me doing it that way?

MR. SHERMAN: Absolutely not.

MS. VANDRUFF: No, Your Honor. Thank you.

JUDGE CHAPPELL: Let's talk about in camera issues.

I don't know if you noticed when you walked in, we've got a sign out there. And when the parties request it, we'll go into in camera session, and then I'll remove everyone from the courtroom who's not subject to the protective order. And we have a sign we will turn to keep people from wandering in.

And our bailiff Ironsides, he is the enforcer. Ironsides will make sure no one comes in who's not supposed to be here during an in camera session.

I saw three joint motions for in camera treatment. By orders dated May 6, 2014, permanent in camera treatment was granted to exhibits containing sensitive personal information and also in camera treatment for a period of six years to the fraud survey questions of Mr. Van Dyke and Javelin Strategy & Research.

On May 14, I saw an additional motion for in camera treatment seeking permanent in camera treatment for one exhibit containing sensitive personal information. I'm going to grant that motion, and an order will issue shortly regarding that.

MS. VANDRUFF: Thank you, Your Honor.

JUDGE CHAPPELL: Let's talk about how we're

going to proceed in here with in camera information if you haven't been here before.

You're instructed to be aware of the documents and any information derived from those documents that have been granted in camera treatment. If you wish to question a witness about that document or that information, you need to ask me, you need to request to move into an in camera session. At that point I will clear the courtroom of persons who are not authorized to be in here.

And in keeping with the least amount of disruption possible, you shall segregate your questioning, your examining of witnesses, so that any section on in camera materials is grouped together so that I'm not clearing the courtroom and bringing people back in more than necessary.

I have found that the best way to do this, whoever calls the witness reserves in camera issues until the end of their examination, and then the person conducting cross-exam conducts their in camera portion of questioning at the beginning of their examination.

In addition, counsel shall instruct witnesses to ensure they do not disclose in camera testimony in open session. We really don't want anything bleated out by a witness who may or may not know what's in camera.

Any questions on how we're going to handle in camera info?

MS. VANDRUFF: No, Your Honor.

MR. SHERMAN: No, Your Honor.

JUDGE CHAPPELL: Ironsides, can you come up when you get a minute.

I have a pending motion filed by respondent on May 2, 2014 seeking to limit the relevant time period concerning adequacy of respondent's data security practices.

Now, it may appear that I'm reading to you, but I'm going to make a bench ruling, so I am going to be reading from my script here.

So the motion involves adequacy of respondent's data security practices to the time period analyzed by Dr. Raquel Hill, complaint counsel's proffered expert, which is January 2005 to July of 2010.

Respondent is questioning what is the relevant time period and seeks not only to limit Dr. Hill's testimony to this time period, 2005 to 2010, but also to exclude any other witness from the FTC from providing evidence concerning adequacy of LabMD's security practices after July 2010.

Complaint counsel filed an opposition on May 13, 2014 and acknowledged Dr. Hill's report and her opinions

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are limited to the time period January 2005 through July 2010, and complaint counsel agrees it will not elicit testimony from Dr. Hill outside of that time frame.

However, complaint counsel argues, simply because Dr. Hill's opinion is limited does not mean complaint counsel is precluded from presenting other evidence concerning the adequacy of respondent's data after July 2010.

Complaint counsel also argues that evidence of the data security practices after July 2010 and through the end of discovery remains relevant to the allegations in the complaint and the proposed injunctive remedy.

Complaint counsel also notes that the motion is untimely because respondent failed to file by April 22, 2014, the deadline for motions in limine covered by the scheduling order.

I've reviewed the parties' filings and fully considered the issue. This is my ruling.

Respondent's motion is untimely under the scheduling order, and there appears to be no justification for the failure to file it before the deadline, given that the expert report was served on or about March 18, 2014. However, that's not why I'm going

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to overrule your motion or deny your motion.

Respondent has failed to demonstrate that evidence of respondent's data security practices during the time period after July 2010 and through the end of discovery is not relevant and clearly inadmissible for all purposes, which is our motion in limine standard. At a minimum, this later time period is relevant to the proposed relief in this case.

Accordingly, respondent's motion to limit evidence to the time frame of complaint counsel's expert report is denied.

However, Dr. Hill's testimony is limited to the opinions expressed in her report and thus to the time period January 2005 through July 2010.

Any questions?

MR. SHERMAN: None whatsoever, Your Honor.

MS. VANDRUFF: No, Your Honor. Thank you.

JUDGE CHAPPELL: Let's talk about trial timing.

Pursuant to rule 3.41(b), this hearing is limited to no more than 210 hours. Assuming six-and-a-half-hour days, which generally we have after our breaks are taken out, this equates to about 32 total days of trial.

Under that same rule, 3.41(b)(4), each side is allotted no more than half of the time. That's about

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16 days each.

As I instructed the parties at the initial conference, the parties are charged with keeping track of the time allotted.

Have you developed a system?

MR. SHERMAN: I have not, Your Honor. But we will do so prior to the beginning of the hearing.

MS. VANDRUFF: Correct, Your Honor. We will work with respondent's counsel to do that.

JUDGE CHAPPELL: And it's not required if you are absolutely sure we will come under the wire and not need the full amount of time, which I would encourage if possible.

Let's talk about trial dates.

Because we all have numerous other matters to attend to, we generally will be in court four days a week. Normally that's going to be a Monday or Friday out of court to better accommodate those from out of town.

I have the following dates that I'm blocking as of today:

May 26, which is a holiday.

June 2.

June 9.

June 16.

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June 23.

Those are all Mondays. If we are still in trial beyond those dates, we will revisit scheduling. And I can tell you, if we're still here in July, which I hope we're not, we also will not be here July 14.

Do the parties have any particular dates you need to line out that you're aware of today?

Let's start with respondent.

MR. SHERMAN: I am not aware of them today. Is it possible, however, Your Honor, that we could be given an opportunity to check on dates and submit that to the court -- I don't know how many --

JUDGE CHAPPELL: How long do you need?

I mean, is this today or is this --

MR. SHERMAN: Oh, absolutely, I can do it by the end of the day. But --

JUDGE CHAPPELL: I generally am not going to put this in a written motion.

MR. SHERMAN: I want to stay married.

JUDGE CHAPPELL: That's a worthy goal, so...

Are you aware of any dates you think you need off?

MS. VANDRUFF: Given the schedule that Your Honor just described, then no, Your Honor, we don't anticipate there being any issues on our side.

JUDGE CHAPPELL: Generally there's at least one wedding between everybody involved, but hopefully not this time.

This is what we'll do. You are aware of the e-mail address OALJ?

MR. SHERMAN: I am.

JUDGE CHAPPELL: By the end of the day, if you think you need a day off, tell me why and tell me what day it is. Otherwise, I'll assume we have nothing further to deal with there. Okay?

MR. SHERMAN: And I will copy complaint counsel on anything submitted to the court in --

JUDGE CHAPPELL: Yes. Anything to OALJ needs to go to everyone.

Opening statements.

Each side is permitted to make an opening statement that's no more than two hours in duration.

I'd like to hear from the parties as to how much time you think you will need for your opening.

MS. VANDRUFF: Your Honor, for complaint counsel we think 90 minutes or thereabouts.

JUDGE CHAPPELL: Okay.

MR. SHERMAN: Half that time probably.

JUDGE CHAPPELL: Excellent.

MR. SHERMAN: Maybe an hour.

JUDGE CHAPPELL: Okay.

At this time I'm going to give the parties time -- you'll be given time to work together on narrowing the objections regarding the exhibits as we discussed some moments ago.

And be advised, I'm not looking for a final joint exhibit today. Hopefully the meetings will be fruitful. And I will need that final joint exhibit let's say 10:00 when we reconvene on Tuesday, and then I can accept an offer of it at that time.

And you're probably aware that when you offer a joint exhibit there needs to be no signature line for the judge. If I accept it, it will be admitted; if I don't, you'll know why and you'll need to resubmit it.

How much time do you think you need to talk about exhibits?

MS. VANDRUFF: I would hope, Your Honor, that we could resolve this relatively quickly, but I'm looking to Mr. Sherman.

MR. SHERMAN: Your Honor, we've usually been able to work pretty cooperatively together. Half an hour would --

JUDGE CHAPPELL: I don't want to rush -- what if I say we'll reconvene at 1:00?

MS. VANDRUFF: That would be fine by us.

MR. SHERMAN: I think we will know rather quickly whether or not we can agree or agree to disagree.

JUDGE CHAPPELL: All right. Then when we come back, I will get an update, and then if there are still objections, I'll hear them at that time.

And also I'm going to resolve the objection over the exhibit about Social Security numbers.

Anything further before we recess?

MR. SHERMAN: Nothing, further, Your Honor.

MS. VANDRUFF: Nothing further, Your Honor. Thank you.

JUDGE CHAPPELL: Okay.

Okay. We will reconvene at 1:00 p.m.

We're in recess.

(Recess)

JUDGE CHAPPELL: Back on the record.

I'm going to set aside for now the issue of CX 451.

Let's get back to the exhibits and objections thereto for those documents that were not previously agreed to.

Have the parties been able to work out some agreement or arrangement?

MR. SHERMAN: Your Honor, we have.

This previously was the list of exhibits (indicating). It was several pages that they were objecting to, and I'm proud to say we're down to four.

JUDGE CHAPPELL: Four pages or four exhibits?

MR. SHERMAN: Four exhibits.

JUDGE CHAPPELL: That's better.

All right. And what about --

MS. VANDRUFF: And Your Honor, I think that what Mr. Sherman is representing is that of all of the parties' exhibits that there are four outstanding objections as well as the objection that you heard argument on this morning with respect to CX 451.

JUDGE CHAPPELL: And are those documents that are in one category or are they --

MS. VANDRUFF: There are two categories, Your Honor. These are respondent's exhibits to which complaint counsel objects, and the categories are twofold. One, affidavits that were submitted by witnesses who either will testify live or have been deposed, and one of those affidavits contains an opinion.

And the second is the requests for admission, that you granted a motion for complaint counsel to amend that document, respondent would like to keep the prior

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responses as an exhibit.
So those are the two categories.
JUDGE CHAPPELL: Okay. So all of these are documents being offered by respondent?
MR. SHERMAN: That's correct, Your Honor.
JUDGE CHAPPELL: So let me hear your offer and your legal basis.
MR. SHERMAN: Your Honor, we have three affidavits. All of them are from prior employees of LabMD with regard to LabMD's data security practices, policies and procedures that were in place during the relevant time period.
These affidavits were submitted to complaint counsel I think during part of their investigation, and they were submitted in May of 2011.
JUDGE CHAPPELL: Are any of these witnesses going to testify?
MR. SHERMAN: We are hopeful that John Boyle, who is in Denver, will be able to come out and testify.
We're hopeful that Allen Truett, who is in Atlanta, will be able to come out and testify.
Chris Maire will not be asked to come live.
Complaint counsel has --
JUDGE CHAPPELL: How many affidavits are there?
MR. SHERMAN: Excuse me?

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JUDGE CHAPPELL: What's the total affidavits?
MR. SHERMAN: Three.
JUDGE CHAPPELL: Three?
MR. SHERMAN: Three affidavits.
And they basically go through what these individuals knew and had personal knowledge of with regard to LabMD's policies, practices, procedures, hardware, software, configurations, and things of that nature.
Complaint counsel has had the opportunity to cross-examine these witnesses after the receipt of these affidavits, and we believe that should -- these affidavits are not -- they're not a surprise, the information in them is not a surprise, and that they should be in fact admitted into evidence.
JUDGE CHAPPELL: All right. Response?
MS. VANDRUFF: Thank you, Your Honor.
So the three affidavits, it is true that we've had them for some time, and it is also true that the witnesses have been deposed.
JUDGE CHAPPELL: What's your objection?
MS. VANDRUFF: Our objection is that they are rank hearsay, Your Honor. They are being offered for the truth of the matter asserted.
The testimony -- or I should say the matters

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that are addressed in the affidavits, to the extent that respondent wishes to introduce that evidence to this court, it should do so through the testimony of those witnesses, not through these out-of-court statements.
JUDGE CHAPPELL: Are you going to continue your objection if the witness takes the stand?
MS. VANDRUFF: To the admission of the declaration or to the facts that are in the declaration --
JUDGE CHAPPELL: To the exhibit. If the witness takes the stand, are you still going to maintain your objection?
MS. VANDRUFF: It would be complaint counsel's position, Your Honor, that the testimony should be elicited if the witness is present in the courtroom as opposed to the document received as the witness' testimony.
JUDGE CHAPPELL: And I'll ask you, Mr. Sherman, why do you need the affidavit if the witness testifies?
MR. SHERMAN: Your Honor, I may not need the affidavit if the witness testifies, but as I said before, these witnesses are -- one is in Denver. One is in Atlanta. We're in contact with them. Final arrangements have not been made for their travel. It is

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our hope and our intent that they are here.
And for that purpose, I would -- and I don't know how --
JUDGE CHAPPELL: You mean you don't control the witnesses you're calling?
I mean, when I hear things like "my hope and my intent," I mean, aren't they LabMD witnesses?
MR. SHERMAN: They are witnesses that have information that would be beneficial to LabMD, but they've moved on with their lives. They're in other cities.
JUDGE CHAPPELL: Former employees.
MR. SHERMAN: Former employees.
JUDGE CHAPPELL: Well, don't put them in Motel 6.
MR. SHERMAN: One is a former third-party provider, Mr. Truett.
JUDGE CHAPPELL: But any of those people now in competition with LabMD?
MR. SHERMAN: I don't think anybody is in competition with LabMD given their current state of business affairs.
JUDGE CHAPPELL: Okay. So just to narrow it down, we have three affidavits, two of people who you plan to have appear live, one who we know no one is

appearing.
MR. SHERMAN: That's correct. Chris Maire.
JUDGE CHAPPELL: So address that one.
MS. VANDRUFF: With respect to Mr. Maire, Your Honor, he was deposed, and so to the extent that his testimony should be admissible, it should be the testimony that he offered at deposition that was subject to cross-examination as opposed to the out-of-court statement that respondent would like to offer for the truth of the matter.
JUDGE CHAPPELL: Was the information in the affidavit not covered in the deposition?
MR. SHERMAN: I don't think it was covered as cogently and succinctly as it is in the affidavit, Your Honor.
JUDGE CHAPPELL: What came first, the depo or the affidavit?
MR. SHERMAN: The affidavit. The affidavit came first.
And I mean, if I could, you know, assist the court with section 3.43, which indicates that you may make a finding upon the motion of a party to have these exhibits admitted such that the prior testimony not be duplicative, would not present unnecessary hardship to any party or delay to the proceedings and would aid the

determination of the matter. Statements or testimony by a party opponent if relevant shall be admitted.
I submit that these are --
JUDGE CHAPPELL: But that's actually used by the government against respondent. We're talking about an affidavit by your own client. The party opponent rule doesn't apply to your own people.
MR. SHERMAN: Very well. But I would submit that these statements are relevant. They do not present any hardship.
JUDGE CHAPPELL: Well, we're past relevance. We need reliability.
MR. SHERMAN: And I believe that they are reliable. They are sworn statements.
These statements have been used in other litigation to support motions. In fact, the -- is it Northern District of Atlanta -- of Georgia -- I'm sorry -- these affidavits were also used, so --
JUDGE CHAPPELL: Let me ask this.
Do you think -- are there details in these affidavits you don't like, or is this a matter of principle objection because they're hearsay? I'm trying to find some common ground here.
MS. VANDRUFF: No, no, I understand. Certainly this is a principle objection.

If I may, there's one additional issue that we have that I have not had the opportunity to raise with Your Honor, which is, with respect to one of the declarations or affidavits that is of Mr. Truett, whom Mr. Sherman has described as a former contractor for LabMD, I think arguably one of the paragraphs of his affidavit also provides an opinion, and so it should not be admitted on that separate ground because he has not been designated as an expert witness.
JUDGE CHAPPELL: Tell me specifically what that opinion is.
MS. VANDRUFF: Certainly.
Paragraph 9 of his affidavit concludes that the security measures taken by LabMD were consistent with those used by other customers of a similar size and security needs profile.
JUDGE CHAPPELL: So it sounds like you've got yourself an opinion there. What do you have to say?
MR. SHERMAN: Well, I would just say that all lay opinion is not necessarily inadmissible.
He is in fact basing that on his experience as a -- one who provides data security for any of a variety of companies. And his testimony, as he was cross-examined or examined in his deposition, he was asked about how many medical-type companies he provided

this service to, and he basically said, you know, it was a high percentage of his business, maybe 60 or 70 percent of his customers.
JUDGE CHAPPELL: Isn't that the same thing you were objecting to with Mr. Johnson?
MR. SHERMAN: I don't think so, Your Honor, because what they are asking Mr. Johnson to do is to give an opinion which is very consistent with what their experts have given an opinion as to, which is the likelihood of harm or the type of harm that was likely to occur, which goes directly to the proof in their case.
JUDGE CHAPPELL: Let me ask this.
What if you take a black marker to it and you excise certain portions of the affidavit? Is there any chance of an agreement if certain things are redacted, including what I consider to be a lay opinion right now?
MS. VANDRUFF: Thank you, Your Honor, for that.
It would remain complaint counsel's position that the affidavits should not be admitted because they constitute rank hearsay. But to the extent that they are admitted, we certainly would take the position that the lay opinions as we've held should not be admitted on that separate ground.

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MR. SHERMAN: In terms of I think it's paragraph 9, we wouldn't object to it being redacted from the affidavit.

JUDGE CHAPPELL: And you still would renew your objection without paragraph 9.

MS. VANDRUFF: We would, Your Honor.

JUDGE CHAPPELL: Okay. Anything else on the affidavits?

MR. SHERMAN: No, Your Honor.

JUDGE CHAPPELL: All right. Then what's left?

MS. VANDRUFF: Your Honor, there's one other document that's left, and that is respondent's initial -- excuse me -- complaint counsel's initial responses to requests for admission.

JUDGE CHAPPELL: And it's whose document?

MS. VANDRUFF: Sorry. Respondent wishes to --

JUDGE CHAPPELL: They're offering it?

MS. VANDRUFF: Yes, Your Honor.

JUDGE CHAPPELL: Go ahead.

MR. SHERMAN: Your Honor, it's the initial responses to requests for admissions. And we believe that what it reflects is the cavalier attitude that the government has had about this case all along, that, you know, they don't have to answer requests for admissions, they don't have to give us a 3.33 witness,

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and if they do, they don't have to identify him. They don't have to give us standards.

When the FTC represents the United States government, Your Honor, and in terms of the initial responses, they pretty much just refused to admit anything, even facts that were clear on their face that they should have admitted -- now, they later go back and even in their -- even in their amended admissions, they couch them in long objections and at the very end they finally admit to the proposed admission.

And so I think it's relevant when the FTC representing the government puts their witness on the stand that they be asked to explain why, you know, this was the manner in which they chose not only to investigate this particular incident but how they chose to give information as it relates to discovery, how they fought us tooth and nail for everything we've basically asked for. And this is just an example of it, Your Honor.

And I think that it's an exhibit that can be used to impeach Mr. Kaufman should he get on the stand and say something that's inconsistent with it.

JUDGE CHAPPELL: Let me ask you this.

If the shoe were on the other foot, if you had answered discovery and the government wanted to use your

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discovery responses against you, do you think it's fair to hold against your client what you as an attorney may have done?

MR. SHERMAN: I do not, Judge.

JUDGE CHAPPELL: Then how is this different?

MR. SHERMAN: Well --

JUDGE CHAPPELL: Because they're attorneys representing the FTC.

MR. SHERMAN: Well, that's right. But I think it's different because I believe that the government should be held to a higher standard.

And when you're representing the United States government, you have more power than any other litigant in our judicial system, and that power should be wielded I think with a lot of discretion, and it should not be cavalierly thrown about to make the lives and the work of the attorneys and the other litigants on the other side more difficult than they have to be.

I think we've had to file motions that in any -- in an Article III court would have been -- I think sanctions may have been levied. But I think that this document reflects that attitude, and I believe that it should be admissible and it should be admitted.

JUDGE CHAPPELL: Are there other discovery response documents that are agreed to as exhibits?

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MS. VANDRUFF: Yes, Your Honor, there are.

JUDGE CHAPPELL: Is it everything but this one?

MR. SHERMAN: Yes, Your Honor.

JUDGE CHAPPELL: All right. That's his offer. What's your objection?

MS. VANDRUFF: Our objection, Your Honor, is that when the concerns of respondent were brought to the attention of complaint counsel that we immediately moved to amend our --

JUDGE CHAPPELL: Well, let's talk about how the requests for admission response, the previous one, is to be treated differently than any other, the one that came before it, the one that came after it, why is it different than the later -- I think you've said you amended it -- why would that be treated differently, if you agreed to other discovery documents being in evidence as exhibits.

MS. VANDRUFF: Okay. I think I understand your question, Your Honor, and please correct me if I'm addressing the wrong issue.

But with respect to other discovery responses that are on respondent's exhibit list to which we have no objection, it's because they have not been superseded by subsequent responses by complaint counsel.

Here, we sought the leave of Your Honor to amend

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our discovery responses, and that was granted, and so to the extent that the prior responses are probative of anything, it's not probative of any claim, defense or relief.

Indeed, the purposes for which Mr. Sherman just described using them I don't think are proper before Your Honor with respect to why or how decisions were made by complaint counsel either in the investigation or discovery in this matter.

JUDGE CHAPPELL: So your legal basis for your objection is the document is not probative.

MS. VANDRUFF: Yes, Your Honor. We don't think it's probative of any claim, defense or relief in this answer.

JUDGE CHAPPELL: And your legal basis for your theory of admissibility is what again?

MR. SHERMAN: It's a sworn statement, Your Honor. Requests for admissions are sworn statements. It was submitted to the court. It was filed.

JUDGE CHAPPELL: What pending issue that needs to be determined is it relevant to?

MR. SHERMAN: I'm not sure --

JUDGE CHAPPELL: On the merits of what issue is it relevant to?

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MR. SHERMAN: I'm not sure that it goes directly to any one particular issue. I do believe that it is reflective of generally what's going on in this case.

And broadly what's going on in this case -- and people may disagree about it -- is that the Federal Trade Commission is seeking to expand its authority to govern, to regulate and to enforce data security as it relates to personal identifying information, and it will stop at nothing to do this.

JUDGE CHAPPELL: You think what's going on in this case hasn't been appropriately documented in the public orders that have been issued.

MR. SHERMAN: I think it's been -- I think it's been appropriately documented. Right? I believe that this document --

JUDGE CHAPPELL: By the way, when I say "what's going on in this case," I don't mean one side or the other.

MR. SHERMAN: I understand.

JUDGE CHAPPELL: But there are orders that have been issued dealing with discovery issues that explain how we got there and what we're arguing about and why certain rulings have been made. I don't ever issue an order without reasoning, background, arguments and

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reasoning.

MR. SHERMAN: I'm not questioning the court's reasoning on any of the motions or the orders that have been ruled upon.

What I said here is that --

JUDGE CHAPPELL: What I'm saying is --

MR. SHERMAN: -- this issue is --

JUDGE CHAPPELL: -- I don't know that the ruling on that issue to make -- to force the government I guess to modify that response, I'm not sure what you're looking for isn't contained in that order that dealt with the very issue.

Did I not make a ruling on this issue requiring an amendment?

MR. SHERMAN: You did. You did. And they amended it. But the fact that there needed to be a motion filed on requests for admissions --

JUDGE CHAPPELL: And that motion is in the record.

MR. SHERMAN: It is.

MS. VANDRUFF: Your Honor, if I may, may I just revisit the procedural history here, because I want to make sure there's no misunderstanding with the court.

But there was a motion filed by counsel for respondent without having met and conferred with us.

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Immediately upon receipt of that motion, we moved to amend our responses as well as opposing their motion to deem as admitted.

And the ruling of the court was to allow our amendments and to deny as moot their request to deem as admitted.

So I just wanted to clarify that for the record.

MR. SHERMAN: That's accurate.

Your Honor, we did not meet and confer because we were not asking complaint counsel to do anything. We were asking the court to rule that the -- that their responses be deemed admissions.

JUDGE CHAPPELL: Well, I understand you want to defend your position, but there's no need. That's long past. We're past all that.

MR. SHERMAN: I understand.

JUDGE CHAPPELL: Let me have the exhibit numbers. What are the exhibit numbers of the affidavits?

MS. VANDRUFF: Certainly, Your Honor. And I can hand up copies if that would be helpful.

JUDGE CHAPPELL: I just want the numbers.

MS. VANDRUFF: Certainly, Your Honor. It is RX 313, 314, which contains the opinion of Mr. Truett,

and RX 315.
Then with respect to the requests for admission, the initial responses to the requests for admission, that appears at RX 520.
JUDGE CHAPPELL: And does that exhibit contain the full discovery response or just the one RFA?
MS. VANDRUFF: It contains the full discovery response, Your Honor. With respect to the requests for admissions of course.
JUDGE CHAPPELL: Is your objection just to the one RFA or the entire exhibit?
MS. VANDRUFF: Well, the entire exhibit, Your Honor, is superseded by our amended RFAs which address --
JUDGE CHAPPELL: And remember, I don't read these unless there's a dispute and they're attached to a motion.
So did you then file an entirely new response to the request for admissions?
MS. VANDRUFF: We did, Your Honor, that addressed every request for admission from respondent. That's correct.
JUDGE CHAPPELL: And again, your objection is to the whole thing or just the one RFA?
MS. VANDRUFF: Our objection is to the whole

thing.
There were several RFAs that we amended -- I'm sorry -- several responses to respondent's requests for admission that were amended in our subsequent RFA answers, and so we think that allowing the prior answers, which have been superseded by Your Honor's ruling, serves no purpose. It's not probative of any fact in dispute in this case.
JUDGE CHAPPELL: So the next iteration, the amended RFAs, those are an exhibit.
MS. VANDRUFF: Yes, Your Honor.
JUDGE CHAPPELL: Anything further?
MR. SHERMAN: Nothing further, Your Honor.
MS. VANDRUFF: No, Your Honor.
JUDGE CHAPPELL: And you have copies of the affidavits?
MS. VANDRUFF: I do, Your Honor. Would it be helpful for me to approach and hand these up?
JUDGE CHAPPELL: Yes.
MS. VANDRUFF: May I approach?
JUDGE CHAPPELL: Yes.
You know what, just hand them to Ms. Arthaud.
MS. VANDRUFF: Certainly.
(Pause in the proceedings.)
Your Honor, would you like the RFAs as well?

JUDGE CHAPPELL: Yes. Leave her a copy.
MS. VANDRUFF: Thank you, Your Honor.
JUDGE CHAPPELL: So those four exhibits are the only exhibits that we have a dispute over; is that correct?
MR. SHERMAN: That's correct.
MS. VANDRUFF: As well as the exhibit that --
JUDGE CHAPPELL: 451. In addition.
MS. VANDRUFF: Correct, Your Honor.
And I wanted to ask Your Honor if I may be heard.
That, Your Honor didn't have an opportunity to review. We would be happy to display it. It is a large document. It is also subject to your in camera motion, but if it would be useful to the court in ruling on Mr. Sherman's oral motion, we are prepared to display it if that would be helpful.
JUDGE CHAPPELL: I have a pretty good idea of the spreadsheet. I don't need to see that.
MS. VANDRUFF: Okay. Thank you, Your Honor.
JUDGE CHAPPELL: All right. We're going to take a short recess. We'll reconvene at 2:15.
(Recess)
JUDGE CHAPPELL: Let's go back on the record.
So we know this, starting on Tuesday, I'll need

everybody to speak up a little bit and lean closer to the microphones. I'm having trouble hearing especially your side (indicating).
MS. VANDRUFF: Very well, Your Honor.
JUDGE CHAPPELL: And if anyone can't hear me, let me know. I tend to push this away because it rings sometimes and we don't want the ringing noise (indicating).
Let me deal with, first of all, the motions to quash. I'm waiting on a response to one of those. That will be today.
MR. SHERMAN: Yes, sir.
JUDGE CHAPPELL: So I'm not going to be able to get those rulings out today.
However, because those parties are obligated to be here on the 20th, I expect someone who issued those subpoenas to inform those parties or their attorneys they will not have to be here before May 27, pending a ruling on these motions.
Someone take care of that?
MR. SHERMAN: Yes, sir.
JUDGE CHAPPELL: I'm basing that on the fact that I'm assuming that your case will take at least next week for the government?
MS. VANDRUFF: Yes, Your Honor. We believe that

our case will take three to four days.

JUDGE CHAPPELL: And if we get lucky and they are finished, you wouldn't call these two witnesses in the beginning of your case, would you?

MR. SHERMAN: No, I would not, as I've said over and over again to them and their attorneys that I would work with them to accommodate their schedules as best I could.

JUDGE CHAPPELL: That part was left out of the motions, as I recall. Okay?

MR. SHERMAN: It's a fact.

JUDGE CHAPPELL: All right. Let's talk about these exhibits.

Let me start with the affidavits, RX 313, 314, 315.

Those are clearly out-of-court statements offered for the truth of the matter asserted without sufficient indicia of reliability.

The deposition transcripts are in the record, and two of the affiants are expected to appear to testify.

Those exhibits are not admitted.

And if it helps, I've never admitted an affidavit as long as I've been here as far as I know.

MR. SHERMAN: I don't take it personally,

Your Honor.

JUDGE CHAPPELL: Okay.

RFA RX 520.

After hearing the argument and considering both sides, my finding is that respondents have not offered a sufficient legal basis for admissibility to overcome the objection of the government. Therefore, RX 520 is not admitted.

However, I do note, I believe the issues that respondent raised have been documented in the pleadings and orders that have been issued in this case.

Let's talk about CX 451, the Wilmer spreadsheet.

Is that right, Wilmer?

MS. VANDRUFF: Your Honor, it was prepared by Mr. Kevin Wilmer, that's correct.

JUDGE CHAPPELL: Okay.

The spreadsheet regarding the issue of Social Security numbers generated from Thomson Reuters, I have concerns about the reliability of the data comprising the spreadsheet, which in turn reflects on the reliability of the spreadsheet itself, any conclusions that can be drawn from it, how accurate is the Thomson Reuters database, et cetera.

I'm not admitting that exhibit today. However,

the government has the opportunity to call Mr. Wilmer and reoffer CX 451 and attempt to lay a proper foundation, at which time respondent will then be able to test the reliability under cross-examination.

Any questions on those rulings?

MS. VANDRUFF: Just one, Your Honor.

If I may, earlier today we represented that we would be calling four live witnesses. In light of Your Honor's ruling, we may reconsider that with Your Honor's permission.

JUDGE CHAPPELL: Oh, no. You said four certainly. I'm not holding you to that.

MS. VANDRUFF: Thank you, Your Honor.

JUDGE CHAPPELL: Yes. If I did that, trials would go a lot quicker, but...

Oh, let's talk about the elevator. I want everybody to know that during the repair of the elevators in the back of the building that I and my staff normally use, we are using an elevator, it's not where you are, but it's just around the corner, so I can hear things.

So please be advised and tell everybody, don't talk about the case in the elevator lobby and especially don't disparage the judge in the elevator lobby, because I don't want to hear anything I shouldn't hear in the

hallway.

I think that concludes it.

Do we have anything further from either party?

MR. SHERMAN: Nothing further from respondents, Your Honor.

MS. VANDRUFF: Nothing from complaint counsel, Your Honor.

JUDGE CHAPPELL: Right. You will reconfigure what will become JX 2, and it will be comprised basically of the stip you offered last night. I think paragraph 2 will be gone now. That was the one about conditional admissions, but the rest sounds good.

Hearing nothing further, on Tuesday -- hang on a second. I need to procedurally do something.

At this time I'm going to conclude the final prehearing conference, and until Tuesday at 10:00 a.m. we are adjourned.

(Whereupon, the foregoing final prehearing conference was concluded at 2:26 p.m.)

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER: 9357
CASE TITLE: In Re LabMD, Inc.
HEARING DATE: May 15, 2014

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

DATED: MAY 20, 2014

JOSETT F. WHALEN, RMR

CERTIFICATION OF PROOFREADER

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

ELIZABETH M. FARRELL

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Exhibit H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FEDERAL TRADE COMMISSION, et al., *Plaintiffs,* v. THOMAS JEFFERSON UNIVERSITY, et al. *Defendants.*	CIVIL ACTION NO. 20-01113

ORDER

AND NOW, this 10th day of September 2020, upon consideration of Defendants' Motion *in Limine* (ECF No. 132), their exhibits (ECF No. 135), and Plaintiffs' Response (ECF No. 166), it is **ORDERED** that the Motion is **DENIED**.[1]

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

[1] Defendants seek to preclude Plaintiffs from offering declarations and third-party investigational hearing transcripts they obtained before filing their Complaint. Arguing the documents are hearsay, needlessly cumulative and controvert Federal Rule of Civil Procedure 43's preference for live testimony, Defendants ask the Court to refrain from exercising its discretion to consider them. (Def.'s Mot. at 2–4, ECF No. 132.)

The Court is not strictly bound by the Federal Rules of Evidence in a preliminary injunction proceeding. As both sides acknowledge, the Court may use its discretion to consider hearsay evidence in this context. *See Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 718–19 (3d Cir. 2004) ("District courts must exercise their discretion in weighing all the attendant factors, including the need for expedition, to assess whether, and to what extent, affidavits or other hearsay materials are appropriate given the character and objectives of the injunctive proceeding.") (internal quotation marks and citation omitted). Given that part of the Court's role in the preliminary injunction proceeding will be to determine Plaintiffs' likelihood of success on the merits in the administrative adjudication, *see FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016), Plaintiffs may present declarations or investigational hearing transcripts that they may later introduce during the administrative adjudication. The parties are also entitled to examine live witnesses as they deem appropriate during the preliminary injunction hearing. The Court will evaluate and consider the live testimony and accompanying evidence and will give the weight it considers appropriate to any declarations or investigational hearing transcripts introduced into the record in the absence of a live witness.

Exhibit I

PUBLIC

ORIGINAL

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

In the Matter of	)	
McWANE, INC., a corporation, and	)	DOCKET NO. 9351
STAR PIPE PRODUCTS, LTD., a limited partnership, Respondents.	)	

ORDER DENYING RESPONDENT'S MOTION TO PRECLUDE COMPLAINT COUNSEL'S PROPOSED PROFFER OF INVESTIGATIONAL HEARING TRANSCRIPTS AT TRIAL

I.

On July 27, 2012, Respondent McWane, Inc. ("Respondent" or "McWane") filed a Motion *in Limine* to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial ("Motion"). Complaint Counsel filed an opposition to the Motion on August 7, 2012 ("Opposition"). Having fully considered the Motion and the Opposition, and as more fully explained below, Respondent's Motion is DENIED.

II.

As stated most recently in *In re POM Wonderful LLC*:

> "Motion *in limine*" refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *see also In re Motor Up Corp.*, Docket 9291, 1999 FTC LEXIS 207, at *1 (August 5, 1999). Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the court's inherent authority to manage the course of trials. *Luce*, 469 U.S. at 41 n.4. The practice has also been used in Commission proceedings. *E.g., In re Telebrands Corp.*, Docket 9313, 2004 FTC LEXIS 270 (April 26, 2004); *In re Dura Lube Corp.*, Docket 9292, 1999 FTC LEXIS 252 (Oct. 22, 1999).
>
> Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. *Hawthorne*

> *Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *see also Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, No. 94 Civ. 6608 (PKL) (AJP), 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. October 16, 2002). Courts considering a motion *in limine* may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *U.S. Environmental*, 2002 U.S. Dist. LEXIS 19701, at *6; *see, e.g., Veloso v. Western Bedding Supply Co., Inc.*, 281 F. Supp. 2d 743, 750 (D.N.J. 2003).

2011 FTC LEXIS 77, at *3-4 (May 5, 2011).

In addition, "*[i]n limine* rulings are not binding on the trial judge, and the judge may change his mind during the course of a trial." *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 85, at *20 (Apr. 20, 2009) (citations omitted). "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted at trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded." *Id.* (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)).

III.

Respondent states that Complaint Counsel has designated for admission at trial portions of 19 investigative hearing transcripts (IHTs). Respondent contends that all the IHTs should be excluded pursuant to Rule 3.43(b) of the Commission's Rules of Practice because they are unreliable, cumulative, a waste of time, and/or any probative value is outweighed by the risk of confusion and prejudice to Respondent if they are admitted. In support of its argument that the IHTs are unreliable and/or present the risk of confusion and prejudice, Respondent asserts that, pursuant to Commission Rules of Practice 2.8 and 2.9, Respondent was not given notice of, and did not attend, 17 of the 19 investigative hearings, and that there was no opportunity to object to improper questions or to contemporaneously cross-examine any of the investigational hearing witnesses. In support of Respondent's argument that the IHTs should be excluded as a "waste of time" and "needless presentation of cumulative evidence," Respondent asserts that Complaint Counsel also has taken the deposition of every witness who provided testimony earlier at an investigational hearing and, according to Complaint Counsel's final proposed witness list, intends to call each such witness for live testimony at trial. Moreover, Respondent argues, depositions and live testimony are more thorough and more reliable than IHTs, and there is no risk of prejudice to Complaint Counsel from being barred from introducing the IHTs.

Complaint Counsel argues that the Commission's Rules expressly allow the admission of IHTs, and the procedural rules governing the conduct of investigational hearings do not result in testimony so inherently unreliable as to be subject to a blanket exclusion. Complaint Counsel asserts that Respondent has failed to demonstrate that any of the designated investigational hearing testimony is unreliable. Complaint Counsel states that, indeed, Respondent has failed to identify any allegedly objectionable

investigational hearing testimony that has been designated for admission. Moreover, Complaint Counsel notes, Respondent deposed each investigational hearing witness, including examining each witness' credibility and bases for prior testimony.

Furthermore, Complaint Counsel argues, the IHTs cannot be deemed cumulative or unnecessary where, as here, Respondent has failed to point to any testimony that is duplicative of other testimony. In addition, the testimony is not duplicative, Complaint Counsel asserts, because due to limitations on the time allowed for the depositions of each investigational hearing witness, Complaint Counsel did not question the witnesses on all areas covered by the investigational hearing testimony, and references to investigational hearing testimony in the depositions will be difficult to understand without further reference to the actual investigational hearing testimony. According to Complaint Counsel, Respondent has also designated investigational hearing testimony as exhibits and Respondent's expert relied on IHTs in forming his opinions. Finally, Complaint Counsel notes that investigational hearing testimony of McWane executives is admissible pursuant to Rule 3.43(b) in any event, as statements of a party-opponent.

IV.

Pursuant to Commission Rule 3.43(b), "[r]elevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence." 16 C.F.R. § 3.43(b). With respect to the admissibility of investigational hearing testimony, Rule 3.43(b) further states:

> Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. . . . If otherwise meeting the standards for admissibility described in this paragraph, depositions, investigational hearings, prior testimony in Commission or other proceedings, expert reports, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay.

Id. (emphasis added); *see also* 74 Fed. Reg. 1804 at *1816 (January 20, 2009) (Commission explaining that under revised Rule 3.43(b), investigational hearings "would be admissible and would not be excluded solely because they constitute or contain hearsay, if the testimony or other form of hearsay was sufficiently reliable and probative").

Regarding the conduct of investigational hearings, the Commission's Rules provide that:

> [s]uch hearings shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation. . . . Unless otherwise ordered by the Commission, investigational hearings shall not be public. In investigational

> hearings conducted pursuant to a civil investigative demand for the giving of oral testimony, the Commission investigators shall exclude from the hearing room all other persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and the stenographer recording such testimony. . . .

16 C.F.R. § 2.8(b), (c). In addition, pursuant to Rule 2.9, investigational hearing witnesses are entitled to review, correct and sign the hearing transcript; bring counsel; and be advised by counsel during questioning. However, there are only limited rights to object to questions, and there are no provisions for cross-examination. 16 C.F.R. § 2.9.

Respondent cites no authority for its position that the Commission's Rules that do not allow Respondent's counsel to appear, object to questions, or cross-examine the investigational hearing witness, necessarily result in testimony that is unreliable and, therefore, must be excluded under Rule 3.43(b). Moreover, the witness' ability to review and correct the IHT, and to be advised by counsel, are indicia of the testimony's reliability. In addition, the IHT attached to Respondent's motion shows that the testimony was given under oath, which also adds to its reliability. Respondent's argument that deposition testimony and live testimony are more reliable than investigational hearing testimony, because of the ability to cross-examine, does not mean that the investigational hearing testimony is unreliable to the extent that it is inadmissible in its entirety. Rather, this argument goes to the weight to be given the investigational hearing testimony, not to its admissibility.

The Rules do not, however, provide for the automatic admission of IHTs at trial. Rather, Rule 3.43 clearly contemplates that individual portions of investigational hearing testimony can be excluded, like any other proffered evidence, if the testimony is irrelevant, unreliable, duplicative, or otherwise fails to "meet[ ] the standards for admissibility described in" Rule 3.43. 16 C.F.R. § 3.43(b). Respondent has failed to identify any testimony that has been designated by Complaint Counsel to which it objects, and Respondent's general assertions of unreliability or duplication of evidence are insufficient. *See In re Rambus*, 2002 FTC LEXIS 90, at *10 (Nov. 18, 2002) (holding that conclusory assertions of burden were insufficient basis for quashing subpoena). *See also In re North Texas Specialty Physicians*, 2006 FTC LEXIS 10, at * 8-9 (Jan. 10, 2006) (denying motion to stay injunctive order, in part because "[s]imple assertions of harm or conclusory statements based on unsupported assumptions" were insufficient to meet burden of showing harm). Such general assertions are particularly insufficient to exclude evidence, prior to, and outside the context of, trial.

Respondent has failed to meet its burden of demonstrating that Complaint Counsel's proffered IHTs are clearly inadmissible on all potential grounds. Accordingly, Respondent's Motion is DENIED.

V.

Having fully considered the Motion and the Opposition, and for all the foregoing reasons, Respondent's Motion to Preclude Complaint Counsel's Proposed Proffer of Investigational Hearing Transcripts at Trial is DENIED. This Order is not a determination, and shall not be construed as a ruling, as to the admissibility of any particular IHT testimony that may be offered at trial.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 15, 2012

Exhibit J

PUBLIC

PUBLIC

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,	)	
Respondents.	)	

SCHEDULING ORDER

August 17, 2020	-	Complaint Counsel provides preliminary witness list (not including experts) with a summary of the general topics of each witness' anticipated testimony.
August 31, 2020	-	Respondents' Counsel provides preliminary witness list (not including experts) with a summary of the general topics of each witness' anticipated testimony. The parties' preliminary witness lists (not including experts) shall include no more than 35 persons. The lists must reflect each party's good-faith efforts to identify for the other side any witnesses it may call at trial other than solely for impeachment.
November 9, 2020	-	Complaint Counsel provides expert witness list.
November 20, 2020	-	Deadline for issuing document requests and interrogatories to parties, except for discovery for purposes of authenticity and admissibility of exhibits.
November 23, 2020	-	Respondents' Counsel provides expert witness list.
December 18, 2020	-	Complaint Counsel shall provide its supplemental witness list

(not including experts) with a summary of the general topics of each witness' anticipated testimony. The list shall include no more than 30 persons, including no more than seven party witnesses who did not appear on Complaint Counsel's preliminary witness list. Third-party witnesses shall count toward the 30-person limit, but there shall be no other limit on the number of new third-party witnesses that may be added to the supplemental list.

December 21, 2020 - Deadline for issuing subpoenas *duces tecum* to third parties, except for discovery for purposes of authenticity and admissibility of exhibits.

January 6, 2021 - Respondents' Counsel shall provide their supplemental witness list (not including experts) with a summary of the general topics of each witness' anticipated testimony. The list shall include no more than 30 persons, including no more than seven party witnesses who did not appear on Respondents' Counsel's preliminary witness list. Third-party witnesses shall count toward the 30-person limit, but there shall be no other limit on the number of new third-party witnesses that may be added to the supplemental list.

January 19, 2021 - Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.

February 1, 2021 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.

February 8, 2021 - Deadline for Complaint Counsel to provide expert witness reports.

March 1, 2021 - Complaint Counsel provides to Respondents' Counsel its final proposed exhibit list, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), and Complaint Counsel's basis of admissibility for each proposed exhibit.

Complaint Counsel also provides its final proposed witness list, which shall include: (1) an indication whether each witness is designated as fact or expert witness; (2) a summary of the general topics of each witness' anticipated testimony; and (3) a good faith indication whether Complaint Counsel intends to seek leave to present the witness' testimony by video deposition. Complaint

Counsel's proposed final witness list shall not include more than 25 fact witnesses, and shall not include more than three witnesses who did not appear on the supplemental witness lists provided by Complaint Counsel in accordance with the timeframes set forth above. No witness may be added to the final witness list who did not appear on the supplemental witness list unless such witnesses have been deposed in their personal capacity in this litigation.

Complaint Counsel provides courtesy copies to ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

March 8, 2021 - Deadline for Respondents' Counsel to provide expert witness reports. Respondents' expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).

March 10, 2021 - Respondents' Counsel provides to Complaint Counsel its final proposed exhibit list, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), and Respondents' basis of admissibility for each proposed exhibit.

Respondents' Counsel also provides each party's final proposed witness list, which shall include: (1) an indication whether each witness is designated as fact or expert witness; (2) a summary of the general topics of each witness' anticipated testimony; and (3) a good faith indication whether Respondents' Counsel intends to seek leave to present the witness' testimony by video deposition. Respondents' Counsel's proposed final witness list shall not include more than 25 fact witnesses, and shall not include more than three witnesses who did not appear on the supplemental witness lists provided by Respondents' Counsel in accordance with the timeframes set forth above. No witness may be added to the final witness list who did not appear on the supplemental witness list unless such witnesses have been deposed in their personal capacity in this litigation.

Respondents' Counsel provides courtesy copies to ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

March 11, 2021 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice

		to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[1]
March 19, 2021	-	Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondents).
March 22, 2021	-	Deadline for filing motions *in limine* to preclude admission of evidence, except to the extent such motions relate to any expert rebuttal report, in which case such motions must be made within four days after the deposition of the rebuttal expert. *See* Additional Provision 15.
March 22, 2021	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits. *See* Additional Provision 14.
March 24, 2021	-	Deadline for depositions of experts, except any expert providing a rebuttal report, and exchange of expert related exhibits.
March 26, 2021	-	Exchange and provide a courtesy copy to ALJ of objections to final proposed witness lists and exhibit lists. The Parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits.
March 26, 2021	-	Complaint Counsel files pretrial brief supported by legal authority.
March 30, 2021	-	Deadline for depositions of rebuttal experts.
March 30, 2021	-	Deadline for filing responses to motions *in limine* to preclude admission of evidence, except to the extent such motions relate to any expert rebuttal report, in which case any such response must be within four days after the motion *in limine* is filed.

[1] Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

March 30, 2021	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
April 2, 2021	-	Exchange proposed stipulations of law, facts, and authenticity.
April 6, 2021	-	Respondents' Counsel files pretrial brief supported by legal authority.
April 9, 2021	-	Final prehearing conference to begin at 1:00 p.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties. Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.
April 13, 2021	-	Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall provide a courtesy copy to the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly

after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to Office of the Administrative Law Judge directly, and the FTC E-filing system shall not be used for this purpose. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth the docket number, an abbreviated case name, and the title of the submission (e.g., "No. 1234: Acme Corp – Motion to Extend")**. The parties are not required to provide a courtesy copy to the OALJ in hard copy, except upon request. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges.

2. The parties shall serve each other by electronic mail and shall include "Docket 9393" in the re: line and all attached documents in .pdf format. In the event that service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and

the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 10 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within 21 days of service of a document request, the parties shall: (1) confer about the format for the production of electronically stored information; and (2) serve any objections to the document requests. Within five days of serving any objections, the parties will meet and confer to attempt to resolve any disputes. The party responding to document requests must produce responsive documents on a rolling basis and will make a good-faith effort to produce them as expeditiously as possible. No deposition of a party witness (including any former employee) shall be scheduled sooner than four business days following the time the party completes production of that witness' documents within the party's custody or control in response to a subpoena *duces tecum*.

8. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, the deadline for the motion to compel shall be within 5 days of reaching an impasse.

9. A party that obtains a declaration from a non-party must produce the declaration at least three days before the non-party is scheduled to be deposed, but no later than January 18, 2021 absent a showing of good cause. The parties reserve all rights and objections with respect to the use and/or admissibility of any declaration, and no declaration shall be admitted unless a fair opportunity was available to depose the declarant.

10. A party that produces for deposition a corporate representative(s) pursuant to 16 CFR § 3.33(c)(1) must identify to the other side the representative(s) it intends to produce and, to the extent it intends to produce more than one representative, the matters on which each witness will testify, no less than five days in advance of the scheduled deposition.

11. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by

videotape at least five days in advance of the deposition. The parties shall work in good faith, in light of the public-health emergency, to develop appropriate protocols for remote depositions. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge. Each side shall be limited to taking a total of 35 depositions, other than expert depositions, unless the Administrative Law Judge grants leave to take any additional depositions.

12. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. The parties need not separately notice the deposition of a non-party noticed by an opposing party. If both sides notice any non-party fact deposition, the time and allocation for the deposition shall be divided evenly between them. For any non-party deposition noticed by only one side, the non-noticing side shall be allocated one and a half hours of deposition time for cross or re-cross testimony. Unused time in any side's allocation of deposition time may be used by the other side only if agreed to by all parties, or as ordered by the Administrative Law Judge. Solely for the purpose of allocating deposition time pursuant to this Paragraph 12, former employees of a party are considered party witnesses rather than non-party witnesses if such former employees are represented by the party's counsel.

13. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and five business days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

14. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained *In re Otto Bock Healthcare N. Am.*, 2018 WL 3491602 at *1 (July 2, 2018); and *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

15. Motions *in limine* are strongly discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20

(April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. Id. (citing *Hawthorne Partners v. AT&T Technologies, Inc*., 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental, Inc*., 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

16. The final witness lists shall represent counsel's good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary or supplemental witness lists previously exchanged unless pursuant to the provisions in the above schedule, by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

17. If any party wishes to offer a rebuttal witness other than a rebuttal expert, the party shall file a request in writing in the form of a motion to request a rebuttal witness. That motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include: (a) the name of any witness being proposed (b) a detailed description of the rebuttal evidence being offered; (c) citations to the record, by page and line number, to the evidence that the party intends to rebut; and shall demonstrate that the witness the party seeks to call has previously been designated on its witness list or adequately explain why the requested witness was not designated on its witness list.

18. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

19. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

20. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert report is produced, the producing party shall provide to the

other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g), except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied on by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

(i) a list of all commercially-available computer programs used by the expert in the preparation of the report;

(ii) a copy of all data sets used by the expert, in native file format and processed data file format; and

(iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

(g) Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) any form of communication or work product shared between any of the parties' counsel and their expert(s), or between any of the experts themselves;

(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

(iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;

(iv) drafts of expert reports, analyses, or other work product; or

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

21. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with 16 C.F.R. § 3.45(e).

22. An expert witness' testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness is only allowed to provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

23. The final exhibit lists shall represent counsel's good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

24. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and shall not be read in open court to provide that testimony, but may be used in the examination of live witnesses. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

25. The parties shall provide to one another, and to the Administrative Law Judge and the court reporter, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or unforeseen circumstances.

26. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

27. Complaint Counsel's exhibits shall bear the designation PX and Respondents' exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation PXD and Respondents' demonstrative exhibits shall bear the designation RXD or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

28. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial and to provide the exhibits to the court reporter. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if PX100 and RX200 are different

copies of the same document, only one of those documents shall be offered into evidence. The parties shall agree in advance as to which exhibit number they intend to use. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: August 4, 2020

Exhibit K

PUBLIC

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

In the Matter of	)	
Otto Bock HealthCare North America, Inc.,	)	DOCKET NO. 9378
a corporation,	)	
Respondent.	)	

SCHEDULING ORDER

January 30, 2018	-	Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
February 2, 2018	-	Complaint Counsel provides expert witness list.
February 6, 2018	-	Respondent's Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
February 12, 2018	-	Respondent's Counsel provides expert witness list.
February 28, 2018	-	Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
March 2, 2018	-	Deadline for supplementing preliminary witness lists.
March 15, 2018	-	Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.
March 30, 2018	-	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.

April 9, 2018	-	Deadline for Complaint Counsel to provide expert witness reports.
April 13, 2018	-	Complaint Counsel provides to Respondent's Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
April 24, 2018	-	Deadline for Respondent's Counsel to provide expert witness reports (to be provided by 4 p.m. ET). Respondent's expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
April 24, 2018	-	Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondent's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
April 24, 2018	-	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[1] *See* Additional Provision 7.

[1] Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

May 3, 2018	-	Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent).
May 7, 2018	-	Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
May 7, 2018	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
May 11, 2018	-	Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
May 14, 2018	-	Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. The Parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits.
May 14, 2018	-	Complaint Counsel files pretrial brief supported by legal authority.
May 14, 2018	-	Deadline for filing responses to motions *in limine* to preclude admission of evidence.
May 14, 2018	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
May 14, 2018	-	Exchange proposed stipulations of law, facts, and authenticity.
May 16, 2018	-	Respondent's Counsel files pretrial brief supported by legal authority.
May 18, 2018	-	Final prehearing conference to begin at 1:00 p.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one

business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.

May 22, 2018 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to Office of the Administrative Law Judge directly, and the FTC E-filing system shall not be used for this purpose. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth only the docket number and the title of the submission**. The parties are not required to serve a courtesy copy to the OALJ in hard copy, except upon request. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges.

2. The parties shall serve each other by electronic mail and shall include "Docket 9378" in the re: line and all attached documents in .pdf format. In the event that service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re Jerk, LLC*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

9. Motions *in limine* are strongly discouraged. Motion *in limine* refers "to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *In re Daniel Chapter One*, 2009 FTC LEXIS 85, *18-20 (April 20, 2009) (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)). Evidence should be excluded in advance of trial on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds. Id. (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993); *Sec. Exch. Comm'n v. U.S. Environmental, Inc.*, 2002 U.S. Dist. LEXIS 19701, at *5-6 (S.D.N.Y. Oct. 16, 2002)). Moreover, the risk of prejudice from giving undue weight to marginally relevant evidence is minimal in a bench trial such as this where the judge is capable of assigning appropriate weight to evidence.

10. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests shall be filed within 30 days of service of the responses and/or objections to the discovery requests or within 20 days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, the deadline for the motion to compel shall be within 5 days of reaching an impasse.

11. Each party is limited to 50 document requests, including all discrete subparts; 25 interrogatories, including all discrete subparts; and 50 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits. Any single interrogatory inquiring as to a request for admissions response may address only a single such response. There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits. Within seven days of service of a document request, the parties shall confer about the format for the production of electronically stored information. If any federal court proceeding related to this administrative proceeding is initiated, any discovery obtained in this proceeding may be used in the related federal court litigation, and vice versa.

12. The deposition of any person may be recorded by videotape, provided that the deposing party notifies the deponent and all parties of its intention to record the deposition by videotape at least five days in advance of the deposition. No deposition, whether recorded by videotape or otherwise, may exceed a single, seven-hour day, unless otherwise agreed to by the parties or ordered by the Administrative Law Judge.

13. The parties shall serve upon one another, at the time of issuance, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *ad testificandum*, the party seeking the deposition shall consult with the other parties before the time and place of the deposition is scheduled. The parties need not separately notice the deposition of a non-party noticed by an opposing party. Unless the parties otherwise agree, at the request of any party, the time and allocation for a non-party deposition shall be divided evenly between them, but the noticing party may use any additional time not used by the opposing party. If no party makes such a request, cross-examination of the witness will be limited to one hour.

14. Non-parties shall provide copies or make available for inspection and copying of documents requested by subpoena to the party issuing the subpoena. The party that has requested documents from non-parties shall provide copies of the documents received from non-parties to the opposing party within three business days of receiving the documents. No deposition of a non-party shall be scheduled between the time a non-party provides documents in response to a subpoena *duces tecum* to a party, and 3 business days after the party provides those documents to the other party, unless a shorter time is required by unforeseen logistical issues in scheduling the deposition, or a non-party produces those documents at the time of the deposition, as agreed to by all parties involved.

15. The final witness lists shall represent counsels' good faith designation of all potential witnesses who counsel reasonably expect may be called in their case-in-chief. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of the scheduling order. The final proposed witness list may not include additional witnesses not listed in the preliminary or supplemental witness lists previously exchanged unless by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

16. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

17. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. F.R.E. 602.

18. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

19. The parties are required to comply with Rule 3.31A and with the following:

(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g), except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

(i) a list of all commercially-available computer programs used by the expert in the preparation of the report;

(ii) a copy of all data sets used by the expert, in native file format and processed data file format; and

(iii) all customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.

(g) Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that neither side must preserve or disclose:

(i) any form of communication or work product shared between any of the parties' counsel and their expert(s), or between any of the experts themselves;

(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

(iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;

(iv) drafts of expert reports, analyses, or other work product; or

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

20. An expert witness's testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness is only allowed to provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

21. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

22. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

23. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

24. Complaint Counsel's exhibits shall bear the designation PX and Respondent's exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation PXD and Respondent's demonstrative exhibits shall bear the designation RXD or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

25. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial and to provide the exhibits to the court reporter. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if PX100 and RX200 are different copies of the same document, only one of those documents shall be offered into evidence. The parties shall agree in advance as to which exhibit number they intend to use. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: January 18, 2018

PUBLIC

Notice of Electronic Service

I hereby certify that on January 18, 2018, I filed an electronic copy of the foregoing Scheduling Order, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on January 18, 2018, I served via E-Service an electronic copy of the foregoing Scheduling Order, upon:

Steven Lavender
Attorney
Federal Trade Commission
slavender@ftc.gov
Complaint

William Cooke
Attorney
Federal Trade Commission
wcooke@ftc.gov
Complaint

Yan Gao
Attorney
Federal Trade Commission
ygao@ftc.gov
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Lynda Lao
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Wayne A. Mack
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spmcconnell@duanemorris.com
Respondent

Lynnette Pelzer
Attorney

Exhibit L

PUBLIC

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

In the Matter of Tronox Limited, a corporation, National Industrialization Company (TASNEE) a corporation, National Titanium Dioxide Company Limited (Cristal) a corporation, and Cristal USA Inc. a corporation, Respondents.	DOCKET NO. 9377

SCHEDULING ORDER

January 3, 2018	-	Complaint Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
January 10, 2018	-	Respondents' Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
January 17, 2018	-	Complaint Counsel provides expert witness list.
January 31, 2018	-	Respondents' Counsel provides expert witness list.
February 9, 2018	-	Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.

February 16, 2018	-	Deadline for supplementing preliminary witness lists.
March 1, 2018	-	Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.
March 13, 2018	-	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
March 26, 2018	-	Deadline for Complaint Counsel to provide expert witness reports.
March 30, 2018	-	Complaint Counsel provides to Respondents' Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
April 10, 2018	-	Deadline for Respondents' Counsel to provide expert witness reports (to be provided by 4 p.m. ET). Respondents' expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).
April 10, 2018	-	Respondents' Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondents' basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness. Respondents' Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

April 10, 2018	-	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[1] *See* Additional Provision 7.
April 19, 2018	-	Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondents).
April 23, 2018	-	Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
April 23, 2018	-	Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
April 24, 2018	-	Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
April 30, 2018	-	Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. The Parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits.
April 30, 2018	-	Complaint Counsel files pretrial brief supported by legal authority.
April 30, 2018	-	Deadline for filing responses to motions *in limine* to preclude admission of evidence.
April 30, 2018	-	Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.

[1] Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

May 1, 2018	-	Exchange proposed stipulations of law, facts, and authenticity.
May 1, 2018	-	Respondents' Counsel files pretrial brief supported by legal authority.
May 4, 2018	-	Final prehearing conference to begin at 1:00 p.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580. The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties. Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.
May 8, 2018	-	Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ADDITIONAL PROVISIONS

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall serve a courtesy copy on the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The courtesy copy should be transmitted at or

shortly after the time of any electronic filing with the Office of the Secretary. Courtesy copies must be transmitted to Office of the Administrative Law Judge directly, and the FTC E-filing system shall not be used for this purpose. The oalj@ftc.gov email account is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents specifically requested of the parties by the Office of Administrative Law Judges. Certificates of service for any pleading shall not include the OALJ email address, or the email address of any OALJ personnel, including the Chief ALJ, but rather shall designate only 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service. **The subject line of all electronic submissions to oalj@ftc.gov shall set forth only the docket number and the title of the submission**. The parties are not required to serve a courtesy copy to the OALJ in hard copy, except upon request. In any instance in which a courtesy copy of a pleading for the Administrative Law Judge cannot be effectuated by electronic mail, counsel shall hand deliver a hard copy to the Office of Administrative Law Judges. Discovery requests and discovery responses shall not be submitted to the Office of Administrative Law Judges.

2. The parties shall serve each other by electronic mail and shall include "Docket 9377" in the re: line and all attached documents in .pdf format. In the event that service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission's Rules of Practice.

3. Each pleading that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include such copies as exhibits.

4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), or each motion for sanctions pursuant to § 3.38(b), the required signed statement must also "recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference." Motions that fail to include such separate statement may be denied on that ground.

5. Rule 3.22(c) states:

> All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

If a party chooses to submit a motion without a separate memorandum, the word count limits of 3.22(c) apply to the motion. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words, and the word count limits of 3.22(c) apply to the memorandum in support of the motion. This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and braces}**. 16 C.F.R. § 3.45(e). Parties shall be aware of the rules for filings containing such information, including 16 C.F.R. § 4.2.

7. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties are required to inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45, explained in *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re Jerk, LLC*, 2015 FTC LEXIS (Feb. 23, 2015); *In re Basic Research, Inc.*, 2006 FTC LEXIS 14 (Jan. 25, 2006). Motions also must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *In re 1-800 Contacts, Inc.*, 2017 FTC LEXIS 55 (April 4, 2017); *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 66 (April 23, 2004). Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

8. If the expert reports prepared for either party contain confidential information that has been granted *in camera* treatment, the party shall prepare two versions of its expert report(s) in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

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16. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only by consent of all parties, or, if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

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(a) At the time an expert is first listed as a witness by a party, that party shall provide to the other party:

(i) materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and

(ii) transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.

(b) At the time an expert report is produced, the producing party shall provide to the other party all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of 19(g), except that documents and materials already produced in the case need only be listed by Bates number.

(c) It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once and each expert deposition shall be limited to one day for seven hours.

(d) Each expert report shall include a complete statement of all opinions to be expressed and the basis and reasons therefore; the data or other information considered by the expert in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the expert; and the compensation to be paid for the study and testimony.

(e) A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for hearing and who is not designated by a party as a testifying witness.

(f) At the time of service of the expert reports, a party shall provide opposing counsel:

(i) a list of all commercially-available computer programs used by the expert in the preparation of the report;

(ii) a copy of all data sets used by the expert, in native file format and processed data file format; and

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(ii) any form of communication or work product shared between an expert(s) and persons assisting the expert(s);

(iii) expert's notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;

(iv) drafts of expert reports, analyses, or other work product; or

(v) data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

20. An expert witness's testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness is only

allowed to provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

21. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Videotape deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

22. The parties shall provide one another, and the Administrative Law Judge, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of hearing, subject to possible delays or other unforeseen circumstances.

23. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness.

24. Complaint Counsel's exhibits shall bear the designation CCX and Respondents' exhibits shall bear the designation RX or some other appropriate designation. Complaint Counsel's demonstrative exhibits shall bear the designation CCXD and Respondents' demonstrative exhibits shall bear the designation RXD or some other appropriate designation. If demonstrative exhibits are used with a witness, the exhibit will be marked and referred to for identification only. Any demonstrative exhibits referred to by any witness may be included in the trial record, but they are not part of the evidentiary record and may not be cited to support any disputed fact. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one piece of paper, each page of the exhibit must bear a consecutive control number or some other consecutive page number. Additionally, parties must account for all their respective exhibit numbers. Any number not actually used at the hearing shall be designated "intentionally not used."

25. At the final prehearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial and to provide the exhibits to the court reporter. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial. For example, if CCX 100 and RX 200 are different copies of the same document, only one of those documents shall be offered into evidence. The parties shall agree in advance as to which exhibit number they intend to use. Counsel shall contact the court reporter regarding submission of exhibits.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: December 20, 2017

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
Secretary
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
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

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

David Marriott Christine A. Varney Sharonmoyee Goswami Cravath, Swaine & Moore LLP 825 Eighth Avenue New York, NY 10019 (212) 474-1140 dmarriott@cravath.com cvarney@cravath.com sgoswami@cravath.com Karl C. Huth Matthew J. Reynolds Huth Reynolds LLP 41 Cannon Court Huntington, NY 11743 (212) 731-9333 huth@huthreynolds.com reynolds@huthreynolds.com *Counsel for Illumina, Inc.*	Al Pfieffer Michael G. Egge Marguerite M. Sullivan Latham & Watkins LLP 555 Eleventh Street, NW Washington, DC 20004 (202) 637-2285 al.pfeiffer@lw.com michael.egge@lw.com marguerite.sullivan@lw.com *Counsel for GRAIL, Inc.*

s/ Stephanie Bovee
Stephanie Bovee

Counsel Supporting the Complaint