

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

**COMMISSIONERS:**       **Edith Ramirez, Chairwoman**  
                                  **Julie Brill**  
                                  **Maureen K. Ohlhausen**  
                                  **Joshua D. Wright**



In the Matter of	)	<b>PUBLIC</b>
LabMD, Inc.,	)	Docket No. 9357
a corporation,	)	
Respondent.	)	

**COMPLAINT COUNSEL’S OPPOSITION TO  
RESPONDENT’S MOTION TO DISQUALIFY  
COMMISSIONER BRILL FROM THIS ADMINISTRATIVE PROCEEDING**

Complaint Counsel submits this Opposition to Respondent LabMD, Inc.’s (“LabMD” or “Respondent”) Motion to Disqualify Commissioner Brill. Neither Commissioner Brill nor the Commission without Commissioner Brill’s participation should grant the relief sought because Respondent has not made the requisite showing that Commissioner Brill has “adjudged the facts as well as the law” alleged in the Complaint. *Cinderella Career & Finishing Schools, Inc. v. Fed. Trade Comm’n*, 425 F.2d 583, 591 (D.C. Cir. 1970) (internal quotation omitted).

In filing its Motion, Respondent assumed a “high” burden. *In re Whole Foods*, No. 9324, 2008 WL 4153583, at \*2 (F.T.C. Sept. 5, 2008). To prevail, Respondent must show, with “affidavits and other information,” Rule 4.17(b)(1), 16 C.F.R. § 4.17(b)(1), that Commissioner Brill’s mind is “‘irrevocably closed’ with regard to the legality of the conduct at issue in the adjudication.” *In re N.C. Bd. of Dental Examiners*, 2011 FTC LEXIS 59, at \*9 (Feb. 16, 2011)

(quoting *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948)). Respondent has not made such a showing, and its Motion should be denied.

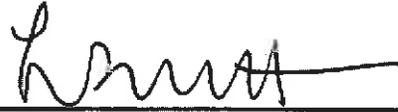
In support of its Motion, Respondent has identified two of Commissioner Brill's speeches in which her written remarks identify this matter *in footnotes*. Read in context, both references are understood properly to characterize this matter as one in which the Commission, including Commissioner Brill, found *reason to believe* that LabMD failed to employ reasonable and appropriate measures to prevent unauthorized access to consumers' personal information. See Compl. ¶ 22.

Nothing in Commissioner Brill's speeches suggests that she has prejudged the law that the Commission will consider on Respondent's Motion to Dismiss. Nor do Commissioner Brill's remarks indicate that her mind is irrevocably closed as it relates to the facts alleged in the Complaint. To the extent LabMD may be relying on Commissioner Brill's citation to other similar cases, as observed by the Second Circuit, there is nothing improper about "members of regulatory commissions . . . form[ing] views about law and policy on the basis of their prior adjudications of similar issues which may influence them in deciding later cases." *Am. Med. Ass'n v. FTC*, 638 F.2d 443, 449 n.4 (2d Cir. 1980) (internal quotation omitted).

Accordingly, Commissioner Brill and the Commission without Commissioner Brill's participation should deny Respondent's Motion to Disqualify.

Dated: December 24, 2013

Respectfully submitted,



Alain Sheer  
Laura Riposo VanDruff  
Megan Cox  
Margaret Lassack  
Ryan Mehm  
John Krebs  
Jarad Brown

Federal Trade Commission  
600 Pennsylvania Ave., NW  
Room NJ-8100  
Washington, DC 20580  
Telephone: (202) 326-2999 – VanDruff  
Facsimile: (202) 326-3062  
Electronic mail: [lvandruff@ftc.gov](mailto:lvandruff@ftc.gov)

*Complaint Counsel*

## CERTIFICATE OF SERVICE

I hereby certify that on December 24, 2013, I filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-113  
Washington, DC 20580

I also certify that I caused a paper copy of the foregoing document with an original signature to be filed with the Office of the Secretary.

I also certify that I caused twelve (12) copies of the foregoing document to be delivered to the Office of the Secretary, Room H-113.

I also certify that I caused a copy of the foregoing document to be delivered *via* electronic mail and by hand to:

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW, Room H-110  
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

Michael D. Pepson  
Lorinda Harris  
Hallee Morgan  
Regulatory Counsel  
Cause of Action  
1919 Pennsylvania Avenue, NW, Suite 650  
Washington, DC 20006  
michael.pepson@causeofaction.org  
lorinda.harris@causeofaction.org  
hallee.morgan@causeofaction.org

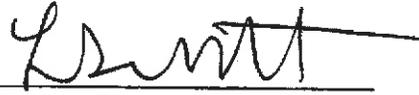
Reed Rubinstein  
William Sherman, II  
Dinsmore & Shohl, LLP  
801 Pennsylvania Avenue, NW, Suite 610  
Washington, DC 20004  
reed.rubinstein@dinsmore.com  
william.sherman@dinsmore.com

*Counsel for Respondent LabMD, Inc.*

I further certify that the electronic copy sent to the Office of the Secretary is a true and correct copy of the paper original and that I possess a paper copy of the signed document that is available for review.

December 24, 2013

By:



Laura Riposo VanDruff  
Federal Trade Commission  
Bureau of Consumer Protection