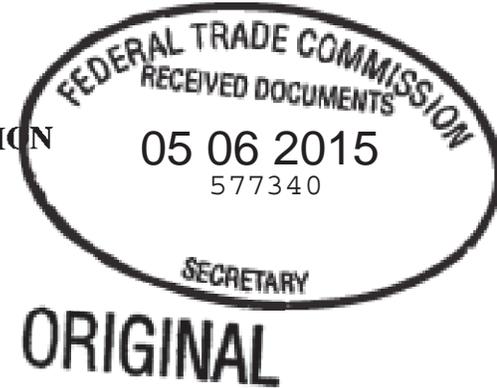


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Edith Ramirez, Chairwoman  
Maureen K. Ohlhausen  
Joshua D. Wright  
Terrell McSweeney

\_\_\_\_\_)  
In the Matter of ) PUBLIC  
)  
LabMD, Inc., a corporation ) Docket No. 9357  
Respondent. )  
\_\_\_\_\_)

**RESPONDENT’S MOTION TO STRIKE COMPLAINT COUNSEL’S OPPOSITION TO  
RESPONDENT’S MOTION TO DISQUALIFY CHAIRWOMAN EDITH RAMIREZ OR,  
IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF  
MOTION TO DISQUALIFY COMMISSIONER EDITH RAMIREZ**

On April 27, 2015, Respondent LabMD, Inc. (“LabMD”) filed a Motion to Disqualify Commissioner Edith Ramirez (“Motion to Disqualify”) from the administrative proceedings because she has been irrevocably tainted by her involvement in the Federal Trade Commission’s (“FTC”) response to a Congressional investigation. On April 30, 2015, without citation to any rule permitting it to do so, Complaint Counsel filed an Opposition to Respondent’s Motion to Disqualify (the “Opposition”). Complaint Counsel had no authority to file this Opposition and LabMD hereby moves to strike it.

Under applicable Commission Rule 4.17, 16 C.F.R. § 4.17, LabMD’s Motion to Disqualify is decided directly by the Commission. The subject matter and relief sought – potential disqualification of a tainted Commissioner – do not invoke Complaint Counsel’s interests, such that Complaint Counsel may “oppose” or respond to the motion. Indeed, in contrast to other FTC motion rules which expressly allow for an opposition and establish the

procedures for filing the same,<sup>1</sup> Commission Rule 4.17 overtly omits any provision allowing Complaint Counsel a response to the Motion to Disqualify. The Opposition, therefore, is improper and should be stricken from the administrative record.

If, however, Complaint Counsel is permitted to file its Opposition, LabMD should be permitted an opportunity to submit a reply brief. Among other issues, Complaint Counsel has mischaracterized the relevant facts and law. Accordingly, to the extent that Complaint Counsel's Opposition is not stricken, LabMD requests leave to file the attached Reply (*see* Exhibit A).

### CONCLUSION

For the reasons stated above, LabMD respectfully requests that this Court grant its Motion to Strike or, in the alternative, Motion for Leave to File a Reply.

Dated: May 6, 2015

Respectfully submitted,



\_\_\_\_\_  
Daniel Z. Epstein, Esq.  
Prashant K. Khetan, Esq.  
Patrick J. Massari, Esq.  
Erica L. Marshall, Esq.  
Cause of Action  
1919 Pennsylvania Ave., NW Suite 650  
Washington, DC 20006  
Phone: (202) 499-4232  
Facsimile: (202) 330-5842  
Email: prashant.khetan@causeofaction.org

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<sup>1</sup> *See, e.g.*, Commission Rules 3.22 (16 C.F.R. § 3.22), 3.24 (16 C.F.R. § 3.24), 3.38 (16 C.F.R. § 3.38); *see also Cipollone v. Liggett Group*, 505 U.S. 504, 508 (1992) (the expression of one thing is the exclusion of another, *expressio unius est exclusion alterius*).

RDR/BJEM

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William A. Sherman, II, Esq.  
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Phone: (202) 372-9100  
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*Counsel for Respondent, LabMD, Inc.*

# **EXHIBIT A**



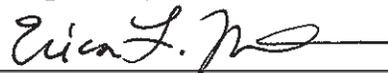
*v. Federal Trade Comm'n*, 354 F.2d 952, 963-65 (5th Cir. 1966); *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972)).

**CONCLUSION**

For these reasons, and those previously raised, LabMD respectfully requests that Chairwoman Ramirez disqualify herself and abstain from any further participation in this matter.

Dated: May 6, 2015

Respectfully submitted,



Daniel Z. Epstein, Esq.

Prashant K. Khetan, Esq.

Patrick J. Massari, Esq.

Erica L. Marshall, Esq.

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*Counsel for Respondent, LabMD, Inc.*

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

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

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

**MEET AND CONFER STATEMENT**

On May 4, 2015, Prashant Khetan, counsel for Respondent, LabMD, Inc. ("LabMD"), met and conferred by telephone with Laura VanDruff, Complaint Counsel, regarding the subject of the instant Motion to Strike and, in the alternative, Motion for Leave to File a Reply. Complaint Counsel did not consent to the Motion to Strike and did not consent to the Motion for Leave to File a Reply. On May 5, 2015, Erica L. Marshall, counsel for Respondent, LabMD, met and conferred by email with Laura VanDruff, Complaint Counsel, and confirmed that she did not consent to the Motion to Strike or the Motion for Leave to File a Reply.

Dated: May 6, 2015

By: 

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

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

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

**[PROPOSED] ORDER**

IT IS HEREBY ORDERED THAT, upon due consideration, Respondent LabMD, Inc.’s Motion to Strike is hereby GRANTED, Complaint Counsel’s Opposition to Respondent’s Motion to Disqualify Commissioner Edith Ramirez be and is hereby stricken from the record, and LabMD Inc.’s Motion for Leave to File a Reply in Support of its Motion to Disqualify Commissioner Edith Ramirez is moot;

Or, IN THE ALTERNATIVE,

IT IS HEREBY ORDERED that, upon due consideration, Respondent LabMD, Inc.’s Motion for Leave to File a Reply in Support of its Motion to Disqualify is hereby GRANTED, and LabMD Inc.’s Reply attached hereto as Exhibit A shall be filed as part of the record.

\_\_\_\_\_  
Commissioner

**CERTIFICATE OF SERVICE**

I hereby certify that on May 6, 2015, I caused to be filed the foregoing document electronically through the Office of the Secretary's FTC E-filing system, which will send an electronic notification of such filing to the Office of the Secretary:

Donald S. Clark, Esq.  
Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

I also certify that on May 6, 2015, I caused hand-delivery of twelve paper copies of the foregoing document to the following address: Document Processing Unit, RFO Receiving Constitution Center, 400 7<sup>th</sup> Street SW, 5<sup>th</sup> Floor, Suite 5610, Washington, DC 20024.

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

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

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Alain Sheer, Esq.  
Laura Riposo VanDruff, Esq.  
Megan Cox, Esq.  
Ryan Mehm, Esq.  
John Krebs, Esq.  
Jarad Brown, Esq.  
Division of Privacy and Identity Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Room CC-8232  
Washington, D.C. 20580

Dated: May 6, 2015

By: /s/ Patrick J. Massari

**CERTIFICATE OF ELECTRONIC FILING**

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

Dated: May 6, 2015

By: /s/ Patrick J. Massari

Notice of Electronic Service

I hereby certify that on May 06, 2015, I filed via hand a paper original and electronic copy of the foregoing LabMD's Mtn. to Strike Complaint Counsel's Opp. to LabMD's Mtn. to Disqualify Comm'r Edith Ramirez, Or in the Alternative for Leave to File a Reply in support of LabMD's Mtn. to Disqualify Comm'r Ramirez, 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 May 06, 2015, I filed via E-Service of the foregoing LabMD's Mtn. to Strike Complaint Counsel's Opp. to LabMD's Mtn. to Disqualify Comm'r Edith Ramirez, Or in the Alternative for Leave to File a Reply in support of LabMD's Mtn. to Disqualify Comm'r Ramirez, with:

John Krebs  
Attorney  
Federal Trade Commission  
jkrebs@ftc.gov  
Complaint

Jarad Brown  
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Alain Sheer  
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Complaint

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Complaint

Megan Cox  
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Complaint

Ryan Mehm  
Federal Trade Commission  
rmehm@ftc.gov  
Complaint

Erica Marshall  
Counsel  
Cause of Action  
erica.marshall@causeofaction.org

**I hereby certify that on May 06, 2015, I filed via other means, as provided in 4.4(b) of the foregoing LabMD's Mtn. to Strike Complaint Counsel's Opp. to LabMD's Mtn. to Disqualify Comm'r Edith Ramirez, Or in the Alternative for Leave to File a Reply in support of LabMD's Mtn. to Disqualify Comm'r Ramirez, with:**

William Sherman, II  
Attorney  
Dinsmore & Shohl, LLP  
william.sherman@dinsmore.com  
Respondent

Patrick Massari  
Attorney