

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

ORIGINAL

_____) DOCKET NO. 9357
In the Matter of)
)
) PUBLIC
LabMD, Inc.,)
a corporation.)
)
_____)

**SECOND MOTION TO DISQUALIFY COMMISSIONER EDITH RAMIREZ –
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

Pursuant to 5 U.S.C. § 557(d) and 16 C.F.R. § 4.17, Respondent LabMD, Inc. (“LabMD”) respectfully moves to disqualify Federal Trade Commission (“FTC” or “Commission”) Chairwoman Edith Ramirez because she has violated 5 U.S.C. § 557(d) of the Administrative Procedure Act (“APA”) by refusing to enter in the public record of this matter any and all communications regarding her involvement in the FTC’s response to the United States House of Representatives Committee on Oversight and Government Reform (“OGR”) investigation of Tiversa, Inc. (“Tiversa”).¹

Responding to proper FOIA requests, FTC has withheld disclosure of a vast number of Commissioners’ emails, documents and other records, claiming the deliberative process privilege. This means that FTC has conceded that the Commissioners were engaged in substantive discussions regarding the LabMD matter during the administrative case. In fact, the

¹ Relevant documents already are part of the record (though heavily redacted by FTC in response to proper FOIA requests). See LabMD’s Motion for Disqualification of Commissioner Ramirez, Exs. 1-3 (Apr. 27, 2015); see also LabMD’s Notice of Supp. Authority, Attachment A (May 15, 2015).

limited records FTC *has* produced show that Commissioner Ramirez and her staff were fully engaged, contrary to her quasi-judicial responsibility.

Chairwoman Ramirez – who acted to protect her agency’s reputation at all costs – overzealously responded to OGR’s investigation. Her failure to disclose in compliance with 5 U.S.C. § 557(d)(1)(A)-(C) creates a presumption of bias. Thus, Chairwoman Ramirez has been irrevocably tainted and compromised, and so must be disqualified from any further participation in this matter.

Facts

On July 23, 2014, former Senator John D. Rockefeller IV (D- W.Va.), who served as chairman of the Senate Commerce, Science and Transportation Committee, wrote to Congressman Darrell Issa (R- CA), former Chairman of OGR, stating “I am troubled by the impropriety of your ongoing interference with an administrative trial regarding allegations that the medical testing company LabMD, Inc. (LabMD) violated the security and privacy of almost 10,000 consumers.”² Senator Rockefeller added, “[t]he trial process provides defense counsel with ample opportunity to impugn the veracity or integrity of a witness or evidence. It is not the job of Congress to serve as an advocate for one particular side and attempt to sway a judge who makes determinations of fact based on evidence formally presented under well-established rules and procedures.”³

Senator Rockefeller *specifically found former Chairman Issa’s communications with Chairwoman Edith Ramirez to be improper:*

Instead of allowing the parties in this trial to present evidence and to argue their positions before an independent fact finder, you are

² Letter from Sen. John D. Rockefeller IV, Chairman, Senate Commerce, Sci. & Transp. Comm., to Rep. Darrell E. Issa, Chairman, House Oversight & Gov’t Reform Comm., at 1 (July 23, 2014), *available at* <http://causeofaction.org/assets/uploads/2014/12/FOIA-2014-01217.pdf> (2-4) (last accessed July 7, 2015).

³ *Id.*

instead using heavy-handed bullying tactics to undermine due process and to inappropriately assist the defendant, LabMD. As a result of your interference – including a June 11, 2014, letter to Chairwoman Edith Ramirez stating that your Committee may ‘immunize certain future testimony under 18 U.S.C. § 6005’ – the administrative law judge presiding over this case has suspended the trial indefinitely.⁴

In essence, Senator Rockefeller argued that Chairman Issa “overstepped [his] bounds . . . [i]t is not appropriate for Congress to intervene in the midst of a trial and to adversely affect its proceedings[.]”⁵ Further, “[i]f the Commission acted improperly or otherwise relied on faulty testimony or evidence in its case against LabMD, a judge would be the proper arbiter of such an allegation at trial, not Members of Congress.”⁶

Senator Rockefeller’s letter was copied⁷ to the Ranking Democratic Member of the Oversight Committee, Elijah Cummings (D-MD), who also posted the letter online.⁸ Ranking Member Cummings stated during a July 24 hearing, “[t]his committee should base its oversight work on facts rather than the extreme rhetoric of a defendant in an ongoing enforcement action Our job is not to take sides, but rather to serve as neutral overseers and base our conclusions on facts and evidence.”⁹

⁴ *Id.* Senator Rockefeller’s reference to a June 11, 2014 letter concerns a letter from former Chairman Issa directly to Chairwoman Ramirez expressing his views on the authentication of evidence by the Commission and stating, “[i]t is my expectation that you and your staff will cooperate fully with any subsequent requests for documents or transcribed witness interviews.” Letter from Rep. Darrell E. Issa, Chairman, House Oversight & Gov’t Reform Comm., to The Honorable Edith Ramirez, Chairwoman, Fed. Trade Comm., at 2 (June 11, 2014), *available at* <http://causeofaction.org/assets/uploads/2014/12/FOIA-2014-01217.pdf> (6) (last accessed July 7, 2015); *see also* Letter from Rep. Darrell E. Issa, Chairman, House Oversight & Gov’t Reform Comm., to The Honorable Edith Ramirez, Chairwoman, Fed. Trade Comm., at 1-3 (July 18, 2014), *available at* https://www.ftc.gov/system/files/documents/cases/571451_0.pdf (17-19) (last accessed July 7, 2015).

⁵ *See supra* note 2, at 1.

⁶ *Id.* at 2-3.

⁷ *Id.* at 3.

⁸ *See* <http://democrats.oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/uploads/Chairman%20Rockefeller%20to%20Chairman%20Issa%2007-23-14.pdf> (last accessed July 7, 2015).

⁹ Allison Grande, *CORRECTED: LABMD SAYS FTC, WITNESS CONSPIRED IN DATA SECURITY SUIT*, Law360.com (July 24, 2014 6:37 PM EDT), *available at* <http://www.law360.com/articles/560525/corrected-labmd-says-ftc-witness-conspired-in-data-security-suit> (last accessed July 7, 2015).

Indeed, press reports suggested that “it is highly unusual for Congress to intervene directly in an ongoing case, particularly on behalf of one particular party in that case.”¹⁰ Law360 reported that “Cummings and other Democrats also criticized their Republican counterparts for pursuing an investigation in the midst of a regulatory action, saying it would set a ‘dangerous precedent’ that companies who are dissatisfied with an administrative proceeding could turn to the committee.”¹¹

Argument

I. CHAIRWOMAN RAMIREZ VIOLATED THE APA.

The Administrative Procedure Act is clear that *ex parte* communications of any type, including those with Congress, by a decision-maker in a pending administrative proceeding must be disclosed on the public record of the proceeding. *See* 5 U.S.C. § 557(d)(1)(A). Moreover, an FTC decisional official, such as Chairwoman Ramirez (the Chief among Chiefs in FTC’s administrative appeal process), “shall place on the public record of the proceeding[] (i) all such written communications; memoranda stating the substance of all such oral communications; and all written responses, and (ii) memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph ...” *Id.* at § 557(d)(C)(i-iii). To this end, under well-established precedent in this Circuit, agency action is invalidated when the judgment of the ultimate decision-maker is improperly shaped by outside considerations. *See Aera Energy v. Salazar*, 642 F.3d 212, 221 (D.C. Cir. 2011); *Peter Kiewit Sons’ Co. v. United States Army Corps of Eng’rs*, 714 F.2d 163, 170 (D.C. Cir. 1983).

¹⁰ Dana Liebelson, *DARRELL ISSA INVESTIGATION BENEFITS EX-AIDE*, Mother Jones.com (Politics) (July 24, 2014 11:41 AM EDT), available at <http://www.motherjones.com/politics/2014/07/ftc-issa-rockefeller-labmd-cause-of-action> (last accessed July 7, 2015).

¹¹ *See supra* note 9.

Here, there is ample evidence of *ex parte* communications between Chairwoman Ramirez (and/or her staff) and Congress. According to OGR's Report,¹² Congressman Issa's letter(s) was shared with the Chairwoman directly. *See id.* at 15 ("Thank you Jen. We will make sure it gets to the Chairwoman and Ms. VanDruff."). Chairwoman Ramirez was involved in responding to the letter(s). *See id.* at 23 (Edith Ramirez writing "Heather, I've made a couple of small changes. The revised text is below."). In fact, the Commission admits in its Order that Chairwoman Ramirez was presented with congressional correspondence, despite public statements otherwise. *See* FTC Opinion & Order at 2, Attachment A at 1 (June 15, 2015). Tellingly, the FTC was aware of the prohibition against Chairwoman Ramirez's involvement in this capacity, as noted by Secretary of the Commission Donald S. Clark: "[B]ecause the matter of LabMD, Inc. is still in administrative adjudication your letter of December 1, 2014 has not been shared with the Chairwoman or the Commissioners."¹³ Despite this, the FTC has refused the remedy for such taint – full disclosure on the record. *See Salazar*, 646 F.3d at 220-21; *see also* 5 U.S.C. § 557(d)(C)(i-iii).

Chairwoman Ramirez, in failing to produce the above and other communications with Congress on the public record violated the APA and must be disqualified.

¹² *See* STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM, 113th Cong., *Tiversa, Inc.: White Knight Or High-Tech Protection Racket?* (Jan. 2, 2015) (PREPARED FOR CHAIRMAN DARRELL E. ISSA), available at <http://www.scribd.com/doc/265820770/2015-01-02-Staff-Report-for-Rep-Issa-Re-Tiversa#scribd> (last accessed July 9, 2015). This report, and the other OGR letters from 2014 (previously submitted into the record), questioned FTC's integrity, ethical compliance, competence and professionalism. For example, the report stated that both FTC and Tiversa misled Congress and had been less than truthful regarding the circumstances of the LabMD prosecution. *See id.* at 6.

¹³ Letter from Donald E. Clark, Sec'y, Fed. Trade Comm'n, to Rep. Darrell E. Issa, Chairman, House Oversight & Gov't Reform Comm. (Dec. 16, 2014), available at <https://www.ftc.gov/system/files/documents/cases/577475.pdf> (last accessed July 9, 2015).

II. CHAIRWOMAN RAMIREZ'S ACTIONS HAVE IMPROPERLY CREATED A DISCRETE BODY OF SECRET LAW IN THE LABMD MATTER.

FTC has withheld and redacted Chairwoman Ramirez's communications regarding LabMD and the OGR investigation claiming the deliberative process privilege under FOIA.¹⁴ FTC thus admits that Chairwoman Ramirez was a *direct* part of the deliberative process, meaning that she was offering opinions, advice, or recommendations in the course of agency decision-making with respect to this case. *See, e.g.*, Department of Justice Guide to the Freedom of Information Act, Exemption 5 (Updated May 7, 2014) at 25 – 27 (citations omitted) (defining the parameters of the deliberative process exemption) *available at* <http://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

In concert, Chairwoman Ramirez's failure to comply with 5 U.S.C. § 557(d) and FTC's refusal to make public all of her communications regarding FTC's response to OGR's investigation without redactions, mean the Commission has apparently applied "secret law" in this case. However, the Commission may not regulate, whether by adjudication or otherwise, in secret. *See Ctr. For Effective Gov't*, 7 F. Supp. 3d at 29-30 (citing *Sterling Drug, Inc. v. Fed. Trade Comm.*, 450 F.2d 698, 713 (D.C. Cir. 1971)); *see also Schwartz v. Internal Revenue Serv.*, 511 F.2d 1303, 1305, (D.C. Cir. 1975) (FOIA prevents "bodies of 'secret law' from being built up and applied by government agencies."); 5 U.S.C. § 557(d).¹⁵

¹⁴ *See* Exhibit 1 (sample pages redacted by FTC).

¹⁵ Special vigilance is required when agencies, such as FTC here, assert wholesale (b)(5) redactions in an effort to create a pretextual basis for their actions. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir 1980); *Ash Grove Cement Co. v. Fed. Trade Comm.*, 511 F.2d 815, 818 n.12 D.C. Cir. 1975) ("These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the [FTC], we must require it to disclose orders and interpretations which it actually applies in cases before it.") "A strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as 'formal,' 'binding,' or 'final.'" *Coastal States*, 617 F.2d at 867.

FTC could have remedied its creation of “secret law” by complying with 5 U.S.C. 557(d) and disclosing Chairwoman Ramirez’s communications on the record, or perhaps by complying with FOIA and applying Exemption 5 in accordance with the law. Instead, it chose nondisclosure, thus infecting Chairwoman Ramirez with a presumption of bias and an irrevocable taint. Therefore, she must be recused. *See Salazar*, 646 F.3d at 220-21; *see also Ctr. For Effective Gov’t v. United States Dep’t of State*, 7 F. Supp. 3d 16, 29-30 (D.D.C. 2013).

Conclusion

LabMD respectfully moves that Chairwoman Ramirez be recused from any further participation in this matter.

Dated: July 15, 2015

Respectfully submitted,

/s/ Patrick J. Massari

Daniel Z. Epstein
Prashant K. Khetan
Patrick J. Massari
Erica L. Marshall
Cause of Action
1919 Pennsylvania Ave., NW, Suite 650
Washington, D.C. 20006
Telephone: 202.499.4232
Fax: 202.330.5842
Email: patrick.massari@causeofaction.org

/s/ Reed D. Rubinstein

Reed D. Rubinstein
William A. Sherman, II
Sunni R. Harris
Dinsmore & Shoal, L.L.P.
801 Pennsylvania Ave., NW, Suite 610
Washington, D.C. 20006
Telephone: 202.372.9120
Fax: 202.372.9141
Email: reed.rubinstein@dinsmore.com

Counsel for Respondent, LabMD, Inc.

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

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

In the Matter of)	DOCKET NO. 9357
)	
LabMD, Inc.,)	PUBLIC
a corporation.)	
)	
)	

**[PROPOSED] ORDER GRANTING RESPONDENT LABMD, INC.’S
SECOND MOTION TO DISQUALIFY COMMISSIONER EDITH RAMIREZ –
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

This matter came before the Commission on July 15, 2015, upon Respondent LabMD, Inc.’s Second Motion to Disqualify Commissioner Edith Ramirez For Violation of the Administrative Procedure Act, and for an Order disqualifying Commissioner Edith Ramirez from any further participation in the above-captioned matter. Having considered LabMD’s Motion and the entire Record in this matter,

IT IS ORDERED that Respondent LabMD, Inc.’s Second Motion to Disqualify Commissioner Edith Ramirez From This Proceeding For Violation of the Administrative Procedure Act 5 be and the same is hereby GRANTED; and

IT IS FURTHER ORDERED THAT Commissioner Ramirez is disqualified from participating in the above-captioned matter, including but not limited to any vote concerning the above-captioned matter.

Donald S. Clark
Secretary

SEAL
ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2015, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

I also certify that I delivered via electronic mail and caused to be served by First-Class U.S. Mail 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: July 15, 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: July 15, 2015

By: /s/ Patrick J. Massari

Notice of Electronic Service

I hereby certify that on July 15, 2015, I filed an electronic copy of the foregoing RESPONDENT LABMD, INC.'S SECOND MOTION TO DISQUALIFY COMMISSIONER EDITH RAMIREZ – VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT , 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 July 15, 2015, I served via E-Service an electronic copy of the foregoing RESPONDENT LABMD, INC.'S SECOND MOTION TO DISQUALIFY COMMISSIONER EDITH RAMIREZ – VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT , upon:

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

Hallee Morgan
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Jarad Brown
Attorney
Federal Trade Commission
jbrown4@ftc.gov
Complaint

Kent Huntington
Counsel
Cause of Action
cmccoyhunter@ftc.gov
Respondent

Sunni Harris
Esq.
Dinsmore & Shohl LLP
sunni.harris@dinsmore.com
Respondent

Daniel Epstein
Cause of Action
daniel.epstein@causeofaction.org
Respondent

Patrick Massari
Counsel
Cause of Action
patrick.massari@causeofaction.org

Respondent

Prashant Khetan
Senior Counsel
Cause of Action
prashant.khetan@causeofaction.org
Respondent

Alain Sheer
Federal Trade Commission
asheer@ftc.gov
Complaint

Laura Riposo VanDruff
Federal Trade Commission
lvandruff@ftc.gov
Complaint

Megan Cox
Federal Trade Commission
mcox1@ftc.gov
Complaint

Ryan Mehm
Federal Trade Commission
rmehm@ftc.gov
Complaint

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

Patrick Massari
Attorney