

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.,)	Docket No. 9357
a corporation,)	
Respondent.)	

COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S SECOND MOTION TO DISQUALIFY CHAIRWOMAN EDITH RAMIREZ

Pursuant to Rule 3.22(d) and the Commission’s Opinion and Order Denying Respondent’s Motion to Disqualify, Complaint Counsel submits this Opposition to Respondent LabMD, Inc.’s (“LabMD” or “Respondent”) Second Motion to Disqualify Chairwoman Edith Ramirez.¹ Respondent’s Motion relies on recycled, unfounded allegations and inapposite law. It fails to acknowledge the Commission’s reasoned opinion denying Respondent’s First Motion to Disqualify the Chairwoman. And Respondent’s Motion does not identify any new facts to justify the extraordinary relief it seeks. Because Respondent has again failed to meet the well-established test for disqualification, neither Chairwoman Ramirez nor the Commission should grant the relief sought.

It is law of the case that the Commission’s assertion of a deliberative process privilege in withholding documents responsive to a Freedom of Information (“FOIA”) request in no way

¹ See 16 C.F.R. § 3.22(d); Comm’n Opinion & Order Denying Resp’t’s Mot. to Disqualify 1 n.2 (June 15, 2015) (“Comm’n Order”).

disqualifies Chairwoman Ramirez from participating in this administrative proceeding. Comm'n Order at 3-4. As observed by the Commission, "[t]he deliberative process privilege applies to many types of agency deliberations from officials at various levels within the agency, including recommendations for responding to congressional inquiries." *Id.* at 4 (citing *Judicial Watch Inc. v. U.S. Dep't of Homeland Sec.*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010); *Odland v. FERC*, 34 F. Supp. 3d 3, 16-18 (D.D.C. 2014)). Respondent has made no showing that the Commission's assertion of the deliberative process privilege related to the agency's decision-making regarding the facts or the law in this proceeding. Respondent's bald assertion to the contrary cannot suffice to support disqualification. *See* Resp't's Mot. at 6.

Respondent's arguments regarding the Commission's compliance with the Administrative Procedures Act ("APA") are similarly unavailing. The statutory provisions to which Respondent cites relate to "member[s] of the body comprising the agency, administrative law judge or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding." 5 U.S.C. § 557(d)(a)(1)(A). Specifically, the APA and the Commission's corresponding Rules of Practice prohibit individuals involved in the Commission's decisional process from participating in *ex parte* communications with individuals who are not a party to the proceeding "relevant to the merits" of the proceeding. *Id.*; 16 C.F.R. § 4.7(b)(1). If such a communication were to occur, the remedy that the APA and the Commission's Rules would require is disclosure of the communication. *See* 5 U.S.C. § 557(d)(1)(C); 16 C.F.R. 4.7(c). However, Respondent has made no showing that Chairwoman Ramirez engaged in any communication *relevant to the merits* of the LabMD proceeding with

Members of Congress or any other third party.² If any such communication had taken place, which the evidence Respondent cites does not establish, the remedy would be for the Commission to disclose the communication in accordance with 5 U.S.C. § 557(d)(1)(C) and 16 C.F.R. § 4.7(c). Neither the APA nor the Commission's Rules of Practice require recusal following the transmission of letter from a Member of Congress to a Commissioner. Such an absurd result would upend the adjudicative process. *See* Comm'n Order at 2-3 (“[N]o agency adjudication could ever proceed if there were any congressional involvement . . .”).

Because Respondent has made no showing that Chairwoman Ramirez has “adjudged the facts as well as the law” alleged in the Complaint, Respondent's Motion fails. *Cinderella Career & Finishing Schools, Inc. v. Fed. Trade Comm'n*, 425 F.2d 583, 591 (D.C. Cir. 1970) (internal quotation omitted); *see also In re N.C. Bd. of Dental Examiners*, No. 9343, 2011 FTC LEXIS 59, at *9 (F.T.C. Feb. 16, 2011). Accordingly, Chairwoman Ramirez and the Commission should deny Respondent's Motion to Disqualify.

² Regardless of whether Chairwoman Ramirez ever observed the contents of any “congressional correspondence,” *id.* – a fact that the evidence Respondent cites does not establish – Complaint Counsel timely produced all such communications to Respondent's counsel. Not only does Respondent not dispute that Complaint Counsel produced congressional correspondence to Respondent's counsel, it has moved the admission of several such letters. *See, e.g.,* Resp't's Mot. to Admit Proffered Ex. RX542-RX548 (Dec. 23, 2014); Order on Resp't's Mot. to Admit Proffered Exhibits RX542-R548 (Feb. 12, 2015) (taking judicial notice of certain facts contained in Representative Darrell Issa's June 11, 2014 and December 1, 2014 letters). Accordingly, there is no conceivable prejudice to Respondent.

Dated: July 23, 2015

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2015, I caused the foregoing document to be filed 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
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I also certify that I caused a copy of the foregoing document to be transmitted *via* electronic mail and delivered by hand to:

The Honorable D. Michael Chappell
Chief Administrative Law Judge
Federal Trade Commission
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I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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CERTIFICATE FOR 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.

July 23, 2015

By: 
Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection