UNITED STATES OF AMERICA BEFORE THE FEDERAL TRADE COMMISSIO

COMMISSIONERS: Edith Ramirez, Chairwoman

Maureen K. Ohlhausen Joshua D. Wright Terrell McSweeny

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR LEAVE TO FILE A NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF RESPONDENT'S MOTION TO DISQUALIFY

On April 27, 2015, Respondent LabMD, Inc. ("LabMD") filed a "Motion to Disqualify Commissioner [sic] Edith Ramirez" ("Motion to Disqualify"). Complaint Counsel filed an Opposition to LabMD's Motion to Disqualify on April 30, 2015. On May 15, 2015, LabMD filed a "Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD Inc.'s Motion to Disqualify Commissioner [sic] Edith Ramirez" ("Motion for Leave"), attaching as Exhibit 1 a proposed "Respondent LabMD, Inc.'s Notice of Supplemental Authority in Support of LabMD's Motion to Disqualify Commissioner [sic] Edith Ramirez" ("Notice"). Motion for Leave, Exhibit 1. The Notice includes twenty-six pages of additional documents as Attachment A. *See id.*, Exhibit 1, Attachment A.

¹ In the interim, LabMD also filed, and Complaint Counsel opposed, a "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 [sic] Edith Ramirez." That motion has not been granted, and LabMD

has not otherwise sought leave to file a reply.

The Commission should deny LabMD's Motion for Leave because it is an impermissible reply seeking to bolster the Motion to Disqualify with additional arguments. *See* 16 C.F.R. 3.22(d) (reply permitted only with leave). A notice of supplemental authority may not advance new argument. *E.g.*, *Atkins v. Capri Training Ctr.*, *Inc.*, No. 2:13-cv-06820 (SDW), 2014 WL 4930906, at *10 (D.N.J. Oct. 1, 2014); *United Broad. Corp. v. Miami Tele-Comms.*, *Inc.*, 140 F.R.D. 12, 13 (S.D. Fla. 1991); *U.S. v. Khorozian*, 333 F.3d 498, 506 n.7 (3d Cir. 2003) (28(j) context). But LabMD's Notice does just that: it advances new arguments not made in LabMD's Motion to Disqualify. *See* Motion for Leave, Exhibit 1 at 1-2; Motion to Disqualify at 8-9. For this reason, the Commission should deny LabMD's Motion for Leave.

Dated: May 21, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 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:

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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 600 Pennsylvania Avenue, NW, Room H-110 Washington, DC 20580

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.

May 21, 2015

By:

Jarad Brown

Federal Trade Commission Bureau of Consumer Protection