

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

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

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

**MOTION TO DISQUALIFY COMMISSIONER EDITH RAMIREZ**

Pursuant to 16 C.F.R. § 4.17, Respondent LabMD, Inc. (“LabMD”) respectfully moves to disqualify Commissioner Edith Ramirez because she has been irrevocably tainted and compromised by her involvement in the Federal Trade Commission’s (“FTC” or “Commission”) response to the United States House of Representatives Committee on Oversight and Government Reform (“OGR”) investigation of Tiversa, Inc. (“Tiversa”).

**Facts**

A.     Background.

On June 21, 2012, Commissioner J. Thomas Rosch prophetically warned FTC about Tiversa, stating “I do not agree that staff should further inquire – either by document request, interrogatory, or investigational hearing – about the 1,718 File.” Dissenting Statement of Commissioner J. Thomas Rosch, Petitions of LabMD, Inc. and Michael J. Daugherty to Limit or Quash the Civil Investigative Demands, FTC File No. 1023099 (June 21, 2012), *available at* <https://www.ftc.gov/sites/default/files/documents/petitions-quash/labmd-inc./1023099-labmd-full-commission-review-jtr-dissent.pdf>. He went on to note FTC’s obvious conflict of interest in

blindly relying upon “a commercial entity that has a financial interest in intentionally exposing and capturing sensitive files on computer networks.” *Id.*

FTC should have listened.

On September 25, 2013, the Administrative Law Judge (“ALJ”) advised LabMD’s counsel that all pre-hearing dispositive motions “will be ruled on by the Commission, the same body that voted to issue the complaint in this case.” Initial Pretrial Conference, at 7:12-14.

On November 21, 2013 and again on June 7, 2014, through the testimony of FTC’s lead witness, Tiversa CEO Robert Boback, LabMD discovered FTC had conspired with Tiversa to transfer stolen files, and that CX19, a one-page piece of paper with four typed IP addresses created for Boback’s testimony by Richard Wallace (the whistleblower granted immunity to testify in this case), was the *only* document “proving” that the 1718 File had been “found” on P2P networks and not been stolen from a LabMD computer. FTC had done nothing at all to corroborate Tiversa’s claims before launching its fishing expedition.<sup>1</sup>

On November 8, 2013, Commissioner Wright published an article demonstrating how LabMD was statistically *certain* to lose its case, even if the ALJ, after hearing the evidence, ruled in its favor.<sup>2</sup>

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<sup>1</sup> FTC had “twenty-first century law enforcement tools” including “Consumer Sentinel, a secure, online fraud and identity theft complaint database” and “Internet Lab, which provides FTC lawyers and investigators with high-tech tools to...capture web sites that come and go quickly...[providing] FTC staff with the necessary equipment to preserve evidence for presentation in court.” *Inadvertent File Sharing Over Peer-to-Peer Networks: Hearing Before the H. Comm. on Oversight and Gov’t Reform, 110th Cong. (July 24, 2007)* (statement of Mary Engle, Assoc. Dir. for Advertising Practices, Federal Trade Comm’n), at 3, *available at* [https://www.ftc.gov/sites/default/files/documents/public\\_statements/prepared-statement-federal-trade-commission-peer-peer-file-sharing-technology-issues/p034517p2pshare.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-peer-peer-file-sharing-technology-issues/p034517p2pshare.pdf). However, FTC did not verify the 1718 File’s origin.

<sup>2</sup> As Commissioner Wright recently reiterated: “Perhaps the most obvious evidence of abuse of process is the fact that over the past two decades, the Commission has almost exclusively ruled in favor of FTC staff...when the administrative law judge dares to disagree with FTC staff, the Commission almost universally reverses and finds liability.” Remarks of Joshua D. Wright, Global Antitrust Inst. Invitational Moot Court Competition, at 17 (Feb. 21, 2015), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/626231/150221judgingantitrust-1.pdf](https://www.ftc.gov/system/files/documents/public_statements/626231/150221judgingantitrust-1.pdf). Commissioner Wright further said that defending FTC is “facially implausible.” *Id.* at 18.

On December 24, 2013, Commissioner Brill “voluntarily” recused herself amid credible claims of bias against LabMD. *See* Respondent’s Motion To Disqualify Commissioner Brill, at 1-7, FTC Dkt. No. 9357 (Dec. 17, 2013); Statement of Commissioner Julie Brill, FTC Dkt. No. 9357 (Dec. 24, 2013).

On May 7, 2014, a federal judge described FTC’s case against LabMD as “unreasonable” and “almost being unconscionable.” *See* Hearing Tr., *LabMD v. FTC*, Case No. 1:14-cv-00810-WSD (N.D. Ga. May 9, 2014), at 91:20-21; 77:9-15; 80:3-22:

THE COURT: “So you have no information to establish how those documents were obtained; is that right?”

MR. SCHOSHINSKI: “That’s correct, Your Honor.”

...

THE COURT: “And that evidence relates to other claims, because you have other documents that were found in other places?”

MR. SCHOSHINSKI: “That evidence relates to the potential injury suffered by consumers as a result of exposure of this information.”

THE COURT: “Are you serious about that last response?”

B. OGR Investigates FTC.

FTC’s ill-advised partnership with Tiversa caused Congress, for the first time in decades, to intervene in a pending administrative case. This investigation, in turn, caused Commissioners and staff to protect the agency. 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, which strongly suggests that the Commissioners were engaged in substantive discussions regarding the LabMD matter. It also has withheld other records given to Congress under the Speech or Debate Clause, suggesting FTC believes that an Article II Branch agency has Article I congressional power. However, the limited records FTC has produced demonstrate Commissioner Ramirez and her staff were fully engaged, contrary to her quasi-judicial responsibility.

On June 11, 2014, OGR notified FTC that both Tiversa and the Commission were under investigation and that the information Complaint Counsel used to prosecute LabMD was “incomplete and inaccurate.”<sup>3</sup>

Ramirez and FTC’s top leadership responded by drafting a one paragraph letter dated June 13, 2014, ostensibly from FTC’s Secretary Donald Clark. *See* Ex. 1, at 000091. Ramirez’s Chief of Staff Heather Hipsley and Senior Legal Advisor Janis Kestenbaum edited and finalized Clark’s letter: *“Don, here is the final with Edith’s input . . . Please provide a copy back to our office after you sign and send . . . Thanks! H.”*<sup>4</sup>

FTC’s internal communications show Ramirez’s involvement in the Congressional response effort.<sup>5</sup> The initial e-mail from OGR Staff to Ramirez was received at 5:28 p.m., and forwarded to Jeanne Bumpus (Director, FTC Office of Congressional Relations) and Kim Vandecar (FTC congressional liaison) at 5:39 p.m.<sup>6</sup> Bumpus then e-mailed Designated Agency Ethics Official (“DAEO”) Christian White at 6:13 p.m.,<sup>7</sup> who sent Ramirez the letter at 6:30 p.m., and also forwarded it to General Counsel Jon Nuechterlein and Bruce Freedman (Assistant General Counsel for Ethics).<sup>8</sup> Nuechterlein sent Hipsley the letter at 12:05 p.m. the next day with an “fyi.”<sup>9</sup> Ramirez had the final say.<sup>10</sup>

On June 17, 2014, OGR asked FTC Acting Inspector General Kelly Tshibaka (the “AIG”) to investigate the FTC/Tiversa relationship:

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<sup>3</sup> *See* Ex. 1, documents produced by FTC in response to FOIA-2015-00109 (Feb. 19, 2015) (COA Bates #s 00001–00250), at 000092.

<sup>4</sup> *Id.*, at 000144 (emphasis added); 000142–49.

<sup>5</sup> *See* Ex. 2, documents produced by FTC in response to FOIA-2014-01217 Productions 1 (Aug. 25, 2014) and 2 (Sept. 11, 2014) (COA Bates #s 00001–00089), at 00048.

<sup>6</sup> *See* Ex. 1, at 000151.

<sup>7</sup> *Id.*, at 000150–51.

<sup>8</sup> *Id.*, at 000150.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*, at 000146–49; 000139.

The possibility that inaccurate information played a role in the FTC's decision to initiate enforcement actions against LabMD is a serious matter....[T]he alleged collaboration between the FTC and Tiversa...creates the appearance that the FTC aided a company whose business practices allegedly involve disseminating false data about the nature of data security breaches.<sup>11</sup>

The fire was raging and again Ramirez directed strategy.

On June 18, 2014, the AIG informed Ramirez about the June 17 letter.<sup>12</sup> Hipsley responded: "Thank you for the heads up; Issa sent a letter to the Chairwoman which asked for our cooperation in any investigation he conducted and Don Clark answered the letter on behalf of the agency since there is a pending administrative litigation related to his concerns."<sup>13</sup>

Hipsley, however, neglected to advise the AIG that Ramirez had dictated Clark's response.

Ramirez refused to be walled off. DAEO White briefed Hill staffer Shannon Taylor regarding FTC/Tiversa on June 20, and it appears Ramirez met White beforehand to discuss the briefing and the AIG's investigation.<sup>14</sup> Ramirez certainly knew the AIG was investigating allegations of staff misconduct.<sup>15</sup>

On Friday, July 18, 2014, OGR sent Ramirez another letter, this time echoing Commissioner Rosch's warnings about Tiversa:<sup>16</sup>

Given what the Committee has learned so far, I have serious reservations about the FTC's reliance on Tiversa as a source of information....Because Tiversa was benefiting commercially from the fact that the FTC was investigating the companies that Tiversa itself referred[,]...it is critical for the Committee to understand the relationship between the FTC and Tiversa, and whether Tiversa manipulated the FTC[.]<sup>17</sup>

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<sup>11</sup> *Id.*, at 000119.

<sup>12</sup> *See* Ex. 1, at 000127.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*, at 000124.

<sup>16</sup> *Id.*, at 000082-88.

<sup>17</sup> *Id.*, at 000082-84.

On July 21, 2014, the Commission was required to vote on the release of non-public material, including regarding LabMD, to OGR, which surprised staff.<sup>18</sup> “My understanding is we are going to meet the deadline. But I don’t think any of us considered that we would need a vote.” To vote, the Commission had to be familiar with the subject matter and substance.<sup>19</sup>

On July 23, 2014, Senator Jay Rockefeller sent OGR a letter berating its Chairman for interfering in the LabMD case.<sup>20</sup> It appears FTC instigated and may have even drafted this letter for Rockefeller’s staff,<sup>21</sup> after weeks of cascading calls, meetings, and communications.<sup>22</sup>

The Rockefeller letter was sent the day prior to OGR’s July 24 hearing,<sup>23</sup> where FTC was warned it would be “attacked.”<sup>24</sup> Ellen Doneski, a key Rockefeller aide, sent her friend “Edith” (Ramirez) a copy of the attack letter early in the afternoon of July 23, before it was made public.<sup>25</sup>

A July 23 e-mail from Patrick Satalin (staffer for Rep. Peter Welch) to Aaron Burstein (Brill’s Attorney Advisor) shows how FTC gamed its congressional allies to deflect criticism:

The FTC is going to be getting attacked at the OGR Committee tomorrow (Peter sits on this Committee). If you have a few minutes, would love to chat with you about this today to see if there is anything we could raise that would be helpful for you all. Let me know.<sup>26</sup>

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<sup>18</sup> *Id.*, at 000100.

<sup>19</sup> See FTC, Operating Manual, Ch. 15: *Confidentiality and Access*, available at [https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch15confidentialityandaccess\\_0.pdf](https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch15confidentialityandaccess_0.pdf) (last visited Apr. 27, 2015).

<sup>20</sup> See Ex. 2, at 00002-00003.

<sup>21</sup> *Id.*, at 00009-00016.

<sup>22</sup> *Id.*, at 00012-00018 (see, e.g., Taylor June 18, 2014 e-mail to Vandecar: “We definitely need to talk now.”).

<sup>23</sup> U.S. House of Rep., Comm. on Oversight & Gov’t Reform, *The Federal Trade Commission and Its Section 5 Authority: Prosecutor, Judge, and Jury*, Full Committee (Jul. 24, 2014), available at <http://oversight.house.gov/hearing/federal-trade-commission-section-5-authority-prosecutor-judge-jury-2/> (last visited Apr. 27, 2015).

<sup>24</sup> See Ex. 2, at 00055.

<sup>25</sup> *Id.*, at 00001.

<sup>26</sup> *Id.* Commissioner Brill, of course, already had recused herself from the LabMD matter.

FTC's Hill operatives in both chambers chimed in:<sup>27</sup> "Hey, Kim. I've been meaning to reach out to you on this. You guys have any thoughts you want to share with us, or just tell us generally what's happening in this case now that Government Reform is sniffing around Tiversa?"<sup>28</sup>

On December 1, 2014, OGR sent a fourth letter to Ramirez, proving that Tiversa withheld crucial documents from both FTC and OGR, that Boback perjured himself, and that Tiversa had obstructed the LabMD case by withholding responsive evidence.<sup>29</sup>

### Argument

#### I. The Decisionmaking Process Is Fatally Tainted.

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). Two principles guide the analysis. First, "the appearance of bias" is no less objectionable than the reality. *ATX v. Dep't of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994); *Pillsbury Co. v. Federal Trade Comm'n*, 354 F.2d 952, 963-65 (5th Cir.1966). For example, in *Koniag v. Andrus*, 580 F.2d 601, 610-11 (D.C. Cir. 1978), the Court found that one letter from Representative Dingell "compromised the appearance of the Secretary's impartiality." Second, if "extraneous pressure intruded into the calculus of consideration," then a Commissioner must be disqualified. It is the nexus between the pressure and the decision-maker not the nature of the pressure that is decisive. *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).<sup>30</sup>

<sup>27</sup> *Id.*, at 00008–00011.

<sup>28</sup> *Id.*, at 00039.

<sup>29</sup> See Ex. 3, Letter from OGR Chairman Darrell Issa to FTC Chairwoman Edith Ramirez (Dec. 1, 2015), at 7.

<sup>30</sup> FTC has refused the remedy for such taint – full disclosure on the record. *See Aera Energy*, 646 F.3d at 220-21.

Generally, the cases involve claims of Congressional interference that caused agencies to act improperly. See *ATX*, 41 F.3d at 1522; *Pillsbury*, 354 F.2d at 963; *Koniag*, 580 F.2d at 601. Here, Congress pressured FTC to *stop* acting improperly, but the legal principle applies regardless.

OGR's letters questioned FTC's competence and professionalism. Now, only a judgment against LabMD will rescue FTC's reputation, for any other result confirms FTC's prosecutorial misconduct or malpractice and exposes the agency to civil liability. Furthermore, the few records FTC has produced show a definite nexus between the Congressional investigation and FTC's response with respect to this case. Therefore, FTC's decision-making process is "irrevocably tainted." *Lichoulas v. FERC*, 606 F.3d 769, 778 (D.C. Cir. 2010).

II. Ramirez Should Be Disqualified Because There Is A Reasonable Suspicion She Has Prejudged This Case.

The test for disqualification is whether a disinterested observer may conclude that the agency has in some measure pre-judged the facts and/or law. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); see also *Nuclear Info. & Res. Set. v. NRC*, 509 F.3d 562, 571 (D.C. Cir. 2007); *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995); <http://www.governmentattic.org/12docs/8FTC-OIGinvs2013.pdf> (IG report noting improper Commissioner communications). By claiming the deliberative process privilege as grounds to withhold Commissioners' records, FTC certainly creates the presumption that the facts of this case have been reviewed and adjudicated in some manner or fashion. And, no neutral judge would do what Ramirez (or FTC) did here: "It is fundamental that both unfairness and the appearance of unfairness should be avoided. *Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.*" *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966) (emphasis added); *Marshall v. Jerrico, Inc.*, 446 U.S.



238, 242 (1980) (no person should be “deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him”).

**Conclusion**

LabMD respectfully moves that Chairwoman Ramirez disqualify herself immediately and abstain from any further participation in this matter.

Dated: April 27, 2015

Respectfully submitted,



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