

In the Matter of LabMD, Inc.
Docket No. 9357
Statement of Commissioner Julie Brill
December 24, 2013

On August 28, 2013, the Commission voted unanimously to issue an administrative complaint against LabMD, Inc. (“LabMD”). The complaint alleges that LabMD exposed consumers’ sensitive personal information to unauthorized disclosure through its failure to provide reasonable and appropriate security for that information. As a result, the complaint alleges, LabMD engaged in an “unfair act or practice,” in violation of FTC Act § 5(a), 15 U.S.C. § 45(a). *See Complaint, at 2-5* (¶¶ 6-23). LabMD denies that it violated the FTC Act. *See LabMD’s Answer and Defenses to Administrative Complaint, at 5* (¶¶ 22-23) (Sept. 17, 2013).

On November 12 and November 26, 2013, LabMD filed two separate motions to stay the Commission’s administrative proceeding while LabMD seeks review in two federal courts of the propriety of the Commission’s administrative action against LabMD. *See generally Motion to Dismiss Complaint with Prejudice and to Stay Administrative Proceedings* (Nov. 12, 2013); *Motion to Stay Proceedings Pending Review in the U.S. Court of Appeals for the Eleventh Circuit and the U.S. District Court for the District of Columbia* (Nov. 26, 2013). LabMD brought the first of these federal court actions through a Verified Complaint for Declaratory Relief against the Commission filed in the U.S. District Court for the District of Columbia on November 14, 2013. On November 18, 2013, LabMD filed a “Petition for Review of Unlawful Federal Trade Commission Attempt to Regulate Patient-Information” in the U.S. Court of Appeals for the Eleventh Circuit. On December 13, 2013, the Commission unanimously denied LabMD’s motions to stay the Commission’s administrative proceeding. *See Order Denying Respondent LabMD’s Motions for Stay, at 1* (Dec. 13, 2013).

On December 17, 2013, four days after the Commission denied LabMD’s motions to stay the administrative proceeding, LabMD filed a motion to disqualify me from further participation in this matter (“Motion to Disqualify”) on the basis of two speeches I recently delivered about data security and privacy protection in the United States, and the relationship between the U.S. and the European Union with regard to commercial privacy. On December 24, 2013, Complaint Counsel filed an opposition to the Motion to Disqualify. My statement today addresses the Motion to Disqualify. *See 16 C.F.R. § 4.17(b)(3)(ii)*.

LabMD’s Motion to Disqualify is without merit. In my speeches, I provided an overview of the Commission’s enforcement work in the areas of privacy and data security. The Motion to Disqualify focuses on one or two sentences in each of these two speeches. These sentences refer in the most general of terms to the Commission’s wide range of enforcement activities. In this context, both speeches note that the Commission has “sued companies” on the basis of their data security practices. The main text does not name a specific company, nor does it discuss the specific facts in any complaint that the Commission has filed.

The only specific reference to LabMD in the two speeches is in the footnotes, which were provided to point readers to supporting documents and resources. Specifically, each speech contains a single footnote that cites the administrative complaint against LabMD as an example

of the Commission's enforcement activity in the data security area. Similarly, the neighboring citations provide examples of other enforcement actions in areas ranging from spam to children's privacy. The clear purpose of the single citation to the administrative complaint against LabMD – as well as the other citations – is to refer readers to enforcement actions that the Commission has brought in its efforts to protect consumers from a variety of privacy and data security harms.

A disinterested reader could not reasonably conclude from these two speeches that I had prejudged either the facts or the legal issues in the LabMD proceeding. *See Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1165 (D.C. Cir. 1995). The speeches cited in the Motion to Disqualify contain no explicit or implicit discussion of any facts at issue in this case, and thus bear no resemblance to the 1968 speech (of the FTC's then-Chairman Dixon) underlying the main judicial precedent on which LabMD relies. *See Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 589-90 (D.C. Cir. 1970). Nor do my speeches contain any discussion of how the legal standard that the Commission applies in data security cases might apply to LabMD. Simply put, the speeches contain no evidence that I had made up my mind about specific factual or legal issues in this case. *See Metropolitan Council*, 46 F.3d at 1164-65 (denying challenge to commissioners' decisions not to recuse themselves).

My speeches are designed to inform the public of the many enforcement activities that the Commission undertakes to protect consumers' privacy and security interests. *See American Medical Ass'n v. FTC*, 638 F.2d 443, 448-49 (2d Cir. 1980). In every matter that comes before the Commission, I review all of the relevant facts and arguments on all sides of the issues before reaching any conclusions. My participation in LabMD is no different. LabMD's references to the footnote citations amount to nothing more than a "vague and flimsy" suggestion to the contrary. *Metropolitan Council*, 46 F.3d at 1165.

Nevertheless, I am concerned that full adjudication of the Motion to Disqualify under Rule 4.17 would likely create an undue distraction from the important issues raised in the Commission's administrative complaint against LabMD. Allowing such a distraction to further complicate or delay adjudication of this matter would not serve the public interest. Accordingly, I recuse myself from further participation in this matter.