

**Statement of Chairwoman Edith Ramirez
In the Matter of LabMD, Inc.
Docket No. 9357
May 20, 2015**

The administrative proceeding regarding the complaint against respondent LabMD, Inc. has been pending before Administrative Law Judge D. Michael Chappell since August 2013. In June 2014, the U.S. House of Representatives Committee on Oversight and Government Reform (“Oversight Committee”) began an inquiry regarding Tiversa, Inc., an evidentiary source in the Bureau of Consumer Protection’s investigation of LabMD. By motion filed on April 27 and supplemented on May 15, LabMD seeks to disqualify me from further participation in this matter, arguing that I have been “irrevocably tainted and compromised by” my involvement in the Federal Trade Commission’s response to the Oversight Committee’s requests for information.¹ The charge is without merit. As I explain below, nothing transpired during the course of the Oversight Committee’s inquiry that would warrant my recusal.

The Oversight Committee’s review of the role Tiversa played in the Bureau of Consumer Protection’s investigation has not compromised in any way my ability to participate objectively in this matter. To the contrary, because the Oversight Committee’s requests for information bore some relationship to issues that are being adjudicated in the administrative proceeding before the ALJ and may come before the Commission on any appeal of the ALJ’s decision, I was very careful to limit my involvement in the FTC’s response to the Oversight Committee’s inquiry. My only role (and that of the staff in my office) was to ensure that the Oversight Committee received full and prompt cooperation from the agency. As part of that effort, I was involved in responding to correspondence from the Oversight Committee’s then-Chairman Darrell Issa. However, I took no part in addressing the substantive questions raised by the Oversight Committee, as the exhibits LabMD submitted in support of its motion demonstrate.

In the absence of any evidence that I have been influenced by the Oversight Committee’s inquiry or have prejudged this matter, LabMD first suggests that the very fact of the Oversight Committee’s inquiry has served to taint my ability to render an objective decision. Specifically, LabMD argues that because the Oversight Committee has “questioned [the] FTC’s competence,” “only a judgment against LabMD will rescue [the] FTC’s reputation.”² But if that were the case, no administrative adjudication could proceed in the face of congressional involvement in any issue that could arguably be seen as calling into question agency action. That is too thin a reed on which to base recusal, and not surprisingly, there is no legal authority supporting LabMD’s position.

¹ See Respondent LabMD, Inc.’s Motion to Disqualify Commissioner Edith Ramirez (Apr. 27, 2015) at 1; see also 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 Edith Ramirez (May 6, 2015); Motion for Leave to File a Notice of Supplemental Authority in Support of LabMD, Inc.’s Motion to Disqualify Commissioner Edith Ramirez (May 15, 2015).

² Motion to Disqualify at 8.

LabMD next argues that there is a “reasonable suspicion” that I have prejudged this matter because the FTC withheld certain documents on the basis of the deliberative process privilege in responding to a Freedom of Information Act request about the Oversight Committee’s requests for information. This assertion is equally unfounded. Recusal is required only where “a disinterested observer may conclude that [the decisionmaker] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.”³ A party seeking disqualification must show that the official has “demonstrably made up [her] mind about important and specific factual questions and [is] impervious to contrary evidence.”⁴ LabMD’s claim of prejudgment falls far short of this standard. The deliberative process privilege applies to many types of agency determinations reached by officials at various levels within the agency, including recommendations for responding to Congressional inquiries.⁵ Accordingly, the FTC’s invocation of that privilege provides no basis whatsoever for any claim of prejudgment.

The facts indicate nothing more than that I properly oversaw the FTC’s response to the Oversight Committee’s requests for information. I therefore decline to recuse myself from participation in this matter.

³ *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164-65 (D.C. Cir. 1995) (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

⁴ *Id.* at 1165 (internal quotation omitted).

⁵ *Judicial Watch Inc. v. United States Dep’t of Homeland Security*, 736 F. Supp. 2d 202, 208-09 (D.D.C. 2010).