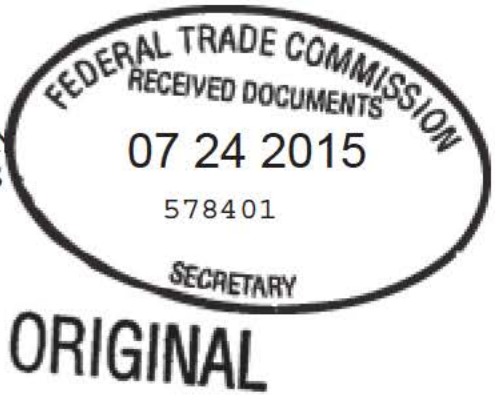
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



ORIGINAL

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO AMEND AFFIRMATIVE DEFENSES AND TO DISMISS THIS PROCEEDING

Nearly two years after Respondent first learned of the predicate facts for its proposed affirmative defense and the filing of its Answer – and significantly, *after* the conclusion of a nine-day hearing on the merits – Respondent now seeks to amend its Answer in order to add a defense that having an FTC Administrative Law Judge ("ALJ") preside over this matter violates the Constitution's Appointments Clause. *See* Motion for Leave to Amend Affirmative Defenses and to Dismiss this Proceeding ("Motion"), at 1-2 (asserting that FTC ALJ was unconstitutionally appointed by the Office of Personnel Management ("OPM"), which should therefore void these proceedings). Respondent's proposed Appointments Clause challenge is legally insufficient, and raising this issue *after* a hearing on the merits is unduly prejudicial and against the public interest.[1]

[1] During the July 15, 2015 hearing, Respondent agreed that its Motion should be decided by the Court as if it were a motion to amend its answer, and that the dispositive relief sought relating to its proposed affirmative defense, if allowed, would be addressed only during post trial briefing. Tr. 1498-1500. Accordingly, Complaint Counsel responds only to Respondent's request to amend its answer, and does not waive its right to oppose the substantive arguments that this matter should be dismissed.

STANDARD

Under FTC Rule 3.15(a), "appropriate" amendments to pleadings that facilitate a determination on the merits "may" be allowed, "upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties." 16 C.F.R. § 3.15(a); *see also* Order Den. Resp't's 2d Mot. to Amend Answer, *In re Daniel Chapter One, et al.*, No. 9329, 2009 WL 871702, at *2 (F.T.C. Mar. 9, 2009) ("*DCO*"). Courts have discretion to deny motions for leave to amend when there is "undue delay, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . ." *DCO* at *2 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

ARGUMENT

On August 29, 2013, Respondent became aware that its hearing would be presided over by an ALJ, and filed its Answer on September 17, 2013. *See* Order (Aug. 29, 2013) (appointing D. Michael Chappell, Chief Administrative Law Judge, "to take testimony and receive evidence in this proceeding and to perform all other duties authorized by law"); Answer (Sept. 17, 2013). At no point in its Answer, at any hearing, or in any motion or other filing, has Respondent objected to any aspect of the ALJ's role in this matter.[2] Respondent's belated Motion should be denied because Respondent's proposed affirmative defense is legally insufficient, and because

[2] No stranger to Constitutional challenges, Respondent has sought relief from the Commission's proceeding three times over alleged Constitutional violations arising out of this matter without ever questioning the role of the ALJ in this matter. *See* Verified Compl. for Declaratory and Injunctive Relief, *LabMD, Inc. v. Fed. Trade Comm'n*, No. 1:13-CV-01787 (D.D.C. Nov. 14, 2013), ECF No. 1; Civil Appeal Statement at 2, *LabMD, Inc. v. Fed. Trade Comm'n*, No. 13-15267 (11th Cir. Dec. 11, 2013); Verified Compl. for Declaratory and Injunctive Relief, *LabMD, Inc. v. Fed. Trade Comm'n*, No. 1:14-cv-00810-WSD (N.D. Ga. Mar. 20, 2014), ECF No. 1.

allowing the proposed amendment at this late stage of the proceeding would be unduly prejudicial and against the public interest.[3]

An affirmative defense is an assertion that, "if proven, will reduce or eliminate a plaintiff's recovery even if the plaintiff established a *prima facie* case." *See, e.g.*, *FDIC v. Stovall*, 2014 U.S. Dist. LEXIS 18310, at *5 (N.D. Ga. Oct. 2, 2014) (citations omitted); *Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 271 (4th Cir. 2003) (affirmative defense, "if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true") (internal quotation omitted); 1-11 James Wm. Moore et al., Moore's Federal Practice & Procedure § 11.50 (2015) (same). Here, Respondent's proposed Appointments Clause challenge is legally insufficient as an affirmative defense: even assuming that Respondent could establish an Appointments Clause violation, which it cannot, the defense would not eliminate or reduce Respondent's potential liability under the FTC Act, as set forth in the Complaint.

For example, in *Hill v. SEC*, the District Court granted a preliminary injunction against an upcoming SEC hearing before an ALJ, finding that such a hearing would likely violate the Appointments Clause. 2013 U.S. Dist. LEXIS 74822, at *54 (N.D. Ga. June 8, 2015).[4] Nevertheless, the court acknowledged that the alleged Appointments Clause violation could be "easily cured" by the SEC pursuing the same claim in federal court or in an administrative

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[3] This Court should also deny the proposed amendment as futile because Respondent's Appointments Clause challenge is without merit. *See, e.g.*, *Landry v. FDIC*, 204 F.3d 1125, 1132-34 (D.C. Cir. 2000) (holding that ALJs are not "inferior officers" under the Appointments Clause when ALJs, like FTC ALJs, do not have authority to render final decisions). At this Court's direction, however, Complaint Counsel will refrain from discussing the merits of the proposed affirmative defense in this Opposition. Tr. 1499-1500; *see also* note 1, *supra*.

[4] The SEC has filed a timely notice of appeal of this decision. *Hill*, Dkt. No. 1:15cv1801 (June 29, 2015) (Eleventh Circuit "Acknowledgment of 32 Notice of Appeal filed by Securities And Exchange Commission").

hearing before an SEC Commissioner. *Id.* Likewise here, the Commission could litigate the same complaint against Respondent by appointing one or more Commissioners to preside over the hearing and to evaluate the testimony and evidence. 16 C.F.R. § 3.42 (Commission has discretion to determine whether the Commission, one or more Commissioners, or an ALJ will preside over matter); *see also* Order Designating Administrative Law Judge, *In re Inova Health Systems Found. & Prince William Health Sys., Inc.*, No. 9326, 2008 WL 2061411, at *10 (F.T.C. May 9, 2008) (designating then-Commissioner Rosch as ALJ). Because the alleged Appointments Clause violation would not reduce or preclude Respondent's liability against the claims in the Complaint, this Court should deny Respondent's Motion as legally insufficient and futile. *See Attys. Title Corp v. Chase Home Mortgage Corp.*, No. 95-863(TAF), 1996 U.S. Dist. LEXIS 11712, at *6 (D.D.C. Aug. 12, 1996) (denying motion to amend answer as futile because proposed affirmative defense was legally insufficient to preclude defendant's liability).

Moreover, allowing Respondent's proposed amendment at this late stage of the proceeding – *after* two years of litigation and *after* the conclusion of a nine-day trial – would be prejudicial and against the public interest. *See DCO* at *3-4 (finding prejudice from belated amendment after close of discovery but two months before hearing); *cf. Harris v. Secretary, U.S. Dep't of Veterans Affairs, et al.*, 126 F.3d 339, 344 (D.C. Cir. 1997) (noting little prejudice from amending pleadings when "no significant developments in the case have occurred and where little time has passed"). If Respondent had timely raised this challenge in its Answer, the Commission, in its discretion and without deciding on the merits of the challenge, could have presided over the hearing itself or, alternatively, filed its Complaint in federal court. 16 C.F.R. § 3.42; 15 U.S.C. § 53. In contrast to the typical prejudice from a late amendment, which could result in additional discovery, Respondent's delay here could result in the Commission

potentially re-litigating the entire case – making "useless" the considerable resources already expended to litigate this matter, and imposing considerable additional costs on this Court, third-party witnesses, and the Commission. *See DCO* at *4 (denying motion for leave to amend answer, in part, because delay to adjudicative process was prejudicial and against the public interest); *Freytag v. Cmmr. of Internal Revenue*, 501 U.S. 868, 901 (Scalia, concurring) (reasoning that Appointments Clause challenge should have been deemed waived so as to avoid "evils" of lower courts and juries expending their time "uselessly").[5] Respondent's Motion is therefore against the public's interest in an efficient use of public resources and an expedient judicial process.

CONCLUSION

For the foregoing reasons, this Court should deny Respondent's Motion.

Dated: July 24, 2015

Respectfully submitted,

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[5] While challenges to a court's subject matter jurisdiction cannot be waived, *see* Motion at 2, litigants can – and often do – waive other constitutional challenges by failing to timely raise them. *See Freytag*, 501 U.S. at 892-901 (Scalia, concurring) (discussing numerous types of Constitutional challenge waivers, and disagreeing with majority decision to hear Appointments Clause challenge in its "discretion" without deciding whether petitioner had waived challenge).

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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
Washington, DC 20580

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.

July 24, 2015

By: _____

Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection