UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Terrell McSweeny

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

ORDER DENYING RESPONDENT LABMD, INC.'S MOTION TO DISMISS

By Chairwoman Edith Ramirez, for a unanimous Commission:[1]

On July 14, 2015, Respondent LabMD, Inc. moved for leave to add a new affirmative defense claiming this administrative proceeding is unconstitutional because the appointment of the presiding administrative law judge, Chief Administrative Law Judge D. Michael Chappell, allegedly violates the Appointments Clause.[2] Concurrent with its motion for leave, LabMD also moved to dismiss the proceeding.[3] On July 27, Judge Chappell allowed LabMD to add the defense and ordered the parties to address the merits of LabMD's motion to dismiss in their post-trial briefs.[4] The parties have now fully briefed the issue. Exercising our plenary authority over this adjudication, we have chosen to address LabMD's motion to dismiss now rather than on appeal and hereby deny it.[5]

The Appointments Clause provides that Congress may vest the appointment of "inferior officers" "in the President alone, in the courts of law, or in the heads of departments." U.S. Const. Art. II., § 2, cl. 2. Government employees who are not "inferior officers" need not be hired in accordance with the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976); *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). LabMD argues Judge Chappell is an improperly appointed "inferior officer" because he was not appointed by the President, a

[1] Commissioner Brill did not take part in the consideration or decision herein.
[2] Respondent's Motion for Leave to Amend Affirmative Defenses and to Dismiss This Proceeding (July 14, 2015).
[3] *Id.*
[4] Order Granting Respondent's Motion for Leave to Amend Affirmative Defenses (July 27, 2015).
[5] In addition to the briefing on Respondent's motion to dismiss this proceeding, in making this ruling we have considered the relevant portions of the following submissions: LabMD Inc.'s Corrected Post-Trial Brief (August 11, 2015); Respondent LabMD, Inc.'s Corrected Proposed Conclusions of Law (August 11, 2015); Complaint Counsel's Reply to Respondent's Post-Trial Brief (September 4, 2015); Complaint Counsel's Reply to Respondent's Proposed Conclusions of Law (September 4, 2015); Respondent LabMD, Inc.'s Post-Trial Reply Brief (September 4, 2015); and Respondent LabMD, Inc.'s Corrected Reply to Complaint Counsel's Conclusions of Law (September 4, 2015).

department head, or a court, in violation of the Appointments Clause. We conclude there has been no such violation.

Specifically, we reject LabMD's contention that the administrative law judges employed by the Commission are "inferior officers" for purposes of the Appointments Clause. An inferior officer is one who "exercis[es] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126. The Commission has discretion to hear particular administrative matters itself or assign them instead to a Commission-employed ALJ or to one or more Commission members. 5 U.S.C. § 556; 16 C.F.R. § 3.42 (a)-(b). Even when it delegates the oversight of an evidentiary hearing to an ALJ, the Commission retains full authority over any adjudication conducted pursuant to section 5(b) of the Federal Trade Commission Act. 15 U.S.C. § 45(b).

When overseeing an administrative hearing, the assigned ALJ issues an opinion known as an "initial decision." The Commission reviews that initial decision *de novo*. 16 C.F.R. §§ 3.52, 3.53.[6] The Commission may "adopt, modify, or set aside" the initial decision in whole or in part and may exercise "all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a).[7] Commission administrative law judges are therefore employees with limited authority; they are not "inferior officers" subject to the Appointments Clause. *Cf. Landry v. FDIC*, 204 F.3d 1125, 1133-34 (D.C. Cir. 2000) (holding that FDIC ALJs are employees rather than "inferior officers" subject to the Appointments Clause due to their limited authority).

Nonetheless, although we conclude that the Appointments Clause does not apply to the hiring of Commission administrative law judges, the Commission, purely as a matter of discretion, has ratified Judge Chappell's appointment as a Federal Trade Commission administrative law judge and as the Commission's Chief Administrative Law Judge.[8] This action by the Commission puts to rest any possible claim that this administrative proceeding violates the Appointments Clause.

We also take this opportunity to reject another new argument presented by LabMD. In its corrected post-trial brief, LabMD asserts for the first time in passing that Article II of the Constitution prohibits the so-called "dual for-cause" removal rules for independent federal agencies, which provide that Commissioners may only be removed for cause and may themselves only remove ALJs for cause. *See* 5 U.S.C. § 7521(a)-(b); 15 U.S.C. § 41. LabMD argues that this infringes on the power of the executive by restricting the ability of the President to remove an "inferior officer."[9] LabMD did not properly raise this argument, which appears neither in its motion for leave to amend its affirmative defenses nor in the affirmative defense itself. In fact, the argument does not even rest on the Appointments Clause, which is the sole

[6] An appeal from an initial decision can be initiated by the parties or *sua sponte* by the Commission. 16 C.F.R. §§ 3.52, 3.53.

[7] In addition, when an ALJ serves as a presiding officer for an informal hearing in a Section 18 rulemaking proceeding, 15 U.S.C. § 57a(c)(1)(A), only the Commission, and not the ALJ, has authority to promulgate a final agency rule. 16 C.F.R. §1.13(g) (presiding officer issues recommended decision); *id*. at § 1.14(a) (after reviewing rulemaking record, Commission may issue, modify, or decline to issue any rule).

[8] *See* Commission Minute dated September 11, 2015, attached as Exh. A.

[9] Respondent LabMD, Inc.'s Post-Trial Reply Brief at 13 n.11.

stated ground for LabMD's new affirmative defense.[10] Consequently, LabMD has waived any argument relating to "dual for-cause" removal. In any event, the argument is without merit for the reasons set forth in *Duka v. SEC*, No. 15-cv-357, __ F. Supp. 3d __, 2015 WL 1943245 (S.D.N.Y. Apr. 15, 2015) (holding that "dual for-cause" restrictions on the power to remove SEC ALJs do not unlawfully impede the power of the executive).[11]

For the reasons explained above, we find that the instant proceeding does not contravene the Constitution and therefore that LabMD's motion to dismiss is without merit.

IT IS HEREBY ORDERED THAT LabMD, Inc.'s Motion to Dismiss is **DENIED**.

By the Commission, Commissioner Brill not participating.

Donald S. Clark
Secretary

SEAL:
ISSUED: September 14, 2015

[10] *See* Respondent's Motion for Leave to Amend Affirmative Defenses and to Dismiss This Proceeding; First Amended Answer and Defenses to Administrative Complaint (July 31, 2015).

[11] *See also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010) (indicating that concerns about dual for-cause protections do not arise with administrative law judges because they "perform adjudicative rather than enforcement or policymaking functions . . . or possess purely recommendatory powers").

Exhibit A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

P130500 **Federal Trade Commission Minute**: Ratification of Appointment of Administrative Law Judge and Chief Administrative Law Judge

Circulation: On September 11, 2015, on Motion by Chairwoman Ramirez, the Commission ratified the appointment of D. Michael Chappell as a Federal Trade Commission Administrative Law Judge and as the Commission's Chief Administrative Law Judge.

Vote: For the public record, Chairwoman Ramirez, Commissioner Ohlhausen, and Commissioner McSweeny voted in the affirmative, and Commissioner Brill did not participate.

Donald S. Clark
Secretary