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

In the Matter of	)	
LabMD, Inc., a corporation, Respondent.	)	DOCKET NO. 9357

ORDER GRANTING RESPONDENT'S MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES

I.

On July 14, 2015, Respondent LabMD, Inc. ("Respondent" or "LabMD") filed a Motion for Leave to Amend Affirmative Defenses and to Dismiss this Proceeding. On July 15, 2015, during concluding proceedings in open court, it was determined that Federal Trade Commission ("FTC") Complaint Counsel's response to the Motion would be limited to the merits of Respondent's request for leave to amend (hereafter, "Motion for Leave"), and that if leave to amend were granted, the parties would address the merits of the proposed affirmative defense as a basis for dismissal of this matter in their post-trial briefs.[1] Complaint Counsel filed its opposition to the Motion for Leave on July 24, 2015. As further explained below, the Motion for Leave is GRANTED.

II.

Respondent's request for leave is governed by FTC Rule 3.15(a), which states in pertinent part: "(a) *Amendments* – (1) *By leave*. If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to pleadings . . . ." 16 C.F.R. § 3.15(a)(1).

Respondent asserts that on June 8, 2015, an opinion was issued in *Hill v. S.E.C.*, Case 1:15-cv-01801 (N.D. Ga. June 8, 2015), which enjoined administrative proceedings before an Administrative Law Judge ("ALJ") working for the Securities and Exchange Commission ("SEC") on the ground that the SEC's delegation of the matter to an ALJ violated the appointments clause of the United States Constitution. Art. II, § 2, cl. 2 ("Appointments

[1] Pursuant to the July 16 Order on Post-Trial Briefs, post-trial briefs are due on August 10, 2015 and reply briefs are due on September 4, 2015.

Clause").[2] Respondent argues that the "constitutional sufficiency" of this proceeding is a significant public concern, and that if the defense is deemed valid, it should result in dismissal of the case, similar to *Hill*. Thus, Respondent contends, the merits of the instant case, and the public interest, will be served by allowing Respondent to add an affirmative defense raising the Appointments Clause. Respondent further argues that allowing Respondent to amend its Answer to add the proposed Appointments Clause defense is not prejudicial to Complaint Counsel because the defense is purely a legal one, and that because the defense is jurisdictional in nature, it can be raised at any time.

Complaint Counsel responds that Respondent has been aware from the outset of the proceeding in 2013 that the matter had been delegated to an ALJ, and that Respondent failed to raise the claim with the other constitutional claims made by LabMD against the FTC in separate federal court litigation. Complaint Counsel also argues that an Appointments Clause defense would be prejudicial, futile, and against the public interest because, if the defense is deemed valid and this case dismissed, the case will only be relitigated with a Commissioner appointed as the presiding official, citing 16 C.F.R. § 3.42(a) ("[h]earings in adjudicative proceedings shall be presided over by a duly qualified Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges") and *In re Inova Health Systems Found. & Prince William Health Sys., Inc.*, No. 9326, 2008 WL 2061411, at *10 (May 9, 2008) (designating then-Commissioner Rosch as ALJ). Complaint Counsel also asserts that allowing the amendment at this stage of proceedings would be prejudicial because, if Respondent had raised the Appointments Clause defense in its Answer, the Commission could have exercised its discretion to preside over the hearing itself, or to file the case in federal court.

III.

The proposed affirmative defense purports to raise a significant constitutional issue that could affect the disposition of these proceedings. Having reviewed and considered the parties' arguments, a determination of the controversy on the merits will be facilitated by allowing Respondent leave to amend its Answer to add the requested affirmative defense based on the Appointments Clause. 16 C.F.R. § 3.15(a).

Daniel Chapter One, 2009 WL 871702 (March 9, 2009), upon which Complaint Counsel relies to support denial of Respondent's request to amend, is inapposite. As noted in *Daniel Chapter One*, an amendment should not be denied merely due to the passage of time between the original filing and the attempted amendment, absent undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the opposing party or futility of the amendment. *In re Daniel Chapter One*, 2009 WL 871702, at *4 (March 9, 2009) (citing *Jupiter Aluminum Corp. v. Home Ins. Co.*, 181 F.R.D. 605, 609 (N.D. Ill. 1998) quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The

[2] Article II, Section 2 states: "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the courts of law, or in the Heads of Departments."

foregoing factors are not found in the instant case. Among other things, unlike *Daniel Chapter One*, there is no basis for concluding that Respondent has unduly delayed in seeking the amendment based on the Appointments Clause defense addressed in *Hill*, since the *Hill* case was only recently issued. Second, to the extent the Appointments Clause defense is jurisdictional, such defense can be raised at any time. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006). Furthermore, Complaint Counsel's assertion that allowing the amendment is futile and/or prejudicial because any resulting dismissal based on the Appointments Clause will result in a second FTC proceeding and the ultimate liability of Respondent in any event, constitutes speculation. Finally, also in contrast to *Daniel Chapter One*, Complaint Counsel has failed to demonstrate any prejudice from allowing the amendment, since the defense, as submitted by Respondent, does not require additional discovery, is purely legal in nature, and may be addressed in post-trial briefing.

IV.

For all the foregoing reasons, Respondent's Motion for Leave is GRANTED, and it is hereby ORDERED that (1) Respondent may file with the Office of the Secretary of the FTC the First Amended Answer attached as Exhibit B to the Motion for Leave, no later than July 31, 2015; (2) Any argument as to whether or not the Appointments Clause defense is a valid basis for dismissing this proceeding shall be included in the parties' post-trial briefs and reply briefs, as appropriate.

ORDERED:

D M Chappell

D. Michael Chappell
Chief Administrative Law Judge

Date: July 27, 2015