UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Joseph J. Simons, Chairman** **Maureen K. Ohlhausen** **Noah Joshua Phillips** **Rohit Chopra** **Rebecca Kelly Slaughter**

In the Matter of: IMPAX LABORATORIES, INC., a corporation.	**Docket No. 9373**

RESPONDENT IMPAX LABORATORIES, INC.'S[1]
OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO DISMISS RESPONDENT'S CROSS-APPEAL

The Commission's rules allow "any party" to file an appeal. This plain language—ignored by Complaint Counsel—is not upset by the more limited rights allotted in federal appellate courts. Indeed, Complaint Counsel's Motion to Dismiss Respondent's Cross-Appeal conflates Article III courts and the Federal Rules of Appellate Procedure with Article I and the regulations governing the Federal Trade Commission. But appeals to federal appellate courts are far different from appeals to the Commission, and they operate under different rules. While the Commission acts similar to a trial court with the power to review factual findings *de novo*, 16 C.F.R. § 3.54(a), federal appellate courts review factual findings only for "clear error." The Commission consequently is not obliged to follow federal appellate rules, and it has long departed from them in important ways.

[1] Impax is now Impax Laboratories, LLC.

This reality renders the federal court cases on which Complaint Counsel relies unhelpful and irrelevant. Tellingly, the only Commission precedent cited by Complaint Counsel, *In re LabMD*, supports Respondent's cross-appeal. That case rejected the use of conditional, catch-all appeals designed to preserve unidentified (and favorably-decided) issues. Order, *In re LabMD, Inc.*, FTC Dkt. No. 9357 (Dec. 18, 2015) ("*LabMD Order*"). Here, Impax challenges a specific, unfavorable ruling in the initial decision, fully consistent with the *LabMD Order*. Complaint Counsel's motion should be denied.

In the alternative, if the Commission prefers only one set of briefs, Impax respectively requests an additional 10,000 words for its opposition brief in order to address the Administrative Law Judge's ("ALJ") findings regarding market definition and market power.

ARGUMENT

The Commission is explicit about appeals in Part III proceedings: "*any party* objecting to *any portion* of the initial decision" can file an appeal or cross-appeal. Federal Trade Commission Rules of Practice, 74 Fed. Reg. 1,819 (Jan. 13, 2009) (emphasis added). The Commission's Rules of Practice consequently state that "*any party* may file objections to the initial decision or order of the Administrative Law Judge by filing a notice of appeal" that "designate[s] the initial decision and order *or part thereof* appealed from." 16 C.F.R. § 3.52(b)(1) (emphasis added). There are no limitations. Impax need not have been found liable to file an appeal.

This is not a controversial point—the Commission has employed the same approach to appeals for decades. *See* Federal Trade Commission Rules of Practice, 32 Fed. Reg. 8,454 (June 13, 1967) ("*Any party to a proceeding may appeal an initial decision* to the Commission:

Provided, [t]hat within ten (10) days after completion of service of the initial decision such party files a notice of intention to appeal." (emphasis added)).

That approach makes sense in light of the Commission's unique role on appeal. The Commission reviews both findings of fact and conclusions of law *de novo*. 16 C.F.R. § 3.54(a). And it frequently alters factual findings, even those related to witness credibility. *See* Opinion of the Commission, *In the Matter of Schering-Plough Corp. et al.,* Dkt. No. 9297 (Dec. 18, 2003). Those factual decisions subsequently establish the record for any future appeal. *McWane, Inc. v. FTC*, 783 F.3d 814, 824 (11th Cir. 2015) (appellate courts review FTC findings of fact under the "substantial evidence standard"); 15 U.S.C. § 45(c) ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.").

For these reasons, the Commission can hear cross-appeals regarding *any* part of an initial decision—including any portion of the "statement of findings of fact . . . and conclusions of law, as well as the reasons or basis therefor," 16 C.F.R. §§ 3.51-52 (defining "initial decision")—a party believes was wrongly decided, even if that party ultimately secured relief. Indeed, the Commission's Order revising the briefing schedule in this case explicitly contemplates the possibility of more than one opening brief, referring to multiple "opening briefs." Dkt. No. 9373 (May 31, 2018). This is consistent with the Commission's *de novo* factual review and its role in creating the record for any potential appeal to a federal appellate court.

The only Commission ruling cited in Complaint Counsel's motion—*In the Matter of LabMD, Inc.*, FTC Dkt. No. 9357 (Dec. 18, 2015)—is not to the contrary. In that case, the Commission concluded that "our rules plainly permit the filing of cross-appeals—that is, appeals challenging all *or part of* a given initial decision or order that are filed by parties other than the party that filed the first notice of appeal." LabMD Order at 1 (emphasis added). The

Commission prohibited LabMD from filing its own appeal because LabMD did "*not* challeng[e] any part of the ALJ's Initial Decision," as required by 16 C.F.R. § 3.52. *Id*. (emphasis added). LabMD instead sought to pursue a "conditional, protective cross-appeal," which was purportedly intended "to preserve issues for appeal to a federal circuit court," while otherwise arguing that the ALJ's Initial Decision and Order "were both correct and should be affirmed." *Id*. at 1-2. The Commission held that a "protective cross-appeal" was inappropriate because it could encourage *every* respondent to cross-appeal *every* issue in order to preserve them for federal court appeal. *LabMD Order* at 2.

That is not what Impax has done here. Impax's cross-appeal challenges a specific part of the initial decision: the ALJ's unfavorable ruling regarding market definition and market power. Impax has long contended that the relevant market encompasses all long-acting opioids; the Administrative Law Judge found it is limited to oxymorphone ER products. This type of cross-appeal will not result in every "victor" filing an appeal as a matter of course. Impax has focused on a discrete—but material—issue, which it *lost*. And because the issue is fact specific, and appropriately subject to *de novo* review by the Commission, the appeal is necessary in light of the cursory market power analysis in the initial decision.

The remainder of Complaint Counsel's motion is predicated on the Federal Rules of Appellate Procedure and judicial interpretations of the same. It is black-letter law, however, that "the Commission is not required to follow the Federal Rules of Appellate Procedure." Federal Trade Commission Rules of Practice, 74 Fed. Reg. 1,818 (Jan. 13, 2009). And with respect to cross-appeals in particular, it is clear that the Commission has its own approach, regardless of federal practice.

Indeed, federal appellate courts have a narrower prerogative; they generally review facts for clear error only. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) ("Traditionally, decisions on 'questions of law' are 'reviewable de novo,' decisions on 'questions of fact' are 'reviewable for clear error.'"); *Ornelas v. United States*, 517 U.S. 690, 695 (1996) ("'Clear error' is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact."). Accordingly, the rules governing federal appeals differ from those governing Part III appeals—only a party that did not obtain relief may appeal in federal court. No such limitation exists here for all the reasons discussed above.

If, however, the Commission prefers only one set of briefs, Impax respectfully requests that it receive an additional 10,000 words for its opposition brief. *See* 16 C.F.R. § 3.52(k). The additional words would allow Impax to respond to Complaint Counsel's arguments while also advancing affirmative arguments regarding the ALJ's unfavorable findings with respect to market definition and market power. *See LabMD Order* at 2 (increasing word limit by 7,000 words "[i]n view of the number of issues that may be raised in connection with Complaint Counsel's appeal"). An increase in the word limit is particularly justified in this case given the complex legal issues and extensive factual record developed in the administrative law court below. *Id*. Without an enlargement of the word count, Impax would be prejudiced. It would have to respond to all issues appealed by Complaint Counsel in the same brief that it is advancing independent issues not appealed by Complaint Counsel. *See ECM Biofilms, Inc.*, 159 F.T.C. 2130 (2015) (granting an enlargement of word counts because with "the magnitude and technical complexity of the record, undue prejudice will result from the existing word limits");

see also In the Matter of Telebrands Corp., F.T.C. Dkt. No. 9313, 2004 WL 3142883, at *2 (F.T.C. Dec. 1, 2004).

CONCLUSION

For all of the foregoing reasons, Impax respectfully requests that the Commission deny Complaint Counsel's motion to dismiss Impax's notice of cross-appeal or, in the alternative, enlarge the word-count limitation by 10,000 words.

Dated: June 11, 2018

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