

**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.	)	<b>DOCKET NO. 9373</b>
	)	
	)	

**ORDER OF THE COMMISSION**

On May 11, 2018, Chief Administrative Law Judge D. Michael Chappell issued an Initial Decision concluding that the evidence adduced in this proceeding failed to prove a violation of Section 5 of the FTC Act and ordering that the Complaint be dismissed. After Complaint Counsel filed a Notice of Appeal, Respondent Impax Laboratories, Inc. (apparently now Impax Laboratories, LLC) filed a Notice of Cross Appeal, stating an intention to cross-appeal “portions of the Initial Decision . . . related to relevant market and market power, as well as any related findings of fact and conclusions of law.” Respondent’s Notice of Cross Appeal (May 29, 2019). On June 5, 2018, Complaint Counsel moved to Dismiss Respondent’s Notice of Cross Appeal.

Complaint Counsel argue that Respondent’s cross-appeal is improper because the Initial Decision dismissed the complaint and the cross-appeal seeks only to address alternative grounds for affirming the dismissal. Respondent opposes Complaint Counsel’s motion. Respondent argues that Commission Rule 3.52(b)(1), 16 C.F.R. § 3.52(b)(1), which provides that “any party may file objections to the initial decision or order of the Administrative Law Judge” by filing a notice of appeal that “designat[es] the initial decision or order or part thereof appealed from,” is not limited to parties that have been found to have violated the FTC Act. Commission Rule 3.52(b)(1), however, does not expressly address the setting where a respondent seeks to appeal an order dismissing the complaint.

The only recent case addressing the application of Rule 3.52(b)(1) was *In the Matter of LabMD, Inc., Docket No. 9357*, Order (F.T.C. Dec. 18, 2015) (“[LabMD Order](#)”). In that case, the respondent acknowledged the ALJ’s Initial Decision and Order “were both correct and should be affirmed,” but nonetheless submitted a conditional, “protective cross-appeal” on issues the ALJ’s decision did not address. *Id.* at 2. The respondent argued the cross-appeal was necessary to preserve issues for appeal to a federal court. The Commission disagreed, explaining

that rationale would permit “protective cross-appeals” by the successful party in essentially every case – a result “inconsistent with general appellate practice” that “would prove highly burdensome and wasteful for all involved.” *LabMD* Order at 2.

Unlike *LabMD*, Respondent’s cross-appeal here would challenge an issue on which the ALJ did rule – market definition and market power – albeit in the alternative. The Commission understands the importance of permitting parties to present their arguments on both the facts and the law for the Commission’s *de novo* review, especially when, as here, there are numerous issues a Commission decision may (or may not) ultimately address. The parties have proposed an alternative: Increase the word limits in Respondent’s answering and Complaint Counsel’s reply briefs. The Commission believes this strikes the right balance between those considerations and the ones animating our decision in *LabMD*. While Respondent requested 10,000 additional words, the Commission finds an additional 7,000 words is appropriate. Seven thousand words represents a 50% increase to the normal 14,000 word limit, is consistent with the increase the Commission granted and found effective in *LabMD*, and should easily suffice to discuss the limited issues raised in Respondent’s cross-appeal. To avoid any prejudice to Complaint Counsel, the Commission increases the word limit for Complaint Counsel’s reply brief by 5,000 words.

Accordingly,

**IT IS HEREBY ORDERED THAT** Complaint Counsel’s Motion to Dismiss Respondent’s Notice of Cross-Appeal is **GRANTED**;

**IT IS FURTHER ORDERED THAT** Complaint Counsel’s opening brief must be filed on or before July 2, 2018, and, if Complaint Counsel files an opening appeal brief by that date, Complaint Counsel’s appeal from the Initial Decision will be treated as having been perfected in accordance with Commission Rule 3.52(b), 16 C.F.R. § 3.52(b);

**IT IS FURTHER ORDERED THAT** while Respondent may not file an opening appeal brief, it may file an answering brief that shall not exceed 21,000 words. Any such answering brief must be filed on or before August 10, 2018; and

**IT IS FURTHER ORDERED THAT** Complaint Counsel may file a reply brief that shall not exceed 12,000 words. Any such reply brief must be filed on or before August 24, 2018.

By the Commission.

Donald S. Clark  
Secretary

Seal:  
Issued: June 27, 2018