

**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**

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<b>In the Matter of</b>	)	
	)	
	)	<b>PUBLIC</b>
<b>Impax Laboratories, Inc.,</b>	)	
<b>a corporation,</b>	)	<b>DOCKET NO. 9373</b>
	)	
<b>Respondent</b>	)	
	)	

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**COMPLAINT COUNSEL’S MOTION TO DISMISS  
RESPONDENT’S NOTICE OF CROSS-APPEAL**

Pursuant to Rules 3.22 and 3.52(b)(1) of the Commission’s Rules of Practice, 16 C.F.R. §§ 3.22 and 3.52(b)(1), Complaint Counsel respectfully moves the Commission for an Order dismissing Respondent’s Notice of Cross-Appeal. Respondent’s Notice of Cross-Appeal is improper and should be rejected because the Administrative Law Judge’s Initial Decision granted Respondent a full dismissal of the Complaint, and Respondent’s “cross-appeal” seeks only to address alternative grounds for affirming that dismissal. Arguments for affirming the Initial Decision in Respondent’s favor are properly raised in Respondent’s answering brief, not in a separate cross-appeal. *See Order, In re LabMD, Inc.*, FTC Dkt. No. 9357 (Dec. 7, 2015) (“*LabMD Order*”). Federal Courts of Appeals have universally applied the same principle to dismiss improper cross-appeals like Respondent’s, not least because such “cross-appeals” result in undue burden and waste.

## **BACKGROUND**

On Friday, May 11, 2018, the Honorable D. Michael Chappell issued an Initial Decision and Order in the above-captioned action dismissing the Complaint in its entirety. Complaint Counsel filed its Notice of Appeal on May 17, 2018. On May 23, 2018, the parties jointly moved the Commission for an order extending the deadlines for Complaint Counsel's opening brief, Respondent's answering brief, and Complaint Counsel's reply brief. *See* Joint Mot. to Revise Briefing Schedule (May 23, 2018) at 2 & Proposed Order. Respondent then filed its Notice of Cross-Appeal on May 29, 2018, appealing the portions of the Initial Decision "related to relevant market and market power." Resp's. Notice of Cross-Appeal (May 29, 2018) at 1. The Commission entered an Order revising the appeal briefing schedule on May 31, 2018.

## **ARGUMENT**

Respondent Impax Laboratories, Inc.'s Notice of Cross-Appeal is improper and should be dismissed. The Initial Decision granted Respondent the full relief it requested: dismissal of the Complaint. Respondent's cross-appeal is limited solely to Respondent's alternative arguments regarding relevant market and market power that support affirming the Initial Decision. The Commission, in accord with the universal practice of federal appellate courts, has ruled that cross-appeals that merely raise alternative arguments in support of the decision below are improper and should be dismissed. The proper place for Respondent's arguments is in its answering brief, not in a separate set of cross-appeal briefing.

The Commission has previously ruled that "the victor" before the Administrative Law Judge "is not entitled to file an opening appeal brief." *LabMD* Order at 2. In *LabMD*, the ALJ dismissed the complaint, Complaint Counsel appealed, and LabMD noticed a "cross-appeal" urging affirmance of the ALJ's Initial Decision dismissing the complaint. *See* Notice of

Conditional Cross-Appeal, *In re LabMD*, FTC Dkt. No. 9357 (Dec. 1, 2015). LabMD’s notice was filed “solely to raise additional and/or alternative grounds to support the Order issued by Chief Judge D. Michael Chappell dismissing the Complaint, and to preserve its rights.” *Id.* at 1. The Commission ordered that LabMD may not file an opening brief and should instead include its arguments in its answering brief. *See LabMD Order* at 2. The Commission reasoned that allowing a cross-appeal in such a circumstance was contrary to general appellate practice, unnecessary for Respondent to preserve its arguments, and inefficient. *See id.* The Commission’s reasoning in *LabMD* applies with equal force to Impax’s “cross-appeal,” which was filed solely to raise additional and/or alternative grounds to support the Initial Decision, i.e., “relevant market and market power.” Resp’s. Notice of Cross-Appeal at 1.

Cross-appeals like Impax’s that seek affirmances based on alternative grounds are contrary to “general appellate practice.” *LabMD Order* at 2. The language of Commission Rule 3.52(b) and Federal Rule of Appellate Procedure 3 are materially similar.<sup>1</sup> And federal appellate decisions interpreting that similar rule set forth a clear and consistent principle: “a party cannot prosecute an appeal from a judgment in its favor.” *In re Shkolnikov*, 470 F.3d 22, 24 (1st Cir. 2006).<sup>2</sup> “That proposition remains true even though the appealing party considers the offending

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<sup>1</sup> Commission Rule 3.52(b)(1) provides in relevant part: “[A]ny party may file objections to the initial decision or order of the Administrative Law Judge by filing a notice of appeal . . . . The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from.” 16 C.F.R. § 3.52(b)(1). Federal Rule of Appellate Procedure 3 also provides that an appeal is taken by filing a notice of appeal and requires, in relevant part, that the notice must “specify the party or parties taking the appeal . . . [and] designate the judgment, order, or part thereof being appealed.” Fed. R. App. P. 3(c)(1)(A)-(B).

<sup>2</sup> *See also, e.g., California v. Rooney*, 483 U.S. 307, 311 (1987) (rejecting cross-appeal from a judgment that was in cross-appellant’s favor); *Lindheimer v. Ill. Bell Tel. Co.*, 292 U.S. 151, 176 (1934) (“The Company was successful in the District Court and has no right of appeal from the decree in its favor”); *Janese v. Fay*, 692 F.3d 221, 225 (2d Cir. 2012) (dismissing cross-appeal as “unnecessary” because it sought affirmance on alternative ground); *McMunn v. Babcock &*

statements or findings to be erroneous.” *Id.* “[A] winner cannot appeal a judgment merely because there are passages in the court’s opinion that displease him—that may indeed come back to haunt him in a future case. He can appeal only if the judgment gives him less relief than he considers himself entitled to.” *Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992) (citations omitted).<sup>3</sup> There is no basis for departing from this long-established rule against cross-appeals that merely disagree with the reasoning of a favorable decision.

Permitting Impax to initiate a parallel set of briefing with a separate cross-appeal also will “prove highly burdensome and wasteful for all involved.” *LabMD* Order at 2. The number of opening, answering, and reply briefs will be needlessly doubled. As the Seventh Circuit observed:

Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be

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*Wilcox Power Generation Grp., Inc.*, 869 F.3d 246, 259–60 (3d Cir. 2017) (dismissing cross-appeal as “superfluous,” considering argument as an alternate ground for affirmance, and disregarding reply brief in support of the cross-appeal); *Reynolds v. Am. Nat’l Red Cross*, 701 F.3d 143, 155-56 (4th Cir. 2012) (dismissing cross-appeal “as it merely seeks affirmance of the district court’s judgment on an alternative ground”); *Klamath Strategic Inv. Fund v. United States*, 568 F.3d 537, 546 (5th Cir. 2009) (“As a general matter, a party who is not aggrieved by a judgment does not have standing to appeal it.”); *Marcatante v. City of Chicago*, 657 F.3d 433, 438 (7th Cir. 2011) (“It is improper to file a cross-appeal to merely assert an alternative ground of affirmance.”); *Hudson Specialty Ins. Co. v. Brash Tygr, LLC*, 769 F.3d 586, 593 (8th Cir. 2014) (dismissing cross-appeal because it did no more than advance an alternative argument for affirmance); *Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC*, 555 F.3d 1331, 1343 (11th Cir. 2009) (holding that cross-appellant “does not have standing to cross-appeal a summary judgment in its favor even though the district court rejected arguments . . . about alternative grounds for that summary judgment”); *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320 n.5 (Fed. Cir. 2014) (“This cross-appeal was improper because it merely presented an alternative ground for affirming the trial court.”).

<sup>3</sup> See also *Stone Container Corp. v. Hartford Steam Boiler Inspection & Ins. Co.*, 165 F.3d 1157, 1159 (7th Cir. 1999) (“A cross-appeal is necessary and proper only when the appellee wants the appellate court to alter the judgment (the bottom line, not the grounds or reasoning) of the district court.”).

distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.

*Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 439 (7th Cir. 1987).<sup>4</sup> Impax’s cross-appeal here will result in even more burden, as it will increase the number of briefs from three to six and add even more confusion as the arguments proliferate across briefs.

Finally, Impax does not need to file a separate cross-appeal to preserve its arguments about relevant market and market power. The Commission rejected LabMD’s argument that it needed to file a “protective cross-appeal” to preserve issues for appeal to a federal circuit if the Commission reversed the ALJ. *LabMD* Order at 2. “LabMD is certainly entitled to make, in an answering brief, conditional arguments setting forth alternate grounds for affirmance of the ALJ’s decision.” *Id.* So too, Impax may preserve any arguments it needs to make by raising them before the Commission in its answering brief. Otherwise, as the Commission has recognized, “every case in which one party prevails could result in an appeal by the unsuccessful party and a second, purported ‘protective cross-appeal’ by the victor.” *Id.*

## CONCLUSION

Complaint Counsel respectfully requests that the Commission dismiss Respondent Impax Laboratories, Inc.’s Notice of Cross-Appeal. The Initial Decision granted Impax full relief by dismissing the Complaint. Impax’s appeal of that decision in its favor is improper under the Commission’s own precedent enforcing the rule against cross-appeals that merely raise

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<sup>4</sup> “[C]learly unnecessary cross-appeals should be avoided. Appeal procedure is streamlined in desirable ways if arguments to support the judgment are made in brief without filing an unnecessary cross-appeal. Cross-appeal procedure complicates briefing schedules and the number and length of the briefs in ways that may generate more confusion than enlightenment.” 15A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3904 (2d ed. 2018).

alternative grounds for affirmance. Allowing Impax's cross-appeal will unduly burden the Commission and the parties.

Dated: June 5, 2018

Respectfully submitted,

*/s/ Charles A. Loughlin*

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*Counsel Supporting the Complaint*

STATEMENT OF CONFERENCE WITH OPPOSING COUNSEL

Pursuant to Commission Rule 3.22, Complaint Counsel represents that it conferred with Counsel for Respondent on Friday, June 1, 2018 in an effort in good faith to resolve by agreement the issues raised by this motion. Based on that conference, Complaint Counsel states that Respondent does not agree to voluntarily withdraw its Notice of Cross-Appeal.

Dated: June 5, 2018

Respectfully submitted,

*/s/ Charles A. Loughlin*

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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The Honorable D. Michael Chappell  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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*Counsel for Respondent Impax Laboratories, Inc.*

June 5, 2018

By: s/ Rebecca E. Weinstein



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.

June 5, 2018

By: s/ Rebecca E. Weinstein

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<b>Respondent</b>	)	

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**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL’S  
MOTION TO DISMISS RESPONDENT’S NOTICE OF CROSS-APPEAL**

Upon consideration of Complaint Counsel's Motion To Dismiss Respondent’s Notice of Cross-Appeal and good cause appearing therefor,

**IT IS ORDERED THAT** Respondent Impax Laboratories, Inc. shall not file an appeal brief pursuant to Rule 3.52(c), 16 C.F.R. § 3.52 (c), to perfect its “Notice of Cross-Appeal,” dated May 29, 2018; and;

**IT IS FURTHER ORDERED THAT** Respondent Impax Laboratories, Inc. may address any of its noticed cross-appeal arguments in its answering brief pursuant to Rule 3.52(d), 16 C.F.R. § 3.52(d), as modified by the Commission’s Order of May 31, 2018.

By the Commission.

Donald S. Clark  
Secretary

SEAL:

Issued: \_\_\_\_\_