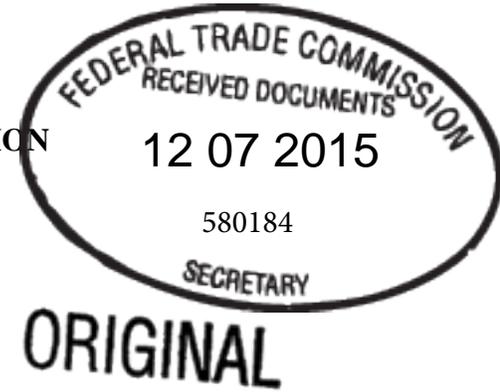


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



COMMISSIONERS: Edith Ramirez, Chairwoman
Maureen K. Ohlhausen
Terrell McSweeney

_____)
In the Matter of)
)
LabMD, Inc.,)
a corporation,)
Respondent.)
_____)

PUBLIC
Docket No. 9357

MOTION TO ENFORCE LIMITS ON APPEAL BRIEFING PURSUANT TO RULE 3.52

Pursuant to Rules 3.22 and 3.52, 16 C.F.R. §§ 3.22 and 3.52, Complaint Counsel respectfully moves the Commission for an Order enforcing proper limits on appeal briefing for Respondent LabMD, Inc.’s (“LabMD” or “Respondent”) anticipated “Conditional Cross-Appeal.” Complaint Counsel respectfully requests that the Commission order that LabMD address any “cross-appeal” arguments in its answering brief. Rule 3.52(d), 16 C.F.R. § 3.52(d). The requested relief is necessary to ensure compliance with the governing Rules. Complaint Counsel met and conferred with counsel for Respondent on the subject of this motion, but was unable to reach agreement. Meet and Confer Statement (attached as Exhibit A).

Background

On November 24, 2015, Complaint Counsel timely filed its notice of appeal of the Initial Decision and Order entered in this action (“Initial Decision”). Contrary to the governing Rules, Respondent subsequently filed a “Notice of Conditional Cross-Appeal” (“Notice”) purporting to notice its “conditional and protective cross-appeal solely to raise additional and/or alternative grounds to support the Order . . . and to preserve its rights.” Notice at 1. The Notice states that

LabMD “must file this conditional and protective cross-appeal with respect to the absence of certain findings of fact and/or conclusions of law” in the Initial Decision to protect its rights and preserve issues for appeal to an Article III court. Notice at 2. According to the Notice, these alleged omissions in the Initial Decision “would have provided additional and/or alternative grounds for the Order” and relate to twelve different issues, such as alleged failures of proof. Notice at 2-4, ¶¶ a.- 1. The Notice further states that LabMD “intends to file a brief perfecting this Notice of Appeal pursuant to 16 C.F.R. § 3.52(b) and (c).” Notice at 5.

Argument

Respondent’s anticipated “conditional cross-appeal” is improper and should be rejected. If Respondent’s proposed approach were correct – which it is not – in every case in which an administrative law judge issued an initial decision and dismissed a complaint, the parties would need to file two separate appeals to the Commission simultaneously under Rule 3.52(c)-(e), 16 C.F.R. § 3.52(c)-(e): One merits appeal by Complaint Counsel and a separate, second appeal by the prevailing party to advance alternative grounds for affirmance and to preserve issues for appeal to an Article III court without challenging a specific prior ruling. This result would generate superfluous briefing, needlessly waste Commission resources, and contravene the Part 3 Rules.

In its Notice, Respondent asserts that “[a] conditional, protective cross-appeal in response to Complaint Counsel’s notice of appeal is proper even where, as here, the administrative law judge’s initial decision and proposed order dismissed the complaint in its entirety.” Notice at 1. Not so. The only FTC precedent on which Respondent relies, *In the Matter of Rambus Inc.*, Docket No. 9302, 2006 FTC LEXIS 60 (Aug. 2, 2006), confirms that Respondent’s attempted conditional cross-appeal is improper for multiple reasons. First, the operative Part 3 Rules were amended in 2009 – three years after *Rambus* – and no longer provide for cross-appeals, let alone

“conditional cross-appeals.” Second, the respondent in *Rambus* limited its cross-appeal to a single issue on which the administrative law judge had issued a ruling in the initial decision.

Rule 3.52, which governs appeals from an initial decision, does not provide for cross-appeals. While the respondent in *Rambus* was allowed to file a combined answering brief and cross-appeal under Rule 3.52, *see* 16 C.F.R. § 3.52(c) (version effective to January 12, 2009), the rule was amended in 2009 to eliminate cross-appeals.¹ As amended, Rule 3.52 “requires simultaneous briefing on review for all cases brought in Part 3” and “the word count limitations in the former Rule for a combined answering and cross-appeal brief, and the additional rounds of briefing provided in the former Rule for cross-appeals, are unnecessary, and these provisions have been eliminated.” 74 Fed. Reg. 1804-01, at 1819 (Jan. 13, 2009).

Where, as here, Respondent seeks to address alternate grounds to support the Initial Decision or to preserve issues for appeal but not to challenge a specific order or ruling of the administrative law judge, Respondent should do so in its answering brief without cross-appealing to the Commission. *See, e.g., United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924) (“[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.”); *Datascope Corp. v. SMEC, Inc.*, 879 F.2d 820, 822 n.1 (Fed. Cir. 1989) (cross-appeal filed for the “sole purpose of preserving its right to offer arguments in support of the judgment” deemed improper) (citing *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957)); *Smith v. Johnson and Johnson*, 593 F.3d 280, 283 n.2 (3d Cir. 2010) (“[A] party, without taking a cross-appeal, may urge in

¹ Compare Rule 3.52(c), 16 C.F.R. § 3.52(c) (effective to January 12, 2009) with Rule 3.52(c)-(d), 16 C.F.R. § 3.52(c)-(d) (versions effective from January 13, 2009 to present). 16 C.F.R. § 3.52(c) was redesignated in 2009 as 16 C.F.R. § 3.52(d).

support of an order from which an appeal has been taken any matter appearing in the record, at least if the party relied on it in the district court”) (dismissing cross-appeal seeking affirmance on an alternate basis and disregarding cross-appeal reply brief).

In *Rambus*, as in this case, the presiding administrative law judge dismissed the complaint and Complaint Counsel appealed. *Rambus*, 2006 FTC LEXIS 60, at *28-32. In *Rambus*, however, the respondent limited its cross-appeal to the narrow issue of whether the administrative law judge applied the correct burden of proof in the initial decision.² *Id.* at *33-34. The respondent did not, as LabMD proposes here, base its cross-appeal on “the absence of certain findings of fact and/or conclusions of law” in the initial decision and address twelve different issues that may have “provided additional and/or alternative grounds” for affirmance. Notice at 2. Nor is there any reason to. The Rules make clear that upon appeal the Commission will review the record *de novo* by considering “such parts of the record as are cited or as may be necessary to resolve the issues presented and ... exercis[ing] all the powers which [the Commission] could have exercised if it had made the initial decision.” Rule 3.54, 16 C.F.R. § 3.54; *see also Rambus*, 2006 FTC LEXIS 60, at *44.³

² See Br. of Appellee and Cross-Appellant, Docket No. 9302, June 2, 2004, at 134, *available at* <https://www.ftc.gov/enforcement/cases-proceedings/011-0017/rambus-inc-matter>.

³ Respondent has previously briefed the principal issues of law and fact identified in Respondent’s Notice of Appeal. Complaint Counsel has no objection to the Commission’s consideration of those voluminous submissions as part of the Commission’s *de novo* review of the entire record in this proceeding. Rule 3.54(a), 16 C.F.R. § 3.54(a).

Conclusion

For these reasons, Complaint Counsel respectfully requests that the Commission order that LabMD shall not file an opening brief pursuant to Rule 3.52(c), 16 C.F.R. § 3.52(c), to perfect its “Notice of Conditional Cross-Appeal,” but 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).

Dated: December 7, 2015

Respectfully submitted,



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Complaint Counsel

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

**[PROPOSED] ORDER GRANTING MOTION TO
ENFORCE LIMITS ON APPEAL BRIEFING PURSUANT TO RULE 3.52**

Upon consideration of Complaint Counsel’s Motion to Enforce Limits on Appeal Briefing Pursuant to Rule 3.52 and good cause appearing therefor,

IT IS ORDERED that Respondent LabMD, 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 Conditional Cross-Appeal,” dated December 1, 2015; and it is further

ORDERED that LabMD, 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 December 3, 2015.

By the Commission, Commissioner Brill not participating.

Donald S. Clark
Secretary

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room H-113
Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be transmitted *via* electronic mail and delivered by hand to:

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

I further certify that I caused a copy of the foregoing document to be served *via* electronic mail to:

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Counsel for Respondent LabMD, Inc.

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.

December 7, 2015

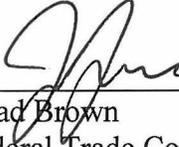
By: 
Jarad Brown
Federal Trade Commission
Bureau of Consumer Protection

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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**STATEMENT REGARDING MEET AND CONFER PURSUANT TO
RULE 3.22(g) AND ADDITIONAL PROVISION 4 OF THE SCHEDULING ORDER**

Complaint Counsel respectfully submits this Statement, pursuant to Federal Trade Commission Rule of Practice 3.22(g) and Additional Provision 4 of the Scheduling Order. Prior to filing the attached Motion to Enforce Limits on Appeal Briefing Pursuant to Rule 3.52, Complaint Counsel Jarad Brown met and conferred with counsel for Respondent Patrick Massari, by teleconference on December 7, 2015 at 3:30 PM, in a good faith effort to resolve by agreement the issue raised by this motion. Despite good faith efforts to do so, Complaint Counsel has been unable to reach agreement with counsel for Respondent on the subject of the attached motion.

Dated: December 7, 2015

Respectfully submitted,



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