

**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)	
)	
)	PUBLIC
Impax Laboratories, Inc.,)	
a corporation,)	DOCKET NO. 9373
)	
Respondent)	

**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

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. *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." *Id.* Order at 2. In *Id.*, 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. *Id.* Notice of

Conditional Cross-Appeal, *Impax*, 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.” *Impax* at 1. The Commission ordered that LabMD may not file an opening brief and should instead include its arguments in its answering brief. *Impax* 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. *Impax*. The Commission’s reasoning in *Impax* 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.” *Impax* Order at 2. The language of Commission Rule 3.52(b) and Federal Rule of Appellate Procedure 3 are materially similar.¹ 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.” *Irish*, 470 F.3d 22, 24 (1st Cir. 2006).² “That proposition remains true even though the appealing party considers the offending

¹ 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 app

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.

W.D. & P.H., 815 F.2d 429, 439 (7th Cir. 1987).

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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/ ~~CA . L~~

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

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~~CFR~~

June 5, 2018

By: s/ ~~AE~~ ~~W~~ _____

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/ *E. W* *h*

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BEFORE THE FEDERAL TRADE COMMISSION

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[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S
MOTION TO DISMISS RESPONDENT'S NOTICE OF CROSSAPPEAL

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 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 Order of May 31, 2018.

By the Commission

Donald S. Clark
Secretary

SEAL:

Issued: _____