

Interlocutory Orders, Etc.

IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, December 18, 2015.

Commission order increasing the word limit for respondent's answering brief, denying respondent's request to file an opening appeal brief, and granting complaint counsel leave to file a reply brief.

ORDER ADDRESSING AND RESOLVING APPELLATE BRIEFING ISSUES

In an Initial Decision and Order issued on November 13, 2015, Chief Administrative Law Judge D. Michael Chappell dismissed the complaint against Respondent LabMD, Inc., finding that Complaint Counsel failed to prove that the alleged conduct at issue caused or was likely to cause substantial injury to consumers. We address two motions filed by the parties relating to the ensuing appeal to the Commission.

On November 24, 2015, Complaint Counsel filed a Notice of Appeal of the Initial Decision. Despite having prevailed before the ALJ, Respondent filed a "Notice of Conditional Cross-Appeal" a week later, arguing 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." Cross-Appeal Notice at 1. Thereafter, on December 7, 2015, Complaint Counsel filed a "Motion to Enforce Limits on Appeal Briefing" arguing that LabMD's "cross-appeal" is improper and seeking an order requiring that LabMD present all of its arguments in support of the Initial Decision in its answering brief, including any alternate grounds for affirming. On December 14, 2015, LabMD filed its opposition to Complaint Counsel's motion; alternatively, LabMD seeks leave to file an over-length answering brief. LabMD also moved to strike Complaint Counsel's Notice of Appeal claiming it is too indefinite. On December 17, 2015, Complaint Counsel filed its opposition to LabMD's motion to strike.

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While our rules plainly permit the filing of cross-appeals¹ – 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 is not challenging any part of the ALJ’s Initial Decision. LabMD states instead that the ALJ’s Initial Decision and Order “were both correct and should be affirmed.” Cross-Appeal Notice at 2. Moreover, we disagree with LabMD’s argument that it must file a “protective cross-appeal” in order to preserve issues for appeal to a federal circuit court. 16 C.F.R. § 3.54(a). Under LabMD’s reasoning, 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. Such a result would be inconsistent with general appellate practice and would prove highly burdensome and wasteful for all involved. Consequently, LabMD is not entitled to file an opening appeal brief.

Of course, LabMD is certainly entitled to make, in an answering brief, conditional arguments setting forth alternate grounds for affirmance of the ALJ’s decision. In view of the number of issues that may be raised in connection with Complaint Counsel’s appeal, we find that LabMD’s request for leave to file a longer answering brief is justified in this case. We have determined to increase the word limit for LabMD’s answering brief by 7,000 words. We likewise increase Complaint Counsel’s word limit for its reply brief by 7,000 words and extend by a few days the deadline by which it must be filed.

We now turn to LabMD’s cross-motion to strike Complaint Counsel’s Notice of Appeal. We disagree with LabMD’s assertion that Complaint Counsel’s notice is deficient due to a lack of specificity. Commission Rule of Practice 3.52 requires only that a notice of appeal “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). There is no

¹ See Commission Rule of Practice 3.52, 16 C.F.R. § 3.52(b)(1); *see also* Federal Trade Commission Amendments to Parts 3 and 4 of its Rules of Practice, 74 Fed. Reg. 1804, 1819 (Jan. 13, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/federal_register_notices/rules-practice-16-cfr-parts-3-and-4/090113rulesofpractice.pdf.

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question that Complaint Counsel's Notice of Appeal complies with Rule 3.52. There is thus no basis for striking it.²

Accordingly,

IT IS HEREBY 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 February 5, 2016; and

IT IS FURTHER ORDERED THAT Complaint Counsel may file a reply brief that shall not exceed 14,000 words. Any such reply brief must be filed on or before February 23, 2016.

By the Commission, Commissioner Brill not participating.

² Commissioner Brill did not take part in the consideration of, or decision regarding, any of the issues herein.