WHITE PAPER SUBMITTED ON BEHALF OF FACEBOOK, INC. REGARDING THE PROPOSED CIVIL PENALTY

February 28, 2019

Privileged and Confidential
Fed. R. Evid. 408 Settlement Materials

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I. INTRODUCTION[1]

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The fine that Staff proposes is excessive, arbitrary, and capricious. It violates the Due Process Clause and the Eighth Amendment, and it exceeds the FTC's statutory civil penalty authority. It is [redacted] larger than the largest civil penalty in FTC history, and [redacted] times larger than the penalty the FTC secured against Google in a case alleging violations of a consent order—despite the absence of any allegation of consumer harm. No court would entertain such an unprecedented and unprincipled penalty demand.

II. BACKGROUND

(b)(4); (b)(3):6(f); (b)(3):21(f)

(b)(4); (b)(3):6(f); (b)(3):21(f)

Never before has the FTC obtained a civil penalty even remotely approaching Staff's proposal. The two largest fines imposed by the FTC in an order enforcement action during the past 25 years were a $100 million civil penalty levied against LifeLock and a $40 million civil penalty paid by National Urological Group, Inc., both of which included significant restitution for consumer redress. In *LifeLock*, the FTC alleged that the company violated a 2010 court order by failing to maintain an adequate information security program, falsely advertising the strength of its security services, falsely telling consumers that it would send them alerts promptly once the company received any indication that their identity was stolen, and failing to meet the order's recordkeeping requirements.[3] The FTC alleged that LifeLock's conduct caused "substantial injury" and "unjustly enriched" LifeLock. *FTC v. LifeLock, Inc.*, No. 2:10-cv-00530-JJT, Dkt. 1 at ¶ 44 (D. Ariz. March 9, 2010). In *National Urological Group*, the FTC alleged that the company deceptively marketed dietary supplements despite a 2008 court order that specifically enjoined the company from making additional unsubstantiated claims,[4] which, as the complaint alleged, caused "[c]onsumers throughout the United States [to] suffer[] . . . substantial monetary loss." *FTC v. Nat'l Urological Grp., Inc.*, No. 1:04-cv-3294, Dkt. 1 at ¶ 40 (N.D. Ga. Nov. 10, 2004).

The FTC's largest civil penalty for a consent violation with no consumer redress to date was levied against Google in 2012. That matter is particularly instructive because it involved allegations comparable to the allegations at issue here in the sense that the allegations focused on privacy-related misrepresentations and did not involve claims of consumer harm. Specifically, the FTC alleged that Google "misrepresented the extent to which users may exercise control over the collection or use of covered information" by overriding the cookie-blocking settings on Safari browsers used by tens of millions of people, secretly placing cookies, and using the information it obtained to serve targeted advertisements. *United States v. Google Inc.*, No. 5:12-cv-04177-SI, Dkt. 1 at ¶¶ 51, 54 (N.D. Cal. Nov. 16, 2012). The FTC agreed to settle those allegations through a judicial order imposing injunctive relief and requiring a civil penalty of $22.5 million. The Court approved the settlement, finding that the civil penalty amount was appropriate in light of the fact

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[3] Press Release, Fed. Trade Comm'n, LifeLock to Pay $100 Million to Consumers to Settle FTC Charges it Violated 2010 Order (Dec. 17, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/lifelock-pay-100-million-consumers-settle-ftc-charges-it-violated.

[4] Press Release, Fed. Trade Comm'n, U.S District Court Rules in FTC's Favor, Imposes $40 Million Judgment Against Weight-Loss Supplement Marketers for Order Violations (Oct. 16, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/10/us-district-court-rules-ftcs-favor-imposes-40-million-judgment.

that "the complaint never alleged that consumers suffered any monetary harm" and likewise did not allege that the violations "yielded significant revenues for Google." *Google Inc.*, No. 5:12-cv-04177-SI, Dkt. 30 at 7.

A consumer watchdog group challenged the adequacy of the FTC's settlement with Google. *Id.*, Dkt. 13. The FTC, jointly with the Department of Justice ("DOJ"), responded to the consumer watchdog's assertions by representing to the court that the settlement "fairly, adequately, and reasonably addresse[d] the allegations in the complaint." *Id.*, Dkt. 15 at 1. The FTC and the DOJ further stated that, in determining the civil penalty, they had examined "a number of factors, including the benefit obtained by the alleged violator and the harm suffered by consumers." *Id.* at 9. The FTC and the DOJ emphasized that the civil penalty was sufficient to "remov[e] any economic incentive for similar conduct in the future and promot[e] the desire to eliminate the benefits derived by the violations." *Id.* at 9-10 (citation omitted). The FTC and the DOJ further asserted that the $22.5 million civil penalty fully served the purpose of "vindicating the authority of the FTC" and "sends an unequivocal message to other companies under order that the FTC will vigorously enforce its orders and that a defendant's failure to comply carries a significant cost." *Id.* at 6.

In a press release, the FTC described the settlement with Google as "a clear victory for consumers and privacy." [5] The FTC further explained that "[w]ith a company of Google's size, almost any penalty can be dismissed as insufficient. But it is hardly inconsequential to impose a $22.5 million civil penalty when the accompanying complaint does not allege that the conduct at issue yielded significant revenue."[6] The FTC was emphatic that a $22.5 million penalty "provide[s] a strong message to . . . other companies under order that their actions will be under close scrutiny and that the FTC will respond to violations quickly and vigorously." *Id.*

III. DISCUSSION

(b)(4); (b)(3):6(f); (b)(3):21(f)

(b)(4); (b)(3):6(f)

(b)(4); (b)(3):6(f) Facebook is not aware of a single comparable case in which a court calculated a penalty in the manner Staff proposes, let alone a case supporting the

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5 Press Release, Fed. Trade Comm'n, Statement by FTC Bureau of Consumer Protection Director David Vladeck Regarding Judges Approval of Google Safari Settlement (Nov. 20, 2012), *available at* https://www.ftc.gov/news-events/press-releases/2012/11/statement-ftc-bureau-consumer-protection-director-david-vladeck.

6 *See* Fed. Trade Comm'n, Statement of the Commission: *United States of America v. Google Inc.* (United States District Court for the Northern District of California), *In the Matter of Google Inc., FTC Docket No. C-4336* (Aug. 9, 2012) *available at* https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120809googlestatement.pdf.

magnitude of the Staff's proposed penalty. To the contrary, where the Commission has sought massive monetary remedies divorced from levels of consumer harm, courts have criticized the FTC's overreach and dismissed the Commission's claims. *See, e.g.*, *FTC v. DirecTV, Inc*., No. 15-CV-01129-HSG, 2018 WL 3911196, at *22–23 (N.D. Cal. Aug. 16, 2018) (noting the "significant possibility that at the close of the evidence the FTC will be unable to establish a reasonable approximation of damages, or that its approximation will be substantially or even entirely rebutted by the Defendant.").

A. Staff's Proposed Penalty Is Unconstitutional

On February 20, 2019, the Supreme Court issued a unanimous decision emphasizing that constitutional "protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority" is a safeguard "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *Timbs v. Indiana*, 586 U.S. __ , No. 17-1091 slip op. at 2 (Feb. 20, 2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010) (internal quotation marks omitted, emphasis in original)). Tracing history back to the Magna Carta, the Court explained that "the protection against excessive fines has been a constant shield throughout Anglo-American history" because "[e]xorbitant tolls undermine other constitutional liberties." *Id*. at 6. Excessive fines, the Court set forth, are particularly pernicious because they can be used "to retaliate against or chill the speech of political enemies" or as a revenue source "in a measure out of accord with the penal goals of retribution and deterrence." *Id*.

Staff's unprecedented penalty proposal, which (as far as we are aware) seeks to extract the largest fine in U.S. history against *any* company by *any* government agency, suffers all of these flaws and cannot withstand constitutional scrutiny. It violates the Due Process Clause and the Eighth Amendment's Excessive Fines Clause. No court would impose such a plainly excessive and disproportionate penalty.

1. Staff's Proposed Penalty Violates the Due Process Clause

The Constitution dictates that a person must "receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty" that may be imposed. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). For that reason, the Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor," as such awards "further no legitimate purpose and constitute[] an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). Staff's proposed penalty offends these foundational principles of due process, "reflect[ing] not an application of law but a decisionmaker's caprice." *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (citation omitted).

For more than 100 years, the Supreme Court has interpreted the Due Process Clause as restricting the amount of penalties the government can impose. In *Waters-Pierce Oil Co. v. Texas*, the Court established the principle that judicial intervention is appropriate where the government imposes fines that are "so grossly excessive as to amount to a deprivation of property without due process of law." 212 U.S. 86, 111 (1909). Ten years later, the Court held that a statutory penalty violates due process when it is "so severe and oppressive as to be wholly disproportioned to the

offense and obviously unreasonable." *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

The Supreme Court has emphasized that the Due Process Clause places limits on civil penalties. In *Gore*, for example, the Court held that "the basic protection against judgments without notice afforded by the Due Process Clause is implicated by civil penalties." 517 U.S. at 574 n.22 (citation omitted). Indeed, Justice Gorsuch cautioned just last year, in an opinion emphasizing the importance of constitutional due process protections in the civil penalty context that, "[o]urs is a world filled with more and more civil laws bearing more and more extravagant punishments . . . . And not only are punitive civil sanctions rapidly expanding, they are sometimes more severely punitive than the parallel criminal sanctions *for the same conduct*." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (citation omitted).

The Supreme Court has established three factors for courts to balance when evaluating whether a penalty violates due process: (1) the "degree of reprehensibility of the defendant's misconduct"; (2) the "disparity" between the "harm suffered" and the "damages award"; and (3) the disparity between the award and "the civil penalties authorized or imposed in comparable cases." *State Farm*, 538 U.S. at 418. Under each of these factors, the FTC cannot justify even a fraction of the penalty it seeks.

First, Facebook's alleged conduct is not "reprehensible" as defined in applicable caselaw, where reprehensibility is typically premised on consumer or public harm or deceitful conduct.[7] In *State Farm*, the Supreme Court laid out a number of considerations relevant to the reprehensibility analysis, including whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." 538 U.S. at 419. And where courts have found a defendant's behavior reprehensible for purposes of a punitive award, it has typically entailed significant bodily injury or death. For instance, in *Gibson v. Moskowitz*, the Sixth Circuit affirmed a punitive damages award of $3 million, two times greater than the compensatory damages award, against a state prison psychiatrist who acted with "deliberate indifference" by leaving an inmate in an overheated room and prescribing him medication that inhibited his body from properly regulating its temperature, leaving the inmate to lose 40 pounds over four days and die of dehydration. 523 F.3d 657, 665 (6th Cir. 2008). Similarly, in *Estate of Moreland v. Dieter*, the Seventh Circuit affirmed a punitive damages award of $27.5 million, with $29 million in compensatory damages, against two sheriff deputies, finding their conduct was "truly reprehensible" where they threw the plaintiff's head against concrete while he was handcuffed, pepper-sprayed him in the face, repeatedly beat him, and then strapped him into a chair with no medical attention until he died. 395 F.3d 747, 757 (7th Cir. 2005).

In contrast, the proposed complaint does not allege that Facebook's conduct resulted in any concrete consumer harm—neither "economic" nor "physical." *State Farm*, 538 U.S. at 419. And,

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[7] The total fine the FTC seeks here is based entirely on a punitive civil penalty theory because it does not allege any consumer harm that would warrant restitution or disgorgement beyond the civil penalty.

in fact, there was no consumer harm at all. As Judge Chhabria observed during a hearing in the multi-district class action consumer litigation related to Facebook's privacy practices, "I'm not buying" the "allegations about economic harm and all that stuff." Tr. 156:3-5, *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 18-md-2843 VC (N.D. Cal. Feb. 1, 2019). Nor is there any allegation that Facebook engaged in "intentional malice, trickery, or deceit." *State Farm*, 538 U.S. at 419. To the contrary, Facebook has demonstrated a consistent good-faith effort to comply with the Order, meeting with Staff numerous times over the past several years and discussing with Staff some of the very statements and practices now alleged to be unlawful. *See infra* Section III.B.2.a.

Second, the proposed penalty is wildly disproportionate to any harm suffered. The Supreme Court has recognized that penalties reflecting "[s]ingle-digit multipliers" of actual harm "are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution." *State Farm*, 538 U.S. at 425. And in certain cases, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* Thus, to be supportable under due process principles, the FTC would need to identify (b)(4); (b)(4); n actual harm caused by Facebook's alleged conduct, which it cannot do. To the contrary, Staff has conceded that the Commission has identified zero dollars in actual harm caused by Facebook in connection with its alleged Order violations.

Third, Staff's proposed penalty vastly exceeds the civil penalties imposed in comparable cases. There is no analog for the penalty Staff seeks to impose, even within the FTC's own enforcement actions. The FTC's largest monetary award to date in an order enforcement action with no alleged consumer harm was only $22.5 million (in the Google matter). Additional examples from the securities and False Claims Act contexts, in which smaller fines were imposed for fraudulent conduct resulting in significant financial harm, confirm the excessiveness of Staff's proposed penalty.[8] Given that the proposed penalty fails to satisfy any of the Supreme Court's three factors, it violates the Due Process Clause.

2. Staff's Proposed Penalty Violates the Eighth Amendment

Staff's proposed penalty also violates the Eighth Amendment prohibition on "excessive fines." U.S. Const. amend. VIII. As the Supreme Court has held, the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993); *see also Gabelli v. SEC*,

[8] *See, e.g.*, *SEC v. Metter*, 706 F. App'x 699, 704 (2d Cir. 2017) (upholding the imposition of disgorgement in the amount of $52 million and a civil penalty for $6 million, finding that "since the disgorgement ordered almost precisely equaled the gains from the illicit conduct to the entity controlled by Metter, the resulting financial penalty was directly keyed to the scope of the wrongdoing"); *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 405-09 (4th Cir. 2013) (concluding that the district court had the authority to accept the relator's offer of remittitur for $24 million, despite the Act's statutory floor of $5,500 per claim which would have led to a penalty of over $50 million, in order to bring the penalty into compliance with the Eighth Amendment); *United States v. Mackby*, 339 F.3d 1013, 1017-19 (9th Cir. 2003) (holding that the imposition of nearly $730,000 in civil penalties for violations of the False Claims Act was not excessive because of the extent of the defendant's fraud, the harm he caused, and the fact that he faced a maximum statutory penalty of $85 million for submitting 8,499 false claims to Medicare for physical therapy services provided with an unauthorized provider number).

568 U.S. 442, 451-52 (2013) (observing that "penalties, which go beyond compensation, are intended to punish, and label defendants wrongdoers"). So long as the monetary penalty sought by the government has a punitive goal, even if paired with remedial measures, the restrictions of the Excessive Fines Clause apply. *See Austin*, 509 U.S. at 609-10. For example, the Supreme Court recently held that disgorgement sought by the SEC constituted a penalty subject to scrutiny under the Excessive Fines Clause, observing that "SEC disgorgement is imposed by the courts as a consequence for violating public laws," and seeks "to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." *Kokesh v. SEC*, 137 S. Ct. 1635, 1638, 1643 (2017). The same is true of Staff's proposed penalty.

In determining whether a fine is excessive, the Supreme Court has adopted the same "gross disproportionality" standard described above, holding that "[i]f the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). Courts have consistently struck down civil penalties as excessive under this standard. *See*, *e.g.*, *United States v. Ramirez*, 421 F. App'x 950, 952 (11th Cir. 2011) (holding that a forfeiture of nearly $1 million was unconstitutionally excessive where the defendant "did not attempt to conceal his wrongdoing and his money was not connected to any illegal activity"); *United States v. Varrone*, 554 F.3d 327, 331 (2d Cir. 2009) (overturning the district court's imposition of forfeiture 40 times greater than the maximum $250,000 fine authorized by statute). Fines imposed on similarly situated defendants are also relevant to determining whether a fine is constitutional under the Excessive Fines Clause. As the D.C. Circuit observed in *Collins v. SEC*, "[a] penalty that is not far out of line with similar penalties imposed on others and that generally meets the statutory objectives seems highly unlikely to qualify as excessive in constitutional terms." 736 F.3d 521, 527 (D.C. Cir. 2013).

For the reasons discussed *supra* III.A.1, the penalty proposed by Staff here is both "grossly disproportional to the gravity" of the alleged conduct, *Bajakajian*, 524 U.S. at 337, and "far out of line with similar penalties imposed on others," *Collins*, 736 F.3d at 527.

B. Staff's Proposed Penalty Violates the FTC's Statutory Authority

Staff's proposed penalty is also unlawful because it far exceeds the FTC's statutory authority. (b)(4); (b)(3):6(f); (b)(7)(E)
(b)(4); (b)(3):6(f); (b)(7)(E)
(b)(4); (b)(3):6(f); (b)(7)(E) And several mitigating factors suggest that a significantly smaller penalty is appropriate here, particularly in light of the FTC's own past practices and statements.

(b)(4); (b)(3):6(f)

As the draft complaint acknowledges, the FTC's civil penalty authority is derived from 15 U.S.C. § 45.[9]

(b)(4); (b)(3):6(f); (b)(3):21(f)

The FTC itself has explained this statutory structure and its applicability even in cases where a per-day calculation yields a lower civil penalty amount than a per-violation approach. For example, in *Daniel Chapter One*, an FTC enforcement action that was litigated to judgment, the FTC explained to the court that where the violation is a "continuing failure to obey," "each day that Defendants failed to comply with the FTC Order should be deemed a separate violation." No. 10-cv-01362, Dkt. 68 at 11 (Apr. 14, 2014). The FTC further explained that although "Defendants would certainly be liable for a much higher penalty amount if the Court were to count each individual [misrepresentation as a] violation," the "'continuing failure' calculation" is appropriate, providing for a "statutory maximum" penalty of $16,000 per "784 days [that defendants] failed to comply with the FTC Order." *Id.* The district court agreed with the FTC's description of its civil penalty authority. *See Daniel Chapter One*, 89 F. Supp. 3d at 148 (noting that "[w]here the violation is a 'continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense.' 15 U.S.C. § 45. Under this provision, each day that the defendants failed to comply with the FTC Order should be deemed a separate violation."); *see also FTC v. PayDay Fin. LLC*, No. 3:11-cv-03017-RAL, Dkt.

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[9] The statute is as follows:

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

114 at 31 (Mar. 26, 2013) (The FTC argued that "[t]he maximum penalty for each violation occurring on or after February 10, 2009 is $16,000 per violation, or per day of a continuing violation.").

Other courts have (b)(4); (b)(3):6(f)
(b)(4); (b)(3):6(f) For example, in *United States v. Cornerstone Wealth Corp., Inc.*, the FTC sought civil penalties in connection with allegations that the defendants violated an FTC consent order prohibiting it from collecting payments from customers before full performance of credit record services. 549 F. Supp. 2d 811, 814 (N.D. Tex. 2008). The court rejected the FTC's penalty calculation because the FTC had "established that in violation of the consent order, from April 2006 until April 2007, defendants continued to receive payments in advance of full performance under guarantee service contracts." *Id.* at 822. Thus, because the "FTCA sets the maximum penalty at $11,000 for each violation, or *in the case of continual violations of the law, $11,000 for each day that the person or company fails to comply* with the law," the court held that it was only "authorized to impose a [per-day penalty] for defendants' continual violations . . . for one year." *Id*. at 821-22 (emphasis added).

Similarly, in *United States v. Alpine Industries, Inc.*, the district court expressed concern that if each of the defendant's non-complying promotional materials were to be "parsed for individual misrepresentations, there would be thousands upon thousands of violations." No. 2:97-cv-509, 2001 WL 587856, at *6 (E.D. Tenn. Apr. 5, 2001), *aff'd*, 352 F.3d 1017 (6th Cir. 2003). But, said the court, the "statute itself provides the answer" by specifying that the "only reasonable way to characterize defendants' violations of the Consent Order [wa]s as a 'continuing failure to obey.'" *Id.* The Sixth Circuit agreed that the continuous violation calculation was required and calculated Alpine's violations over a period of 1,490 days. *Alpine Industries*, 352 F.3d at 1030.

(b)(4); (b)(3):6(f); (b)(3):21(f)

the authority of the FTC. *See, e.g.*, *Google Inc.*, No. 5:12-cv-04177-HRL, Dkt. 30 at 7 (articulating the factors); *United States v. Nat'l Fin. Servs., Inc.,* 98 F.3d 131, 140-41 (4th Cir. 1996) (same); *United States v. Danube Carpet Mills, Inc.,* 737 F.2d 988, 993–95 (11th Cir. 1984) (same); *United States v. Reader's Digest Ass'n Inc*., 662 F.2d 955, 967–69 (3d Cir. 1981) (same); *Boston Sci. Corp.*, 253 F. Supp. 2d at 98 (applying the factors in a case involving the continuous violation of a consent order).

In assessing these factors, courts impose civil penalties that are far lower than the statutory ceiling where one or more factors weighs in the defendant's favor. *See, e.g.*, *Alpine Indus.*, 352 F.3d at 1030 (applying a fine of $1,000 per day rather than the then-applicable statutory maximum of $10,000 after reviewing the record in light of the five factors); *FTC v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 821 (D.S.D. 2013) (finding that the FTC "understated[] the aggressiveness of [its] request" to impose the "maximum penalty of $16,000 per day for a continuing violation" for a total of $3,800,000 when considering the five factors and ultimately imposing a $550,000 penalty). Here, the absence of bad faith (first factor), the lack of any consumer harm (second factor), the absence of any benefits derived by Facebook from the alleged conduct (third factor), and the FTC's prior statements that a $22.5 million penalty was sufficient to vindicate its interests in a similar case against Google (fifth factor), all militate in favor of a penalty that is substantially lower than the statutory maximum.

a. Facebook Did Not Act in Bad Faith

Courts find bad-faith violations of consent orders where defendants "knew—at the time they intentionally violated [the] order—that their conduct was unlawful and yet continued to engage in that conduct." *Daniel Chapter One*, 89 F. Supp. 3d at 149. The absence of bad faith supports a substantially reduced penalty. For example, in *Boston Scientific*, the defendant's conduct shifted over time from good faith to bad faith, eventually "hid[ing] the ball" from the FTC, filing "materially misleading" compliance reports, manufacturing "pretextual ground[s]" to avoid complying with an order, "ignoring the FTC's staff interpretation" of a consent order, and "circumvent[ing] [a] consent decree [to] 'screw over'" a competitor. 253 F. Supp. 2d at 94, 100-01. For the days *before* the company acted in bad faith, the court assessed a penalty of $5,000 per day, less than half the statutory maximum. *Id.* at 101-02. For the days *after* the company started acting in bad faith, the court doubled the penalty to $10,000 per day, still less than the statutory maximum. *Id.*

(b)(4); (b)(3):6(f); (b)(3):21(f)

(b)(4); (b)(3):6(f); (b)(3):21(f)

Far from "hiding the ball," Facebook has sought to work in partnership with the FTC to remain in compliance with the Order at all times. In similar situations, courts have been reluctant to impose any penalties at all. *See FTC v. Lane Labs-USA, Inc.*, No. 00-cv-3174 (DMC), 2011 WL 5828518, at *7 (D.N.J. Nov 18, 2011) (denying the FTC's request for civil penalties in part because the court was "highly concerned" that Lane Labs had "disclosed many of the statements" alleged to be order violations "to the FTC years before the suit was filed"); *FTC v. Lane Labs-USA, Inc.*, No. 2:00-cv-03174 (DMC)(JAD), 2014 WL 268642, at *6-7 (D.N.J. Jan. 23, 2014) (on remand from the Third Circuit, imposing a penalty of only $803,072, far less than the $15 million the FTC requested, due to the same concern that the FTC had failed to "inform[] the Defendants of any issues with their advertisements").

Accordingly, this factor weighs in favor of a civil penalty substantially lower than the statutory ceiling.

b. There Are No Allegations of Consumer Harm

Consumer harm is a key factor in determining the appropriate civil penalty because the penalty amount should be "proportionate to the harm" to the public. *United States v. Prochnow*, No. 1:02-CV-0917-JOF, 2005 WL 8154273, at *7 (N.D. Ga. Dec. 2, 2005) (finding that the average consumers suffered approximately $20 each in "frustration, trouble and expense" due to the alleged conduct to support a penalty amount of $5.4 million). In *Boston Scientific*, the court described harm to consumers as the "most poignant concern" in its determination that a penalty of $7,040,000 was appropriate, where the defendant's order violation delayed consumer access to an innovative medical device. 253 F. Supp. 2d at 100; *see also Daniel Chapter One*, 89 F. Supp. 3d at 151-52 (the "public harm in this case is significant" because consumers "followed the defendants' advice, stopping conventional proven [cancer] treatments to use the defendants' products," which misrepresented that they would cure cancer). Where there is no evidence of economic harm to consumers, or where it is "difficult to place a dollar value" on the harm, this factor militates in favor of a civil penalty that is substantially lower than the statutory maximum. United States Reply to Amicus Brief, *Google Inc.*, No. 5:12-cv-04177-SI, Dkt. 15 at 9 (FTC/DOJ brief defending the adequacy of a $22.5 million civil penalty amount, where the alleged order violation did not result in quantifiable harm to consumers).

(b)(4); (b)(3):6(f)

(b)(4); (b)(3):6(f); (b)(7)(E)

(b)(4); (b)(3):6(f); (b)(7)(E)

Further, as described above in Section II, Facebook is prepared to prove with expert analysis that, in fact, no consumer harm occurred as a result of the alleged order violations. As such, this factor supports a civil penalty amount substantially lower than the statutory maximum.

c. Facebook Did Not Profit From the Alleged Violations

This factor focuses on whether the violations resulted in pecuniary gain for the defendant. Where the evidence shows that the defendant did not derive significant monetary gains from its violations, a reduced penalty is appropriate. For example, in *Google*, the FTC and the court cited

the absence of monetary gain as strongly supporting imposition of a modest settlement amount. *See Google Inc.*, No. 5:12-cv-04177-SI, Dkt. 30 at 7-8. The court explained that the "complaint never alleged that [the violation] yielded significant revenues for Google." *Id.* at 7.

(b)(4); (b)(3):6(f); (b)(7)(E)
(b)(4); (b)(4); (b)(3):6(f); (b)(3):21(f)
(b)(4); (b)(3):6(f); (b)(3):21(f)
(b)(4); (b)(3):6(f); (b)(3):21(f) Thus, this factor also supports a civil penalty far lower than the statutory maximum.

d. A Penalty Far Below the Statutory Maximum Would Vindicate the FTC's Authority

This factor recognizes that one purpose of the FTC's civil penalty authority is to ensure that companies comply with FTC orders and take compliance seriously.

In 2012, when settling similar allegations against Google, the FTC not only determined, but strenuously defended, that a fine of $22.5 million was sufficient to vindicate its authority and send "an unequivocal message to other companies under order that the FTC will vigorously enforce its orders and that a defendant's failure to comply carries a significant cost." *See Google Inc.*, No. 5:12-cv-04177-SI, Dkt. 15 at 6. Regardless, no factor considered by courts or permitted by statute allows the FTC to inflate its fine beyond the statutory maximum even when the FTC wishes to send a message or vindicate its authority.

IV. CONCLUSION

Staff's proposed penalty is unconstitutional, unlawful, and unsupported by the allegations in the draft complaint. No court would entertain such a penalty, and neither will Facebook.