

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff

v.

FACEBOOK, Inc.,
a corporation,

Defendant.

Case No. 19-cv-2184

**PLAINTIFF’S CONSENT MOTION
FOR ENTRY OF STIPULATED
ORDER FOR CIVIL PENALTY,
MONETARY JUDGMENT, AND
INJUNCTIVE RELIEF AND
MEMORANDUM IN SUPPORT**

On July 24, 2019, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (“FTC”), filed its Complaint for Civil Penalties, Injunction, and Other Relief against Facebook, Inc. (“Facebook”). The parties have reached a settlement of the Complaint’s allegations and memorialized those terms in the attached proposed Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief (“Stipulated Order”). The Stipulated Order requires Facebook to pay a \$5 billion civil penalty and imposes significant injunctive relief, primarily in the form of an amended administrative order that will be entered by the FTC.

The United States respectfully requests that, as soon as practicable, this Court enter the Stipulated Order and effectuate the comprehensive settlement negotiated by the parties. As discussed below, the Stipulated Order is fair to its beneficiaries and is consistent with the public interest, especially for the approximately 210 million American consumers with Facebook accounts and the millions more who interact daily with Facebook-owned companies.

The United States has conferred with Facebook regarding this motion. Facebook consents to the request for the Court to enter the Stipulated Order.

BACKGROUND

Facebook operates a website (www.facebook.com) and smartphone application (“app”) that allow Facebook users to connect with “Friends.” In 2012, Facebook settled allegations that its information-sharing practices and privacy settings were deceptive trade practices under Section 5 of the FTC Act by consenting to entry of an FTC administrative order (the “2012 Order”). In the 2012 Order, Facebook agreed, among other things, not to “misrepresent in any manner, expressly or by implication, . . . the extent to which a consumer can control the privacy of any covered information maintained by [Facebook] and the steps a consumer must take to implement such controls; [and] the extent to which [Facebook] makes or has made covered information accessible to third parties.” Order §§ I.B, C, *In the Matter of Facebook, Inc.*, Dkt. No. C-4365, 2012 FTC LEXIS 135 (July 27, 2012). Facebook also agreed to maintain a privacy program reasonably designed to address the risks of giving app developers access to user data.

The Complaint here alleges that Facebook violated the 2012 Order in multiple ways: (1) by maintaining deceptive settings that misled users about how to protect their information from being shared by Facebook with third-party developers of apps used by their Facebook Friends (Compl. Counts 1, 2); (2) by promising to stop giving app developers access to the data of app users’ Friends starting in 2014, when in fact many app developers continued to have such access past that date, with access for some lasting through June 2018 (*id.* Count 3); (3) by inconsistently enforcing its privacy policies against app developers who violated those policies, taking less severe action against app developers that generated significant revenue for Facebook (*id.* Count 4); and (4) by implying to approximately 60 million users that they could “turn on” facial-recognition technology associated with their posted photos and videos when, in fact, that technology was “on” for those users by default (*id.* Count 5). In Count 6, the Complaint further alleges that Facebook violated Section 5 of

the FTC Act by using phone numbers provided to enable two-factor authentication—an enhanced account-security tool—for advertising purposes.

Following extensive negotiations, the parties have settled the Complaint’s allegations by the Stipulated Order. In addition to imposing a \$5 billion civil penalty—the largest civil penalty ever awarded in an FTC enforcement action—the Stipulated Order requires Facebook to consent to the reopening of the FTC’s earlier administrative proceeding against it so the FTC can replace the 2012 Order with an Amended Order, which is Attachment A to the Stipulated Order. The Amended Order, which would remain in effect for 20 years, contains substantial new compliance terms drafted to ensure that Facebook and Facebook-controlled companies, such as WhatsApp and Instagram, improve their data-privacy practices, account for privacy concerns on an ongoing basis, and have regular reporting obligations. The Stipulated Order also gives the Department of Justice and the FTC authority to monitor and enforce Facebook’s compliance with the Amended Order.

ARGUMENT

This Court’s “role in evaluating the reasonableness of a proposed consent order is limited.” *See Citizens for a Better Env’t v. Gorsuch*, 718 F.2d 1117, 1125-26 (D.C. Cir. 1983). As a district court has “power to enter a consent decree without first determining that a statutory violation has occurred,” *id.* (citing *Swift & Co. v. United States*, 276 U.S. 311, 327 (1928)), its duty is only to “satisfy itself of the settlement’s ‘overall fairness to beneficiaries and consistency with the public interest,’” *id.* (quoting *United States v. Trucking Emps., Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977)). In approving a settlement, this Court “need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy.” *In re Idaho Conservation League*, 811 F.3d 502, 515 (D.C. Cir. 2016) (quoting *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)). Rather, this Court “need only determine that the settlement is

fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.” *Id.*

The proposed settlement memorialized in the Stipulated Order is fair, adequate, reasonable, and appropriate. The proposed settlement has two main components: a civil penalty award and injunctive relief imposing new compliance terms on Facebook. Each component secures strong, pro-consumer relief and reflects months of intense negotiations following a detailed investigation of Facebook’s conduct.

The negotiated civil penalty is the largest civil penalty ever obtained by the United States on behalf of the FTC—the previous record was \$168 million, or only 3.4 percent of the proposed settlement here. Indeed, the civil penalty is the second largest obtained by the United States in any context. The FTC tied its calculation of the range of civil penalties it sought in this matter to the public’s approximately 900 million views of Facebook webpages containing allegedly deceptive statements about data privacy, equating each view to an alleged violation of the 2012 Order. The resulting settlement obtains a penalty of approximately \$5.56 per alleged violation, an amount that is commensurate with—in fact, greater than—civil penalties obtained in contested cases similarly involving millions of FTC Act violations by large corporations. *See United States v. Dish Network*, 256 F. Supp. 3d 810, 991 (C.D. Ill. 2017) (\$168 million civil penalty on 66 million FTC Act violations, or \$2.54 per violation); *United States v. Reader’s Digest Ass’n, Inc.*, 662 F.2d 955, 959-60 (3d Cir. 1981) (affirming \$1,750,000 civil penalty for 17,940,521 violations of FTC consent order, or approximately \$0.10 per violation).

The injunctive relief set forth in the Stipulated Order and attached Amended Order also is historic in its scope and significance to American consumers. Structured in a manner consistent with the government’s broad discretion to determine the most advantageous form for securing

negotiated relief, *see United States v. Fokker Servs. B.V.*, 818 F.3d 733, 744 (D.C. Cir. 2016) (consent orders should be reviewed by the district court in a manner that “avoid[s] encroaching on the Executive’s core discretion over enforcement decisions”), the injunctive-relief provisions articulate specific but flexible compliance terms designed to ensure that Facebook and its controlled companies protect user data and offer clear user notifications and controls. For example, the injunctive-relief provisions:

- expand protections for consumer information, including any information for which there is a Facebook privacy setting, as well as sensitive personal and financial information;
- prohibit misrepresentations regarding the “use” of protected information;
- require Facebook to select an independent assessor, approved by the government, to monitor its compliance with the Amended Order;
- require Facebook to submit to the government privacy-review reports for every new or modified product, service, or practice that it considers implementing;
- require Facebook to create an Independent Privacy Committee of its Board of Directors, with members designated through an independent nominating committee established by Facebook;
- mandate annual CEO certifications of compliance with the Amended Order;
- require Facebook to submit a prompt written report to the government and the independent assessor about any incident in which the information of 500 or more users was accessed by a third party in violation of Facebook’s policies;
- add important recordkeeping requirements related to third-party access to protected user information; and

- empower the government to conduct full discovery to investigate concerns regarding non-compliance with the injunctive relief.

Taken as a whole, the proposed settlement is thus fair, adequate, meaningful, and represents a significant achievement for American consumers. It addresses the issues that gave rise to the FTC investigation in an effective and efficient manner, obtaining immediate relief and a massive civil penalty. The injunctive provisions of the settlement also are carefully calibrated to ensure the privacy of Facebook users' data over the course of the next two decades, to prevent further incidents of unauthorized data sharing as much as possible, and to allow for the taking of speedy and adequate measures if user data is inadvertently compromised. These provisions, which do not exist today, are plainly in the public interest, as they directly affect the privacy choices of 210 million Americans with Facebook accounts and millions more who interact with Facebook-controlled companies. *See United States v. W. Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990) (holding that the district court's function in deciding whether to approve a consent decree "is not to determine whether the resulting array of rights and liabilities is the one that will best serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest" (emphasis in original)). At the very least, the negotiated terms of the proposed settlement are sufficient to allow this Court to enter the Stipulated Order. *See Fokker Servs.*, 818 F.3d at 743 (holding that "a district court should not 'reject a consent decree simply because it believes the [g]overnment could have negotiated a more exacting decree,' *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1237 (D.C. Cir. 2004), or because it believes the government 'failed to bring the proper charges,' *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 297 (2d Cir. 2014)").

The settlement negotiated through the Stipulated Order also avoids a "protracted examination of the parties' legal rights," and both the parties and the public will "benefit from the

saving of time and money that results from the voluntary settlement of litigation.” *Citizens for a Better Env’t*, 718 F.2d at 1126. Having already undertaken a lengthy investigation and period of negotiation, the parties support entry of the Stipulated Order.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court enter the attached Stipulated Order.

Respectfully submitted:

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