UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. DANIEL CHAPTER ONE, and JAMES FEIJO, Defendants.	)	Civil No. 1:10CV01362 EGS

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF ORDER FOR EQUITABLE MONETARY RELIEF, CIVIL PENALTIES, AND INJUNCTIVE RELIEF

In their response to the Government's Motion for Entry of Order for Equitable Monetary Relief, Civil Penalties, and Injunctive Relief, Defendants (1) assert that broader injunctive relief is inappropriate, (2) claim that equitable monetary relief is inappropriate, (3) argue that the Court should not impose substantial civil penalties, (4) assert that the civil penalty the Government seeks would violate the Eighth Amendment, and (5) ask that the Court stay these proceedings. The Government addresses Defendant's first four points herein, and files a separate response to Defendants' request that this matter be stayed. As discussed in detail below, Defendants' arguments ignore both the facts of this case and established law, and should be rejected by the Court.

I. Broader Injunctive Relief Should be Imposed

Defendants' assert that they have complied with the FTC order since May 24, 2012, and that no further injunctive relief is necessary. It is well established that current compliance does not preclude the entry of a permanent injunction, and a permanent injunction is justified if "there exists some cognizable danger of recurrent violation" or "some reasonable likelihood of future violations." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (internal citations omitted); *see also Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011) ("[A] defendant's 'voluntary cessation of allegedly illegal conduct does not deprive [a court] of power to hear and determine the case.'") To predict the likelihood of future violations, courts consider "the totality of the circumstances surrounding the defendant and his violations[,]" including: (1) the degree of scienter involved; (2) whether the infraction was isolated or recurrent; (3) whether the defendant recognizes "the wrongful nature of his conduct;" (4) "the sincerity of his assurances against future violations[;]" (5) the degree of consumer harm caused by the Defendants; and (6) "whether defendants are positioned to commit future violations[.]" *SEC v. Murphy*, 626 F.2d 633, 655 (9th Cir. 1980); *FTC v. Medical Billers Network, Inc.*, 543 F.Supp.2d 283, 323 (S.D.N.Y. 2008).

Here, based on Defendants' past conduct, there is every reason to expect that, if given the opportunity, they will resume their illegal conduct and continue to sell their products in violation of the FTC Order. Defendants were well aware of what they were required to do to comply, yet deliberately chose to ignore the FTC Order. They violated the order in numerous ways, every single day, for 784 days. Defendants have made no assurances that they will comply with the FTC Order in the future, and took affirmative steps to conceal their activities

and hide their illegal conduct from the Government during the pendency of this lawsuit. The degree of consumer harm that resulted from Defendants' conduct is high, and because Defendants appear to still be selling their various herbal remedies online, they are well positioned to commit violations in the future. Consideration of Defendants' conduct demonstrates that the imposition of a permanent injunction is justified if there is clearly a cognizable danger that Defendants will return to their past conduct.

The injunctive relief requested by the Government would: (1) broaden coverage of the FTC Order provisions to ban the Defendants from selling any dietary supplement and from marketing any product or service with disease claims; and (2) enhance the compliance monitoring provisions to help the FTC guard against order violations in the future. The bans proposed by the Government are reasonable, are based upon Defendants' past conduct, and are suitably tailored to curtail future law violations.

It is appropriate for courts to order broad "fencing in" injunctive relief in actions brought under the FTC Act. *See FTC v. Think Achievement Corp.*, 144 F.Supp.2d 1013, 1016 (N.D. Ind. 2000). Indeed, the Supreme Court has held that, when entering orders, the FTC "cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *see also Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1154 (9th Cir. 1984); *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 429 (1957). Similarly, federal courts have the power not only to enjoin specific violations, but to fashion orders to prevent the same unlawful ends. *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132-33 (1969); *United States v. Midwest Pharms., Inc.*, 890 F.2d 1004, 1007 (8th Cir. 1989).

The Defendants have a long history of violating the FTC Act, the FTC Order, and numerous court orders, and as a result, the final order in this case should fence in these known violators so that they are unable to act with such impunity and disregard in the future. The ban language proposed by the Government creates a simple, bright line test that the Court will be able to use to address any issues concerning Defendants' future order compliance. The stricter compliance-monitoring provisions merely update and supplement provisions in the FTC Order. These provisions contain standard language that is routinely included in federal court orders in FTC cases, and will provide a stronger oversight mechanism to better ensure that Defendants do not return to their recidivist tendencies.

In sum, the proposed modifications would better serve the FTC Order's purpose of protecting consumers from Defendants' deceptive advertising tactics. The relief requested by the Government is not moot, and the United States respectfully requests that that Court enter a final order containing the injunctive relief proposed by the Government in the Motion for Entry of Order for Equitable Monetary Relief, Civil Penalties, and Injunctive Relief.

II. Equitable Monetary Relief Should Be Imposed

Defendants ask that this Court break from well-established case law and declare – as no court has ever done – that district courts lack the authority to order equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Defendants' argument is premised on their belief that these opinions are all wrong, and that the Court may only issue temporary restraining orders, preliminary injunctions, or permanent injunctions under the statute. As discussed below, Defendants' analysis is flawed.

Relying on Supreme Court authority discussed below, the Fifth, Ninth, Eighth, Seventh, and Eleventh Circuits have held that Section 13(b) grants the FTC access to the full range of a

district court's equitable powers, including the ability to obtain monetary relief. *See, e.g.*, *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Sw. Sunsites, Inc*., 665 F.2d 711, 718–19 (5th Cir. 1982). Courts in this district along with other district courts have similarly held that Section 13(b) authorizes monetary relief. *See, e.g., FTC v. Cantkier*, 767 F. Supp. 2d 147, 160 (D.D.C. 2011); *FTC v. Swish Mktg*, No. C 09- 03814 RS, 2010 WL 653486, at *6-10 (N.D. Cal. Feb. 22, 2010); *FTC v. Davison Assocs.*, 431 F. Supp. 2d 548, 560 (W.D. Pa. 2006); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 533 (S.D.N.Y. 2000); *FTC v. Mylan Labs, Inc.* 62 F. Supp. 2d 25, 37 (D.D.C. 1999); *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 261-62 (E.D.N.Y. 1998).

Courts authorizing equitable monetary relief under Section 13(b), rely on *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960), in support of a district court's broad discretion to fashion appropriate equitable remedies to violations of the FTC Act. *See, e.g.*, *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111–13 (9th Cir. 1982). In *Porter*, the Supreme Court held that when a district court's equitable jurisdiction is invoked, all the inherent equitable powers of the district court are available for the proper and complete exercise of that jurisdiction, unless a statute—by clear and valid legislative command or by necessary and inescapable inference—restricts the district court's equitable powers. *Porter*, 328 U.S. at 397–98. The Court further held that when the public interest is involved, these equitable powers assume an even broader and more flexible character than when only a private controversy is presented. *Id.* at 398. Specifically, the Supreme Court ruled in *Porter* that a district court could order restitution pursuant to the

Emergency Price Control Act of 1942, which authorizes a permanent or temporary injunction, restraining order, or other order. *Id.* at 403. The Court expanded this holding in *Mitchell* and found that a district court could order reimbursement for lost wages caused by a violation of the Fair Labor Standards Act, which authorizes courts to restrain violations but does not contain the "or other order" language found in the *Porter* statute. *See Mitchell*, 361 U.S. at 289–96 ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes.").

Applying the reasoning of *Porter* and *Mitchell* to the FTC Act, courts consistently have held that they are able to grant monetary relief under Section 13(b) of the Act. *See, e.g.*, *Singer*, 668 F.2d at 1111–13. *Porter* and *Mitchell* have been invoked and relied on repeatedly for the past half-century and continue to represent valid law in this regard. *See, e.g.*, *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 496 (2001) ("when district courts are properly acting as courts of equity, they have discretion [to fashion remedies] unless a statute clearly provides otherwise. . . . Such discretion is displaced only by a 'clear and valid legislative command.'") (*quoting Porter*, 328 U.S. at 398).

Defendants rely on *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), in a futile attempt to limit the application of *Porter* to the FTC Act. In *Philip Morris*, a divided panel of the D.C. Circuit held that disgorgement was not available for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") because: (1) the specific statutory language "to prevent and restrain" limited courts to ordering forward-looking remedies aimed at preventing future violations of the Act; and (2) the specific statute enumerated a series

of remedies, which the D.C. Circuit concluded were forward-looking. *Philip Morris*, 396 F.3d at 1198–202.

This argument fails because, in contrast to RICO, Section 13(b) of the FTC Act contains neither the "prevent and restrain" statutory grant nor the list of remedies that the D.C. Circuit determined to be forward-looking. *See* 15 U.S.C. § 53(b). In *Rx Depot*, the Tenth Circuit rejected an analogous argument. The defendants in that case argued that, in light of *Philip Morris*, disgorgement is unavailable under the FDCA. *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1058–59 (10th Cir. 2006). The court rejected their argument, reasoning that (1) the statutory grant in the FDCA is analogous to that at issue in *Mitchell*, not in *Philip Morris*; and (2) the FDCA does not enumerate only forward-looking remedies. *Id.* at 1058–61. Indeed, as with the FDCA, courts consistently have found the text of Section 13(b) to be analogous to the provisions at issue in *Porter* and *Mitchell*, and have held that it allows for the award of monetary relief.

Finally, Defendants ignore the fact that Congress has endorsed the use of Section 13(b) to award equitable monetary relief. When the interpretation of a statute "'has been fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *See United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *see also N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982); *United States v. Chestman*, 947 F.2d 551, 560 (2d Cir. 1991). Here, the FTC's authority to obtain equitable monetary relief under 13(b) has been acknowledged explicitly, "Section 13 of the FTC Act authorizes the FTC to file suit to enjoin any violation of the FTC [Act]. The FTC can go into court ex parte to obtain an order freezing assets, and *is also able to obtain consumer redress*." S.

Rep. No. 103-130, at 15–16 (1993) (emphasis added); *see* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, 108 Stat. 1691, at § 10 (codified as amended at 15 U.S.C. § 53) (expanding venue and service of process provisions). Additionally, the FTC routinely testifies before Congress and issues reports highlighting the amount of monetary relief it has obtained.

In sum, it is well established that equitable monetary relief is available under Section 13(b) of the FTC Act, , and Defendants' reliance on *Phillip Morris* is misplaced. Additionally, as Congress is well aware that the statute is being used for this purpose, and has not taken any steps to amend the statute to correct that interpretation, the legislative intent is clear. Defendants' argument against equitable monetary relief should be rejected, and the Government respectfully requests that equitable monetary relief in the amount of $1,345,832.43 be awarded in this case.

III. The Civil Penalty Sum Requested by the Government is Appropriate

In their response, Defendants discuss the civil penalties factors: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the desire to eliminate the benefits derived by the violations; and (5) the necessity of vindicating the authority of the FTC. *See United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967 (3d Cir. 1981); *United States v. Danube Carpet Mills, Inc.*, 737 F.2d 988, 994 (11th Cir. 1984). Defendants' analysis of these factors attempts to rewrite history and ignores relevant case law. Defendants' arguments should be rejected and a civil penalty should be imposed in the amount of $3,528,000.

First, Defendants claim that they acted in good faith because they believed that they law was on their side and their conduct "was an extension of their heartfelt religious beliefs." However "heartfelt" Defendants' beliefs may be, however, the standard for determining whether

a violation occurred in good or bad faith has nothing to do with whether a party believes they are correct, but instead, whether the violation was "willful and deliberate[.]" *United States v. Phelps Dodge Indus.*, 589 F.Supp. 1340, 1363 (S.D.N.Y. 1984). The facts in this case clearly established that the Defendants did not act out of mistake or negligence. They were well aware of what was required under the FTC Order, and they made the deliberate decision to violate the FTC Order. They refused to comply until they faced the threat of imminent incarceration. This conduct does not – in any way – satisfy the legal standard for good faith.

Second, Defendants argue that the Government has to provide substantive evidence of injury to the public to satisfy the second prong of the civil penalty analysis. The Government described three ways in which the public was harmed by Defendants: (1) financial injury incurred by those who purchased the products; (2) injury caused by Defendants' actions in publicizing deceptive information about their products and failing to send the corrective notice to purchasers; and (3) the injury caused by Defendants' instructions to stop using conventional, proven treatments and instead use Defendants' products. Defendants assert that the Government has not met its burden with regard to the second and third categories of injury to the public detailed above. This argument ignores all relevant case law on this topic, which states that "the government need not prove actual harm to consumers in order to assess penalties." *United States v. Nat'l Fin. Svcs.*, 98 F.3d at 140 (*citing United States v. Reader's Digest Ass'n, Inc.*, 494 F.Supp. 770 (D. Del. 1980)). Instead, harm can be determined from looking at the natural consequences of a defendant's conduct. *See, e.g., United States v. Prochnow*, No. 07-10273, 2007 WL 3082139, at *4 (11th Cir. Oct. 22, 2007) (finding injury based on the payments made as well as "the frustration, inconvenience, and expense involved in cancelling their subscriptions"); *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 969 (3d Cir. 1981) (when

materials "having a capacity to confuse or deceive [reach] the public . . . that in and of itself causes harm and injury"); *National Financial Svcs.*, 98 F.3d at 140 (the conduct was "likely to be intimidating to customers, and cause distress and anxiety"). The harm the Government describes in the Motion for Entry of Order for Equitable Monetary Relief, Civil Penalties, and Injunctive Relief is the commonsense result of Defendants' conduct, and no additional proof of harm is necessary.

Third, Defendants claim that if the court imposes equitable monetary relief, no civil penalty should be imposed. This argument treats civil penalties and equitable monetary relief as mutually exclusive remedies. This is simply not correct. *See Prochnow*, 2007 WL 3082139, at *3 (affirming order of district court assessing civil penalties and disgorgement); *FTC v. PayDay Fin. LLC*, No. 11CV3017, 2013 WL 5442387, at *17 (D.S.D. Sept. 30, 2013) (imposing disgorgement remedy, and postponing a determination on an appropriate civil penalty until after trial); *FTC v. Navestad*, No. 09CV6329T, 2012 WL 1014818, at *9 (W.D.NY Mar. 23, 2012) (entering judgment that included $20,000,000 in civil penalties and $1,105,078.96 as disgorgement). The third factor courts consider when entering a civil penalty is the need to eliminate any benefits a defendant received from the violation, and this factor is completely separate from any consumer redress or disgorgement ordered by the Court. Indeed, because a civil penalty should "be more than . . . an acceptable cost of doing business," the civil penalty should be higher than the amount the Defendants benefited and the amount of any consumer redress award. *FTC v. Onkyo U.S.A. Corp.*, No. 95CV1378, 1995 WL 579811, at *4 n.6 (D.D.C. Aug. 21, 1995). As discussed in the Government's Motion, the higher penalty of $3,528,000 is appropriate.

Defendants respond to the fourth factor by asserting that there is no need to "vindicate the authority of the FTC" because they have been complying with the FTC Order since the contempt proceeding and because they have been "made an example of in both civil and criminal proceedings." These arguments actually reinforce the importance of this factor. "Since the Commission has no plenary power to enforce its own orders, it must enlist the aid of the federal district courts for that purpose. The penalty to be assessed must therefore be a significant one." *FTC v. Consol. Foods Corp.*, 396 F. Supp. 1353, 1357 (S.D.N.Y. 1975). The Defendants' statement demonstrates that their compliance is the result of this action and the criminal proceeding, and not the FTC Order itself. This statement reinforces the necessity of imposing a substantial penalty to deter other would-be violators from following this path. *See United States v. Mac's Muffler Shop, Inc.*, No. C85-138R, 1986 WL 15443, at *10 (N.D. Ga. Nov. 4, 1986) ("If the regulated community perceives that violations of the law are treated lightly, the government's regulatory program is subverted."). A substantial penalty is necessary in order to vindicate the authority of the FTC, regardless of the fact that Defendants agreed to comply after being threatened with coercive incarceration in this case.

Finally, Defendants fail to address the ability to pay factor, stating that doing so would compromise their Fifth Amendment privilege. This argument ignores the fact that Defendant Daniel Chapter One cannot claim the Fifth Amendment. *See* Minute Order dated May 5, 2013; *United States v. Dean*, 989 F.2d 1205, 1207 (D.C. Cir. 1993) ("corporations and other collective entities are not entitled to Fifth Amendment protections."). Both Defendants participated in discovery related to their ability to pay, responding to interrogatories, providing documents, and answering deposition questions. The facts identified via the discovery process support the relief requested in the Government's Motion for Entry of Order for Equitable Monetary Relief, Civil

Penalties, and Injunctive Relief. Nonetheless, if Defendants have identified an error in the Government's math or arguments, they are free to introduce the records they provided in the discovery process to demonstrate that error.

Defendants are attempting to draw a distinction between providing a sworn interrogatory or deposition answer and putting that same answer in a filing before the Court. There is no basis for this distinction. The factual record has already been created in this case, and Defendants can certainly quote the deposition transcript or attach a spreadsheet to advocate for an alternate ability to pay calculation should any facts support a different sum. Instead, Defendants have chosen to hide behind the Fifth Amendment when there is no reason – or basis – for them to do so. A defendant is "free to invoke the Fifth Amendment in civil cases, but the court is equally free to draw adverse inferences from their failure of proof." *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998); *SEC v. Whittemore*, 691 F. Supp. 2d 198, 206 (D.D.C. 2010). By invoking the Fifth Amendment, Defendants have failed to present any evidence to refute the facts before the Court. It is therefore appropriate for the Court to draw an adverse inference that the Government's ability to pay calculation is correct.

As discussed fully in the Government's Motion for Entry of Order for Equitable Monetary Relief, Civil Penalties, and Injunctive Relief, the five civil penalties factors demonstrate that imposing a significant civil penalty is appropriate in this case. As a result, the Government requests that the Court enter a civil penalty of $3,528,000, which equals a $4,500 penalty for every day in which Defendants failed to comply with the FTC Order.

IV. A Civil Penalty of $3,528,000 Would Not Violate the Eighth Amendment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This clause has been

interpreted to limit "the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (*quoting Austin v. United States*, 509 U.S. 602, 609-610 (1993)). While Eighth Amendment claims are typically associated with criminal prosecutions, "civil sanctions may fall within the scope of the amendment." *Korangy v. U.S. Food & Drug Admin.*, 498 F.3d 272, 277 (4th Cir. 2007) (internal citations omitted). A two-part analysis is therefore conducted: first, the Court must determine whether the particular a civil penalty under the FTC Act is a "punishment," and only if the answer to that question is affirmative would the Court then conduct a proportionality examination to determine if the penalty complied with the requirements of the Excessive Fines Clause.

To determine whether a civil penalty under the FTC Act is a punishment, the court must first look at any indications of legislative intent. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (*citing United States v. Ward*, 448 U.S. 242, 248 (1980)). The Court must then consider various factors, including:

> (1) [w]hether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

Hudson, 522 U.S. at 99-100 (internal quotations omitted) (*quoting Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)). These factors are to "'be considered in relation to the statute on its face' . . . and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 100 (*citing Ward* 448 U.S. at 249).

The legislative intent behind the civil penalties provision of the FTC Act is clear. The statute itself provides for "a civil penalty" payable to the United States that "may be recovered in a civil action." 15 U.S.C. § 45(*l*). This section also contains language discussing the standard civil remedies of injunctions "and further equitable relief" that may be appropriately entered in a suit brought pursuant to this statute. *Id.* This language demonstrates a clear legislative intent that civil penalties under the FTC Act are just that: *civil* penalties. *See, e.g.*, *Phelps Dodge Indus.*, 589 F.Supp. at 1358 ("[t]he civil penalty is not designed to punish or to assign moral culpability, but to deter."); *FTC v. Capital City Mortg. Corp.*, 321 F.Supp.2d 16, 22 (D.D.C. 2004) (The FTC Act is "a remedial, consumer protection statute[.]"). As these courts have recognized, civil penalties under the FTC Act are not intended to be punitive or retributive. Instead, they are intended to compensate society generally and motivate compliance.

The next step of the analysis confirms this conclusion. For example, the sanction does not involve a restraint or affirmative disability, no finding of *scienter* is required in 15 U.S.C. § 45(*l*), and violating an order of the Federal Trade Commission is not a crime. "Similarly, 'the payment of fixed or variable sums of money [is a] sanction which ha[s] been recognized as enforceable by civil proceedings since the original revenue law of 1789." *Hudson*, 522 U.S. at 104 (*quoting Helvering v. Mitchell*, 303 U.S. 391, 399 and n.2 (1938)). The clear "alternative purpose" of this provision is nonpunitive in nature, and is to compensate society generally for violations of the FTC Act and motivate compliance with orders of the Federal Trade Commission. *See Korangy*, 498 F.3d at 277 ("Civil fines serving remedial purposes do not fall within the reach of the Eighth Amendment"). The civil penalties remedy is not excessive in relation to this purpose.

Indeed, the only factor that weighs toward a finding that it is a punishment is the fact that the operation of this statute promotes deterrence. However, this one factor is certainly not dispositive, as the Supreme Court has "recognized that all civil penalties have some deterrent effect." *Hudson*, 522 U.S. at 102 (*citing Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777 n.14 (1994); *United States v. Ursery*, 518 U.S. 267, 284-85 n.2 (1996)). As a result, "the mere presence of [deterrence as a] purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" *Hudson*, 522 U.S. at 105 (*quoting Ursery*, 518 U.S. at 292). Consideration of the legislative intent and the seven factors demonstrates that civil penalties under the FTC Act are not a punishment.

Because civil penalties under the FTC Act are not a punishment, the Court should not proceed to the second step of the analysis. However, even if the Court were to find that a civil penalty under the FTC Act is a punishment, the penalty the Government requests in this case does not run afoul of the Excessive Fines Clause. The proportionality examination required by the Excessive Fines Clause requires the Court to "compare the amount of the [civil penalty] to the gravity of the defendant's offense" and consider whether the sum "is grossly disproportional to the gravity of the defendant's offense." *Bajakajian*, 524 U.S. at 336-37.

This assessment is redundant here, because any penalty entered by the Court will be entered with consideration of the five factors: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the desire to eliminate the benefits derived by the violations; and (5) the necessity of vindicating the authority of the FTC. *See Reader's Digest Ass'n*, 662 F.2d at 967 (3d Cir. 1981); *Danube Carpet Mills, Inc.*, 737 F.2d at 994. These factors provide their own proportionality examination, and effectively prevent the imposition of a civil penalty that is grossly disproportional to the defendant's conduct. As

detailed in the Government's Motion for Entry of Order for Equitable Monetary Relief, Civil Penalties, and Injunctive Relief, these factors show that the Defendants acted in bad faith, that they injured the public in several ways, that they are able to pay a civil penalty, that it is necessary to eliminate the benefits Defendants derived from the violations, and it is necessary to vindicate the authority of the FTC. The balance of these factors demonstrates that imposing a civil penalty of $3,528,000 is appropriate in this case, and this sum is in no way disproportional to Defendants' conduct.

V. Conclusion

Defendants arguments should be rejected, as broader injunctive relief is appropriate, equitable monetary relief is a well-established remedy under 15 U.S.C. § 53(b), the civil penalties factors demonstrate that a civil penalty award of $3,528,000 is appropriate, civil penalties under the FTC Act are not a punishment, and the civil penalty requested by the Government would not run afoul of the Eighth Amendment. For the reasons discussed in the Motion for Entry of Order for Equitable Monetary Relief, Civil Penalties, and Injunctive Relief, the United States requests that the Court enter a final order that includes injunctive relief, equitable monetary relief in the amount of $1,347,237.33, and a civil penalty award of $3,528,000.

Date: June 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 6, 2014, I caused a true and correct copy of the above-entitled PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR ENTRY OF ORDER FOR EQUITABLE MONETARY RELIEF, CIVIL PENALTIES, AND INJUNCTIVE RELIEF to be served via the Court's Electronic Case Filing system to counsel for the Defendants as follows:

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