Respondent Meta Platforms, Inc.'s Materials for Oral Argument

In the Matter of Facebook, Inc., Docket No. C-4365

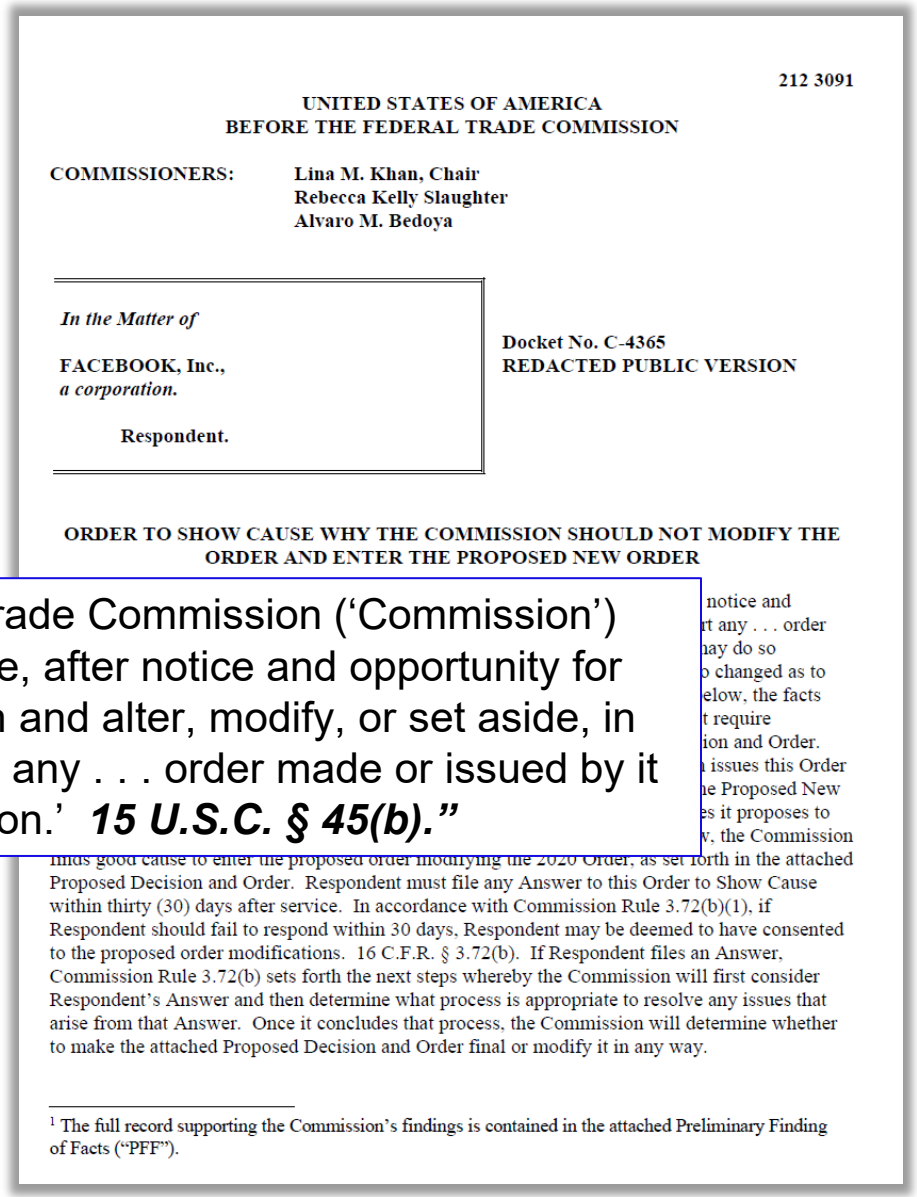
November 12, 2024

Section 5(b) Does Not Authorize Modification of the Order

01

The Order to Show Cause Is Predicated on the Commission's Section 5(b) Authority

The Commission relies exclusively on Section 5(b) as its authority to reopen the Order.



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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya

In the Matter of

FACEBOOK, Inc.,
a corporation.

Respondent.

Docket No. C-4365
REDACTED PUBLIC VERSION

ORDER TO SHOW CAUSE WHY THE COMMISSION SHOULD NOT MODIFY THE ORDER AND ENTER THE PROPOSED NEW ORDER

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issues this Order
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, the Commission
finds good cause to enter the proposed order modifying the 2020 Order, as set forth in the attached Proposed Decision and Order. Respondent must file any Answer to this Order to Show Cause within thirty (30) days after service. In accordance with Commission Rule 3.72(b)(1), if Respondent should fail to respond within 30 days, Respondent may be deemed to have consented to the proposed order modifications. 16 C.F.R. § 3.72(b). If Respondent files an Answer, Commission Rule 3.72(b) sets forth the next steps whereby the Commission will first consider Respondent's Answer and then determine what process is appropriate to resolve any issues that arise from that Answer. Once it concludes that process, the Commission will determine whether to make the attached Proposed Decision and Order final or modify it in any way.

[1] The full record supporting the Commission's findings is contained in the attached Preliminary Finding of Facts ("PFF").

"The Federal Trade Commission ('Commission') 'may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any . . . order made or issued by it under this section.' ***15 U.S.C. § 45(b).***"

OTSC at 1

Section 5(b) Authorizes Modification Only of Orders Issued "Upon [a] Hearing"

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph [1] (2) not later than 120 days after the date of the filing of such request.

15 U.S.C. § 45(b)

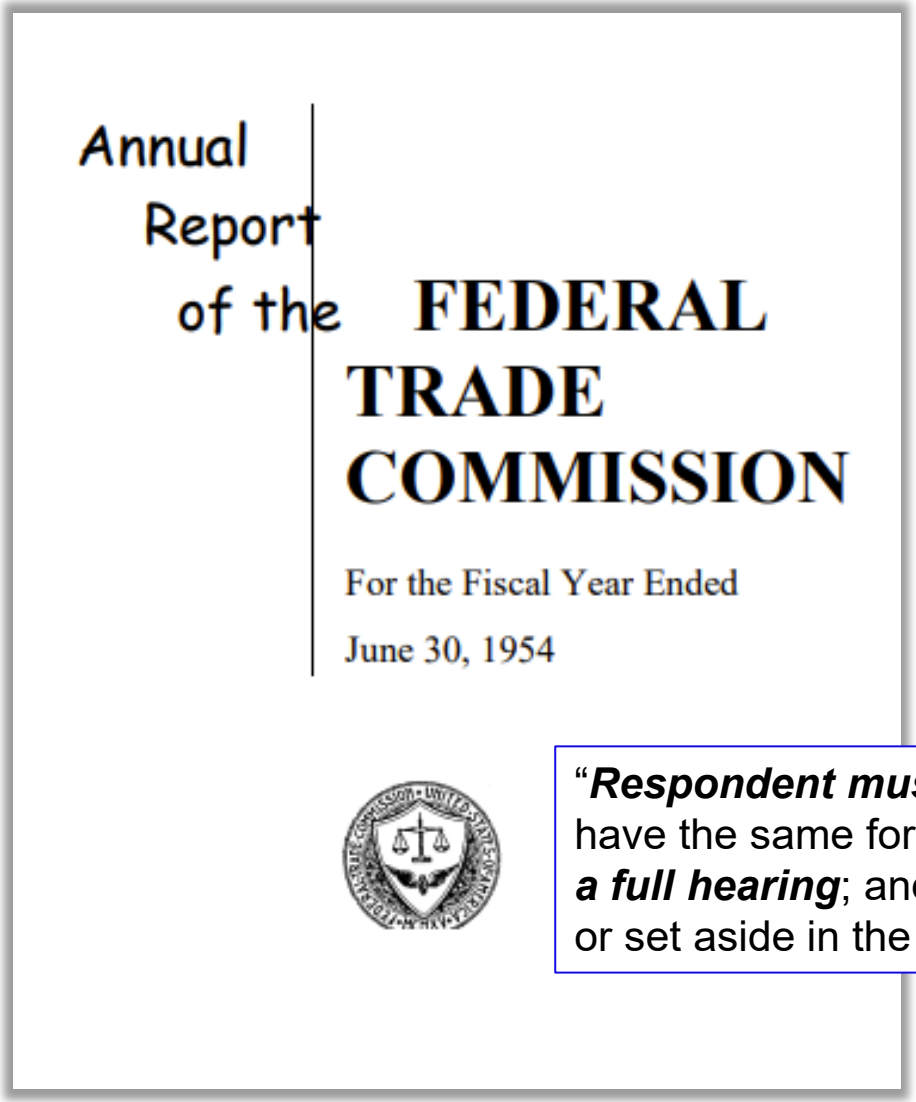
Section 5(b) authorizes the Commission to:

- "issue and serve" a "complaint stating its charges" and "containing a notice of a hearing";
- "***upon such hearing*** . . . issue and cause to be served" an order to cease and desist;
- "reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it ***under this section***."

Nothing in Section 5(b) authorizes the Commission to issue or reopen consent orders.

The Commission Has Long Recognized that Section 5(b) Does Not Authorize Issuance or Modification of Consent Orders

Because Section 5(b) only authorizes issuance and modification of orders upon a hearing, the Commission has—for decades—understood that agreement is necessary for it to issue or reopen consent orders.



Annual Report of the FEDERAL TRADE COMMISSION

For the Fiscal Year Ended June 30, 1954

"***Respondent must agree*** . . . that the order shall have the same force and effect ***as if entered after a full hearing***; and that the order may be modified or set aside in the same manner as other orders."

Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1954, 1954 WL 47708, at *5 (Jan. 1, 1954)

Rule 2.32 Demonstrates that Section 5(b) Does Not Authorize Modification of Consent Orders

The Commission formalized its interpretation of Section 5(b) in Rule 2.32(c).

- Section 5(b) authorizes the modification only of orders issued "***on a litigated or stipulated record***."
- Rule 2.32(c) therefore requires respondents settling administrative complaints to agree that consent orders can be modified "***in the same manner***" provided by Section 5(b).

§ 2.32 Agreement.

Every agreement in settlement of a Commission complaint shall contain, in addition to an appropriate proposed order, either an admission of the proposed findings of fact and conclusions of law submitted simultaneously by the Commission's staff or an admission of all jurisdictional facts and an express waiver of the requirement that the Commission's decision contain a statement of findings of fact and conclusions of law. Every agreement also shall waive further procedural steps and all rights to seek judicial review or otherwise to challenge or contest the validity of the order. In addition, where appropriate, every agreement in settlement of a Commission complaint challenging the lawfulness of a proposed merger or acquisition shall also contain a hold-separate or asset-maintenance order. The agreement may state that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint. Every agreement shall provide that:

(a) The complaint may be used in construing the terms of the order;

(b) No agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order;

(c) The order will have the same force and effect and may be altered, modified or set aside in the same manner provided by statute for Commission orders issued on a litigated or stipulated record;

(d) Except as provided by order of the Commission, any order issued pursuant to the agreement will become final upon service;

(e) The agreement will not become a part of the public record unless and until it is accepted by the Commission; and

(f) If the Commission accepts the agreement, further proceedings will be governed by § 2.34.

[64 FR 46268, Aug. 25, 1999]

16 C.F.R. § 2.32(c)

§ 2.32 Agreement.

(b) No agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order;

(c) The order will have the same force and effect and may be altered, modified or set aside in the same manner provided by statute for Commission orders issued on a litigated or stipulated record;

(d) Except as provided by order of the Commission, any order issued pursuant to the agreement will become final upon service;

(e) The agreement will not become a part of the public record unless and until it is accepted by the Commission; and

(f) If the Commission accepts the agreement, further proceedings will be governed by § 2.34.

[64 FR 46268, Aug. 25, 1999]

Under Supreme Court precedent, Rule 2.32(c)'s language precludes the application of Section 5(b) to anything other than "orders issued on a litigated or stipulated record."

Rule 2.32(c) would be superfluous if consent orders could be modified under Section 5(b).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 11–393. Argued March 26, 27, 28, 2012—Decided June 28, 2012*

In 2010, Congress enacted the Patient Protection and Affordable Care Act in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision is the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. 26 U. S. C. §5000A. For individuals who are not exempt, and who do not receive health insurance through an employer or government program, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. §5000A(b)(1). The Act provides that this "penalty" will be paid to the Internal Revenue Service with an individual's tax-

"[R]equir[ing] assessable penalties to be assessed and collected '***in the same manner*** as taxes' makes little sense if assessable penalties are themselves taxes."

*Together with No. 11–398, *Department of Health and Human Services et al.* v. *Florida et al.*, and No. 11–400, *Florida et al.* v. *Department of Health and Human Services et al.*, also on certiorari to the same court.

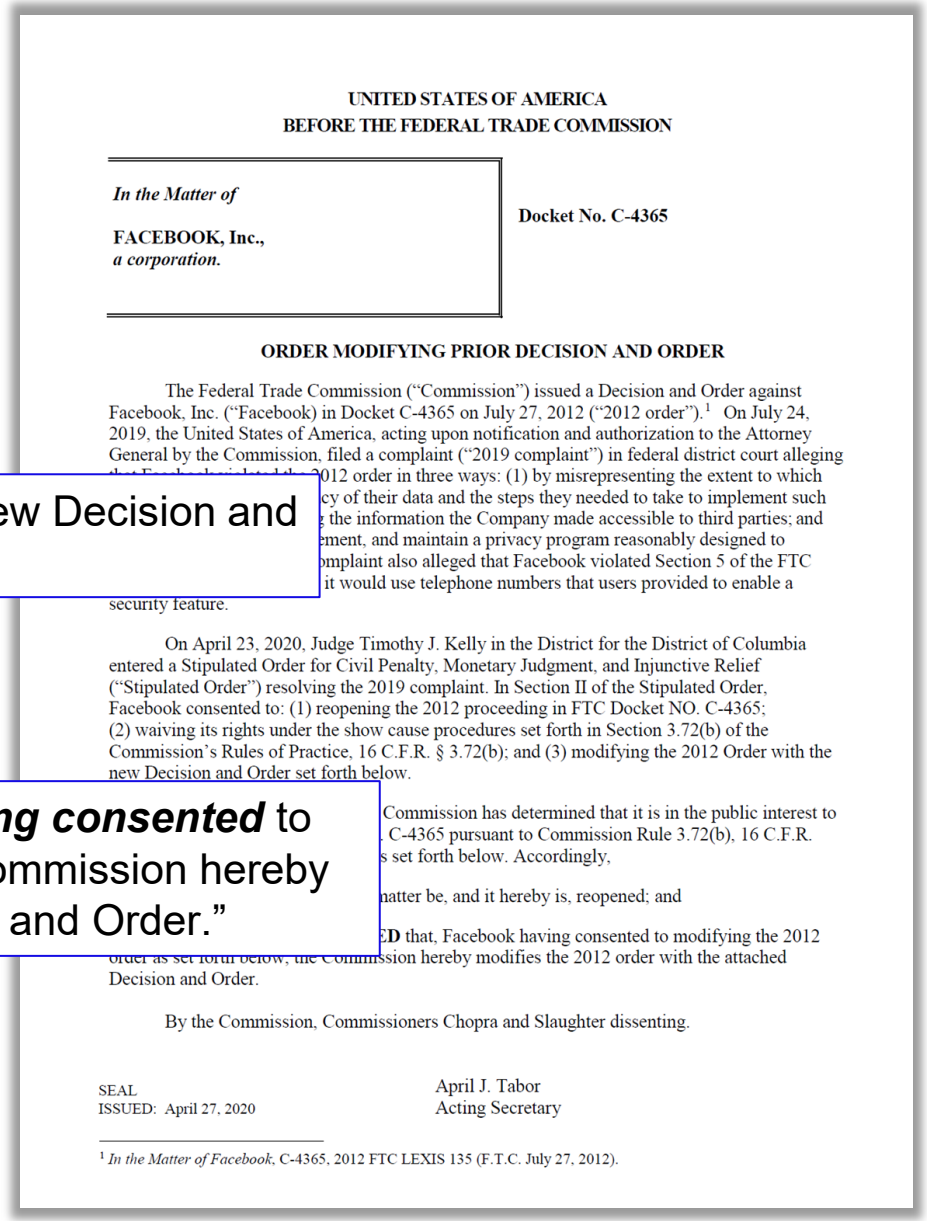
16 C.F.R. § 2.32(c); *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 546 (2012)

The Order Was Not Issued under Section 5(b)

Meta consented to entry of the Order.

"***Facebook consented*** to . . . the new Decision and Order set forth below."

"**IT IS FURTHER ORDERED** that, ***Facebook having consented*** to modifying the 2012 order as set forth below, the Commission hereby modifies the 2012 order with the attached Decision and Order."



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

FACEBOOK, Inc.,
a corporation.

Docket No. C-4365

ORDER MODIFYING PRIOR DECISION AND ORDER

The Federal Trade Commission ("Commission") issued a Decision and Order against Facebook, Inc. ("Facebook) in Docket C-4365 on July 27, 2012 ("2012 order").[1] On July 24, 2019, the United States of America, acting upon notification and authorization to the Attorney General by the Commission, filed a complaint ("2019 complaint") in federal district court alleging

012 order in three ways: (1) by misrepresenting the extent to which
cy of their data and the steps they needed to take to implement such
the information the Company made accessible to third parties; and
ment, and maintain a privacy program reasonably designed to
mplaint also alleged that Facebook violated Section 5 of the FTC
it would use telephone numbers that users provided to enable a
security feature.

On April 23, 2020, Judge Timothy J. Kelly in the District for the District of Columbia entered a Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief ("Stipulated Order") resolving the 2019 complaint. In Section II of the Stipulated Order, Facebook consented to: (1) reopening the 2012 proceeding in FTC Docket NO. C-4365; (2) waiving its rights under the show cause procedures set forth in Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(b); and (3) modifying the 2012 Order with the new Decision and Order set forth below.

Commission has determined that it is in the public interest to
C-4365 pursuant to Commission Rule 3.72(b), 16 C.F.R.
s set forth below. Accordingly,

natter be, and it hereby is, reopened; and

D that, Facebook having consented to modifying the 2012
order as set forth below, the Commission hereby modifies the 2012 order with the attached Decision and Order.

By the Commission, Commissioners Chopra and Slaughter dissenting.

SEAL
ISSUED: April 27, 2020

April J. Tabor
Acting Secretary

[1] *In the Matter of Facebook*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012).

Order Modifying Prior Decision and Order, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. Apr. 27, 2020) at 1

Meta Did Not Agree that the Order Could be Modified

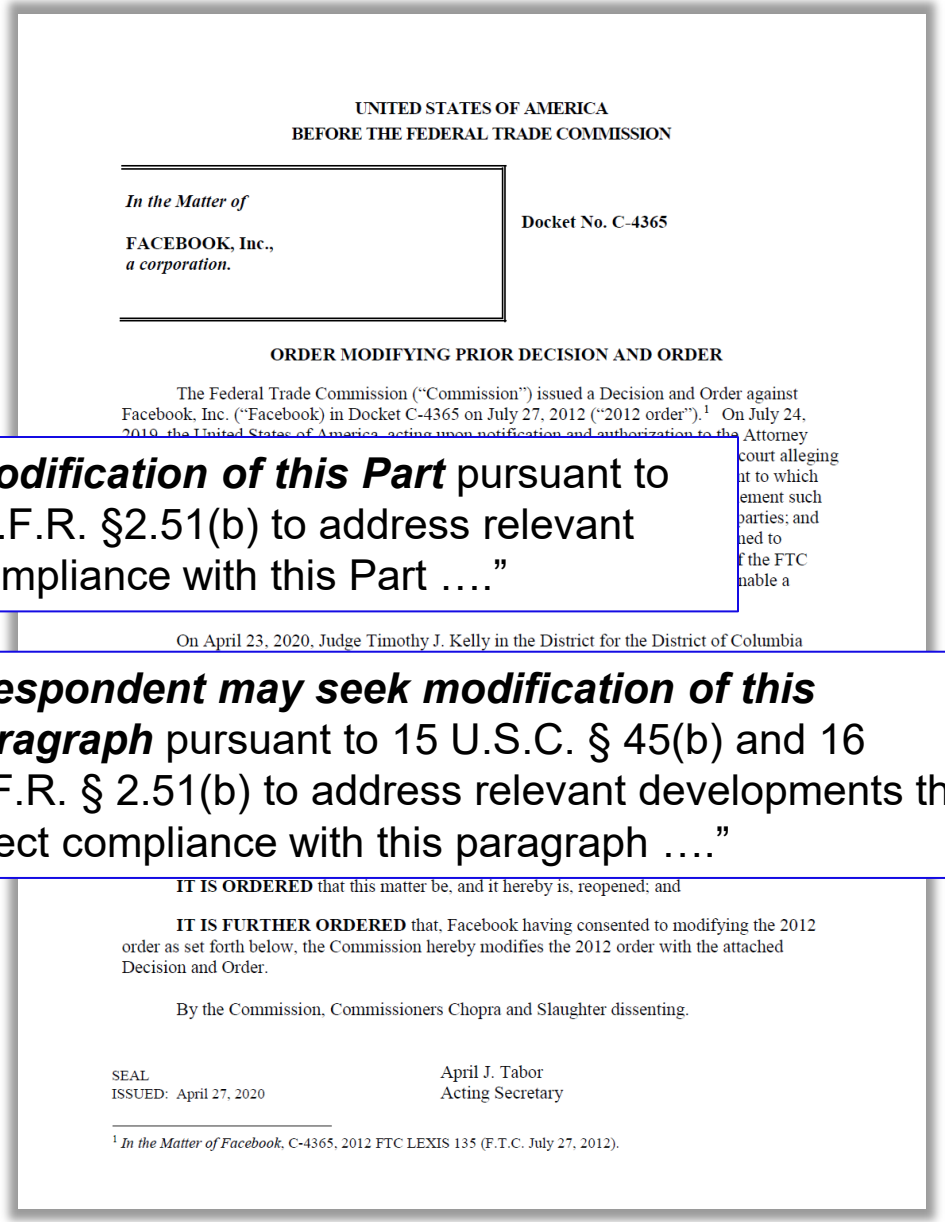
The Order to Show Cause does not invoke Meta's consent as a basis for modification because Meta did not agree that the Order could be modified.

Because the Order did not resolve an administrative complaint, Meta was not required to agree that it could be modified.

"***Respondent may seek modification of this Part*** pursuant to 15 U.S.C. § 45(b) and 16 C.F.R. §2.51(b) to address relevant developments that affect compliance with this Part …."

The parties agreed that Parts II and III of the Order could be modified under particular circumstances.

Construing Section 5(b) to authorize modification of the entire Order would render those negotiated provisions superfluous.



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

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Docket No. C-4365

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IT IS ORDERED that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that, Facebook having consented to modifying the 2012 order as set forth below, the Commission hereby modifies the 2012 order with the attached Decision and Order.

By the Commission, Commissioners Chopra and Slaughter dissenting.

SEAL
ISSUED: April 27, 2020

April J. Tabor
Acting Secretary

[1] *In the Matter of Facebook*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012).

Section 5(b) Only Authorizes Modification of Orders Subject to Petitions for Review

02

Section 5(b) Only Authorizes Modification of Orders Subject to Petitions for Review

§ 45. Unfair methods of competition unlawful; prevention by Commission

or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except

"***After the expiration of the time allowed for filing a petition for review***, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section …."

the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall

15 U.S.C. § 45(b)

The Order Gave Rise Only to an Appeal

One order cannot give rise to both an appeal and a petition for review.

Rule 3. Appeal as of Right—How Taken

(a) FILING THE NOTICE OF APPEAL.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

Rule 15. Review or Enforcement of an Agency Order—How Obtained; Intervention

(a) PETITION FOR REVIEW; JOINT PETITION.

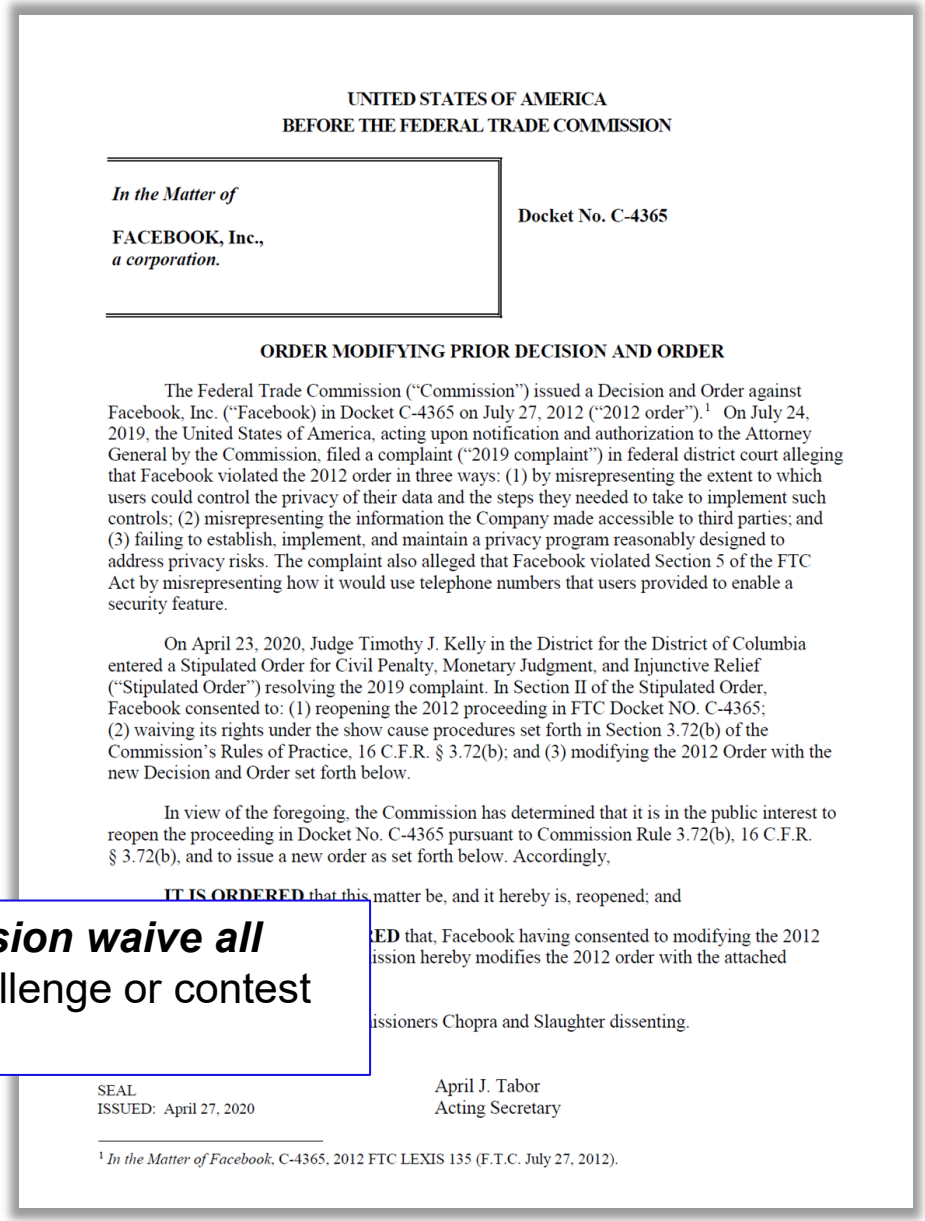
(1) Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order. If their interests make joinder practicable, two or more persons may join in a petition to the same court to review the same order.

Fed. R. App. P. 3(a)(1); Fed. R. App. P. 15(a)(1)

The Commission's Waiver Confirms that the Order Gave Rise to an Appeal

Waiver is the intentional relinquishment of a ***known right***.

The Commission's waiver acknowledged its right to ***appeal*** the Order.



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

FACEBOOK, Inc.,
a corporation.

Docket No. C-4365

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The Federal Trade Commission ("Commission") issued a Decision and Order against Facebook, Inc. ("Facebook) in Docket C-4365 on July 27, 2012 ("2012 order").[1] On July 24, 2019, the United States of America, acting upon notification and authorization to the Attorney General by the Commission, filed a complaint ("2019 complaint") in federal district court alleging that Facebook violated the 2012 order in three ways: (1) by misrepresenting the extent to which users could control the privacy of their data and the steps they needed to take to implement such controls; (2) misrepresenting the information the Company made accessible to third parties; and (3) failing to establish, implement, and maintain a privacy program reasonably designed to address privacy risks. The complaint also alleged that Facebook violated Section 5 of the FTC Act by misrepresenting how it would use telephone numbers that users provided to enable a security feature.

On April 23, 2020, Judge Timothy J. Kelly in the District for the District of Columbia entered a Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief ("Stipulated Order") resolving the 2019 complaint. In Section II of the Stipulated Order, Facebook consented to: (1) reopening the 2012 proceeding in FTC Docket NO. C-4365; (2) waiving its rights under the show cause procedures set forth in Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. § 3.72(b); and (3) modifying the 2012 Order with the new Decision and Order set forth below.

In view of the foregoing, the Commission has determined that it is in the public interest to reopen the proceeding in Docket No. C-4365 pursuant to Commission Rule 3.72(b), 16 C.F.R. § 3.72(b), and to issue a new order as set forth below. Accordingly,

IT IS ORDERED that this matter be, and it hereby is, reopened; and

ED that, Facebook having consented to modifying the 2012
ission hereby modifies the 2012 order with the attached

issioners Chopra and Slaughter dissenting.

SEAL
ISSUED: April 27, 2020

April J. Tabor
Acting Secretary

[1] *In the Matter of Facebook*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012).

"4. Respondent and ***the Commission waive all rights to appeal*** or otherwise challenge or contest the validity of ***this Order***."

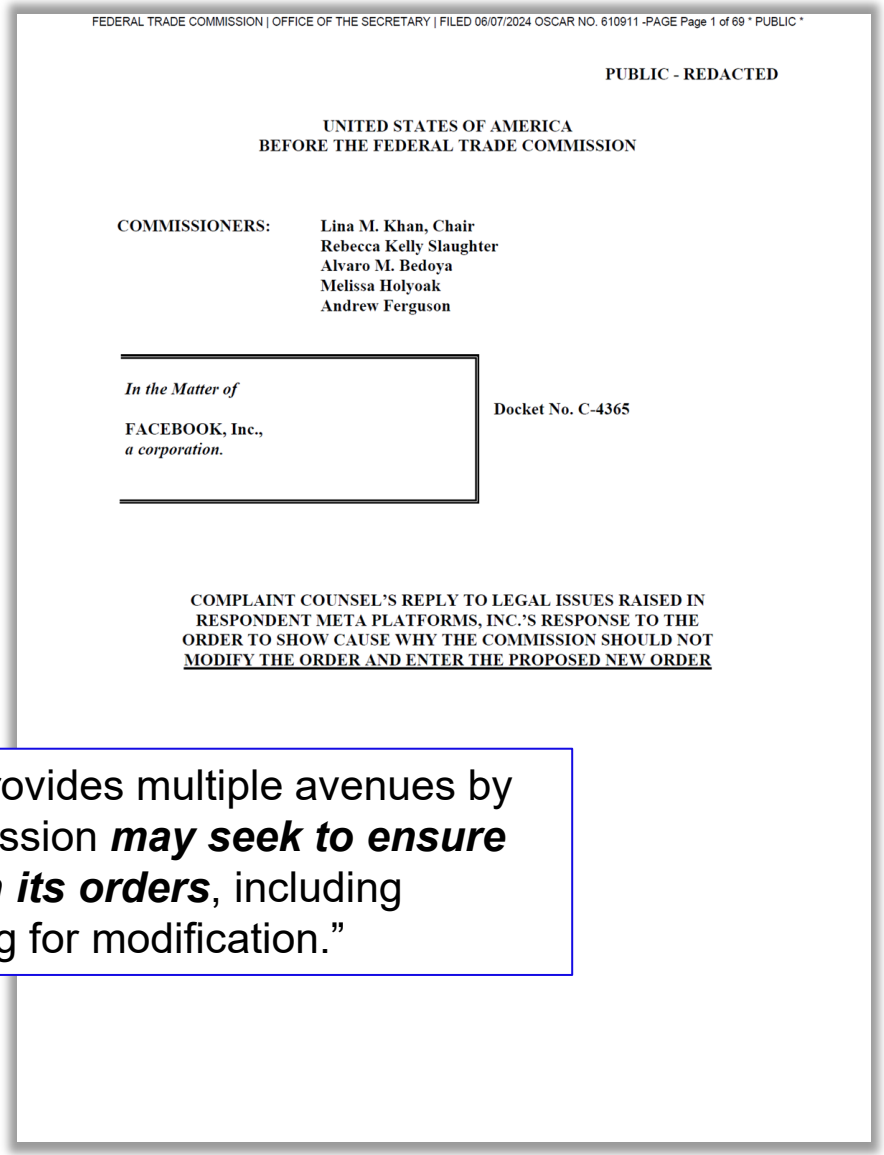
Order Modifying Prior Decision and Order, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. Apr. 27, 2020); *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022)

The Commission Cannot Enforce its Orders

03

The Commission Cannot Enforce its Orders

Complaint Counsel expressly argues that Section 5(b) allows the Commission to enforce its orders.



FEDERAL TRADE COMMISSION | OFFICE OF THE SECRETARY | FILED 06/07/2024 OSCAR NO. 610911 -PAGE Page 1 of 69 * PUBLIC *

PUBLIC - REDACTED

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya
Melissa Holyoak
Andrew Ferguson

In the Matter of

FACEBOOK, Inc.,
a corporation.

Docket No. C-4365

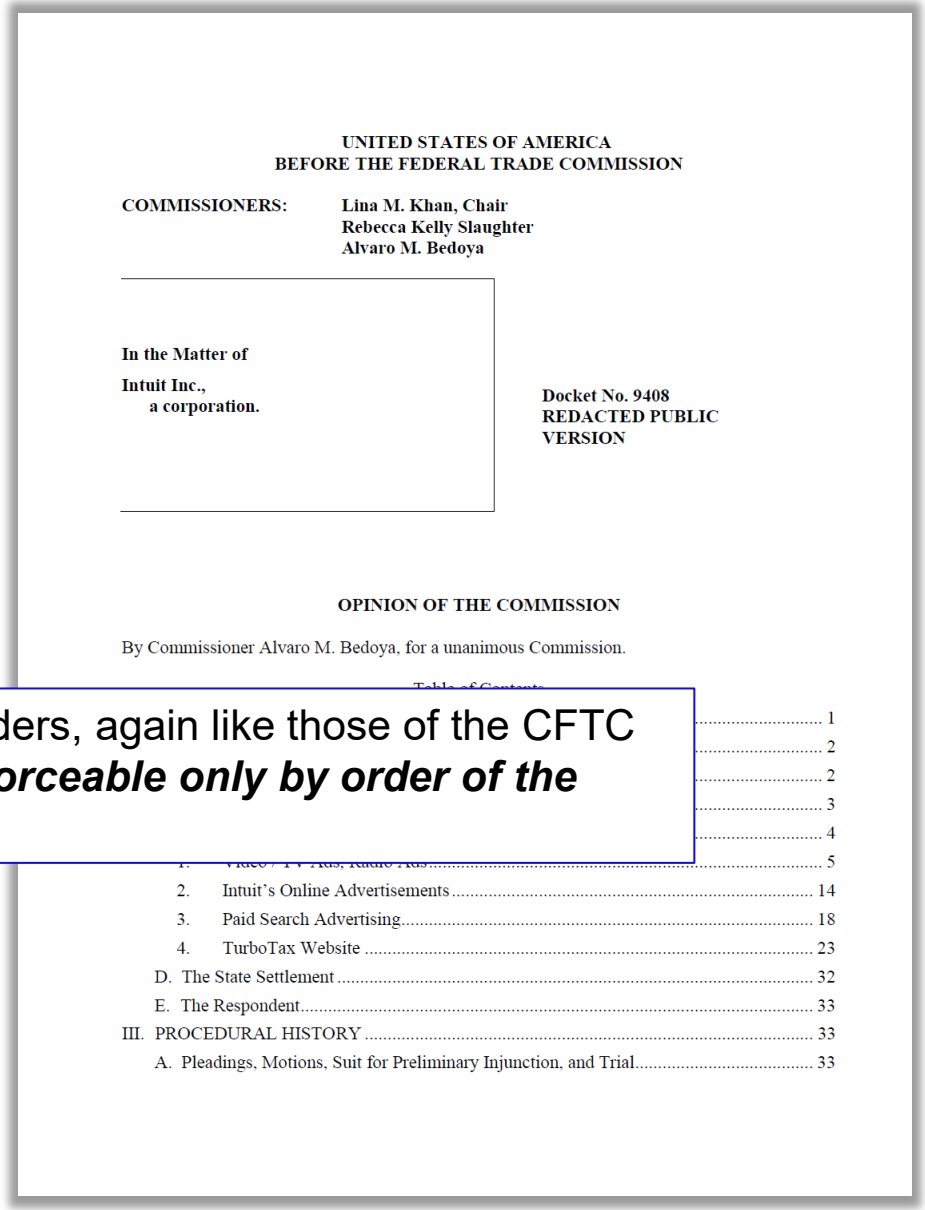
COMPLAINT COUNSEL'S REPLY TO LEGAL ISSUES RAISED IN RESPONDENT META PLATFORMS, INC.'S RESPONSE TO THE ORDER TO SHOW CAUSE WHY THE COMMISSION SHOULD NOT MODIFY THE ORDER AND ENTER THE PROPOSED NEW ORDER

"[T]he FTC Act provides multiple avenues by which the Commission ***may seek to ensure compliance with its orders***, including through reopening for modification."

Complaint Counsel's Reply to Meta's OTSC Response at 2, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. June 7, 2024)

Only Federal Courts Can Enforce Commission Orders

The Commission reiterated—and defended the constitutionality of its administrative adjudication—on the basis that it ***cannot*** enforce its own orders.



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya

In the Matter of

Intuit Inc.,
a corporation.

Docket No. 9408
REDACTED PUBLIC
VERSION

OPINION OF THE COMMISSION

By Commissioner Alvaro M. Bedoya, for a unanimous Commission.

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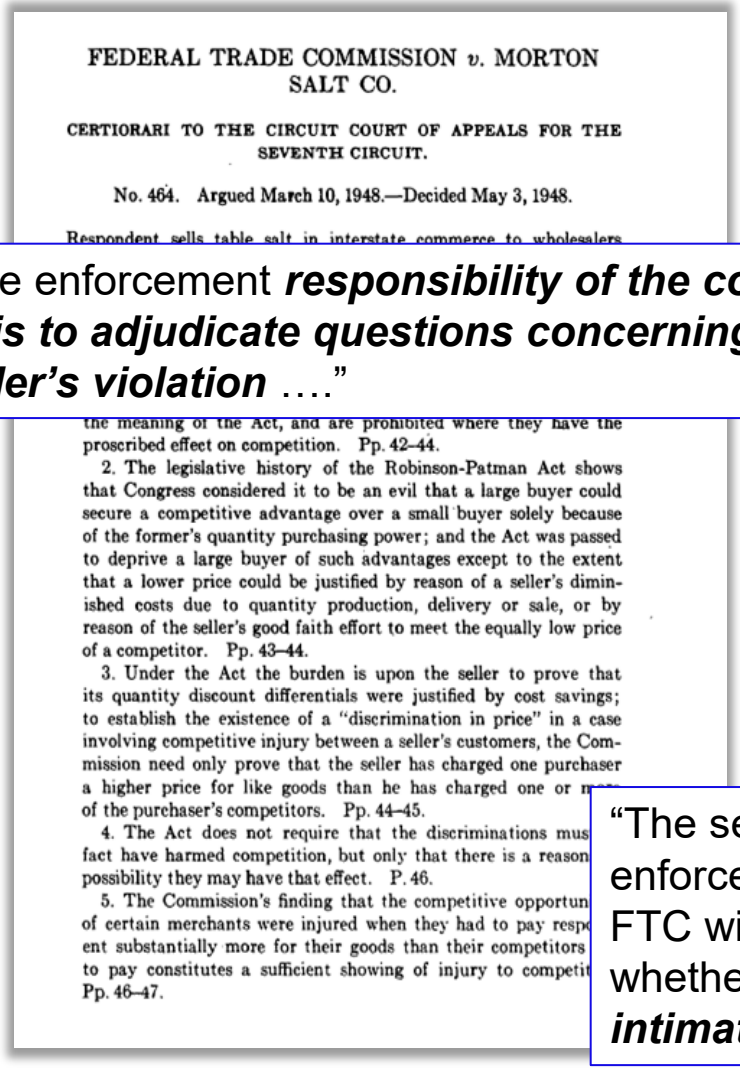
"Second, FTC orders, again like those of the CFTC in *Schor*, are ***enforceable only by order of the district court***."

In re Intuit Inc., 2024 WL 382358, at *56 (F.T.C. Jan. 22, 2024)

Only Courts—Not the Commission—Can Adjudicate Order Compliance

Courts—including the Supreme Court—have held that ***only courts*** may adjudicate order compliance.



FEDERAL TRADE COMMISSION *v.* MORTON SALT CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 464. Argued March 10, 1948.—Decided May 3, 1948.

Respondent sells table salt in interstate commerce to wholesalers

the meaning of the Act, and are prohibited where they have the proscribed effect on competition. Pp. 42–44.

2. The legislative history of the Robinson-Patman Act shows that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the former's quantity purchasing power; and the Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity production, delivery or sale, or by reason of the seller's good faith effort to meet the equally low price of a competitor. Pp. 43–44.

3. Under the Act the burden is upon the seller to prove that its quantity discount differentials were justified by cost savings; to establish the existence of a "discrimination in price" in a case involving competitive injury between a seller's customers, the Commission need only prove that the seller has charged one purchaser a higher price for like goods than he has charged one or m

of the purchaser's competitors. Pp. 44–45.

4. The Act does not require that the discriminations mus

fact have harmed competition, but only that there is a reason

possibility they may have that effect. P. 46.

5. The Commission's finding that the competitive opportun

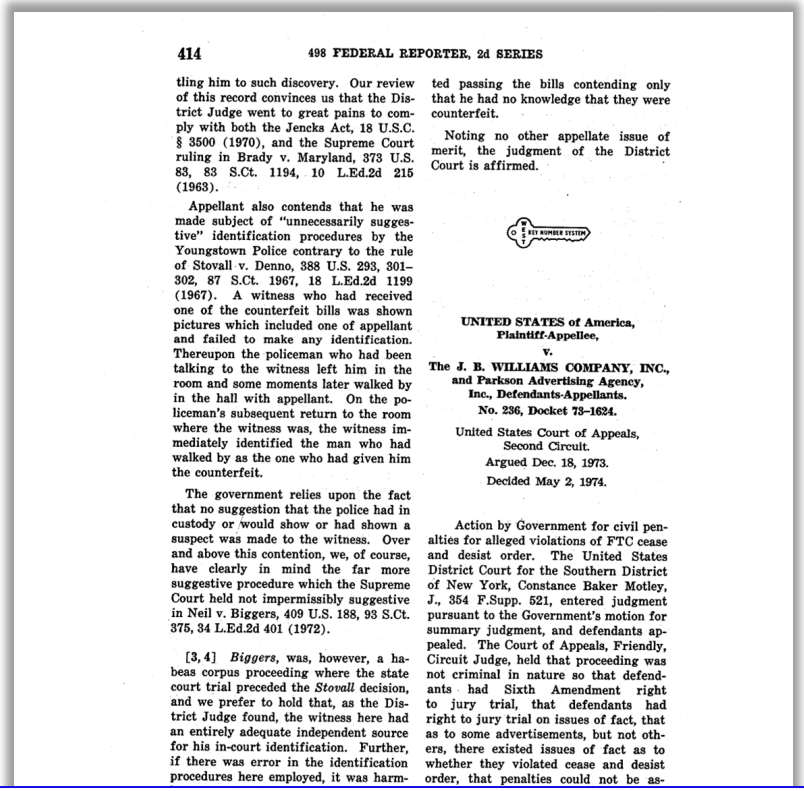
of certain merchants were injured when they had to pay resp

ent substantially more for their goods than their competitors

to pay constitutes a sufficient showing of injury to competit

Pp. 46–47.

"The enforcement ***responsibility of the courts … is to adjudicate questions concerning the order's violation*** …."



414 498 FEDERAL REPORTER, 2d SERIES

tling him to such discovery. Our review of this record convinces us that the District Judge went to great pains to comply with both the Jencks Act, 18 U.S.C. § 3500 (1970), and the Supreme Court ruling in Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Appellant also contends that he was made subject of "unnecessarily suggestive" identification procedures by the Youngstown Police contrary to the rule of Stovall v. Denno, 388 U.S. 293, 301–302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). A witness who had received one of the counterfeit bills was shown pictures which included one of appellant and failed to make any identification. Thereupon the policeman who had been talking to the witness left him in the room and some moments later walked by in the hall with appellant. On the policeman's subsequent return to the room where the witness was, the witness immediately identified the man who had walked by as the one who had given him the counterfeit.

The government relies upon the fact that no suggestion that the police had in custody or would show or had shown a suspect was made to the witness. Over and above this contention, we, of course, have clearly in mind the far more suggestive procedure which the Supreme Court held not impermissibly suggestive in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972).

[3, 4] *Biggers*, was, however, a habeas corpus proceeding where the state court trial preceded the *Stovall* decision, and we prefer to hold that, as the District Judge found, the witness here had an entirely adequate independent source for his in-court identification. Further, if there was error in the identification procedures here employed, it was harmted passing the bills contending only that he had no knowledge that they were counterfeit.

Noting no other appellate issue of merit, the judgment of the District Court is affirmed.

KEY NUMBER SYSTEM

UNITED STATES of America, Plaintiff-Appellee, v. The J. B. WILLIAMS COMPANY, INC., and Parkson Advertising Agency, Inc., Defendants-Appellants. No. 236, Docket 73–1624.

United States Court of Appeals, Second Circuit.

Argued Dec. 18, 1973.

Decided May 2, 1974.

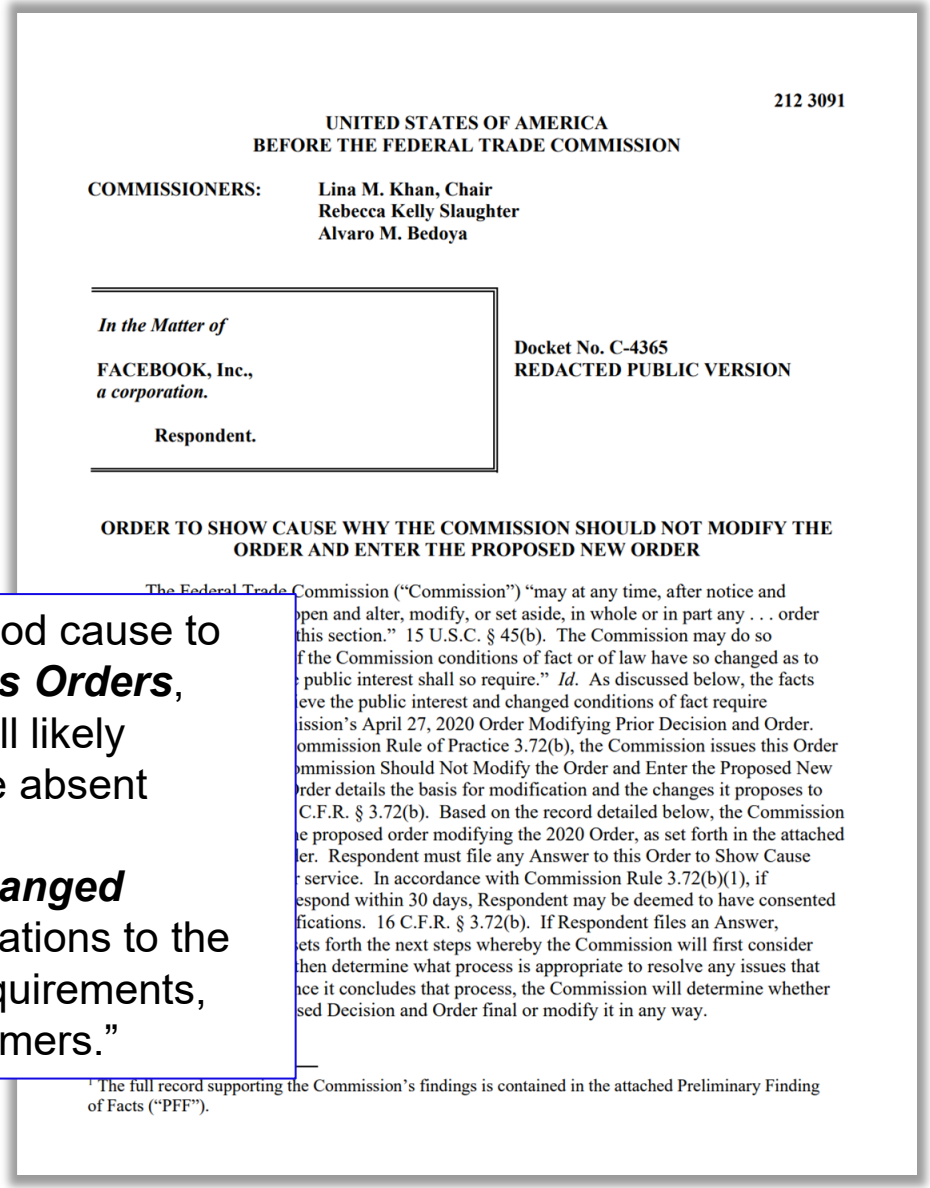
Action by Government for civil penalties for alleged violations of FTC cease and desist order. The United States District Court for the Southern District of New York, Constance Baker Motley, J., 354 F.Supp. 521, entered judgment pursuant to the Government's motion for summary judgment, and defendants appealed. The Court of Appeals, Friendly, Circuit Judge, held that proceeding was not criminal in nature so that defendants had Sixth Amendment right to jury trial, that defendants had right to jury trial on issues of fact, that as to some advertisements, but not others, there existed issues of fact as to whether they violated cease and desist order, that penalties could not be as-

"The second proposition seems unsound as applied to enforcement proceedings unless Congress has vested the FTC with power not only to make orders but to determine whether they have been violated …. ***No decision has ever intimated such a view***."

FTC v. Morton Salt Co., 334 U.S. 37, 54 (1948);
United States v. J.B. Williams Co., 498 F.2d 414, 422 (2d Cir. 1974)

This Proceeding Is an Order Enforcement Action

The ***Order to Show Cause explicitly states*** that this proceeding is an order enforcement action to adjudicate Meta's order compliance.



212 3091

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lina M. Khan, Chair
Rebecca Kelly Slaughter
Alvaro M. Bedoya

In the Matter of

FACEBOOK, Inc.,
a corporation.

Respondent.

Docket No. C-4365
REDACTED PUBLIC VERSION

ORDER TO SHOW CAUSE WHY THE COMMISSION SHOULD NOT MODIFY THE ORDER AND ENTER THE PROPOSED NEW ORDER

The Federal Trade Commission ("Commission") "may at any time, after notice and
pen and alter, modify, or set aside, in whole or in part any . . . order
this section." 15 U.S.C. § 45(b). The Commission may do so
f the Commission conditions of fact or of law have so changed as to
public interest shall so require." *Id.* As discussed below, the facts
eve the public interest and changed conditions of fact require
ission's April 27, 2020 Order Modifying Prior Decision and Order.
ommission Rule of Practice 3.72(b), the Commission issues this Order
mmission Should Not Modify the Order and Enter the Proposed New
rder details the basis for modification and the changes it proposes to
C.F.R. § 3.72(b). Based on the record detailed below, the Commission
e proposed order modifying the 2020 Order, as set forth in the attached
er. Respondent must file any Answer to this Order to Show Cause
service. In accordance with Commission Rule 3.72(b)(1), if
espond within 30 days, Respondent may be deemed to have consented
fications. 16 C.F.R. § 3.72(b). If Respondent files an Answer,
ets forth the next steps whereby the Commission will first consider
hen determine what process is appropriate to resolve any issues that
nce it concludes that process, the Commission will determine whether
sed Decision and Order final or modify it in any way.

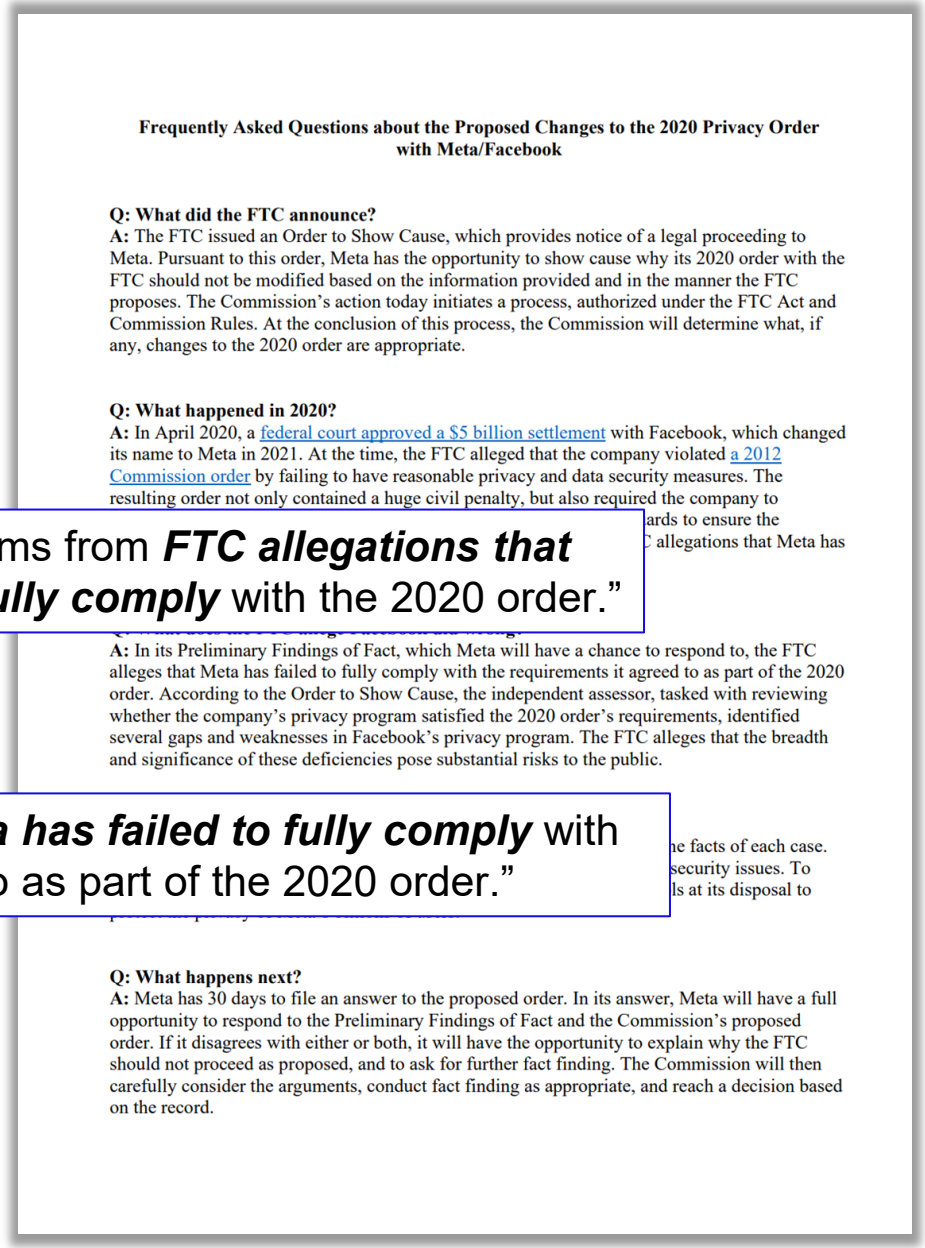
[1] The full record supporting the Commission's findings is contained in the attached Preliminary Finding of Facts ("PFF").

"Based on the foregoing, the Commission has good cause to believe ***Respondent violated the Commission's Orders***, Section 5, COPPA, and the COPPA Rule, and will likely continue to commit privacy violations in the future absent further ***enforcement action*** by the Commission. ***Respondent's non-compliance constitutes changed conditions*** demonstrating that additional modifications to the Order are needed to clarify and strengthen its requirements, and thus provide enhanced protections for consumers."

OTSC at 12

This Proceeding Is an Order Enforcement Action

The Commission has ***told the public*** that this proceeding is an order enforcement action to adjudicate Meta's order compliance.



Frequently Asked Questions about the Proposed Changes to the 2020 Privacy Order with Meta/Facebook

Q: What did the FTC announce?
A: The FTC issued an Order to Show Cause, which provides notice of a legal proceeding to Meta. Pursuant to this order, Meta has the opportunity to show cause why its 2020 order with the FTC should not be modified based on the information provided and in the manner the FTC proposes. The Commission's action today initiates a process, authorized under the FTC Act and Commission Rules. At the conclusion of this process, the Commission will determine what, if any, changes to the 2020 order are appropriate.

Q: What happened in 2020?
A: In April 2020, a federal court approved a $5 billion settlement with Facebook, which changed its name to Meta in 2021. At the time, the FTC alleged that the company violated a 2012 Commission order by failing to have reasonable privacy and data security measures. The resulting order not only contained a huge civil penalty, but also required the company to

ards to ensure the

C allegations that Meta has

A: In its Preliminary Findings of Fact, which Meta will have a chance to respond to, the FTC alleges that Meta has failed to fully comply with the requirements it agreed to as part of the 2020 order. According to the Order to Show Cause, the independent assessor, tasked with reviewing whether the company's privacy program satisfied the 2020 order's requirements, identified several gaps and weaknesses in Facebook's privacy program. The FTC alleges that the breadth and significance of these deficiencies pose substantial risks to the public.

he facts of each case.
security issues. To
ls at its disposal to

Q: What happens next?
A: Meta has 30 days to file an answer to the proposed order. In its answer, Meta will have a full opportunity to respond to the Preliminary Findings of Fact and the Commission's proposed order. If it disagrees with either or both, it will have the opportunity to explain why the FTC should not proceed as proposed, and to ask for further fact finding. The Commission will then carefully consider the arguments, conduct fact finding as appropriate, and reach a decision based on the record.

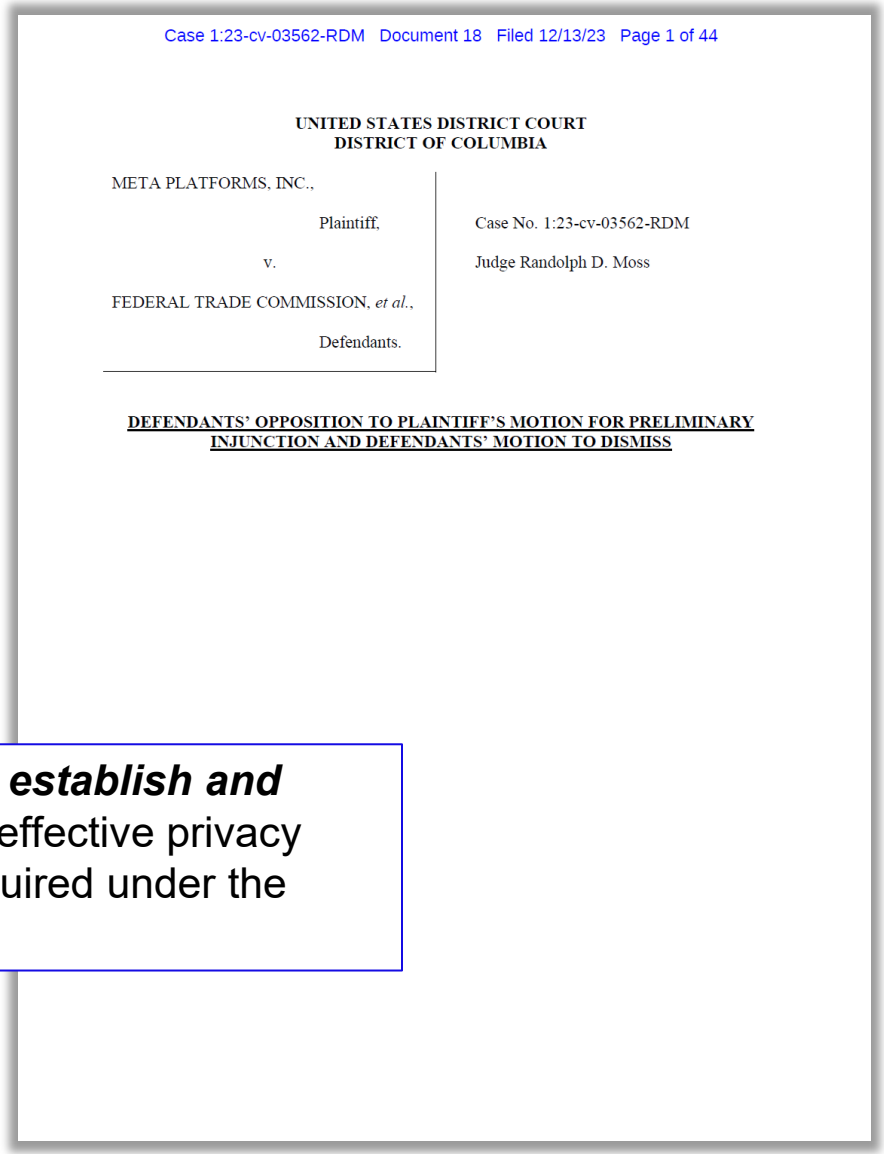
"The latest action stems from ***FTC allegations that Meta has failed to fully comply*** with the 2020 order."

"[T]he FTC alleges that ***Meta has failed to fully comply*** with the requirements it agreed to as part of the 2020 order."

Frequently Asked Questions about the Proposed Changes to the 2020 Privacy Order with Meta/Facebook, Federal Trade Commission (May 3, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/FB-FAQ.pdf

This Proceeding Is an Order Enforcement Action

The Commission has ***argued in court*** that this proceeding is an order enforcement action to adjudicate Meta's order compliance.



Case 1:23-cv-03562-RDM Document 18 Filed 12/13/23 Page 1 of 44

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

META PLATFORMS, INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, *et al.*,

Defendants.

Case No. 1:23-cv-03562-RDM

Judge Randolph D. Moss

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANTS' MOTION TO DISMISS

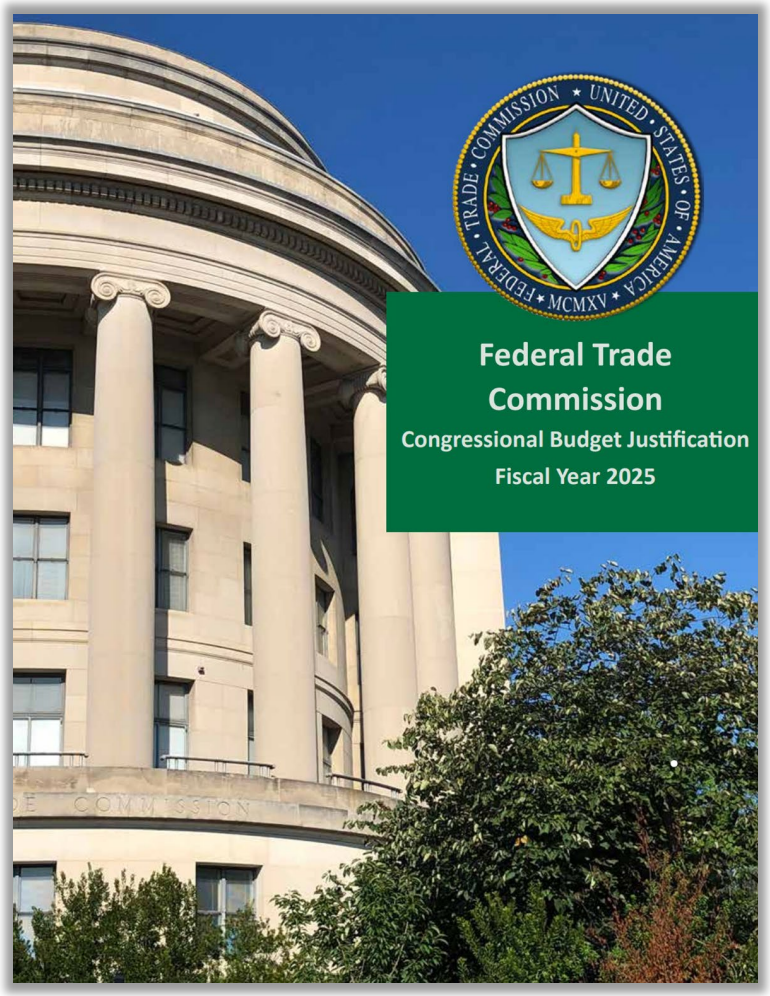
"Meta ***failed to establish and implement*** an effective privacy program as required under the 2020 order …."

Opp. to Mot. for Prelim. Inj. and Mot. to Dismiss of Defendant (FTC) at 1, *Meta Platforms, Inc. v. FTC*, No. 23-3562 (D.D.C. Dec. 13, 2023)

This Proceeding Is an Order Enforcement Action

The Commission has ***represented to Congress*** that this proceeding is an order enforcement action to adjudicate Meta's order compliance.

> "The FTC proposed changes to the agency's 2020 privacy order with Facebook, Inc. after alleging that the company has ***failed to fully comply with the order*** …."



Fed. Trade Comm'n, FY 2025 Congressional Budget Justification – Budget Request (Mar. 11, 2024) at 27

No Conditions of Fact "Have So Changed" to Require Reopening

04

No Conditions of Fact "Have So Changed" to Require Reopening

Section 5(b)'s "have so changed" prong requires both a cognizable change in factual conditions and a ***need*** for modification.

§ 45. Unfair methods of competition unlawful; prevention by Commission

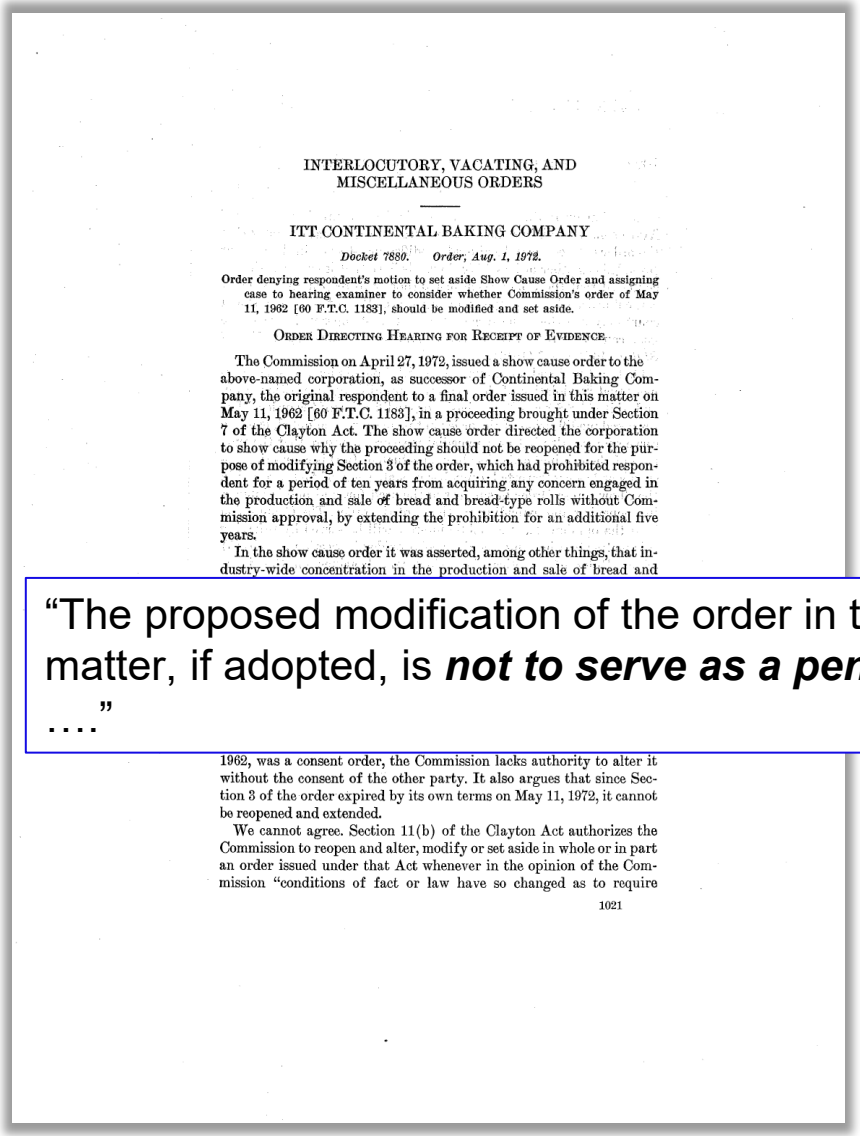
Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon

"[W]henever in the opinion of the Commission conditions of fact or of law ***have so changed as to require*** such action …."

the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph [1] (2) not later than 120 days after the date of the filing of such request.

15 U.S.C. § 45(b)

No Conditions of Fact "Have So Changed" to Require Reopening



INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

ITT CONTINENTAL BAKING COMPANY

Docket 7880. Order, Aug. 1, 1972.

Order denying respondent's motion to set aside Show Cause Order and assigning case to hearing examiner to consider whether Commission's order of May 11, 1962 [60 F.T.C. 1183], should be modified and set aside.

ORDER DIRECTING HEARING FOR RECEIPT OF EVIDENCE

The Commission on April 27, 1972, issued a show cause order to the above-named corporation, as successor of Continental Baking Company, the original respondent to a final order issued in this matter on May 11, 1962 [60 F.T.C. 1183], in a proceeding brought under Section 7 of the Clayton Act. The show cause order directed the corporation to show cause why the proceeding should not be reopened for the purpose of modifying Section 3 of the order, which had prohibited respondent for a period of ten years from acquiring any concern engaged in the production and sale of bread and bread-type rolls without Commission approval, by extending the prohibition for an additional five years.

In the show cause order it was asserted, among other things, that industry-wide concentration in the production and sale of bread and

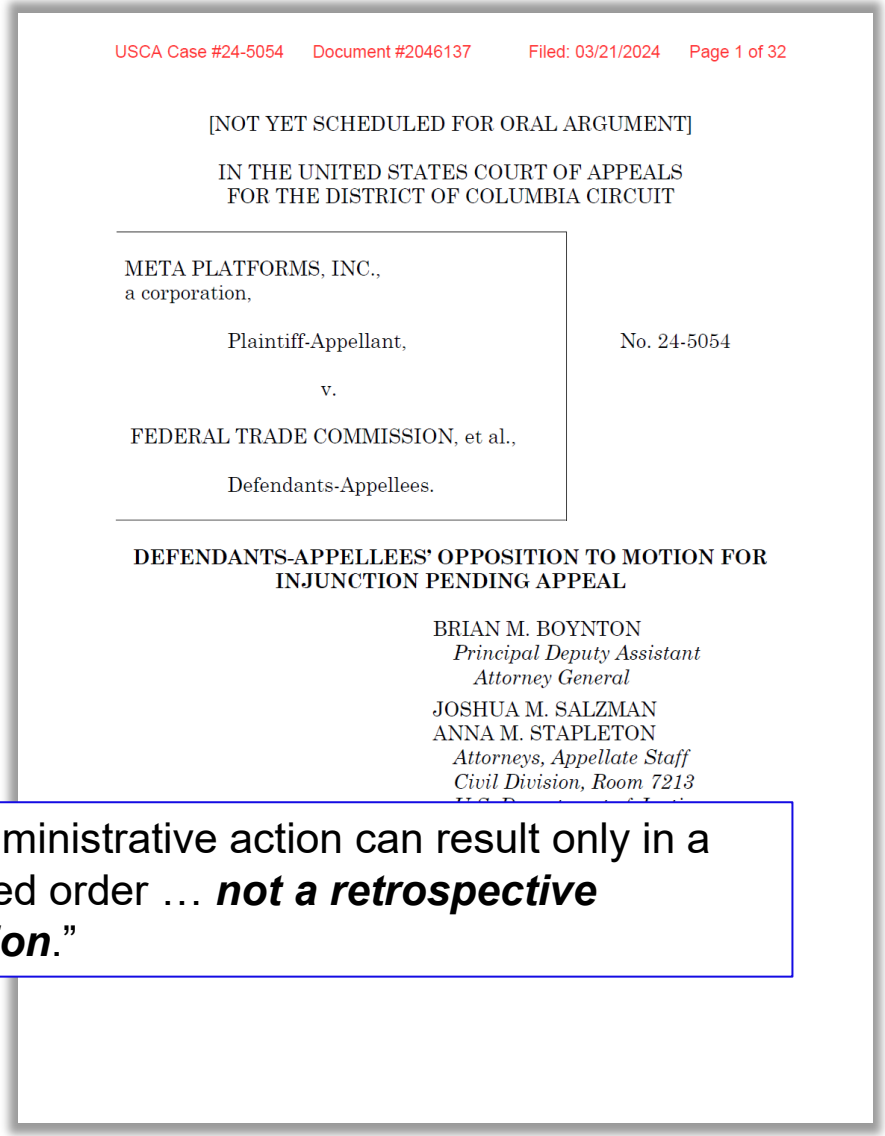
1962, was a consent order, the Commission lacks authority to alter it without the consent of the other party. It also argues that since Section 3 of the order expired by its own terms on May 11, 1972, it cannot be reopened and extended.

We cannot agree. Section 11(b) of the Clayton Act authorizes the Commission to reopen and alter, modify or set aside in whole or in part an order issued under that Act whenever in the opinion of the Commission "conditions of fact or law have so changed as to require

1021

"The proposed modification of the order in this matter, if adopted, is ***not to serve as a penalty*** …."

The Commission has acknowledged that Section 5(b) is remedial, not a basis to address past wrongs.



USCA Case #24-5054 Document #2046137 Filed: 03/21/2024 Page 1 of 32

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

META PLATFORMS, INC.,
a corporation,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants-Appellees.

No. 24-5054

DEFENDANTS-APPELLEES' OPPOSITION TO MOTION FOR INJUNCTION PENDING APPEAL

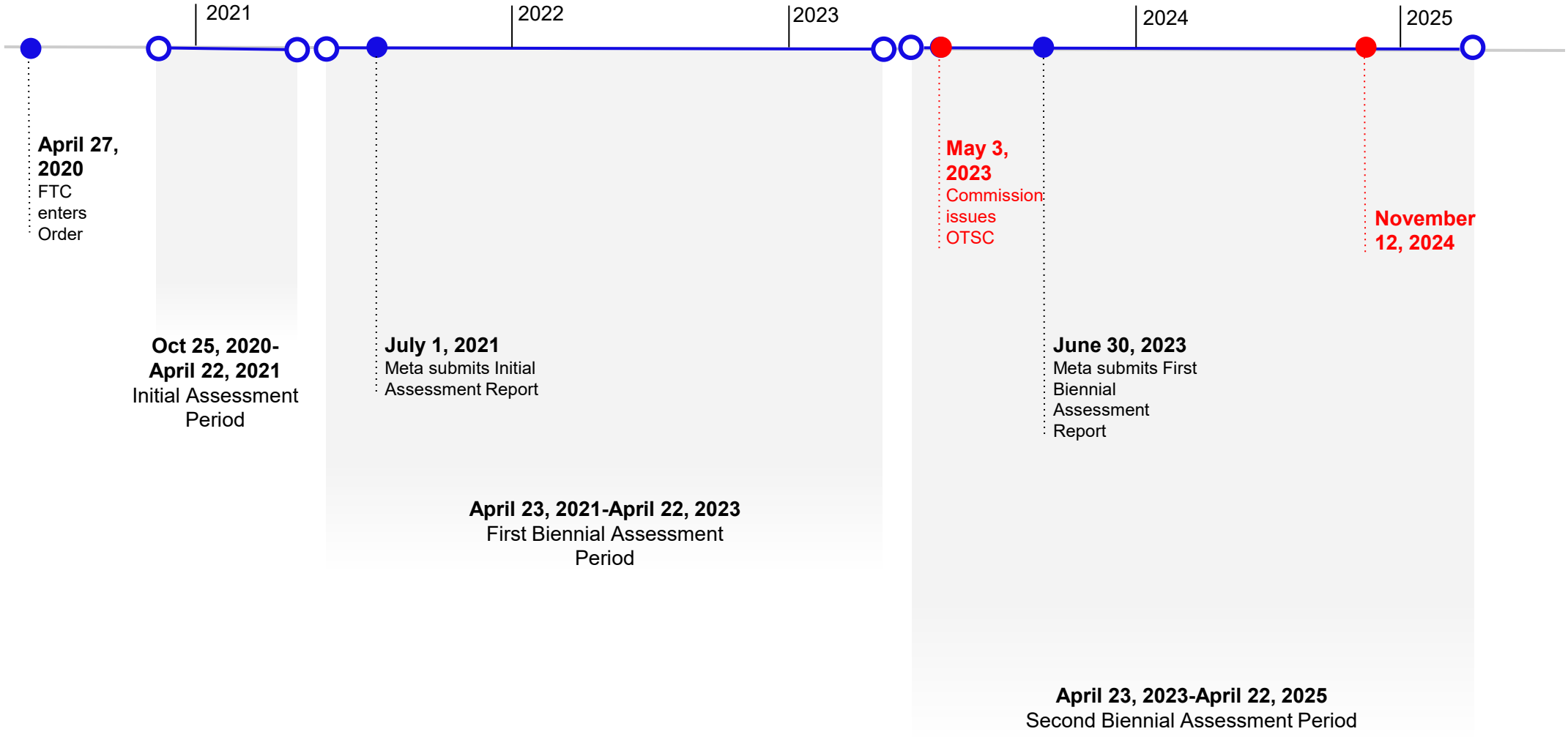
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

JOSHUA M. SALZMAN
ANNA M. STAPLETON
Attorneys, Appellate Staff
Civil Division, Room 7213

"An administrative action can result only in a modified order … ***not a retrospective sanction***."

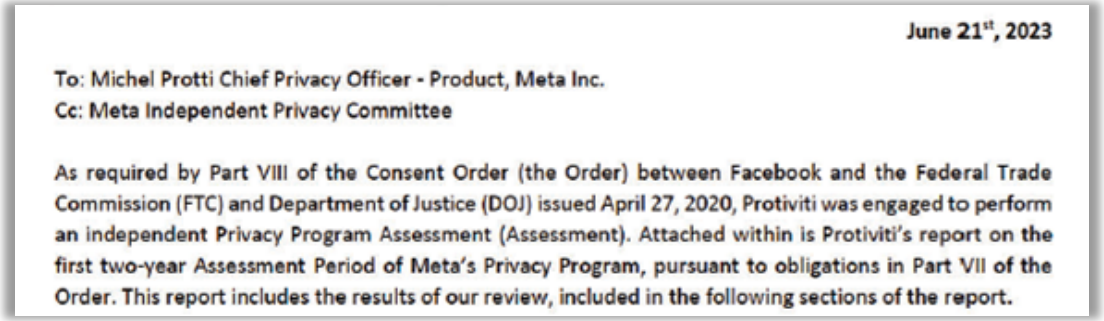
In re ITT Cont'l Baking Co., 81 F.T.C. 1021, 1972 WL 128875, at *1 (F.T.C. Aug. 1, 1972);
Br. for Appellee (FTC) at 24, *Meta Platforms, Inc. v. FTC*, No. 24-5054 (D.C. Cir. Mar. 21, 2024)

No Conditions of Fact "Have So Changed" to Require Reopening



No Conditions of Fact "Have So Changed" to Require Reopening

The 2023 Assessment demonstrates that the Order to Show Cause relies on a 2021 initial assessment whose findings have long since been addressed "***effectively***."



June 21st, 2023

To: Michel Protti Chief Privacy Officer - Product, Meta Inc.
Cc: Meta Independent Privacy Committee

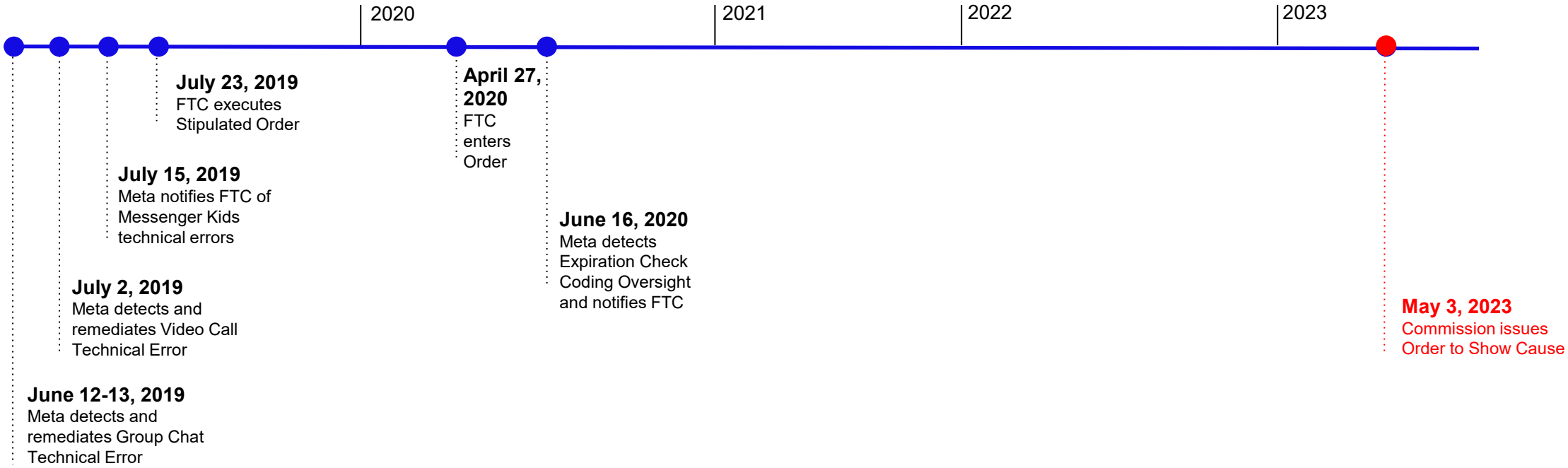
As required by Part VIII of the Consent Order (the Order) between Facebook and the Federal Trade Commission (FTC) and Department of Justice (DOJ) issued April 27, 2020, Protiviti was engaged to perform an independent Privacy Program Assessment (Assessment). Attached within is Protiviti's report on the first two-year Assessment Period of Meta's Privacy Program, pursuant to obligations in Part VII of the Order. This report includes the results of our review, included in the following sections of the report.

"***The nature of the Gaps found is consistent with the maturation of the MPP in light of Meta effectively addressing previous weaknesses***."

"We also observed that Meta ***has continued to push a privacy-first message*** from the top of company leadership. Broadly, improvements have included 1) the actions to address the three 2021 themes mentioned above, 2) new voluntary or discretionary activities driven by management decisions to improve the program and 3) additional actions taken to address new Assessor observations identified during the Current Assessment Period."

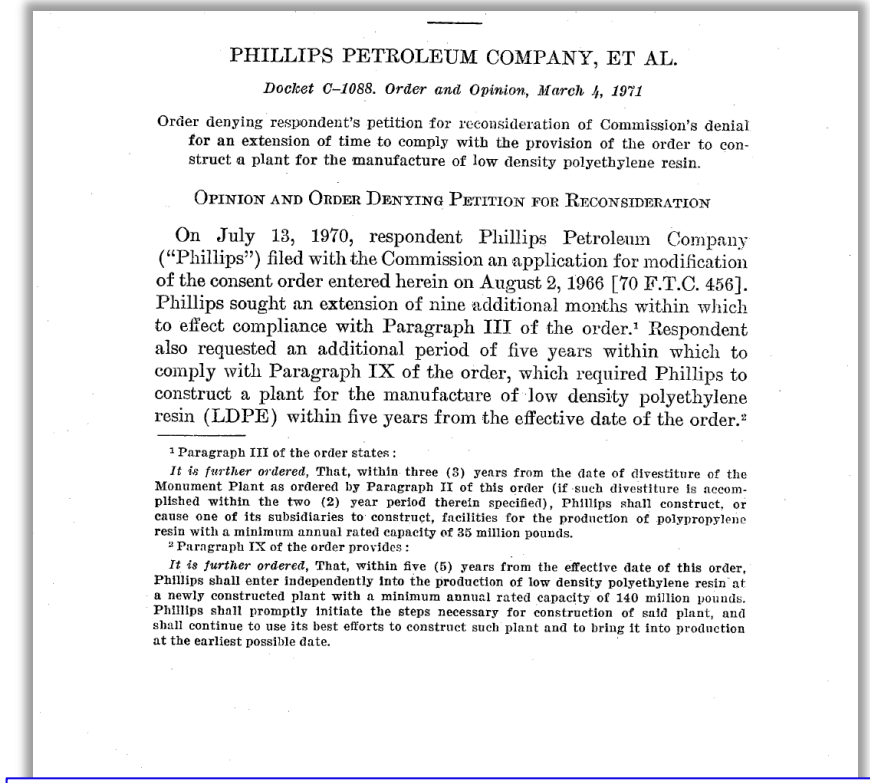
2023 Assessment Report at 7

No Conditions of Fact "Have So Changed" to Require Reopening



The three technical errors were remediated ***years before*** the Commission issued the Order to Show Cause; two of them before the 2019 settlement was reached.

No Conditions of Fact "Have So Changed" to Require Reopening



PHILLIPS PETROLEUM COMPANY, ET AL.

Docket C–1088. Order and Opinion, March 4, 1971

Order denying respondent's petition for reconsideration of Commission's denial for an extension of time to comply with the provision of the order to construct a plant for the manufacture of low density polyethylene resin.

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

On July 13, 1970, respondent Phillips Petroleum Company ("Phillips") filed with the Commission an application for modification of the consent order entered herein on August 2, 1966 [70 F.T.C. 456]. Phillips sought an extension of nine additional months within which to effect compliance with Paragraph III of the order.[1] Respondent also requested an additional period of five years within which to comply with Paragraph IX of the order, which required Phillips to construct a plant for the manufacture of low density polyethylene resin (LDPE) within five years from the effective date of the order.[2]

[1] Paragraph III of the order states:

It is further ordered, That, within three (3) years from the date of divestiture of the Monument Plant as ordered by Paragraph II of this order (if such divestiture is accomplished within the two (2) year period therein specified), Phillips shall construct, or cause one of its subsidiaries to construct, facilities for the production of polypropylene resin with a minimum annual rated capacity of 35 million pounds.

[2] Paragraph IX of the order provides:

It is further ordered, That, within five (5) years from the effective date of this order, Phillips shall enter independently into the production of low density polyethylene resin at a newly constructed plant with a minimum annual rated capacity of 140 million pounds. Phillips shall promptly initiate the steps necessary for construction of said plant, and shall continue to use its best efforts to construct such plant and to bring it into production at the earliest possible date.

The Commission has construed Section 5(b) to "clearly" preclude "reasonably foreseeable" events from constituting changed conditions of fact.

"Subsequent changes in factual circumstances, ***if falling within the range of contingencies which were reasonably foreseen or foreseeable*** at the time of consent negotiations, ***clearly do not constitute the kind of changed conditions*** . . . to require modification."

- *In re Gen. Ry. Signal Co.*, 108 F.T.C. 181, 1986 WL 722148, at *2 (F.T.C. Nov. 13, 1986) (requiring "***unforeseeable changes*** in fact")
- *In re Union Carbide Corp.*, 108 F.T.C. 184, 1986 WL 722149, at *3 (F.T.C. Nov. 14, 1986) ("Changed factual circumstances justify modification of an ***order only when the changed circumstances (1) were unforeseeable when the order was entered*** ….")
- *In re Nat'l Tea Co.*, 111 F.T.C. 109, 1988 WL 1025505, at *2 (F.T.C. Sept. 23, 1988) (***rejecting as insufficient costs that "were foreseeable*** at the time National agreed to the order")
- *In re Culligan, Inc.*, 113 F.T.C. 367, 1990 WL 10012596, at *2 (F.T.C. May 14, 1990) ("[C]hanged conditions ***must be unforeseeable***")
- *In re Firestone Tire & Rubber Co.*, 114 F.T.C. 450, 454, 1991 WL 11008532 (F.T.C. Aug. 2, 1991) ("***[M]odification not required for changes reasonably foreseeable*** at time of consent negotiations")
- *In re Stop & Shop Cos.*, 123 F.T.C. 1721, 1725, 1997 WL 33483283 (F.T.C. June 20, 1997) ("***Reopening is not required for changes in circumstances that were reasonably foreseeable*** at the time the consent order was entered.")

Phillips Petrol. Co., 78 F.T.C. 1573, 1575, 1971 WL 128558 (F.T.C. Mar. 4, 1971)

No Conditions of Fact "Have So Changed" to Require Reopening

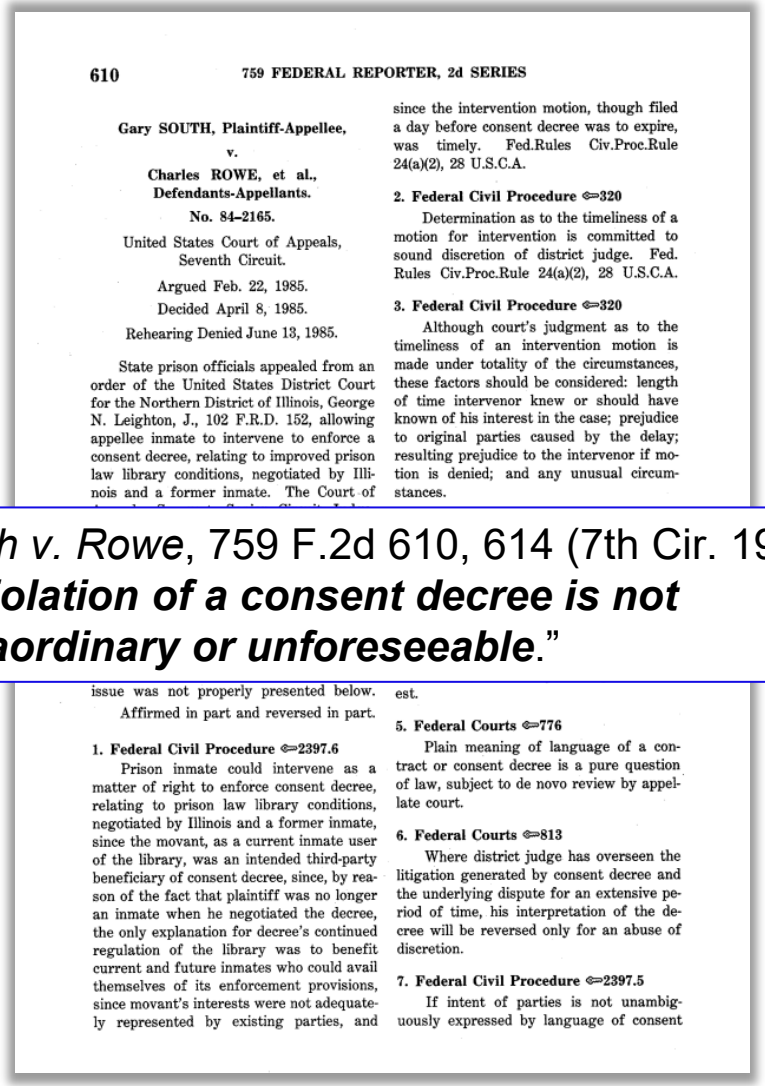
The Commission has applied the *Phillips Petroleum* Section 5(b) standard consistently and conservatively.

If the contingent event was reasonably foreseeable, it does not suffice, regardless of whether it was actually foreseen.

- *In re Canada Cement Lafarge Ltd.*, 111 F.T.C. 590, 593–94, 1989 WL 1126737 (F.T.C. Apr. 4, 1989): No changed conditions of fact warranting modification where changes to the relevant market were "***possibly foreseeable***."
- *In re Tarra Hall Clothes, Inc.*, 115 F.T.C. 920, 927–28, 1992 WL 12011077 (F.T.C. Oct. 27, 1992): No changed conditions of fact warranting modification where ***it was foreseeable, if not actually foreseen***, that the petitioner might sell its interest in one business to purchase interest in another or where it was foreseeable that the petitioner might stop importing products.
- *In re Nestle Holdings, Inc.*, 140 F.T.C. 1130, 1135, 2005 WL 6300827 (F.T.C. July 12, 2005): No changed conditions of fact warranting modification where it was ***possible to foresee, if not actually foreseen***, that the company might lose its ice cream business and acquire a separate yogurt business.

No Conditions of Fact "Have So Changed" to Require Reopening

Courts applying a similar standard have made clear that violations of a consent decree are not unforeseeable:



610 759 FEDERAL REPORTER, 2d SERIES

Gary SOUTH, Plaintiff-Appellee,
v.
Charles ROWE, et al.,
Defendants-Appellants.
No. 84-2165.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 22, 1985.
Decided April 8, 1985.
Rehearing Denied June 13, 1985.

State prison officials appealed from an order of the United States District Court for the Northern District of Illinois, George N. Leighton, J., 102 F.R.D. 152, allowing appellee inmate to intervene to enforce a consent decree, relating to improved prison law library conditions, negotiated by Illinois and a former inmate. The Court of

issue was not properly presented below.

Affirmed in part and reversed in part.

1. Federal Civil Procedure ⇐2397.6
Prison inmate could intervene as a matter of right to enforce consent decree, relating to prison law library conditions, negotiated by Illinois and a former inmate, since the movant, as a current inmate user of the library, was an intended third-party beneficiary of consent decree, since, by reason of the fact that plaintiff was no longer an inmate when he negotiated the decree, the only explanation for decree's continued regulation of the library was to benefit current and future inmates who could avail themselves of its enforcement provisions, since movant's interests were not adequately represented by existing parties, and since the intervention motion, though filed a day before consent decree was to expire, was timely. Fed.Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

2. Federal Civil Procedure ⇐320
Determination as to the timeliness of a motion for intervention is committed to sound discretion of district judge. Fed. Rules Civ.Proc.Rule 24(a)(2), 28 U.S.C.A.

3. Federal Civil Procedure ⇐320
Although court's judgment as to the timeliness of an intervention motion is made under totality of the circumstances, these factors should be considered: length of time intervenor knew or should have known of his interest in the case; prejudice to original parties caused by the delay; resulting prejudice to the intervenor if motion is denied; and any unusual circumstances.

est.

5. Federal Courts ⇐776
Plain meaning of language of a contract or consent decree is a pure question of law, subject to de novo review by appellate court.

6. Federal Courts ⇐813
Where district judge has overseen the litigation generated by consent decree and the underlying dispute for an extensive period of time, his interpretation of the decree will be reversed only for an abuse of discretion.

7. Federal Civil Procedure ⇐2397.5
If intent of parties is not unambiguously expressed by language of consent

South v. Rowe, 759 F.2d 610, 614 (7th Cir. 1985): "***A violation of a consent decree is not extraordinary or unforeseeable***."

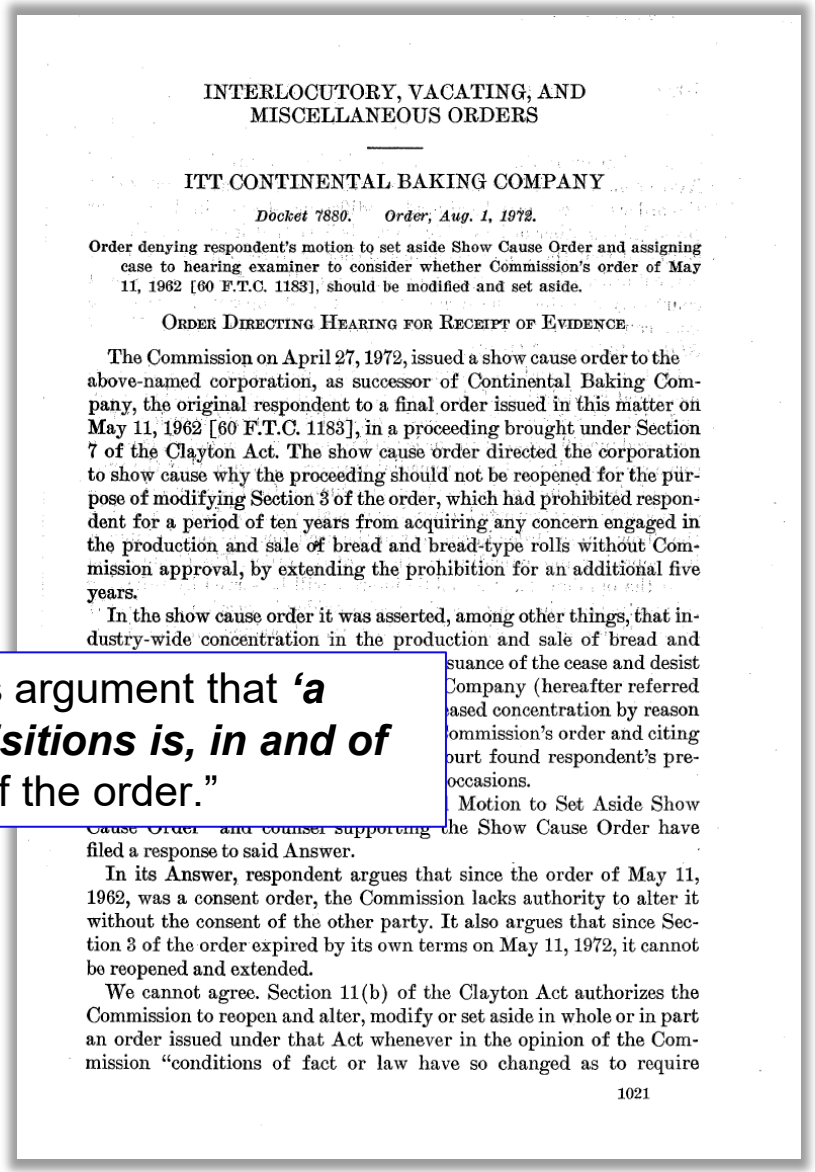
- *Stewart v. O'Neill*, 225 F. Supp. 2d 6, 9 (D.D.C. 2002) (Consent decree violations "***fall[] far short*** of the type of 'changed circumstance' that might warrant the amendment of a settlement agreement-in the negotiation of a settlement, ***the negotiation of incentives and penalties that will ensure the opposing parties' compliance is an omnipresent concern***.")
- *Cook v. Billington*, 2003 WL 24868169, at *4 (D.D.C. Sept. 8, 2003) ("The second 'changed circumstance' that Plaintiffs cite is that the Library has failed to correct its racially discriminatory employment practices, in violation of the Settlement Agreement. This too ***does not constitute the type of 'changed circumstance' which justifies modification***.")
- *FTC v. Garden of Life, Inc.*, 2012 WL 1898607, at *5 (S.D. Fla. May 25, 2012) ("Second, even if the FTC's assertion that GOL violated the Final Stipulated Order had merit, this argument is ***insufficient to constitute a significant change in factual circumstances***.")
- *FTC v. Nat'l Urological Grp, Inc.*, 2014 WL 3893796, at *12 (N.D. Ga. May 14, 2014) ("If the court were to grant the FTC's requested relief, then ***any violation of an injunction would require modification of the injunction***.")

No Conditions of Fact "Have So Changed" to Require Reopening

The Commission has rejected an argument that even multiple order violations—***adjudicated by a federal district court***—amounted to changed conditions of fact.

Complaint Counsel cites ***no case*** in which the Commission has cited order violations as a predicate for reopening.

"[W]e cannot agree with Commission counsel's argument that ***'a violation of the final order prohibiting acquisitions is, in and of itself, [] a sufficient basis for modification*** of the order."



INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

ITT CONTINENTAL BAKING COMPANY

Docket 7880. Order, Aug. 1, 1972.

Order denying respondent's motion to set aside Show Cause Order and assigning case to hearing examiner to consider whether Commission's order of May 11, 1962 [60 F.T.C. 1183], should be modified and set aside.

ORDER DIRECTING HEARING FOR RECEIPT OF EVIDENCE

The Commission on April 27, 1972, issued a show cause order to the above-named corporation, as successor of Continental Baking Company, the original respondent to a final order issued in this matter on May 11, 1962 [60 F.T.C. 1183], in a proceeding brought under Section 7 of the Clayton Act. The show cause order directed the corporation to show cause why the proceeding should not be reopened for the purpose of modifying Section 3 of the order, which had prohibited respondent for a period of ten years from acquiring any concern engaged in the production and sale of bread and bread-type rolls without Commission approval, by extending the prohibition for an additional five years.

In the show cause order it was asserted, among other things, that industry-wide concentration in the production and sale of bread and suance of the cease and desist Company (hereafter referred ased concentration by reason ommission's order and citing ourt found respondent's pre- occasions.

Motion to Set Aside Show Cause Order and counsel supporting the Show Cause Order have filed a response to said Answer.

In its Answer, respondent argues that since the order of May 11, 1962, was a consent order, the Commission lacks authority to alter it without the consent of the other party. It also argues that since Section 3 of the order expired by its own terms on May 11, 1972, it cannot be reopened and extended.

We cannot agree. Section 11(b) of the Clayton Act authorizes the Commission to reopen and alter, modify or set aside in whole or in part an order issued under that Act whenever in the opinion of the Commission "conditions of fact or law have so changed as to require

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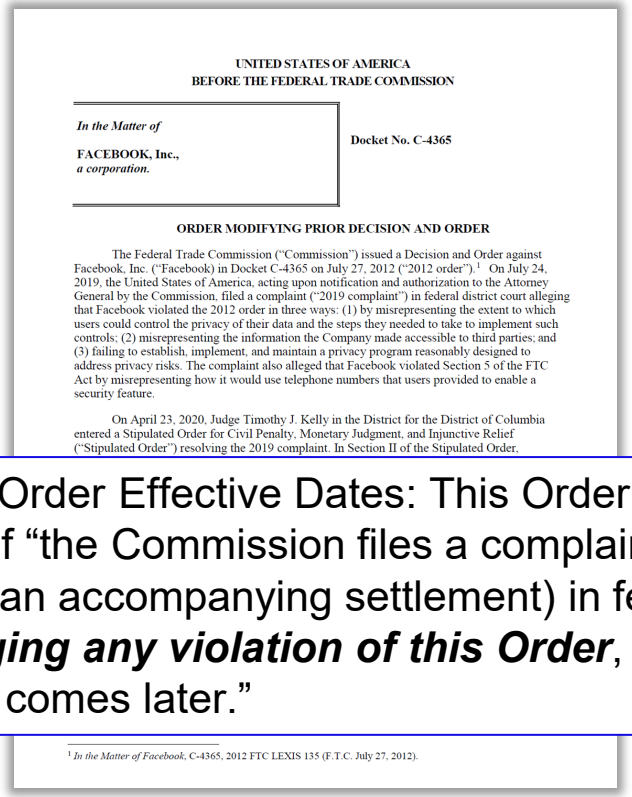
ITT Cont'l Baking Co., 81 F.T.C. 1021, 1972 WL 128875, at *1 (F.T.C. Aug. 1, 1972)

No Conditions of Fact "Have So Changed" to Require Reopening

That the parties specifically foresaw the possibility for violations—and negotiated accordingly—is clear from the Order and the Commission's statements to the public.



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

FACEBOOK, Inc.,
a corporation.

Docket No. C-4365

ORDER MODIFYING PRIOR DECISION AND ORDER

The Federal Trade Commission ("Commission") issued a Decision and Order against Facebook, Inc. ("Facebook") in Docket C-4365 on July 27, 2012 ("2012 order").[1] On July 24, 2019, the United States of America, acting upon notification and authorization to the Attorney General by the Commission, filed a complaint ("2019 complaint") in federal district court alleging that Facebook violated the 2012 order in three ways: (1) by misrepresenting the extent to which users could control the privacy of their data and the steps they needed to take to implement such controls; (2) misrepresenting the information the Company made accessible to third parties; and (3) failing to establish, implement, and maintain a privacy program reasonably designed to address privacy risks. The complaint also alleged that Facebook violated Section 5 of the FTC Act by misrepresenting how it would use telephone numbers that users provided to enable a security feature.

On April 23, 2020, Judge Timothy J. Kelly in the District for the District of Columbia entered a Stipulated Order for Civil Penalty, Monetary Judgment, and Injunctive Relief ("Stipulated Order") resolving the 2019 complaint. In Section II of the Stipulated Order,

[1] *In the Matter of Facebook*, C-4365, 2012 FTC LEXIS 135 (F.T.C. July 27, 2012).

Part XVI. Order Effective Dates: This Order will terminate if "the Commission files a complaint (with or without an accompanying settlement) in federal court ***alleging any violation of this Order***, whichever comes later."

Order Modifying Prior Decision and Order, *In re Facebook, Inc.*, Dkt. No. C-4365 (F.T.C. Apr. 27, 2020), Part XVI

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook

FTC settlement imposes historic penalty, and significant requirements to boost accountability and transparency

July 24, 2019 | Tags: Consumer Protection | Bureau of Consumer Protection | Privacy and Security | Consumer Privacy | Data Security | Social Media

Give Feedback

NOTE: The FTC hosted an IN-PERSON press conference at FTC Headquarters, 600 Pennsylvani. Ave, NW, Washington D.C., on July 24, 2019. Watch archival video of the press conference.

its users' privacy, to settle Federal Trade Commission charges that the company violated a 2012 FTC order by deceiving users about their ability to control the privacy of their personal information.

The $5 billion penalty against Facebook is the largest ever imposed on any company for violating consumers' privacy and almost 20 times greater than the largest privacy or data security penalty ever imposed worldwide. It is one of the largest penalties ever assessed by the U.S. government for any violation.

"The relief is designed . . . ***to punish future violations***."

July 2019 Press Release

Public Interest Does Not Require Reopening

05

Public Interest Does Not Require Reopening

Section 5(b) imposes a heavy burden to show detailed and specific facts demonstrating a public interest in any modification.

- *In re DTE Energy Co.*, 2021 WL 5711344, at *2 (F.T.C. Nov. 23, 2021): "The requester's burden is not a light one given ***the broad public interest in the finality of Commission orders***."
- *In re Nestle Holdings, Inc.*, 140 F.T.C. 1130, 1133, 2005 WL 6300827 (F.T.C. July 12, 2005): "A request to reopen and modify will not contain a 'satisfactory showing' if it is merely conclusory or otherwise fails to set forth by affidavit(s) ***specific facts demonstrating in detail the reasons why the public interest would be served by the modification***."

Public Interest Does Not Require Reopening

The Commission has construed the public interest to require reopening to impose new restrictions only where the order was insufficient to prevent the underlying pre-order Section 5 violations from continuing post-order.

- In *Elmo,* the marketing materials permitted by the consent order were proven by ***intervening medical evidence*** to violate Section 5 in the same manner alleged in the original complaint. *In re The Elmo Co., Inc.*, 70 F.T.C. 1374, 1391–92 (F.T.C. Nov. 18, 1966).

- In *Mohr*, the respondent exploited the administrative order's "ineptness of expression" to continue to violate Section 5.

    - "[S]ince paragraph 1 of ***the Commission's outstanding order to cease and desist has given rise to confusion and controversy*** as to the compliance required, the public interest demands that said paragraph be revised to insure, beyond question, that such deception shall cease." *In re Mitchell S. Mohr Trading as Nat'l Rsch. Co.*, 55 F.T.C. 720, 722 (F.T.C. Nov. 14, 1958).

- In *National Housewares*, the order's gaps permitted the respondent to continue to violate Section 5.

    - "The public interest is in remedying alleged violations of law not remedied by the original order, which ***violations are on account of the weakness of the original order, alleged to be continuing today***." *In re Nat'l Housewares, Inc.*, 84 F.T.C. 1566, 1570 (F.T.C. Dec. 3, 1974).

Public Interest Does Not Require Reopening

- The OTSC cites no actual harm to any user.
- The OTSC points to no unfair or deceptive act or practice starting after the Order's entry.
- No violation is "alleged to be continuing today."
- The OTSC points to no ambiguity or "ineptness of expression" in the Order.

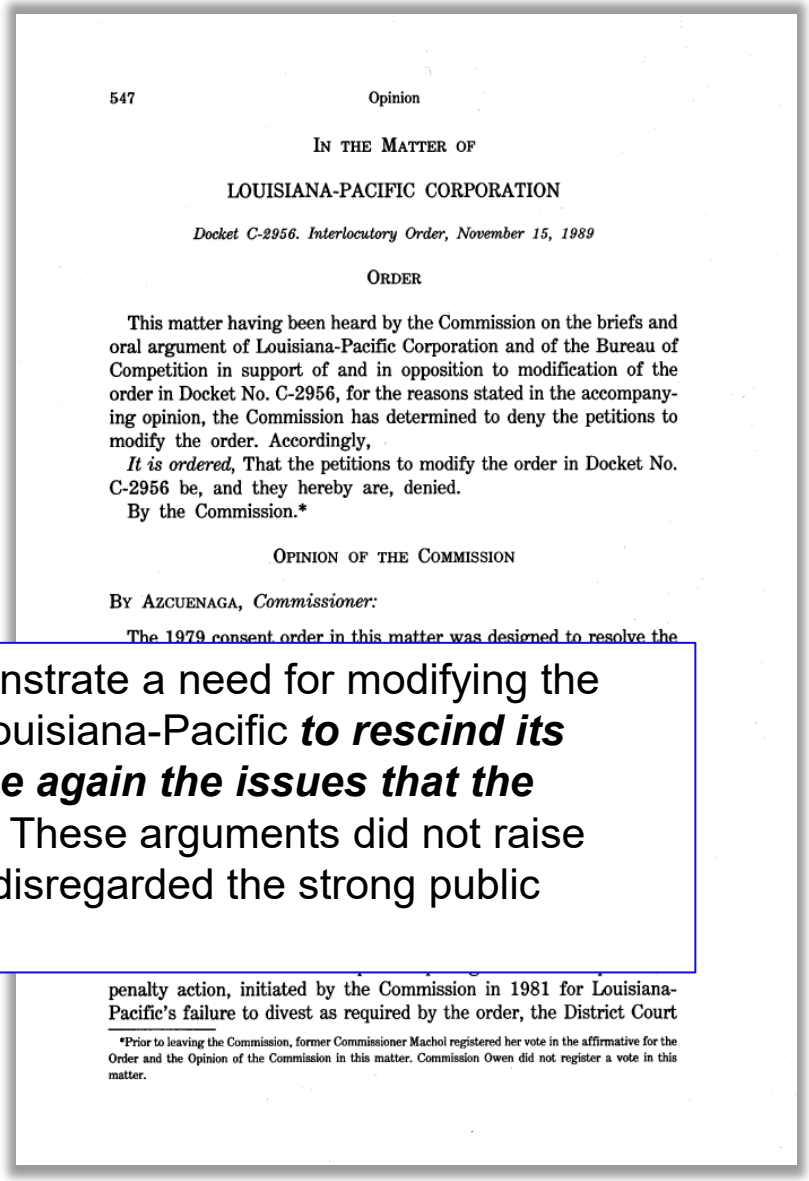
Public Interest Does Not Require Reopening

- The Assessor's 2023 findings are inconsistent with any risk of public harm from its 2021 findings.
    - "The nature of the Gaps found is consistent with the maturation of the MPP in light of ***Meta effectively addressing previous weaknesses***."
    - "We also observed that Meta ***has continued to push a privacy-first message*** from the top of company leadership. Broadly, improvements have included 1) the actions to address the three 2021 themes mentioned above, 2) new voluntary or discretionary activities driven by management decisions to improve the program and 3) additional actions taken to address new Assessor observations identified during the Current Assessment Period."
- The OTSC acknowledges that the coding errors began pre-Order and were remediated by June 2020.

2023 Assessment Report at 7

Public Interest Favors Finality Here

Section 5(b) does not allow reopening to revisit issues that the order resolved.



547 Opinion

IN THE MATTER OF

LOUISIANA-PACIFIC CORPORATION

Docket C-2956. Interlocutory Order, November 15, 1989

ORDER

This matter having been heard by the Commission on the briefs and oral argument of Louisiana-Pacific Corporation and of the Bureau of Competition in support of and in opposition to modification of the order in Docket No. C-2956, for the reasons stated in the accompanying opinion, the Commission has determined to deny the petitions to modify the order. Accordingly,

It is ordered, That the petitions to modify the order in Docket No. C-2956 be, and they hereby are, denied.

By the Commission.*

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner:*

The 1979 consent order in this matter was designed to resolve the

penalty action, initiated by the Commission in 1981 for Louisiana-Pacific's failure to divest as required by the order, the District Court

*Prior to leaving the Commission, former Commissioner Machol registered her vote in the affirmative for the Order and the Opinion of the Commission in this matter. Commission Owen did not register a vote in this matter.

"These arguments did not demonstrate a need for modifying the order, but were an attempt by Louisiana-Pacific ***to rescind its consent to the order and argue again the issues that the consent agreement resolved***. These arguments did not raise public interest issues, and they disregarded the strong public interest in repose and finality."

In re La.-Pac., 112 F.T.C. 547, 1989 WL 1126760, at *13 (F.T.C. Nov. 15, 1989)

Public Interest Favors Finality Here

The proposed changes add provisions advocated by the 2019 dissents and rejected by the Commission

Dissent	New Provision in Proposed Order
No "substantive limit on Facebook's collection, use, or sharing of personal information." (Chopra Dissent at 13.)	Meta is enjoined from the commercial use of certain data. (Part I)
No limitation on what constitutes justified information collection. (Chopra Dissent at 12.)	Meta must consider expanded "Privacy Risks and Harms" as part of the Privacy Review. (Part VIII.E.2a)
No ability for Assessor "to stop a major program change." (Chopra Dissent at 13.)	If the most recent Assessment shows material gaps or weaknesses, Meta cannot introduce new or modified products until the Assessor provides written confirmation to the Commission that Meta has fully remediated the gaps or weaknesses. (Part X)
No restrictions on Privacy Committee members. (Chopra Dissent at 14–15.)	At least one independent director of the Privacy Committee must serve or have recently served on a nonprofit focused on civil liberties or consumer privacy. (Definition M)
No public disclosure of categories of information collected or purpose and use. (Slaughter Dissent at 13.)	Meta must develop a comprehensive data map documenting information including the type of Covered Information collected and the purpose and use. (Part IV)
No public disclosure of data privacy incidents. (Slaughter Dissent at 13.)	Meta must publish reports following identification of a Covered Incident. (Parts XI.E)

Public Interest Favors Finality Here

The OTSC ignores the broad public interest in the finality of administrative adjudication that the Commission routinely invokes when rejecting reopening requests from respondents.

- *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 798 n.6 (1986): "The ***importance of bringing a legal controversy to conclusion*** is generally no less when the tribunal is an administrative tribunal than when it is a court."
- *Fed. Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981): "This Court has long recognized that ***'[p]ublic policy dictates that there be an end of litigation***; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."
- *McCuin v. Sec'y of Health & Hum. Servs.*, 817 F.2d 161, 172 (1st Cir. 1987): "The ***reopening power claimed by the Secretary takes away the finality*** that adjudication normally affords."

Public Interest Favors Finality Here

Proceeding with the OTSC would upend settled precedent, undermine the Commission's consent process, and impair the Commission and the public interest.

- *United States v. St. Regis Paper Co.*, 355 F.2d 688, 697 (2d Cir. 1966): "Adoption of the Government's position would deal a ***serious blow to the reasonable expectations of those who consented to cease and desist orders*** with the FTC."

- *Phillips Petrol. Co.*, 78 F.T.C. 1573, 1971 WL 128558, at *2 (Mar. 4, 1971): "***To conclude otherwise would mean that a negotiated consent agreement could never operate with any finality*** to require compliance at a fixed future date—a result which would rob the consent procedure of much of its usefulness."