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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CV 12-04177 SI

Plaintiff,

v.

**ORDER APPROVING STIPULATED  
ORDER FOR PERMANENT  
INJUNCTION AND CIVIL PENALTY  
JUDGMENT**

GOOGLE INC.,

Defendant.

On August 8, 2012, the United States filed a complaint alleging that Google Inc. (“Google”) violated a consent order with the Federal Trade Commission (“FTC”). The next day, Google and the United States filed a Proposed Stipulated Order for Permanent Injunction and Civil Penalty Judgment (“Proposed Order”). The Court granted *amicus curiae* Consumer Watchdog leave to file a brief opposing the Proposed Order, and to file supplemental briefing. On November 16, 2012, the Court heard argument on the Proposed Order. Having carefully considered the arguments of counsel and the papers submitted, the Stipulated Order for Permanent Injunction and Civil Penalty Judgment is APPROVED, for the reasons set forth below.

**BACKGROUND**

**1. Factual Background**

This action arises from Google’s alleged violation of a previous consent order with the FTC. In the prior action, the FTC alleged that when Google launched its social networking tool, Google Buzz, it used Gmail users’ private information despite telling those users it would only use that information for Gmail services. Complaint ¶¶ 6-7. The FTC also alleged that Google misrepresented to its Gmail

1 users that it would not automatically enroll them in the Buzz network and that they could control what  
2 information would be public on their profiles. *Id.*

3 In October 2011, the FTC settled its Buzz investigation with Google through a consent order that  
4 prohibited Google from future misrepresentations regarding: (1) its collection and use of private  
5 information and its customers' control over that information; and (2) its membership and compliance  
6 with privacy or security programs. *Id.* at ¶ 8.

7 In the instant case, the FTC alleges that Google violated the first part of the Buzz consent order  
8 through the placing of cookies on users' computers without their knowledge. Google uses cookies to  
9 collect information from users' web browsing activity, and uses this information to tailor its  
10 advertisements. *Id.* at ¶¶ 17-22. Google allows users to opt out of these cookies through an "opt-out  
11 button" they can click in their preferences, or through downloading an "opt-out cookie" plugin. *Id.* at  
12 ¶ 33. Google does not offer the plugin to users of the Safari internet browser, but it assured users that  
13 the Safari default settings would block cookies. *Id.* at ¶¶ 36-40. The FTC alleges that Google overrode  
14 the Safari software that blocked cookies, and secretly collected cookies from Safari users. *Id.* at ¶¶ 41-  
15 48. The FTC alleges that the misrepresentations of collecting private information and using targeted  
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**United States District Court**  
For the Northern District of California

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**United States District Court**  
For the Northern District of California

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## DISCUSSION

### 1. Procedural Fairness

For the procedural fairness prong, the Court looks to whether the consent decree was the product of “good faith, arms-length negotiations.” *Oregon*, 913 F.2d at 581.

Here, the FTC conducted an independent investigation into Google’s conduct before it began any settlement discussions. Declaration of Megan A. Bartley (“Bartley Decl.”) ¶ 2. It was the FTC, not Google, which drafted the initial Proposed Order. *Id.* at ¶ 3. The FTC and Google engaged in extensive negotiations that lasted over two months, and they debated the details of the settlement almost daily. *Id.* at ¶ 4; *see United States v. Pac. Gas & Elec.*, 776 F. Supp. 2d 1007, 1025 (N.D. Cal. 2011)

1 a preliminary injunction. Black’s Law Dictionary 855 (9th ed. 2009) (“Despite its name, a permanent  
2 injunction does not necessarily last forever.”).

3         Second, Consumer Watchdog argues that Google should be enjoined from further violating the  
4 Buzz consent order. However, such an injunction is unnecessary and duplicative. The Buzz consent  
5 order already prohibits Google future misrepresentations regarding its customers’ private information.  
6 The FTC has shown that it can enforce violations of the Buzz consent order, as it is doing in the instant  
7 action. Because Google remains subject to the Buzz consent order, an injunction to prohibit future  
8 violations of that order is unnecessary.

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28 <sup>1</sup> Because this argument was first included in the reply brief, neither the United States nor Google had a chance to respond in briefing.

1 judgment.” *Randolph*, 736 F.2d at 529 (citations omitted); *see also Chevron, U.S.A., Inc. v. Natural*  
2 *Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

3 The Court finds that the injunction is fair, adequate and reasonable. With the Buzz consent order  
4 in place, the injunction need only address the specific harm from the Safari cookies. Here, the  
5 injunction specifically requires Google to maintain systems to expire Safari cookies and creates a  
6 compliance reporting mechanism.

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8 **B. Adequacy of the Civil Penalty**

9 Consumer Watchdog argues that the civil penalty of \$22.5 million is an insufficient amount to  
10 enforce compliance with the Buzz consent

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1 district court granted a monetary award of \$37.6 million based on “a reasonable approximation of the  
2 loss consumers suffered as a result of defendant’s deceptive infomercials.” Unlike in *Circa Direct* or  
3 *Trudeau*, the instant case does not contain allegations of large amounts of consumer loss or Google  
4 profit.

5 Accordingly, Court finds that the civil penalty is fair, adequate and reasonable.

### 6 7 **C. Google’s Denial of Liability**

8 Finally, Consumer Watchdog argues that Google’s denial of liability in the consent decree  
9 contravenes the public’s interest. It alleges that the denial of liability allows Google to put its own spin  
10 on the facts, which will confuse consumers relying on its statements when making privacy choices.

11 However, Consumer Watchdog’s position that a consent decree requires an admission of liability  
12 is contradicted by legal history and precedent. *See, e.g., Swift & Co. v. United States*, 276 U.S. 311, 327  
13 (1928) (finding that the contention that a consent decree could not be upheld because there was no  
14 admission of guilt “ignores both the nature of injunctions, already discussed, and the legal implications  
15 of a consent decree”). More recently, the Second Circuit strongly disapproved of a district court’s  
16 rejection of a consent decree when that court’s primary basis for the rejection was the lack of an  
17 admission of liability. *Citigroup*, 673 F.3d at 163-65 (finding that in requiring an admission of liability,  
18 the district court prejudged the merits of the case, assumed that the SEC could win at trial or that  
19 Citigroup would be willing to settle if it admitted liability, did not give deference to the SEC’s policy  
20 judgment, and did not consider the agency’s discretionary assessment of its prospects or of the optimal  
21 allocation of its limited resources). Moreover, as the Second Circuit noted, “[r]equiring such an  
22 admission would in most cases undermine any chance for compromise.” *Id.* at 165.

23 The only case that Consumer Watchdog cites in support of its argument that the Proposed Order  
24 must have an admission of liability is *Circa Direct*, which noted that learning the truth of the  
25 defendants’ alleged deceptive conduct may be an important matter of public concern. *Circa Direct*,  
26 2012 WL 2178705 at \*6. However, the *Circa Direct* court later approved the consent decree without  
27 an admission of liability, relying on *Citigroup* and giving deference to the FTC’s determination that  
28 requiring admission of liability would force it to go to trial, which would result in a significant



1 expenditure of time and resources without much gain. *Fed. Trade Comm'n v. Circa Direct LLC*, CIV.  
2 11-2172 RMB/AMD, 2012 WL 3987610 at \*6-7 (D.N.J. Sept. 11, 2012). Moreover, as explained *supra*,  
3 the *Circa Direct* court based its reasoning on a separate public interest inquiry, which the Ninth Circuit  
4 does not follow. Indeed, courts in this circuit have upheld many agreements without an admission of  
5 wrongdoing, and Consumer Watchdog fails to cite a single case that does not. *See e.g., Turtle Island*  
6 *Restoration Network v. U.S. Dept. of Commerce*, 834 F. Supp. 2d 1004 (D. Haw. 2011) *aff'd* 672 F.3d  
7 1160 (9th Cir. 2012); *S.E.C. v. Olins*, 762 F. Supp. 2d 1193 (N.D. Cal. 2011); *see also Maher v. Gagne*,  
8 448 U.S. 122, 126 n.8 (1980) (noting that “[a]s is customary, the consent decree . . . explicitly stated that  
9 “[n]othing in this Consent Decree is intended to constitute an admission of fault by either party to this  
10 action.”)

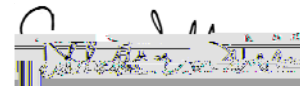
11 Accordingly, Court finds the Proposed Order with Google’s denial of liability to be fair,  
12 adequate and reasonable.

### 14 CONCLUSION

15 For the foregoing reasons, the Court hereby finds that the Proposed Order is both procedurally  
16 and substantively fair, adequate, and reasonable. Accordingly, the Court APPROVES the Stipulated  
17 Order for Permanent Injunction and Civil Penalty Judgment. (Docket No. 3.)

19 **IT IS SO ORDERED.**

20 Dated: November 16, 2012



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22 **SUSAN ILLSTON**  
United States District Judge