**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| ELECTRONIC PRIVACY INFORMATION CENTER, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 12-206-ABJ |
| FEDERAL TRADE COMMISSION, | ) | |
| Defendant. | ) | |

**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND IN SUPPORT OF MOTION TO DISMISS**

## INTRODUCTION

Plaintiff, the Electronic Privacy Information Center ("EPIC"), seeks to have this Court compel the Federal Trade Commission ("FTC" or "Commission") to file a civil action in a United States District Court to enforce a consent order to which EPIC is not a party. The consent order settled an administrative complaint in which the Commission alleged that Google, Inc., in launching its Google Buzz social network, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

EPIC alleges that in January 2012, Google announced new privacy practices that will take effect on March 1, 2012, and that these anticipated changes will result in a violation of the consent order. EPIC would like this Court to order the FTC to file a civil action "within five days" in order "to recover the maximum allowable civil penalty pursuant to 15 U.S.C. § 45." Complaint ("Compl.") at 9. EPIC asserts that the FTC "has a mandatory, nondiscretionary duty to enforce the consent order." Compl. ¶ 63.

EPIC's complaint, which seeks to deprive the Commission of the discretion to exercise its enforcement authority, flouts controlling precedent that universally rejects such efforts. *See, e.g., Heckler v. Chaney*, 470 U.S. 821 (1985). This lawsuit is completely baseless, and the complaint should be dismissed and EPIC's motion for emergency relief denied.

## BACKGROUND

### I. The FTC Consent Order

On March 30, 2011, the FTC issued an administrative complaint against Google relating to its launch of Google Buzz, and asked for public comment on a proposed consent order that would settle all allegations of the complaint. *See In re Google, Inc.*, No. C-4336.[1] After a period of public comment, the Commission, on October 13, 2011, entered a consent order that settled the administrative complaint. *See* Pl. Exh. 9.[2] Among other things, the consent order bars Google from making misrepresentations regarding its privacy policies, and requires it to implement a comprehensive privacy program, including retaining an independent third-party professional to assess its privacy controls every two years.

### II. This Litigation

EPIC filed its complaint on February 8, 2012, alleging that in January 2012, Google announced that it would change privacy policies, effective March 1, 2012. According to EPIC, Google's announced changes will result in a violation of the consent order between Google and the FTC. Compl. ¶¶ 9, 49-57. Invoking the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1) (Compl. ¶¶ 1, 13), EPIC asserts that the FTC has "failed to take any action regarding

[1] The Commission's administrative complaint against Google is Pl. Exh. 7. It is also available at http://www.ftc.gov/os/caselist/1023136/111024googlebuzzcmpt.pdf.

[2] Available at http://www.ftc.gov/os/caselist/1023136/111024googlebuzzdo.pdf.

this matter" (*id.* ¶ 12; *see also id.* ¶¶ 58-59); that the FTC's alleged "failure to Act constitutes final agency action" (*id.* ¶ 62); and that "[t]he FTC has a mandatory, nondiscretionary duty to enforce the consent order." *Id.* ¶ 63. EPIC also alleges that it "is entitled to injunctive relief compelling the FTC to enforce the consent order" (*id.* ¶ 65) – specifically, an order directing the FTC "within five days," to "commenc[e] a civil action against Google, Inc. in a US district court to recover the maximum allowable civil penalty pursuant to 15 U.S.C. § 45." *Id.* at 8-9.

## ARGUMENT

### I. Standard of Review

#### A. Motion to Dismiss

EPIC's complaint can be dismissed under Federal Rule of Civil Procedure 12(b)(1) because its claim is "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 536-37 (1974). "Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper . . . when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (quoting in part *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)); *see also Neitzke v. Williams*, 490 U.S. 319, 327 n.6 (1989) ("A patently insubstantial complaint may be dismissed . . . for want of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).").

The Court may also dismiss the complaint under Fed. R. Civ. P. 12(b)(6). The APA precludes judicial review of agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This Circuit formerly viewed this provision as a jurisdictional bar, *Baltimore Gas*

*and Electric Co. v. FERC*, 252 F.3d 456, 460-61 (D.C. Cir. 2001), but has stated recently that this provision goes to whether the plaintiff has stated a cause of action. *See Oryszak v. Sullivan*, 576 F.3d 522, 524-25 (D.C. Cir. 2009).

**B. Temporary Restraining Order and Preliminary Injunction**

In order to obtain a temporary restraining order or preliminary injunction, a party must demonstrate that: (1) it has a substantial likelihood of success on the merits; (2) it will suffer irreparable injury in the absence of preliminary relief; (3) other interested parties will not be substantially injured if the requested relief is granted; and (4) granting such relief would serve the public interest. *See Katz v. Georgetown Univ.*, 246 F.3d 685, 687-88 (D.C. Cir. 2001); *Biovail Corp. v. FDA*, 448 F. Supp.2d 154, 158 (D.D.C. 2006). The likelihood of success requirement is the most important of these factors. *Id.* "Without any probability of prevailing on the merits, the Plaintiffs' purported injuries, no matter how compelling, do not justify preliminary injunctive relief." *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 38 F. Supp.2d 114, 140 (D.D.C. 1999). Indeed, when there is no showing of a likelihood of success, the "court need not proceed to review the other three preliminary injunction factors." *Arkansas Dairy Cooperative Ass'n, Inc.. v. Dep't of Agriculture*, 573 F.3d 815, 832 (D.C. Cir. 2009); *see also Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253-54 (D.C. Cir. 2006).

Preliminary injunctive relief is an "extraordinary and drastic remedy" that should be exercised sparingly. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Bristol-Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 215 (D.D.C. 1996). EPIC's request for mandatory relief presents an additional hurdle: when a movant seeks an injunction that "would alter, rather than preserve, the status quo . . . the moving party must meet a higher standard than in the ordinary case by

showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from the denial of the injunction." *Columbia Hosp. for Women Found., Inc. v. Bank of Tokyo-Mitsubishi, Ltd.*, 15 F. Supp.2d 1, 4 (D.D.C. 1997) (quoting *Phillip v. Fairfield Univ.*, 118 F.3d 131, 133 (2d Cir. 1997)), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998); *see also Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969); *Nat'l Conference on Ministry to Armed Forces v. James*, 278 F. Supp.2d 37, 43 (D.D.C. 2003); *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp.2d 30, 36 (D.D.C. 2000).

## II. The Complaint Should be Dismissed Because FTC Enforcement Decisions are Not Subject to Judicial Review

EPIC concedes that it has no private right of action under the FTC Act. *See* Memorandum in Support of Temporary Restraining Order and Preliminary Injunction ("Pl. Mem.") at 9 n.3. It is also well established that "third parties to government consent decrees cannot enforce those decrees absent an explicit stipulation by the government to that effect." *SEC v. Prudential Securities, Inc.*, 136 F.3d 153, 158 (D.C. Cir. 1998); *see also Rafferty v. NYNEX Corp.*, 60 F.3d 844, 849 (D.C. Cir. 1995). Similarly, non-parties cannot seek judicial review of FTC cease and desist orders. *Consumer Federation of America v. FTC*, 515 F.2d 367, 373 (D.C. Cir. 1975).[3]

[3] Surprisingly, EPIC relies on *Consumer Federation* to support the assertion that the D.C. Circuit recognized a "danger" that FTC enforcement decisions would not be subject to judicial review at the behest of complainants. Pl. Mem. at 7. That is the *opposite* of what *Consumer Federation* held: The Court flatly rejected a complainant's attempt to obtain judicial review of a Commission cease and desist order. 515 F.2d at 373. Although the D.C. Circuit quoted the legislative history that EPIC relies on, Pl. Mem. at 7, it did so for the purpose of setting forth the alternative view of judicial review that Congress specifically rejected in enacting the Federal Trade Commission Act. 515 F.2d at 370-73.

Thus precluded from a direct means of enforcing the consent order against Google, EPIC tries to evade these principles by invoking the APA, contending that its suit is an action to "compel agency action unlawfully withheld." Pl. Mem. at 9 & n.3. The "agency action" EPIC seeks to compel, however, is enforcement action, and its attempt is foreclosed by *Heckler v. Chaney*.

In *Chaney*, as here, plaintiffs sought to enjoin the government to take enforcement action. 470 U.S. at 823. There, plaintiffs, death row inmates, alleged that the use of drugs for lethal injection was in violation of the Food, Drug, and Cosmetic Act ("FDCA") because the drugs were not approved for that purpose. *Id.* Plaintiffs filed a petition with the Food and Drug Administration ("FDA") asking it to undertake enforcement action, and the agency declined to do so. *Id.* The Supreme Court held that agency decisions not to initiate enforcement actions are not subject to judicial review: "This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." *Id.* at 831.

This case cannot be distinguished from *Chaney*. The *Chaney* Court reasoned that "an agency decision not to enforce involves a complicated balancing of a number of factors which are peculiarly within its expertise," including assessing "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831. The Court compared a refusal to institute proceedings with a decision of a prosecutor not to indict, "which has long been regarded as the special province of the Executive Branch." *Id.* at 832.

The presumption of unreviewability "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833. The FTC Act provides no such guidelines; thus, there is no basis for EPIC's assertion that the "FTC has a mandatory, nondiscretionary duty to enforce the consent order." Compl. ¶ 63. The suggested source of this alleged duty is 15 U.S.C. § 45(l). Compl. ¶ 59. In its motion for preliminary relief, EPIC asserts that this statutory section "states that the FTC '*shall*' obtain injunctive relief and recover civil penalties against companies that violate consent orders." Pl. Mem. at 6 (emphasis by EPIC). The cited provision states no such thing. It provides:

> (l) Penalty for violation of order; injunctions and other appropriate relief
>
> Any person, partnership, or corporation who violates an order of the Commission . . . shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. . . . In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.[4]

EPIC also cites 15 U.S.C. § 45(a)(2) in its memorandum. Pl. Mem. at 9-10. This subsection provides:

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[4] EPIC misconstrues the enforcement authority of the FTC. The cited section provides that the Attorney General, not the FTC, can bring an action for civil penalties for violations of FTC administrative orders. Pursuant to 15 U.S.C. § 56(a)(1), if the FTC notifies the Attorney General regarding a civil penalty action, the Attorney General can then bring such an action. If the Attorney General fails within 45 days after receipt of the notification to bring such an action, then the FTC can bring the action in its own name and with its own attorneys. *Id.* EPIC cites 15 U.S.C. § 56(a)(2) in its proposed order and memorandum (Pl. Mem. at 9-10), apparently in the mistaken belief that that section gives the FTC authority to commence a civil penalty action. It does not. That section is limited to the types of cases listed there, which does not include civil penalty actions. Section 56(a)(1) provides the procedure for civil penalty actions. Accordingly, EPIC seeks relief that the FTC Act does not permit the FTC to obtain on its own.

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Neither of these sections gives the FTC a "mandatory, nondiscretionary duty to enforce the consent order." In fact, the statute at issue in *Chaney* was similar to the FTC Act. The section on criminal sanctions interpreted in *Chaney* "states baldly that any person who violates the FDCA's substantive provisions '*shall* be imprisoned . . . or fined.'" 470 U.S. at 835 (quoting 21 U.S.C. § 333) (emphasis added). Nonetheless, the Court held: "The Act's enforcement provisions thus commit complete discretion to the Secretary to decide how and when they should be exercised." *Id.* The Court examined other provisions of the statute. For example, the Court held that the seizure provision, 21 U.S.C. § 334, which provides that offending articles "*shall* be liable to be proceeded against" (emphasis added), was "framed in the permissive." 470 U.S. at 835.

Courts have consistently declined to review enforcement decisions. *See Sierra Club v. Jackson*, 648 F.3d 848, 855-56 (D.C. Cir. 2011) (agency decision not to take enforcement action not reviewable); *Association of Irritated Residents v. EPA*, 494 F.3d 1027, 1031-32 (D.C. Cir. 2007) (decision to enter consent agreement within agency's discretion); *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1258 (D.C. Cir. 2005) (decisions on deadline extensions committed to agency discretion); *Baltimore Gas and Electric Co. v. FERC*, 252 F.3d at 460-61 (decision to settle case committed to agency discretion); *New York State Dep't. of Law v. FCC*, 984 F.2d 1209, 1214-17 (D.C. Cir. 1993) (decision to settle case and choice of remedy committed to agency discretion); *Cutler v. Hayes*, 818 F.2d 879, 893 (D.C. Cir. 1987) ("Congress has not given FDA an inflexible mandate to bring enforcement actions against all violators of the Act.");

*Schering Corp. v. Heckler*, 779 F.2d 683, 686-87 (D.C. Cir. 1985) (FDA's decision not to enforce while it decides substantive issue is committed to its discretion); *Int'l Ctr. for Tech. Assessment v. Thompson*, 421 F. Supp.2d 1, 7 (D.D.C. 2006) ("FDA is simply exercising its discretion not to take enforcement actions." (quotation marks omitted)); *see also Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1558 (11th Cir. 1985) ("The FTC exercises its enforcement powers at its own discretion.").

In *Chaney*, the Supreme Court refused to afford the word "shall" in the statute a mandatory meaning when that interpretation would have circumscribed the agency's discretion not to enforce particular provisions. 470 U.S. at 835. Other cases reach the same result. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (describing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands"); *United States v. Dotterweich*, 320 U.S. 277, 279 (1943) (holding that an administrative hearing is not a prerequisite to prosecution of a manufacturer for violating the FDCA even though 21 U.S.C. § 335 states that notice and a hearing "shall" be provided); *United States v. Morgan*, 222 U.S. 274, 280 (1911) (same under the relevant provision of the Pure Food and Drug Act of 1906, the predecessor to the FDCA); *Dubois v. Thomas*, 820 F.2d 943, 946–47 (8th Cir. 1987); *City of Seabrook v. Costle*, 659 F.2d 1371, 1375 n.3 (5th Cir. 1981); *United States v. Clarke*, 628 F. Supp.2d 1, 11 (D.D.C. 2009) (in *Chaney* "the Supreme Court has instructed that when 'shall' is used in an enforcement provision, it should be construed to confer discretion on an agency unless the statute or regulations provide substantive standards. . . ."); *Wood v. Herman*, 104 F. Supp.2d 43, 47 (D.D.C. 2000) ("While it is a recognized tenet of statutory construction that the word 'shall' is usually a command, this principle has not been

applied in cases involving administrative enforcement decisions." (citation omitted)); *City of Yakima v. Surface Transp. Bd.*, 46 F. Supp.2d 1092, 1100 (E.D. Wash. 1999).

No statutory provision circumscribes the Commission's decision whether to initiate enforcement proceedings; thus, such a decision is not subject to judicial review. EPIC's complaint is so "insubstantial, implausible, [and] foreclosed by prior decisions" of numerous courts, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. at 89, that it should be dismissed under Fed. R. Civ. P. 12(b)(1). Alternatively, the Court may dismiss it under Rule 12(b)(6).[5]

## III. EPIC's Motion for a Temporary Restraining Order and Preliminary Injunction Should be Denied

For the reasons stated above, EPIC has no likelihood of success in this case. On this basis, its motion for emergency relief can be denied, and there is no need for the Court to consider the other factors typically involved in reviewing a motion for a preliminary injunction. *Arkansas Dairy Cooperative Ass'n*, 573 F.3d at 832. But even taking those elements into account, EPIC has not made the kind of strong showing, much less any showing, that would justify the extraordinary remedy of a preliminary injunction, especially a mandatory injunction that would impose an unprecedented form of affirmative relief.

The FTC takes very seriously the need to protect the privacy of consumers, and has devoted substantial resources to this effort. The Commission's commitment to vigorous

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[5] Contrary to EPIC's assertions, Compl. ¶ 62, Pl. Mem. at 10, the FTC has taken no final action with respect to Google's January 2012 announcement. For this reason, the complaint can be dismissed for failure to challenge final agency action and for lack of ripeness. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997); *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-33 (1998). However, in the context of a challenge to an agency's enforcement discretion, it is not necessary to evaluate these issues. In *Chaney*, the FDA had made a *final* decision not to enforce the law in the way desired by plaintiffs. Nonetheless, the Court held that the agency's decision was beyond judicial review. Thus, even if the FTC had reached a final decision regarding the Google announcement, it would not be subject to judicial review.

enforcement of the FTC Act to protect the privacy rights of consumers is reflected in its docket. In the last 10 years, the Commission has brought more than 30 data security cases. The Commission's enforcement efforts in the area of privacy and data security in the past two years – in addition to Google Buzz – include the following: *In re ScanScout, Inc*., Docket No. C-4344 (Dec. 21, 2011) (statements about consumer opt-out from Internet browser cookies used to track online activity); *In re Chitika, Inc*., Docket No. C-4324 (June 17, 2011) (statements about consumer opt-out from online advertising); *In re Rite Aid Corp*., Docket No. C-4308 (Nov. 22, 2010) (statements regarding privacy and security of sensitive information from customers and job applicants); *In re Twitter, Inc*., Docket No. C-4316 (March 11, 2011) (statements about privacy and security of user accounts). More recently, the Commission tentatively approved and published for public comment a settlement with Facebook relating to Facebook's privacy promises to consumers. *In re Facebook, Inc*., File No. 092 3184 (Dec. 5, 2011). Other FTC initiatives in the area of privacy and data security are reported at http://www.ftc.gov/privacy.

To deploy its resources effectively requires thoughtful and deliberate action on the part of the Commission and its staff, in order to carefully ascertain whether a violation has occurred, to consider the full range of remedies that would be available if a violation is found, and to set priorities among the myriad threats to privacy that consumers face. Granting the preliminary injunctive relief that EPIC has requested – forcing the Commission to bring a particular enforcement action within an arbitrary time limit – would be wholly inimical to the "public interest in the effective enforcement" of the laws that Congress has passed to protect the public and entrusted the FTC to enforce. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir.

2001). Accordingly, the balance of equitable considerations here weighs strongly against preliminary injunctive relief.

## CONCLUSION

For the foregoing reasons, this case should be dismissed, and EPIC's motion for a temporary restraining order and preliminary injunction should be denied.

Respectfully submitted,

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