UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BLOCK & LEVITON LLP,	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:19-cv-12539-PBS
FEDERAL TRADE COMMISSION,	)	
Defendant.	)	

DEFENDANT'S REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Dated: June 19, 2020

Attorneys for the Federal Trade Commission

Defendant Federal Trade Commission (the "FTC") respectfully submits this reply memorandum in further support of its motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1 of the Local Rules of the United States District Court for the District of Massachusetts.

ARGUMENT

I. SEVERAL FACTS THAT PLAINTIFF ATTEMPTS TO DISPUTE BY CITING A LACK OF KNOWLEDGE MUST BE DEEMED ADMITTED.

As a preliminary matter, the Court should deem admitted all facts, described in the FTC's and Facebook's Rule 56.1 Statements, that Plaintiff failed properly to dispute in its responses. Those facts include SOF 2, 3 (partial), 7, 8 (partial), and 12 (partial) in the FTC's Rule 56.1 Statement, and SOF 19, 20, 21, and 23 (partial) in Facebook's Rule 56.1 Statement. Doc. # 27. For those facts, Plaintiff responded, in whole or in part, that it "lacks sufficient knowledge to admit or deny." *See id.* Because that response cannot create a genuine issue of fact under the rules and case law, those facts must be deemed admitted.

"A party opposing the motion shall include a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried, with page references to affidavits, depositions and other documentation." Local Rule 56.1. "A party opposing summary judgment cannot create a genuine issue of fact by denying statements, which the moving party contends are undisputed and supported by sufficient evidence, on the basis that he lacks knowledge and information to admit or deny the statement." *Chapman v. Finnegan*, 950 F. Supp. 2d 285, 292 (D. Mass. 2013). Thus, in *Chapman*, because the plaintiff "respond[ed] to all statements regarding what Phelan did or told the police by stating that he cannot admit or deny the statement," the court "deem[ed] that fact admitted for purposes of Defendants' motion for summary judgment." *Id.* *Accord Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 334 n.4 (D. Me.

2017) ("The City's opposing statement, however, does not provide a record citation and therefore fails to properly controvert the Plaintiff's proposed fact. . . . [T]he statement is deemed admitted."); *Cooper v. City of New Rochelle*, 925 F. Supp. 2d 588, 605 (S.D.N.Y. 2013) ("Plaintiffs respond to numerous of these factual allegations by 'deny[ing] knowledge or information sufficient to form a belief as to the[ir] truth.' Thus, these factual allegations are deemed admitted.").[1]

Here, with respect to nine facts, Plaintiff responded, in whole or in part, that it "lacks sufficient knowledge to admit or deny." Doc. # 27. Those nine facts are as follows:

Facts Deemed Admitted

FTC's Rule 56.1 Statement	***Facebook's Rule 56.1 Statement***
SOF 2. Regarding the nature of the FTC's search for responsive records.	SOF 19. Regarding the contents of the investigatory materials that Facebook provided to the FTC, the commercial nature of those materials, and that Facebook does not ordinarily release those materials to the public.
SOF 3 (partial). Statements regarding the FTC's communications with Facebook.	SOF 20. Facebook provided those investigatory materials to the FTC voluntarily.
SOF 7. Regarding the substance of the communications between the FTC and Facebook about the FOIA request.	SOF 21. Facebook may have been subject to a subpoena if it had not provided those investigatory materials to the FTC voluntarily.

[1] As numerous courts have recognized, the same rule applies in FOIA cases, like this one, where motions for summary judgment typically are not proceeded by discovery. *E.g.*, *Sheppard v. United States Dep't of Justice*, No. 17-01037, 2019 WL 3577699, at *6 (W.D. Mo. Aug. 6, 2019) (applying rule in FOIA case and deeming admitted those facts that were not controverted with record evidence); *Peeler v. U.S. Dep't of Justice, Drug Enf't Agency*, No. 11-1261, 2013 WL 4441528, at *1 (D. Conn. Aug. 15, 2013) (same); *Dawson v. Drug Enf't Admin. New York Field Div.*, No. 00-5887, 2002 WL 418022, at *2 (S.D.N.Y. Mar. 14, 2002) (same).

SOF 8 (partial). Regarding the substance of the FTC's consultations with its staff and with Facebook.	SOF 23 (partial). Regarding Facebook's ordinary treatment of identifying information.
SOF 12 (partial). Regarding the portion of the statement describing the contents of the March 11, 2019 confidential report.	

Because Plaintiff's response to the above facts cannot create a genuine issue of fact under the rules and case law, those facts must be deemed admitted. *E.g.*, *Chapman*, 950 F. Supp. 2d at 292; *see also Sheppard*, 2019 WL 3577699, at *6 (FOIA case); *Peeler*, 2013 WL 4441528, at *1 (same); *Dawson*, 2002 WL 418022, at *2 (same).

II. THE FTC'S *VAUGHN* INDEX IS SUFFICIENT.

Plaintiff advances several arguments challenging the adequacy of the FTC's *Vaughn* index. *See* Doc. # 25 at 5-8 ("B&L Mem."). None has merit. The FTC has amply satisfied its obligation to provide a *Vaughn* index that, together with the accompanying Stearns declaration, "provides a broad description of the requested material or information, and the agency's reason for withholding each document or portion of a document." *Carpenter v. U.S. Dep't of Justice*, 470 F.3d 434, 442 (1st Cir. 2006); *Town of Winthrop v. FAA*, 328 Fed. App'x 1 (1st Cir. 2009) (an agency properly "supplements the [*Vaughn*] index with affidavit(s)").

Plaintiff claims that the FTC has insufficiently described the documents that it withheld based on their commercial content. B&L Mem. 6. To the contrary, the *Vaughn* index and Stearns Declaration amply explain, for each document, the context of the communication and the nature of the information withheld, including:

- in the FTC's investigation, information provided by Facebook about its internal operations, including its technology, products, and

business structure (Stearns Decl. ¶36; *e.g.*, *Vaughn* Index, Doc. 275 (6/14/18 email attachment, "Facebook, Inc.'s Fourth Set of Written Responses to Requests for Information"), Doc. 391 (1/29/18 email chain between FTC staff and Facebook's counsel "RE Request 6"));

- in settlement negotiations between the FTC and Facebook, the exchange of drafts of a proposed complaint, court order, and administrative order, and associated correspondence addressing Facebook's proposed revisions (Stearns Decl. ¶¶ 38, 39; *e.g.*, *Vaughn* Index, Doc. 26 (4/10/19 email attachment from Facebook's counsel titled "Complaint redlines"), Doc. 234 (4/14/19 email chain between Facebook and FTC staff regarding "Order language")); and

- Facebook's advocacy submissions to the FTC supporting its settlement positions (Stearns Decl. ¶ 39; *e.g.*, *Vaughn* Index, Doc. 268 (2/28/19 email attachment, "White Paper Submitted on Behalf of Facebook, Inc. Regarding the Proposed Civil Penalty"), Docs. 259, 260 (3/12/19 email to FTC Chairman transmitting letter from Facebook's counsel and consultant report).

The Stearns Declaration further explains that the FTC's Exemption 4 withholdings were informed by Facebook's objections to the disclosure of its confidential commercial information, and specifies aspects of the information that qualify it as "commercial." *See* Stearns Decl. ¶¶ 37-39. Supplementing that explanation, Facebook, in support of its separate motion for summary judgment, has further described the commercial nature of the information it seeks to protect under Exemption 4. *See* Declaration of Jessica Hertz ¶¶ 8-23 (ECF No. 22-1). More specific detail than that is not necessary to assess the merits of the Exemption 4 claim—and, indeed, would risk "reveal[ing] the very information sought to be protected." *Carpenter*, 470 F.3d at 442.

Equally groundless is Plaintiff's argument (B&L Mem. 7) that the FTC has insufficiently explained its withholding of identifying information of individuals of investigative interest.[2] The FTC properly redacted information on this basis in documents 250, 253, 386, and 566 because

[2] Plaintiff wrongly claims (B&L Mem. 7) that the FTC's opening memorandum of law did not mention its redaction of information on this basis. It certainly did. *See* FTC Mem. at 2, 7, 18.

disclosure of that information could cause harm to personal reputation, the affected individuals has not consented to release this information, and Plaintiff did not identify any legitimate public interest in disclosure. Stearns Decl. ¶¶ 46-48; Stearns Supp. Decl., attached hereto, ¶ 1. This information remains nonpublic. *Id*. That explanation suffices.

Plaintiff's surmise that the FTC has "publicly acknowledged" that information (B&L Mem. 7) is specious. To begin, the burden is on Plaintiff to prove public acknowledgement of withheld information, not (as Plaintiff suggests) on the FTC to disprove it. *Am. Civ. Liberties Union v. C.I.A.*, 710 F.3d 422, 426 (D.C. Cir. 2013). But Plaintiff has not "point[ed] to specific information in the public domain that appears to duplicate that being withheld." *Id*. (internal quotation marks omitted). Indeed, where Exemption 7(C) is concerned, that "information has been released to the public domain, especially where the release is limited, has little bearing on the privacy interest" protected by the exemption. *Carpenter*, 470 F.3d at 440 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-64 (1989)); *see Weisberg v. DOJ*, 745 F.2d 1476, 1491 (D.C. Cir. 1984) (Exemption 7(C) protection is not extinguished because a requester might be able to "piece together" the identity of the party).

Plaintiff cites a statement by one of the agency's Commissioners opposing the settlement's inclusion of a liability release that covers Facebook's officers and directors. B&L Mem. 7 n.18. But the Commissioner's stated opinion on that subject does not disclose details of the FTC's investigative activities or the settlement negotiations, including whether those enforcement activities in fact targeted any named individual. Thus, Plaintiff has failed to show any material dispute regarding the FTC's withholding of personally identifying information.

Plaintiff's final claim of supposed inadequacies in the *Vaughn* index (B&L Mem. 8) is likewise meritless. Plaintiff identifies several pages that the *Vaughn* index lists as "released" but

the FTC withheld in its production. *Id.* This discrepancy was due to a software glitch in the conversion of responsive records to PDF for production. Stearns Supp. Decl. ¶ 2. The *Vaughn* index is accurate; those pages were meant to be released, and the FTC has since produced them to Plaintiff. *Id*. Three other pages identified by Plaintiff were incorrectly listed in the *Vaughn* index as "released" when, instead, they are being withheld in part. *Id*. ¶ 3. But this mistake is inconsequential because the documents produced to Plaintiff correctly show the FTC's withholding determinations and identify the basis for the FTC's redactions (FOIA Exemptions 3 and 4 and FTC Act Section 6(f)). *Id*. Such minor errors do not render the *Vaughn* index inadequate.[3]

III. THE FTC PROPERLY WITHHELD RECORDS PURSUANT TO FOIA EXEMPTIONS 3 AND 4 AND SECTION 6(F) OF THE FTC ACT.

Plaintiff does not challenge the FTC's application of Exemption 4 to *investigative* documents. *See generally* B&L Mem. Rather, Plaintiff disputes the FTC's Exemption 4 assertion only with respect to the Facebook *settlement* documents. *See id.* at 8-20. Plaintiff points to several cases, purportedly warranting release of those documents, that it says are "directly on point" when, in fact, all of those cases are inapt. As for the elements of Exemption 4, Plaintiff does not dispute that the FTC has satisfied the "confidential" prong of the analysis, but only whether the information is "commercial" and "obtained from a person." *See id.* Plaintiff's arguments fail.

A. Plaintiff's Cited Cases Are Inapt.

Plaintiff claims that decisions from the First Circuit and an extra-circuit district court demonstrate "unequivocally" that settlement negotiations with the government are not exempt from disclosure under FOIA. B&L Mem. 1. Not so. The cases that Plaintiff cites are not, as it

[3] The FTC has reviewed the *Vaughn* index and has not found any other such errors. Stearns Supp. Decl. ¶ 4.

claims (*id.* at 8), "directly on point." They are all inapt.

The First Circuit's decision in *Madison County, N.Y. v. U.S. Dep't of Justice*, 641 F.2d 1036 (1st Cir. 1981), did not even involve Exemption 4. Rather, the government argued on appeal that Exemption 5 applied, protecting settlement communications between the government and the Oneida Indian Nation. The First Circuit disagreed and rejected the government's further argument that, even absent any applicable FOIA exemption, FOIA allowed withholding the documents based on "equitable grounds of public policy." *Id.* at 1042. But, here, the FTC does not argue that FOIA incorporates a free-standing settlement negotiation exception outside the scope of the statute's enumerated exceptions. *Madison County* is therefore inapposite.

Similarly, neither *Center for Auto Safety v. Department of Justice*, 576 F. Supp. 739 (D.D.C. 1983), nor *NAACP Legal Def. Fund and Educ. Fund, Inc. v. U.S. Dep't of Justice*, 612 F. Supp. 1143 (D.D.C.1985), addressed Exemption 4's application to settlement negotiations. Those cases involved other FOIA exemptions and did not assess whether settlement communications contained confidential commercial information. In both cases, the court refused to read a "settlement negotiation privilege" into FOIA. *Center for Auto Safety*, 576 F. Supp. at 748-49; *NAACP Legal Def. Fund*, 612 F. Supp. at 1146-47. Of course, the FTC's justification for applying Exemption 4 to the Facebook settlement documents do not require recognition of a settlement privilege. Those decisions are therefore inapposite as well.

B. The Withheld Information Is "Commercial."

The FTC's and Facebook's declarations explained in detail that the withheld settlement documents reveal Facebook's commercial priorities and business strategies, information about Facebook's Board operations and governance structure, and information about Facebook's business operations and, in particular, its data privacy and security practices. *See generally* Stearns

Decl.; Hertz Decl. Those declarations also specified how public disclosure of this information would affect Facebook's business interests. Stearns Decl. ¶ 37; Hertz Decl. ¶¶ 10-11, 15-16. As described in the FTC's opening brief, such information fits comfortably within the meaning of "commercial" in the Exemption 4 context.

Plaintiff's cramped view of what information qualifies as "commercial" (*see* B&L Mem. 14) is at odds with the cases Plaintiff itself cites. As one of Plaintiff's own cases explains, the term "commercial" used in Exemption 4 "extends more broadly to any type of activity bearing on commerce." *Pub. Citizen v. U.S. Dep't of Health and Human Servs.*, 975 F. Supp. 2d 81, 101 (D.D.C. 2013). In that case, for instance, a company's reporting of its steps to ensure eligibility to participate in federal health care programs qualified as commercial information under Exemption 4 because the reports "involved the process by which the companies make decisions about managing and conducting their business operation." *Id.* at 105; *see id.* at 106 (company's reporting of allegations of wrongdoing against it "relate to the conduct of employees and/or policies and practices of management in the operation of the companies' business and thereby implicate the companies' 'commercial interests'" protected under Exemption 4); *id.* at 108 (information about company's steps to ensure compliance with FDA legal requirements was properly withheld under Exemption 4 because it "reflect[ed] activities 'instrumental' to [the company's] commercial operations"). The same is true of the withheld information here. Similarly, in *Ctr. For Investigative Reporting v. U.S. Dep't of Labor* (B&L Mem. 14-15), the court recognized that the submitted information—demographic data about the company's workforce—might implicate the submitter's commercial interests if, for example, it showed "how [the company] allocates resources." 424 F. Supp. 3d 771, 779 (N.D. Cal. 2019). Just so here.

By contrast, the information that courts have found not to be "commercial" in other cases that Plaintiff cites (B&L Mem. 13, 15) bears little resemblance to the Facebook information withheld here. *See Wash. Research Project, Inc. v. Dept' of Health, Ed. & Welfare*, 504 F.2d 238, 244 (D.C. Cir. 1974) (addressing "a non-commercial scientist's research design"); *Pub. Citizen Health Research Grp. v. Dep't of Health, Educ. & Welfare*, 477 F. Supp. 595, 605 (D.D.C. 1979) (addressing medical care evaluations studies that contained "no data concerning … commercial arrangements"): *Chicago Tribune Co. v. F.A.A.*, No. 97 C 2363, 1998 WL 242611, at *3 (N.D. Ill. May 7, 1998) (data on the "nature and frequency of in-flight medical emergencies" that did not bear a "direct relationship with the operations of a commercial venture").[4]

C. The Withheld Information Was "Obtained from a Person."

With regard to the draft settlement documents, specifically, the FTC's and Facebook's declarations explained that the documents that Plaintiff seeks reflect Facebook's confidential information concerning its commercial priorities, business practices and strategies, and about the development and operation of Facebook's Privacy Program. *See generally* Stearns Decl.; Hertz Decl. As described in the FTC's opening brief, the FTC properly withheld settlement drafts that would reveal that protected information.

Plaintiff argues that the FTC's "own draft settlement documents" fall outside Exemption 4 because "it beggars belief that Facebook proposed every aspect of the settlement documents." B&L Mem. 18. But that argument misses the point. The FTC properly withheld settlement drafts—even those originating from the FTC—because either (1) such drafts contain Facebook's

[4] The court's holding in *British Airports Auth. v. U.S. Department of State*, 530 F. Supp. 46, 49 (D.D.C. 1981), that information relating to a company's negotiating "strategy" is not "commercial," does not suggest that a company's *business strategy* falls outside the scope of Exemption 4. Plaintiff's attempt to conflate the two categories (B&L Mem. 15) should be rejected.

confidential commercial information itself, or (2) such drafts would allow Plaintiff to obtain some or all of the same information through backwards engineering from the final public filings. Plaintiff appears to concede earlier in its brief that documents in the former category, if truly commercial, would fall under Exemption 4. *See* B&L Mem. 17. But Plaintiff does not address, let alone grapple with, the FTC's argument regarding the latter category of settlement drafts that could be compared against final public filings to reveal Facebook's commercial priorities. Nor does Plaintiff cite a case requiring such documents to be released.

Neither of Plaintiff's cited cases (B&L Mem. 17) does so. In *Bd. of Trade of City of Chicago v. Commodity Futures Trading Comm'n*, 627 F.2d 392 (D.C. Cir. 1980), the court did not reach the issue of Exemption 4's application to documents originating from the agency but revealing information supplied by an outside entity. *Id.* at 404-05 ("We are unable, therefore to resolve the controversy with respect to Exemption 4, but rather must remand to the District Court for full findings of fact and conclusions of law."). And, *Det. Watch Network v. ICE*, 215 F. Supp. 3d 256 (S.D.N.Y. 2016), is inapposite. There, the plaintiffs merely sought "documents that show the ultimate terms" of a party's contracts with the government, not drafts or other documents leading up to that final document. *Id.* at 263 ("Plaintiffs do not seek the initial bid documents, they seek documents that show the ultimate terms of the government contracts."). Here, the analogous document is the final settlement negotiated by the FTC and Facebook, for which document the FTC does *not* claim Exemption 4 protection.

IV. ORDERING THE RELEASE OF THE FACEBOOK SETTLEMENT DOCUMENTS WOULD HARM THE FTC'S MISSION, TO THE DETRIMENT OF CONSUMERS.

The FTC demonstrated in its opening brief, and in a sworn declaration, that ordering the release of the Facebook settlement documents would impede the FTC's mission because regulated entities would be less forthcoming, thereby restricting FTC insight into company actions, making

settlements less achievable, and resulting in expenditure of public funds on unnecessary litigation, all to the detriment of consumers. Stearns Decl. ¶ 41. In response to that record evidence, Plaintiff offers nothing but speculation. Specifically, Plaintiff points to an inadvertent disclosure in 2018 of some settlement documents in an earlier case (B&L Mem. 18-20), and uses it to argue that, because the FTC was still able to obtain information from Facebook in this case and to reach settlements with Facebook and other entities, the FTC "will not be harmed" by releasing settlements documents here (*id.* at 20). But Plaintiff cannot legitimately claim the absence of harm since the FTC's inadvertent disclosure in 2018. Plaintiff simply has no way of knowing what companies did or did not do because of the 2018 disclosure. Nor can Plaintiff legitimately claim the absence of future harm to the FTC should Plaintiff succeed in obtaining the settlement documents it seek in this case.

In all events, it is one thing for the FTC to make one limited, inadvertent disclosure of a settlement document. It is another thing entirely for *a federal court to order* the release of a company's highly sensitive settlement communications with the FTC. Reasonable minds may disagree about the consequences of the former. But, as the FTC has demonstrated through a sworn declaration, the latter would work harm to the FTC's mission by chilling companies' willingness to negotiate with the FTC, ultimately to the detriment of consumers. Stearns Decl. ¶ 41.

CONCLUSION

For all of the foregoing reasons, and those in the FTC's moving papers, the FTC respectfully requests that the Court allow this motion and enter summary judgment on all claims in the FTC's favor.

Respectfully submitted,

FEDERAL TRADE COMMISSION

By its attorney,

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Dated: June 19, 2020

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SUPPLEMENTAL DECLARATION OF DIONE JACKSON STEARNS

I, Dione Jackson Stearns, submit this supplemental declaration in further support of the FTC's Motion for Summary Judgment and declare the following to be a true and correct statement of facts:

1. The *Vaughn* index and my prior declaration identified the documents in which the FTC redacted information based on application of FOIA Exemption 6 and 7(C). As I previously explained, those redactions included the names and/or identifying information of individuals of investigative interest. Specifically, the FTC redacted information on this basis in documents 250, 253, 386, and 566. The FTC has not publicly disclosed that information.

2. Plaintiff's memorandum of law opposing summary judgment identifies the following pages that the FTC's *Vaughn* index lists as released but were withheld in full in the documents the FTC produced to Plaintiff: 0350-51, 0912, 0920, 1036, 1091, 1128, 1486, 1645, and 2032. The *Vaughn* index correctly states the FTC's release determinations for those documents. However, due to a software error in the process of converting the responsive records

with appropriate redactions to PDF, those pages were mistakenly withheld in full in the FTC's document production. The FTC re-produced those pages to Plaintiff as intended on June 15, 2020.

3. Plaintiff's memorandum of law also asserts that the following pages were listed in the *Vaughn* index as released in full but partially redacted in the FTC's production: 0350-51, 0819, and 1537-38. I have already addressed pages 0350-51 above. With regard to pages 0819 and 1537-38, the FTC's production to Plaintiff correctly reflects the FTC's release determinations and shows that FTC made redactions on the basis of FOIA Exemptions 3 and 4 and FTC Act Section 6(f). The *Vaughn* index incorrectly lists those documents as "released"; instead, they should be listed as "withheld in part."

4. The FTC has reviewed the *Vaughn* index and has not found other discrepancies between the *Vaughn* index and the production to Plaintiffs.

I declare under penalty of perjury that the foregoing is true and correct and that Exhibits A through E attached hereto are true and correct copies.

Executed on the 15th day of June 2020 at Washington, D.C

Dione Jackson Stearns
Assistant General Counsel
Federal Trade Commission