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Office of the Secretary

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

August 28, 2015

William L. Kovacs
Senior Vice President
Environment, Technology & Regulatory Affairs
Chamber of Commerce of the United States of America
1615 H Street, NW
Washington, D.C. 20062

Re: In the Matter of Nomi Technologies, Inc., File No. 1323251

Dear Mr. Kovacs:

Thank you for your comment on behalf of the U.S. Chamber of Commerce regarding the Federal Trade Commission ("Commission" or "FTC") consent agreement in the above-captioned proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 CFR § 4.9(b)(6)(ii), and has given it serious consideration.



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Federal Trade Commission

whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or service.² Furthermore, the Commission presumes that an express claim is material, as "information pertaining to the central characteristics of the product or service." The Majority Statement discusses a number of reasons why Nomi's claim was material, including that it was an express claim and that consumers reading the claim could reasonably have decided to opt out at retail locations and avoid locations where Nomi's Listen service was in use.⁴

Second, your comment states that evidence showing that 3.8% of those who viewed the webpage containing Nomi's opt-out promises utilized the available online opt-out, rebuts any presumption that Nomi's promise was material, in part because the opt-out rate is higher than that reported for some online behavioral advertising opt-outs. The Majority Statement discusses a number of reasons why the fact that 3.8% of visitors to Nomi's online privacy statement opted out via the online mechanism is insufficient evidence to evaluate the choices the other 96.2% of visitors intended to make given the promises Nomi made about their options.⁵

Third, your comment states that a consumer who wished to opt out in a store, but was unable to because of the lack of the promised in-store opt-out, could still opt out by using the online mechanism. However, because consumers were not informed when they were in a location that utilized Nomi's services, they would not know to re-visit the website opt-out. In fact these consumers may have reasonably concluded, in the absence of signage and the promised opt-outs, that those locations did not use Nomi's services and that no further action on their part was necessary.

Fourth, your comment states that the proposed consent order fails to prevent future injury, will reduce transparency, and will deter companies from offering consumers privacy choices. The relief in this order, however, is directly tied to the deceptive practices alleged in the complaint. The Majority Statement also addressed this issue. As it noted, the Commission encourages companies to provide truthful privacy choices to consumers and believes such choices are consistent with growth and innovation. However, the Commission also must take action in appropriate cases to stop companies from providing choices.⁶ Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices, or from adopting voluntary privacy codes in innovative areas.⁷

² Majority Statement at 2 (quoting Deception Policy Statement) §

³ Id. (quoting Deception Policy Statement) §.

⁴ Id. at 2.

⁵ Id. at 2-3.

⁶ Majority statement

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark
Secretary



Office of the Secretary

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

August 28, 2015

James C. Cooper
George Mason University School of Law

Re: In the Matter of Nomi Technologies, Inc., File No. 1323251

Dear Mr. Cooper:

Thank you for your comment regarding the Federal Trade Commission ("Commission" or "FTC") consent agreement in the above-captioned proceeding. The Commission has placed your comment on the public record pursuant to 16 C.F.R. § 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has opted out of Nomi's

to track consumers' mobile devices. The proposed consent agreement represents the options that consumers have to opt out of the information that Nomi collects, uses, discloses or shares about them or their devices. It also contains monitoring provisions. The consent agreement does not require Nomi to subject Nomi to civil penalties in the event of future

violations. First, it states that the Commission should not require companies to address the presumption of materiality

and we see no reason to distinguish between different types of claims made directly to consumers and designed to influence consumer behavior. This is particularly true in this case, where Nomi's privacy statement titled "Privacy is Our First Priority" clearly was directed to consumers and designed to ease their concerns about Nomi's information collection practices

Second, our comment questions whether the Commission had reason to believe that consumers' behavior would

Commissioner McSweeney issued with the proposed consent agreement (“Majority Statement”).² The Majority Statement discusses a number of reasons why Nomi’s claim was material, including that consumers reading the claim could reasonably have decided to opt out at retail locations or avoid retail locations where Nomi’s service was in use.

Third, your comment states that the proposed consent agreement will threaten Nomi’s ability to compete and may chill innovation. The relief in the proposed consent agreement is directly tied to the deceptive practices alleged in the complaint – practices that harm consumers and honest businesses alike. As the Majority Statement noted, the Commission encourages companies to provide truthful privacy choices to consumers and believes such choices are consistent with growth and innovation. However, the Commission also must take action in appropriate cases to stop companies from providing false choices.³ Further, prior Commission cases like this one have not deterred companies from continuing to provide truthful choices or from adopting voluntary privacy codes in innovative areas.⁴

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission’s website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen



Office of the Secretary

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

August 28, 2015

Daniel Castro, Vice President
Alan McQuinn, Research Assistant
The Information Technology & Innovation Foundation
1101 K Street, NW
Suite 610
Washington, D.C. 20005

Re: In the Matter of Nomi Technologies, Inc., File No. 1323251

Dear Mr. Castro and Mr. McQuinn:

Thank you for your comment on behalf of the Information Technology & Innovation Foundation regarding the Federal Trade Commission ("Commission" or "FTC") consent agreement in the above-captioned proceeding. The Commission has placed your comment on public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes two main points. First, it claims that there is no evidence of actual harm to consumers from Nomi's alleged misrepresentation. In particular, you state that "the worst thing that could happen to [consumers who wanted to exercise the promised, but unavailable, in-store optout] is that they were tracked without being notified – a practice that is entirely legal." The Commission's goal in bringing this case is to stop and deter deceptive

claims¹ The fact that a company's information collection practices are legal does not give that company license to deceive consumers about those practices.

Second, you assert that the proposed consent agreement will encourage companies to "do the bare minimum on privacy" and "slow down the pace of innovation."



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Federal Trade Commission

Your comment makes three main points. First, it states that Nomi's alleged misrepresentation about providing an in-store opt-out was not material to consumers. This issue was addressed in detail in the

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark
Secretary



In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark
Secretary



Office of the Secretary

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

August 28, 2015

Carl Szabo
Policy Counsel
NetChoice

1401 K Street, NW the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. The proposed consent agreement prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. It also contains standard recordkeeping and compliance monitoring provisions. The consent agreement does not include any monetary remedies, but it would subject Nomi to civil penalties in the event of future violations.

Your comment makes four main points. First, it states that Nomi's alleged misrepresentation was not material to consumers. This issue was addressed in detail in the Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney, issued with the proposed consent agreement ("Majority Statement").

¹ As discussed in the Majority Statement, "[t]he basic question [with respect to materiality] is whether the act or practice is likely to affect the consumer's conduct or decision with respect to the product or service."² Furthermore, the Commission presumes that an express claim is material, as is "information pertaining to the central characteristics of the product or service."³ The Majority Statement

¹ Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney ("Majority Statement") at 2-3; *but cf.*

discusses a number of reasons why Nomi's claim was material, including that it was an express claim and that consumers reading the claim could reasonably have decided to opt out at retail locations or avoid retail locations where Nomi's Listen service was in use.⁴

Second, your comment states that there was clear evidence to rebut the presumption of materiality in this case – i.e., data showing that a meaningful number of consumers used Nomi's online opt out. The Majority Statement discusses a number of reasons why the opt-out rate in this case (3.8% of visitors to Nomi's online privacy statement) is insufficient evidence to evaluate the choices the other 96.2% of visitors intended to make, given the promises Nomi made about their options.⁵

Third, you state that a consumer searching for a missing in-store opt-out could quickly use their phones to opt out by using the online mechanism. However, because consumers were not informed when they were in a location that utilized Nomi's services, they would not know to revisit the website opt-out. In fact, these consumers may have reasonably concluded, in the absence of signage and the promised opt-outs, that those locations did not use Nomi's services and that no further action on their part was necessary.

Fourth, your comment states that the FTC should have exercised its prosecutorial discretion, and declined to take action here, both because Nomi engaged in "privacy by design" and because the FTC could have informally worked with Nomi to remove the alleged misrepresentation from its privacy statement. However, privacy by design means that companies build in privacy at every stage of product development, including by periodically reviewing privacy-related statements they make to consumers. Here, the complaint alleges that the company had a clearly and unequivocally false statement on its website for nearly a year. Further, the order in this case, while narrowly tailored, ensures compliance by Nomi in the future.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark
Secretary

⁴ *Id.*

⁵ *Id.* at 2-3.



Office of the Secretary

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

August 28, 2015

Thomas M. Lenard, PhD
President and Senior Fellow
Technology Policy Institute
1099 New York Ave., NW
Suite 520
Washington, D.C. 20001

Re: In the Matter of Nomi Technologies, Inc., File No. 1323251

Dear Mr. Lenard:

Thank you for your comment on behalf of the Technology Policy Institute regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission's Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

The complaint in this matter alleges that Nomi Technologies, Inc. ("Nomi") violated Section 5 of the FTC Act by misrepresenting to consumers that they could opt out of Nomi's Listen service at retail locations using Listen to track consumers' mobile devices. T

In contrast to these important benefits, the consent agreement



Office of the Secretary

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

August 28, 2015

Zmuda Family
State of Michigan

Re: In the Matter of Nomi Technologies, Inc., File No. 1323251

Dear Zmuda Family:

Thank you for your comment regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreement in the above-entitled proceeding. Your comment states that, "[t]his should be an option for all retail, sales promoters, and political organizations."

The Commission believes it is important for consumers to have appropriate choices regarding the collection and use of their personal information, and encourages companies to provide privacy choices to consumers.¹ The complaint in this matter stands for a narrower proposition: when companies promise consumers the ability to make choices, they must follow through on those promises. Therefore, the relief in this order is tied to the deceptive practices alleged in the complaint and prohibits Nomi from misrepresenting the options that consumers have to exercise control over information that Nomi collects, uses, discloses or shares about them or their devices as well the extent to which they will be notified about such choices. The Commission believes that this enforcement action will also more broadly deter companies from offering false privacy choices.

In light of these considerations, the Commission has determined that the public interest would best be served by issuing the Decision and Order in the above-titled proceeding in final form without any modifications. The final Decision and Order and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. Thank you again for your comment.

By direction of the Commission, Commissioner Ohlhausen dissenting.

Donald S. Clark
Secretary

¹ See, e.g., FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (Mar. 2012), available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf>.