Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeny
In the Matter of Nomi Technologies, Inc.
April 23, 2015

We write to express our support for the complaint and proposed consent order in this case.

Nomi Technologies, Inc. is a provider of technology services that allow retailers to track consumers' movements around their stores by detecting the media access control ("MAC") addresses broadcast by the WiFi interface on consumers' mobile devices.[1] Services like Nomi's benefit businesses and consumers. For example, they enable retailers to improve store layouts and reduce customer wait times.

At the same time, Nomi's service, and others like it, raise privacy concerns because they rely on the collection and use of consumers' precise location data. Indeed, Nomi sought to assure consumers that its practices were privacy-protecting, declaring in its privacy policy that "privacy is our first priority." A core element of Nomi's assurance was its pro [TJ 0.002 Tc -0.002 Tw T*

Ohlhausen dissents on grounds of prosecutorial discretion. This statement addresses both dissents' arguments.

I. Nomi's Express Opt-Out Promise Was False and Material, and Therefore Deceptive

According to the Commission's Deception Policy Statement, a deceptive representation, omission, or practice is one that is material and likely to mislead a consumer acting reasonably under the circumstances. "The 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. ccti mn,614(h)-4(r)-4((e)4(c)4(t.0(g)).)]TJ 0-5(er3(e)4(s)64 Tc [..002 n)2(,614(h)-4(r)-4((e)4(c)4(t.0(

online behavioral advertising (less than 1%),[7] this shows that consumers who wanted to opt out of tracking were able to do so – and therefore, the representation that consumers could opt out at an individual retailer was not material. We do not believe the 3.8% opt-out rate provides reliable evidence to rebut the presumption of materiality.

The benchmark against which Commissioner Wright measures the Nomi opt-out rate – the purported opt out rate for online behavioral advertising – is neither directly comparable to, nor provides meaningful information about, consumers' likely motivations in deciding whether to opt-out of Nomi's Listen service. The difference in opt-out rates could simply mean that the practice of location tracking is much more material to consumers than behavioral advertising, and for that reason a much higher number of consumers exercised the website opt out. Indeed, recent studies have shown that consumers are concerned about offline retail tracking and tracking that occurs over time,[8] as took place here. These relative opt-out rates could just as easily imply that many more than 3.8% of consumers were interested in opting out of Nomi's retail tracking, and that the consumers who did not opt out on the website were relying on their ability to opt out in stores, as promised by Nomi.

In short, the 3.8% opt-out rate for Nomi's website opt-out, along with the comparison to opt-out rates in other contexts, is simply insufficient evidence to evaluate what choices the other 96.2% of visitors to the website intended to make, given the promises Nomi made to them about their options. Commissioner Wright is simply speculating when he extrapolates from the available data his conclusion that in-store opt-out rates would have been so low as to render the in-store option immaterial. Such inconclusive evidence fails to rebut any presumption of materiality that we might apply to Nomi's statements.

II. The Proposed Order Contains Appropriate and Meaningful Relief

The Commission's acceptance of the consent agreement is appropriate in light of both Nomi's alleged deception and the relief in the proposed order. The proposed order addresses the underlying deception in an appropriately tailored way. It 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.[9] It also prohibits Nomi from misrepresenting the extent to which consumers will be notified about such choices.

when companies promise consumers the ability to make choices, they follow through on those promises. The relief in the order is therefore directly tied to the deceptive practices alleged in the complaint.[11] The order will also serve to deter other companies from making similar false promises and encourage them to periodically review the statements they make to consumers to ensure that they are accurate and up-to-date.

In their dissents, however, Commissioners Wright and Ohlhausen argue that the Commission should have declined to take action in this case. Commissioner Ohlhausen views this action as "encourag[ing] companies to do only the bare minimum on privacy, ultimately leaving consumers worse off."[12] Similarly, Commissioner Wright argues that the action against Nomi "sends a dangerous message to firms weighing the costs and benefits of voluntarily providing information and choice to consumers."[13]

The Commission encourages companies to provide privacy choices to consumers, but it also must take action in appropriate cases to stop companies from providing *false* choices. Our action today does just that. Indeed, this case is very similar to prior Commission cases involving allegedly deceptive opt outs.[14] We do not believe that any of these actions – including the one announced today – have deterred or will deter companies from providing truthful choices. To the contrary, companies are voluntarily adopting enforceable privacy commitments in the retail location tracking space[15] and in other areas.[16]

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[11] After arguing primarily that Nomi did not violate Section 5, Commissioner Wright argues in the alternative that the proposed order is too narrow. *See* Statement of Commissioner Wright at 4 (stating that "the proposed consent order does nothing to alleviate such harm [from retail location tracking]" because it does not require Nomi to offer, and provide notice of, an in-store opt out). This argument is based on a misunderstanding of the injury at issue in this case. Here, the injury to consumers was Nomi's allegedly false and material statement of the opt-out choices available to consumers. The proposed order prohibits Nomi from making such representations and thereby addresses the underlying consumer injury.

[12] Statement of Commissioner Ohlhausen.

[13] Statement of Commissioner Wright at 4.

[14] *See U.S. v. Google Inc.*, No. CV 12-04177, (N.D. Cal. Nov. 16, 2012) (stipulated injunction) ($22.5 million settlement over Google's allegedly deceptive opt out, which did not work on the Safari browser); *Chitika, Inc.*, No. C-4324, (F.T.C. June 7, 2011) (consent order) *available at* http://www.ftc.gov/enforcement/cases-proceedings/1023087/chitika-inc-matter (alleging that advertising network deceived consumers by not telling them that their opt out of behavioral advertising cookies would last only 10 days);

The application of Section 5 deception authority to express statements likely to affect a consumer's choice of or conduct regarding a good or service is well established. For close to a year, Nomi claimed to offer two opt-out methods but in fact it provided only one. We believe this failure was material and that Nomi had a legal obligation to fulfill the promises it made to consumers.