

Dissenting Statement of Commissioner Joshua D. Wright
In the Matter of Nomi Technologies, Inc.
April 23, 2015

Today, the Commission finds itself in the unfortunate position of trying to fix a problem that no longer exists by stretching a legal theory to fit the unwieldy facts before it. I dissent from the Commission's decision to accept for public comment a consent order with Nomi Technologies, Inc. (Nomi) not only because it is inconsistent with a fair reading of the Commission's Policy Statement on Deception, but also because even if the facts were to support a technical legal violation which they do not – prosecutorial discretion would favor restraint.

Nomi does not track individual consumers; that is, Nomi's technology records whether individuals are unique or repeat visitors, but it does not identify them. Nomi provides analytics services based upon data collected from mobile device tracking technology and mortar retailers through its "Listen" service.

Count I of the complaint alleges Nordstrom represented in its privacy policy that consumers could opt out of its Listen service at retail locations using the service, but did not provide a retail level opt out. Count II relies upon this same representation to allege a second deceptive practice – that the failure to provide the opt out in the first instance also implies a failure to provide notice to consumers that a specific retailer would be using the Listen service.

The Commission's decision to issue a complaint and accept a consent order for public comment in this matter is problematic for both legal and policy reasons. Section 5(b) of the FTC Act requires us, before issuing any complaint, to establish a "reason to believe" that [a violation has occurred] and that an enforcement action would be "to the interest of the public." While the Act does not set forth a separate standard for accepting a consent order, that threshold should be at least as high as for bringing the initial complaint. The Commission has not met the relatively low "reason to believe" bar because its complaint does not meet the basic requirements of the Commission's 1983 Deception Policy Statement. Further, the complaint and proposed settlement risk significant harm to consumers by deterring industry participants from adopting business practices that benefit consumers.

The fundamental failure of the Commission's complaint is that the evidence simply does not support the allegation that Nordstrom's representation about an opportunity to opt out of the Listen service at the retail level – in light of the immediate and easily accessible opt out available on the webpage itself – was material to consumers. This failure alone is fatal. A representation simply cannot be deceptive under the longstanding FTC Policy Statement on Deception if the absence of materiality is established. The Policy Statement on Deception highlights the centrality of the materiality inquiry, observing that the "basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service." The materiality inquiry is critical because the Commission's construct of "deception" uses materiality as an evidentiary proxy for consumer injury: "[i]njury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well."⁹ This is a critical point. Deception causes consumer harm because it influences consumer behavior – that is, the deceptive statement is one that is not merely misleading in the abstract but one that causes consumers to make choices to their detriment that they would not have otherwise made. The essential link between materiality and consumer injury ensures the Commission's deception authority is employed to deter only conduct that is

The Commission does not explain how it finds ~~the~~ materiality requirement satisfied presumably it does so upon the assumption that “express statements” are presumptively material.¹⁰ However, that presumption was ~~not~~ intended to substitute for common sense

The Commission's reliance upon a presumption of materiality the additional representation of the availability of an in-store opt-out is dubious in light of evidence of the opt-out rate for the webpage mechanism. Actual evidence of consumer behavior indicates that consumers that were interested in opting out of the Listen service took their first opportunity to do so. To presume the materiality of a representative privacy policy concerning the availability of an additional in-store opt-out mechanism requires one to accept the proposition that the privacy-sensitive consumer would be more likely to bypass the easier and immediate route (the online opt-out) in favor of waiting until she had the opportunity to opt-out in a physical location. Here, we can easily dispense with shortcut presumptions meant to aid the analysis of consumer harm rather than substitute for it. The data allow us to know with an acceptable level of precision how many consumers – 3.8% of them – reached the privacy policy, read it, and made the decision to opt out when presented with that immediate choice.

have discontinued or changed the methods by which they track visitors to their physical stores. Technological innovation has also responded to incentives to provide a better consumer experience, including Bluetooth technology that provides not only an option for consumers,¹⁹ but also gives retailers the opportunity to provide their consumers with a more robust shopping experience.²⁰ Notably, Nomi itself has responded to these market changes and no longer offers the MAC address tracking technology to any retailer other than its legacy customers.

Accordingly, I dissent from the issuance of this complaint and the acceptance of a consent decree for public comment.

¹⁸ See, e.g. Amy Hollyfield, Philz to Stop Tracking Customers via Smartphones, ABC 7 NEWS (May 29, 2014), <http://abc7news.com/business/philz-stop-tracking-customers-via-smartphones/83943/>; Peter Cohan, How Nordstrom Uses WiFi to Spy on Shoppers, FORBES (May 9, 2013), <http://www.forbes.com/sites/petercohan/2013/05/09/how-nordstrom-and-home-depot-use-wifi-to-spy-on-shoppers/>

¹⁹ See, e.g. Siraj Dato, High Street Shops are Studying Shopper Behaviour by Tacking their Smartphones or Movement, THE GUARDIAN (Oct. 3, 2013), <http://www.theguardian.com/news/datablog/2013/oct/03/analytics-amazon-retailers-physical-cookies-high-street> (“If customers create accounts on the wireless network, something millions have done they first have to accept terms and conditions that opt in to having their movements monitored when inside the stores.”); Jess Bolluyt, What’s So Bad About In-Store Tracking?, THE CHEAT SHEET (Nov. 27, 2014), <http://www.cheatsheet.com/technology/whats-bad-about-in-store-tracking.html?a=viewall> (“customers have to turn on Bluetooth, accept location services, and opt in to receive notifications”)

²⁰ See, e.g., Greg Petro, How Proximity Marketing Is Driving Retail Sales, FORBES (Oct. 8, 2014), <http://www.forbes.com/sites/gregpetro/2014/10/08/how-proximity-marketing/>