

NetChoice *Promoting Convenience, Choice, and Commerce on the Net*

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Federal Trade Commission
600 Pennsylvania Avenue, NW
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Comments of NetChoice, In the Matter of Nomi Technologies, Inc., Matter No. 1323251

We support the FTC bringing enforcement actions when a business violates Section 5 and engages in unfair or deceptive trade practices in a way that harms consumers. However, the action against Nomi Technologies (hereinafter Nomi) fails to show a violation of the FTC Act, could disincentivize businesses from giving consumers greater control over their privacy, and runs counter to the FTC's prosecutorial discretion.

The FTC did not Show that Nomi Violated the FTC Act

The basis for the complaint against Nomi stems from a statement in Nomi's privacy policy that consumers could opt-out of in-store tracking via tools provided in-store.¹ As the FTC has alleged, these in-store tools were not available.² However, Nomi did accurately state in its privacy policy the availability of a global opt-out on its website of which over one hundred consumers availed themselves.³

The FTC asserts that because the in-store tools were not available, Nomi engaged in a deceptive trade practice. However, FTC policy states a representation cannot be deceptive in the absence of materiality.⁴ While the FTC has long presumed that written expressions are material, express statements are not *per se* material. Instead the presumption merely assumes that written statements change consumer behavior, and evidence to the contrary should be given adequate weight in rebutting the presumption.

As Commissioner Wright explained in his dissent, there was clear evidence to rebut the presumption of materiality in this case – data revealing that a meaningful amount of consumers used Nomi's online opt-out.⁵ In response, the majority Commissioners did not provide evidence that there were consumers who wanted to opt-out in-store and could not. Rather, the majority

¹ FTC Complaint, *In re Nomi Technologies*, Count I and II (Apr. 2015).

² *Id.* at ¶ 13.

³ Dissenting Statement of Commissioner Joshua D. Wright, *In re Nomi Technologies, Inc.* (Apr. 23, 2015).

⁴ Fed. Trade Comm'n, Policy Statement on Deception (1983), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175, 182 (1984) [hereinafter FTC Policy Statement on Deception], *available at* <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

⁵ Dissenting Statement of Commissioner Joshua D. Wright, *In re Nomi Technologies, Inc.* (Apr. 23, 2015).

decision only posited various hypothetical situations where consumers may have preferred an in-store opt-out.

However, without providing supporting data, these hypotheticals turn the presumption into a *per se* standard. The FTC could always create hypotheticals about consumers who were harmed by a misstatement. With such a minimal standard to defend the presumption, no evidence would ever be enough to rebut the presumption of materiality. The practical effect of the majority's position in *Nomi* is that written statements are *per se* material, meaning that any inaccurate statement (even those of a business-to-business company) would trigger FTC Act liability.

Moreover, as Commissioner Wright stated, the materiality presumption was never meant to fly in the face of common sense.⁶ It is much more likely that privacy focused consumers would choose a global opt-out as opposed to a per-store opt-out. This global opt-out was available and used by consumers at Nomi's website. And even those hypothetical consumers searching for the missing opt-out in the store could quickly use their phones *at that same* moment to opt-out on Nomi's website. There is no showing the misstatement materially affected consumer behavior or a showing of harm to consumers from the lack of in-store opt-out.

So lacking materiality and a showing of consumer harm, the FTC failed to show Nomi committed a deceptive practice.

Nomi's technology follows the FTC's "privacy by design"

The FTC regularly calls for all businesses to engage in "privacy by design"⁷ – building and deploying technologies with consumer privacy in mind. While the definition of "privacy by design" may need more clarity,⁸ Nomi certainly was heeding the FTC's call in developing its services with privacy best-practices in mind. Thus, this action against Nomi is even more concerning.

Nomi did not store any personal information (PI) about any consumers. All Nomi collected was the MAC address of a device. We continue to argue that unique identifiers of a device do not constitute PI. However, *ad arguendo*, even if a MAC address is PI, Nomi did not store any consumer MAC addresses. Instead, Nomi immediately hashed the MAC address making it so a device could not be identified based on the Nomi stored data.⁹ Moreover, the FTC complaint made no showing or allegation that Nomi shared any MAC addresses with stores. This means that stores could not, on their own, identify customers.

⁶ Dissenting Statement of Commissioner Joshua D. Wright, *In re Nomi Technologies, Inc.* (Apr. 23, 2015).

⁷ See, e.g., FTC Staff, *Final Commission Report on Protecting Consumer Privacy*, p.22-35 (Mar. 26, 2012).

⁸ See *How to Regulate the Internet of Things Without Harming its Future: Some Do's and Don'ts*, Remarks of Joshua D. Wright, Commissioner, Federal Trade Commission at the U.S. Chamber of Commerce Washington, D.C. (May 21, 2015).

⁹ "Nomi cryptographically hashes the MAC addresses it observes prior to storing them on its servers." FTC Complaint, *In re Nomi Technologies*, ¶ 6.

Nomi went further and created a global opt-out for consumers from any in-store tracking. This feature was available on Nomi's website.¹⁰ This feature gave consumers total control over Nomi's activities -- the type of consumer control that the FTC regularly calls for.

None of these efforts to protect consumer privacy was required by law. Despite Nomi's efforts to give consumers more privacy controls than legally required, the fact that one of the privacy features (opt-out) was not accurately described (available online but not in stores) resulted in this FTC enforcement action.

This enforcement action sends a message to any businesses considering privacy-by-design: if you attempt to protect consumers' privacy in multiple ways, you multiply your legal risk of FTC prosecution.

Lack of Prosecutorial Discretion

The FTC has long said it does not seek "gotcha cases," however *Nomi* seems to show otherwise. At the 2014 IAPP Global Summit, Commissioner Brill said, "I want to make this clear: We don't play the gotcha game."¹¹ Likewise, in 2007 FTC Chairman Majoras said, "the Commission is not simply saying 'gotcha.'"¹² However, bringing an action against a business engaging in privacy-by-design for a non-material error in its privacy policy certainly seems like a "gotcha."

The FTC did not show any consumer harm from the activities of Nomi. Nor did the FTC adequately prove that the error in the Nomi's privacy policy was material or a violation of the FTC act. So we must ask if the FTC and consumers would have been better served by prosecutorial discretion and an opportunity for Nomi to correct the error in its privacy policy.

Commissioner Ohlhausen said, and we agree, the action against Nomi is not the proper use of the FTC's prosecutorial discretion.¹³

We worry this is action sending the wrong messages to businesses. Even if you try to do the right thing, like providing broad consumer opt-out, the FTC will bring suit for even non-material errors in a privacy policy regardless of whether consumers were harmed by any misstatements. We also worry that this incident of prosecutorial discretion sends the wrong impression of the FTC that it is moving from a common-sense arbiter balancing consumer benefits and harms to a strict-liability enforcer.

Rather than using the heavy hammer of an enforcement action, the FTC should have instead approached Nomi, explained its concerns and worked with the businesses to address any

¹⁰ "Nomi provided, and continues to provide, an opt out on its website for consumers who do not want Nomi to store observations of their mobile device. Once a consumer has entered the MAC address of their device into Nomi's website opt out, Nomi adds it to a blacklist of MAC addresses for which information will not be stored." *Id.* at ¶ 11.

¹¹ Jedidah Bracy, *Knocking Down Silos and Weaving the Tapestry: A Look at the Priorities of FTC Commissioner Julie Brill*, Privacy Advisor (Mar. 10, 2014)

¹² Statement of Chairman Majoras, at the IAPP Privacy Summit, *Building a Culture of Privacy and Security—Together*, at 4, 5 (Mar. 7, 2007)

¹³ "I believe the FTC should not have brought a case against Nomi based on these facts and instead should have exercised its prosecutorial discretion." Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In re. Nomi Technologies, Inc.*, (Apr. 23, 2015).

concerns. In other areas, senior FTC officials claim to do just that.¹⁴ In the end, the goal of the FTC is to protect consumers and in this case, working with Nomi would have achieved this goal without the corresponding damage to company incentives to provide additional privacy protections.

We ask the FTC to consider the harm generated from bringing “gotcha” cases like *Nomi* and the disincentive to privacy by design and innovation they create when looking at its next complaint.

Please let us know if we can provide further information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carl Szabo".

Carl Szabo
Policy Counsel, NetChoice

¹⁴ “We are not trying to play a game of ‘gotcha,’ so if you are trying to get it right in a complicated area, and we see that you are getting it wrong, we are going to call you and work with you,” James A. Kohn, *FTC officials give guidance on environmental marketing*, *FTC Watch* (June 17, 2013).