



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 19, 2014

Robert Gellman
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419 Fifth Street, SE
Washington, D.C. 20003

Re: In the Matter of Apperian, Inc., File No. 1423017; Atlanta Falcons Football Club LLC , File No. 1423018; Baker Tilly Virchow Krause, LLP, File No. 1423019; BitTorrent, Inc., File No. 1423020; Charles River Laboratories International, Inc., File No. 1423022; DataMotion, Inc., File No. 1423023; DDC Laboratories, Inc., File No. 1423024; Level 3 Communications, LLC, File No. 1423028; PDB Sports, Ltd. d/b/a Denver Broncos Football Club, File No. 1423025; Reynolds Consumer Products Inc., File No. 1423030; The Receivable Management Services Corporation, File No. 1423031; and Tennessee Football, Inc., File No. 1423032.

Dear Mr. Gellman:

Thank you for your comment regarding the Federal Trade Commission's ("Commission" or "FTC") consent agreements in the above-entitled proceedings. 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.

In your comment, you urge the Commission not to accept these consent orders and express concern that: 1) the complaints lack detail; 2) the Commission did not assess the companies' compliance with the substantive Safe Harbor privacy requirements; 3) the consent orders are too narrow and do not provide adequate relief or deterrent effect; and 4) the Commission's commitment to enforcing the Safe Harbor framework is not the most efficient use of its resources.

Your comment states "there are virtually no facts in the complaint or consent decree that would enable the public to evaluate the extent of the misrepresentation." We respectfully disagree. The complaints provide the necessary information to support the law violations alleged. These complaints contain a single allegation that Respondents engaged in deceptive practices by falsely representing, either expressly or by implication, that they were current participants in the Safe Harbor framework, when, in fact, each company had allowed its self-

certification to lapse.¹ To support this allegation, the complaints explicitly recite the misrepresentations Respondents made and the length of time that each Respondent made the false representations. The proposed complaints do not allege that Respondents substantively violated any of the privacy principles of the Safe Harbor framework or that personal data was at risk.

These cases demonstrate that the Commission takes seriously misrepresentations about membership in the Safe Harbor. However, the Commission is also interested in ensuring that companies abide by the substantive Safe Harbor promises they make. As a matter of course, the Commission's privacy investigations under Section 5 of the FTC Act of companies that claim Safe Harbor membership include evaluating the companies' substantive practices. The Commission has brought several cases with counts relating to substantive violations of the Safe Harbor.²

Your comment also objects to the "extraordinarily narrow scope" of the proposed orders and specifically complains that the proposed orders do not require Respondents to remain members of the Safe Harbor framework in the future. As you know, the Safe Harbor framework is a voluntary program. Requiring Respondents to maintain Safe Harbor membership would be problematic for a couple of reasons. First, it is unclear under what authority the Commission could require Respondents to continue membership in the Safe Harbor. Second, there are many legitimate reasons that a company could decide it no longer wishes to participate in the Safe Harbor framework (*e.g.*, the business no longer needs to transfer data from the EU and Switzerland to the U.S.), and it would be inappropriate to require it to maintain a membership. The orders prohibit Respondents from misrepresenting the extent to which each is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework or the U.S.-Swiss Safe Harbor Framework. Should the companies claim to abide by the Safe Harbor but not abide with its underlying principles, they could be violating the terms of the orders and be liable for civil penalties of up to \$16,000 per violation, or up to \$16,000 per day in the case of continuing violations (as provided by Section 5(l) of the FTC Act). Thus, the orders have the effect of requiring the companies to abide by the substantive Safe Harbor principles for as long as they choose to represent that they comply with the Safe Harbor Framework. It is important to note that companies that choose to leave the Safe Harbor must continue to apply the Safe Harbor principles to the covered data they collected while participating in the program for as long as they store, use, or disclose that data. The Commission believes that the orders in these matters are appropriate to adequately address the violations at issue and to provide fencing-in relief.

¹ In addition, the proposed complaints against Apperian, Inc., Baker Tilly Virchow Krause, LLP, DataMotion, Inc., and the Receivable Management Services Corporation also allege that these companies deceptively display the Safe Harbor Certification Mark.

² See *Myspace LLC*, No. C-4369 (F.T.C. Aug. 30, 2012), available at <http://www.ftc.gov/os/caselist/1023058/120911myspacedo.pdf>; *Facebook Inc.*, No. C-4365 (F.T.C. July 27, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookcmpt.pdf>; *Google Inc.*, No. C-4336 (F.T.C. Oct. 13, 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/10/111024googlebuzzcmpt.pdf>.

As you point out in your comment, the Commission does a remarkable amount of work with relatively limited resources. We are a small agency with a broad mandate. Enforcement of the Safe Harbor framework is an important component of the Commission's mission. We believe that it is important to hold companies to the promises they make. That said, Safe Harbor enforcement is only one component of a robust agenda that includes cases in the areas of data security, mobile privacy, behavioral advertising, credit reporting, social networking, children's privacy, financial privacy, health privacy, and data brokers.³ We agree that we should focus our efforts on all of these areas.

Finally, your comment alleges that the Commission does not "consider seriously public comments." We respectfully disagree. The Commission carefully considers, and has a practice of responding to, public comments filed in reference to its administrative settlements. When the Commission determines that the public interest would be best served by amending a consent order in response to a public comment or otherwise, the Commission takes such action, as it has done in a number of matters.⁴ Where the Commission seeks a modification to which the respondent does not agree, the Commission may proceed to litigation, where a court will ultimately determine what relief is warranted under the FTC Act or other applicable law. In this case and others in which the Commission has not sought to modify a proposed consent order as recommended by you or another commenter, it is because the Commission has concluded that the public interest is best served by final adoption of the original order.

In light of the considerations discussed above, the Commission has determined that the public interest would best be served by issuing the Decision and Orders in the above-titled

³ See, e.g., *Credit Karma, Inc.*, FTC File No. 1323091 (Mar. 28, 2014) (proposed consent order), available at <http://www.ftc.gov/system/files/documents/cases/140328creditkarmacmpt.pdf>; *Accretive Health, Inc.*, No. C-4432 (F.T.C. Feb. 5, 2014), available at <http://www.ftc.gov/system/files/documents/cases/140224accretivehealthcmpt.pdf>; *U.S. v. Path, Inc.*, No. C-13-0448 (N.D. Cal. Jan. 13, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/02/130201pathincmpt.pdf>; *ScanScout, Inc.*, No. C-4344 (Dec. 14, 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/12/111221scanscoutcmpt.pdf>; *U.S. v. ChoicePoint Inc.*, No. CV-00198-GET (N.D. Ga. Filed Jan. 30, 2006), available at <http://www.ftc.gov/sites/default/files/documents/cases/2006/01/0523069complaint.pdf>.

⁴ See, e.g., *Motorola Mobility LLC*, No. C-4410 (F.T.C. July 23, 2013) (amending final consent order based on public comments), available at <http://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>; *Phusion Projects, LLC*, C-4382 (F.T.C. Feb. 6, 2013) (same), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/02/130212phusioncmpt.pdf>; *Sony BMG Music Entm't*, No. C-4195 (F.T.C. June 28, 2007) (same), available at <http://www.ftc.gov/sites/default/files/documents/cases/2007/06/0623019cmp070629.pdf>; see also Letter from Deborah L. Feinstein, Federal Trade Commission, to Roxana Tatman, Georgia Department of Community Health (May 20, 2014) (explaining how the Commission is currently weighing its options in a competition matter in light of information received after seeking public comment on a proposed consent order); Letter from Matthew Jarrad, Georgia Department of Community Health, to G. Edward Alexander, North Albany Health Center, In re Request for Letter of Determination Regarding Facility Divestiture, at 2 (June 3, 2014) (referring to the May 20 Feinstein letter), available at http://scni.media.clients.ellingtoncms.com/news/documents/2014/06/04/DET2014033_Determ_Response.pdf.

proceedings in final form without any modifications. The final Decision and Orders and other relevant materials are available from the Commission's website at <http://www.ftc.gov>. It helps the Commission's analysis to hear from a variety of sources in its work, and it thanks you again for your comment.

By direction of the Commission, Commissioner McSweeney not participating.

Donald S. Clark
Secretary