

**Dissenting Statement of Commissioner Maureen K. Ohlhausen
In the Matter of Nomi Technologies, Inc.
Matter No. 1323251
April 23, 2015**

Nomi Technologies Inc., a startup company, offered its retail merchant clients the ability to analyze aggregate data about consumer traffic in the merchants' stores. Nomi provided this service by observing smartphone MAC addresses – a series of hexadecimal numbers that every WiFi-enabled device publicly broadcasts to any listening receiver. Nomi did not store this publicly broadcast information, but instead hashed the addresses and stored the hash. Nomi provided this service as a third party contractor; it had no direct relationship with consumers. At the time covered by the complaint, the majority of Nomi's customers were trialing this startup service in a few stores, at most.

It is important to note that, as a third party contractor collecting no personally identifiable information, Nomi had no obligation to offer consumers an opt out. Yet from the inception of the service, Nomi offered all consumers the opportunity to opt out globally.

For a time, Nomi's privacy policy stated that Nomi "pledges to Always allow consumers to opt out of Nomi's service on its website *as well as at any retailer using Nomi's technology.*"¹ As already noted, Nomi did offer a global opt out on its website. However, it appears that none of Nomi's retail clients offered consumers the opportunity or ability to opt out. Thus, Nomi's privacy policy was partly inaccurate. As Commissioner Wright points out, the evidence we have suggests that the privacy policy's partially inaccurate statement harmed no consumers.²

I believe the FTC should not have brought a case against Nomi based on these facts and instead should have exercised its prosecutorial discretion, for two reasons. First, the Commission should use its limited resources to pursue cases that involve consumer harm. Second, and more importantly, we should not apply a *de facto* strict liability approach to a young company that attempted to go above and beyond its legal obligation to protect consumers but, in so doing, erred without benefiting itself. I fear that the majority's decision in this case encourages companies to do only the bare minimum on privacy, ultimately leaving consumers worse off.

For these reasons, I dissent.

¹ Complaint, Exhibit A (Nomi's privacy policy from approximately Nov. 2012 until Jan. 2013) (emphasis added).

² Dissenting Statement of Commissioner Joshua Wright at 2.