

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 to brick-and-mortar retailers through its "Listen" service.¹ Nomi uses sensors placed in its clients' retail locations or its clients' existing WiFi access points to detect the media access control (MAC) address broadcast by a consumer's mobile device when it searches for WiFi networks. Nomi passes MAC addresses through a cryptographic hash function before collection and creates a persistent unique identifier for the mobile device.² Nomi does not "unhash" this identifier to retrieve the MAC addresses and Nomi does not store the MAC addresses of the mobile devices. In addition to creating this unique persistent identifier, Nomi collects the device manufacturer information, the device's signal strength, and the date, time and locating sensor of the mobile device. This information is then used to provide analytics to Nomi's clients. For example, even without knowing the identity of those visiting their stores, the data provided by Nomi's Listen service can generate potentially valuable insights about aggregate in-store consumer traffic patterns, such as the average duration of customers' visits, the percentage of repeat customers, or the percentage of consumers that pass by a store rather than entering it. These insights, in turn, allow retailers to measure how different retail promotions, product offerings, displays, and services impact consumers. In short, these insights help retailers optimize consumers' shopping experiences,³ inform staffing coverage for their stores, and improve store layouts.

The Commission's complaint focuses upon a single statement in Nomi's privacy policy. Specifically, Nomi's privacy policy states 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."⁴

¹ In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Compl. ¶ 3 (Apr. 23, 2015).

² For more information on cryptographic hashing, see Rob Sobers, *The Definitive Guide to Cryptographic Hash Functions (Part I)*, VARONIS (Aug. 2, 2012), <http://blog.varonis.com/the-definitive-guide-to-cryptographic-hash-functions-part-1/>.

³ See, e.g., Alyson Shontell, *It Took Only 13 Days for Former Salesforce Execs to Raise \$3 Million for Their Startup, Nomi*, BUSINESS INSIDER (Feb. 11, 2013), <http://www.businessinsider.com/former-salesforce-and-buddy-media-executives-raise-3-million-nomi-2013-2> ("The moment you open Amazon.com, your entire retail experience is personalized, down to the promotions you see and the products you are pushed. That's because e-commerce is a data-driven industry, and websites know a lot about customers who stumble on to their websites. Physical stores however, where 90% of all retail purchases still occur, know nothing about the customers who walk in their doors.").

⁴ Compl. ¶ 12.

Count I of the complaint alleges Nomi represented in its privacy policy that consumers could opt out of its Listen service at retail locations using the service, but did not in fact 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.⁵

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 “reason to believe that [a violation has occurred]” and that an enforcement action would “be to the interest of the public.”⁶ While the Act does not set forth a separate standard for accepting a consent decree, I believe 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 Nomi’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 long-standing FTC Policy Statement on Deception in the absence of materiality.⁷ 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.”⁸ 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. This essential link between materiality and consumer injury ensures the Commission’s deception authority is employed to deter only conduct that is likely to harm consumers and does not chill business conduct that makes consumers better off. This link also unifies the Commission’s two foundational consumer protection authorities – deception and unfairness – by tethering them to consumer injury.

⁵ Compl. ¶ 16-17.

⁶ 15 U.S.C. §45(b).

⁷ 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>.

⁸ FTC Policy Statement on Deception, 103 F.T.C. at 175.

⁹ *Id.* at 183.

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 never intended to substitute for common sense, evidence, or analysis. Indeed, the Policy Statement on Deception acknowledges the “Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.”¹¹ Here, the Commission failed to discharge its commitment to duly consider relevant and competent evidence that squarely rebuts the presumption that Nomi’s failure to implement an *additional*, retail-level opt out was material to consumers. In other words, the Commission neglects to take into account evidence demonstrating consumers would not “have chosen differently” but for the allegedly deceptive representation.

Nomi represented that consumers could opt out on its website as well as in the store where the Listen service was being utilized. Nomi did offer a fully functional and operational global opt out from the Listen service on its website.¹² Thus, the only remaining potential issue is whether Nomi’s failure to offer the represented in-store opt out renders the statement in its privacy policy deceptive. The evidence strongly implies that specific representation was not material and therefore not deceptive. Nomi’s “tracking” of users was widely publicized in a story that appeared on the front page of *The New York Times*,¹³ a publication with a daily reach of nearly 1.9 million readers.¹⁴ Most likely due to this publicity, Nomi’s website received 3,840 unique visitors during the relevant timeframe and received 146 opt outs – an opt-out rate of 3.8% of site visitors. This opt-out rate is significantly higher than the opt-out rate for other online activities.¹⁵ This high rate, relative to website visitors, likely reflects the ease of a mechanism that was immediately and quickly available to consumers at the time they may have been reading the privacy policy.

¹⁰ See POM Wonderful LLC, 2013 FTC LEXIS 6, *121 (2013); Novartis Corp., 127 F.T.C. 580, 686 (1999); American Home Prods., 98 F.T.C. 136, 368 (1981).

¹¹ FTC Policy Statement on Deception, 103 F.T.C. at 182 n.47.

¹² As such, the facts of this case are distinguishable from the cases cited for support by the majority in its statement. In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Statement of Chairwoman Ramirez, Commissioner Brill, and Commissioner McSweeney 5 n.14 (Apr. 23, 2015).

¹³ Stephanie Clifford & Quentin Hardy, *Attention, Shoppers: Store is Tracking Your Cell*, NEW YORK TIMES (July 14, 2013), http://www.nytimes.com/2013/07/15/business/attention-shopper-stores-are-tracking-your-cell.html?pagewanted=all&_r=0.

¹⁴ The Associated Press, *Top 10 Newspapers by Circulation: Wall Street Journal Leads Weekday Circulation*, HUFFINGTON POST (Apr. 30, 2013), http://www.huffingtonpost.com/2013/05/01/newspaper-circulation-top-10_n_3188612.html.

¹⁵ In perhaps the most comparable circumstance -- Do Not Track mechanisms -- the opt-out rate is extremely low. See, e.g., Jack Marshall, *The Do Not Track Era*, DIGIDAY (Feb. 27, 2012), <http://digiday.com/platforms/advertising-in-the-do-not-track-era/> (“[a]ccording to data from Evidon, which facilitates the serving of those icons, someone clicks and goes through the opt-out process once for every 10,000 ad impressions served”); Matthew Creamer, *Despite Digital Privacy Uproar, Consumers are Not Opting Out*, ADVERTISING AGE (May 31, 2011), <http://adage.com/article/digital/digital-privacy-uproar-consumers-opting/227828/> (“Evidon, which has the longest set of data, is seeing click-through of 0.005% with only 2% opting out from 30 billion impressions”). See also Richard Beaumont, *Cookie Opt-Out Stats Revealed*, THE COOKIE COLLECTIVE (Feb. 19, 2014), <http://www.cookie-law.org/blog/2014/2/19/cookie-opt-out-statistics-revealed/>.

The Commission's reliance upon a presumption of materiality as to 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 representation in a 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. The Commission's complaint instead adopts an approach that places legal form over substance, is inconsistent with the available data, and defies common sense.

The Commission's approach here is problematic for another reason. To the extent there is consumer injury when consumers are offered an opt out from tracking that cannot be effectuated, or that more generally, consumers are uncomfortable with such tracking and it should be disclosed to them, the proposed consent order does nothing to alleviate such harm and will, instead, likely exacerbate it. Nomi has removed its representation about a retail level opt-out mechanism from its privacy policy. The proposed consent order does not require Nomi to offer such a mechanism, nor does it require Nomi to disclose the tracking in retail locations.¹⁶ It is unlikely that Nomi could agree to such a condition any case – Nomi contracts with retailers and has no control over the retailers' premises. The order does not – and cannot – compel retailers to disclose the tracking technology.

Even assuming *arguendo* Nomi's privacy policy statement is deceptive under the Deception Policy Statement, the FTC would better serve consumers by declining to take action against Nomi. The analytical failings of the Commission's approach are not harmless error. Rather, aggressive prosecution of this sort will inevitably deter industry participants like Nomi from engaging in voluntary practices that promote consumer choice and transparency – the very principles that lie at the heart of the Commission's consumer protection mission.¹⁷ Nomi was under no legal obligation to post a privacy policy, describe its practices to consumers, or to offer an opt-out mechanism. To penalize a company for such a minor shortcoming – particularly when there is no evidence the misrepresentation harmed consumers – sends a dangerous message to firms weighing the costs and benefits of voluntarily providing information and choice to consumers.

Finally, market forces already appear to be responding to consumer preferences related to tracking technology. For example, in response to potential consumer discomfort some retailers

¹⁶ In the Matter of Nomi Technologies, Inc., FTC File No. 132-3251, Proposed Consent Order Part I (Apr. 23, 2015).

¹⁷ In addition, Nomi arguably offered a product that was more privacy-protective than other, more intrusive methods that retailers currently employ, such as video cameras. *See* Clifford & Hardy, *supra* note 14 (“Cameras have become so sophisticated, with sharper lenses and data-processing, that companies can analyze what shoppers are looking at, and even what their mood is.”).

have discontinued or changed the methods by which they track visitors to their physical stores.¹⁸ Technological innovation has also responded to incentives to provide a better consumer experience, including a Bluetooth technology that provides not only an opt-in choice 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-to-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 Tracking 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 opts them 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-so-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-is-driving-retail-sales/> (“[This will] allow Macy’s to send personalized department-level deals, discounts, recommendations and rewards to customers who opt-in to receive the offers”); Dato, *supra* note 20 (after opting in, “[u]sers can then add their loyalty card numbers to receive personalised recommendations.”).