JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
Division of Law
124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Attorney for Defendant

By: Kevin R. Jespersen (019151981)
          Assistant Attorney General
       Lorraine K. Rak (035771985)
          Deputy Attorney General/ Section Chief
       Glenn T. Graham (013822009)
       Edward J. Mullins III (027892006)
          Deputy Attorneys General

JEREMY RUBIN d/b/a TIDBIT Plaintiff, v. STATE OF NEW JERSEY DIVISION OF CONSUMER AFFAIRS, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY DOCKET NO.: ESX-L-567-14 Civil Action **CERTIFICATION OF GLENN T. GRAHAM**

I, GLENN T. GRAHAM, being of full age, hereby certify and state as follows:

1.   I am an attorney admitted to practice before the courts of this State and am a Deputy

Attorney General with the State of New Jersey, Department of Law and Public Safety, Division of

Law, Consumer Fraud Prosecution Section. I am one of the Deputy Attorneys General responsible

for the representation of defendant State of New Jersey Division of Consumer Affairs ("Division") in this action.

2. I submit this Certification in opposition to the Order to Show Cause with Temporary Restraints Pursuant to Rule 4:52 filed on behalf of Jeremy Rubin d/b/a Tidbit ("Tidbit") and in support of the Division's Motion to Dismiss and for an Order Directing Plaintiff to Respond to the Division's Subpoena Duces Tecum and Interrogatories. I am fully familiar with the facts and procedural history of this action.

3. In or about November 2013, I, along with Deputy Attorney General Edward J. Mullins III, was assigned the representation of the Division in connection with its investigation of Tidbit, specifically whether Tidbit's development of a bitcoin mining software code ("Tidbit Code") violated the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 et seq., and related statutes.

4. On December 4, 2013, I caused to be served an Administrative Subpoena Duces Tecum ("Subpoena") and Interrogatories upon Tidbit via Certified and Regular Mail with a return date of December 20, 2013.

5. On December 10, 2013, I received a telephone call from David Wexler, Esq. ("Mr. Wexler"). During that call, Mr. Wexler requested an extension to respond to the Subpoena and Interrogatories. I granted Mr. Wexler an extension to respond to January 13, 2014.

6. On January 7, 2014, I received an e-mail with attached correspondence from Hanni Fakhoury, Esq. ("Mr. Fakhoury") on behalf of the Electronic Frontier Foundation, indicating that Mr. Fakhoury is representing Tidbit and that Tidbit would not be responding to the Division's Subpoena and Interrogatories because, among other things, "Tidbit's code has never been functional and no bitcoins have been mined." (See E-mail and Correspondence, attached as Exhibit A.)
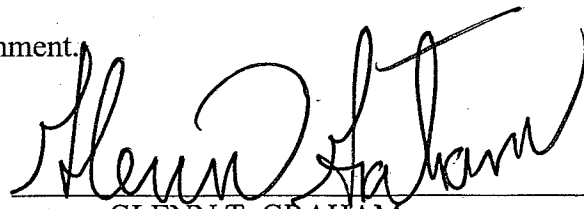
7.   On January 9, 2014, I sent a letter to Mr. Fakhoury via e-mail demanding Tidbit fully respond to the Division's Subpoena and Interrogatories by January 13, 2014. (See Letter, attached as Exhibit B.)

8.   That same day, I spoke to Mr. Fakhoury and Nathan Cardozo, Esq., on the telephone. During that conversation, I informed Mr. Fakhoury that the Division has information concerning the Tidbit Code's activity and presence on websites registered and located in New Jersey. During the call, Mr. Fakhoury requested an extension for Tidbit to respond to the Division's Subpoena and Interrogatories. Mr. Fakhoury and I then agreed upon a production schedule, with Tidbit providing a list of all New Jersey websites utilizing the Tidbit Code by January 21, 2014 and providing further responses by January 27, 2014. Following the phone call, I confirmed this production schedule via e-mail to Mr. Fakhoury. (See E-mail, attached as Exhibit C.)

9.   On January 21, 2014, I received a copy of a Complaint and proposed Order to Show Cause with Temporary Restraints and supporting documents ("Complaint and OTSC") via e-mail from Frank L. Corrado, Esq. ("Mr. Corrado) as local counsel and on behalf of Tidbit. Among other things, the Complaint and OTSC seeks to quash the Division's Subpoena and Interrogatories and enjoin the Division from issuing further subpoenas without judicial review.

10.   All documents submitted with this Certification are true copies of the documents in possession of the Division.

I certify that the foregoing statements made by me are true. I am aware that if any of those statements are willfully false, I am subject to punishment.

_____
GLENN T. GRAHAM

Dated: March 6, 2014
          Newark, New Jersey

EXHIBIT A

Glenn Graham - In re: Subpoena Duces Tecum to Tidbit

From:	Hanni Fakhoury <hanni@eff.org>
To:	<glenn.graham@dol.lps.state.nj.us>
Date:	1/7/2014 7:32 PM
Subject:	In re: Subpoena Duces Tecum to Tidbit
CC:	"Nate D. Cardozo" <nate@eff.org>
Attachments:	1-7-14 Letter re Tidbit.pdf; signature.asc

Mr. Graham,

The Electronic Frontier Foundation ("EFF") represents Jeremy Rubin and Tidbit in connection with the subpoena duces tecum and interrogatories you issued on December 4, 2013. As the attached letter explains, Tidbit is unable to respond to the subpoena or interrogatories at this time. But, as explained in the letter, that is because Tidbit's code has never been functional and no bitcoins have been mined.

Should you have any questions or concerns, please feel free to call or email at your convenience.

January 7, 2014   <u>**VIA OVERNIGHT DELIVERY**</u>

Glenn T. Graham
Deputy Attorney General
Consumer Fraud Prosecution Section
124 Halsey Street, 5th Floor
Newark, New Jersey 07102

RE: **In re: Jeremy Rubin, individually and d/b/a/ Tidbit**

Dear Mr. Graham,

The Electronic Frontier Foundation ("EFF") represents Mr. Rubin and Tidbit in connection with the December 4, 2013 *subpoena duces tecum* and interrogatories you issued requesting information about Tidbit. Thank you for extending the time for Tidbit to produce the requested records. While we are hopeful we can resolve this matter, there is an initial concern we'd like to bring to your attention.

As you know, the Dormant Commerce Clause prohibits New Jersey from using state law to regulate interstate commercial activity, regardless of whether the state legislature intended the extraterritorial reach. *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Indeed, numerous courts have struck down state laws that purport to restrict Internet activity occurring in other states. *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227, 240-41 (4th Cir. 2004); *American Booksellers Foundation v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003); *ACLU v. Johnson*, 194 F.3d 1149, 1161-63 (10th Cir. 1999).

Tidbit and its developers have no connection to New Jersey at all. All of Tidbit's developers, including Mr. Rubin, are MIT students who reside in Massachusetts. Tidbit's servers are not physically located in New Jersey. Tidbit is aware of recent settlements your office has reached with out-of-state Internet companies E-Sports Entertainment and PulsePoint for conduct impacting New Jersey residents. But unlike E-Sports, Tidbit did not take control of over 140,000 computers in New Jersey to mine for bitcoins.[1] And unlike PulsePoint, Tidbit did not place 215 million targeted ads on web browsers used by New Jersey consumers.[2]

That's because Tidbit's code has never been functional and is incapable of mining for bitcoins.

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[1] *Acting Attorney General Announces $1 Million Settlement Resolving Consumer Fraud, Unlawful Access Claims Against Online Gaming Company*, November 19, 2013, http://nj.gov/oag/newsreleases13/pr20131119a.html.
[2] *New Jersey Division of Consumer Affairs Obtains Million-Dollar Settlement With Online Advertising Company Accused of Overriding Consumers' Privacy Settings Without Consent*, July 25, 2013, http://nj.gov/oag/newsreleases13/pr20130725a.html.

Tidbit was developed for the 2013 Node Knockout hackathon. At its core, Tidbit allows users to mine for bitcoins using the computing power of a client's computer. It was envisioned as a replacement for advertising.

But Tidbit was presented as a proof of concept, with its developers clearly stating on the Node Knockout website that "Tidbit isn't fully ready for production use, but 98% of the infrastructure is in place. We believe this is a very strong proof of concept for the idea."[3] The lack of functionality was not an accident; Tidbit wanted time to not only refine the code but also come up with terms of service. This would be important because even Mr. Rubin himself understood that in order for Tidbit to be used online, there would need to be a mechanism for users to opt-in to the service.[4]

Since the code was never functional, it cannot and has not been used to mine for bitcoins. Tidbit has already publicly explained that "[w]e have left out the final interaction with P2Pool while we put together a Terms and Conditions, so we currently do not receive any Bitcoins."[5]

Tidbit certainly appreciates New Jersey's concern that citizens in the Garden State would, without their knowledge or control, have their computers compromised. But Tidbit has not engaged in any illicit behavior comparable to E-Sports or PulsePoint. And in any event, Tidbit's code is not functional and unable to mine for bitcoins at all.

In sum, while Tidbit doubts New Jersey's ability to use state law to regulate interstate online commercial activity, even if it could regulate Tidbit, since its code is not functional and no bitcoins have been mined, it appears there is no need to respond to the subpoena or the interrogatories. We believe that this letter resolves the matter.

Should you have any questions or concerns, please don't hesitate to call, email or write.

Sincerely,

Hanni M. Fakhoury, Esq.
Staff Attorney

Nathan D. Cardozo, Esq.
Staff Attorney

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[3] http://nodeknockout.com/teams/shoop-team.
[4] https://news.ycombinator.com/item?id=6714396.
[5] http://nodeknockout.com/teams/shoop-team.

EXHIBIT B

January 9, 2014

VIA E-MAIL (hanni@eff.org)
Hanni M. Fakhoury, Esq.
Electronic Frontier Foundation
815 Eddy Street
San Francisco, California 94109

Re: In the Matter of Jeremy Rubin, individually and d/b/a Tidbit

Dear Mr. Fakhoury:

I am in receipt of your letter, dated January 7, 2014, and sent on behalf of Jeremy Rubin, individually and d/b/a Tidbit ("Tidbit"). Please be advised that the Subpoena Duces Tecum and Interrogatories served on Tidbit were issued by the State of New Jersey Division of Consumer Affairs on behalf of the Acting Attorney General of New Jersey ("Attorney General") to determine whether Tidbit engaged in conduct in violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("CFA").

The CFA describes the investigative powers and duties of the Attorney General:

When it shall appear to the Attorney General that a person has engaged in, is engaging in, or about to engage in any practice declared to be unlawful by this act, or when he believes it to be in the public interest that an investigation should made to ascertain whether a person in fact has engaged in, is engaging in or is about to engage in, any such practice, he may:

(a) Require such person to file on such forms as are prescribed a statement or report in writing under oath or otherwise, as to all the facts and circumstances concerning the sale or advertisement of merchandise by such person, and such other data and information as he may deem necessary;

. . . . .

(c) Examine any merchandise or sample thereof, record, book, document, account or paper as he may deem necessary.

[N.J.S.A. 56:8-3(a), (c).]

Additionally, N.J.S.A. 56:8-4 expressly states that:

To accomplish the objectives and to carry out the duties prescribed by [the CFA], the Attorney General, in addition to other powers conferred upon by [the CFA], may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, promulgate such rules and regulations, and prescribe such forms as may be necessary, which shall have the force of law.

[N.J.S.A. 56:8-4.]

Accordingly, the Attorney General is authorized to investigate whether any person, whether located in New Jersey or elsewhere, has engaged in, is engaging in or is about to engage in any unlawful practice in violation of the CFA that affects New Jersey consumers.

Thus, Tidbit is required to fully respond to the Subpoena Duces Tecum and Interrogatories by January 13, 2014, so that the Attorney General may continue to fulfill its responsibility of protecting the public interest. The Subpoena and Interrogatories seek documents and information about Tidbit's practices, including, but not limited to, whether the Bitcoin code was present on websites owned and/or operated in the State or visited by New Jersey consumers. Please be guided accordingly. I thank you for your anticipated cooperation.

Sincerely yours,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____
Glenn T. Graham
Deputy Attorney General

cc: Nathan D. Cardozo, Esq.
Kevin R. Jespersen, Assistant Attorney General
Edward J. Mullins III, Deputy Attorney General

EXHIBIT C

Glenn Graham - Re: In re: Subpoena Duces Tecum to Tidbit

From:	Glenn Graham
To:	hanni
Date:	1/9/2014 5:20 PM
Subject:	Re: In re: Subpoena Duces Tecum to Tidbit
CC:	Edward Mullins; Kevin Jespersen; Nate D. Cardozo

Hanni,

Thank you for your time. This e-mail shall confirm that Tidbit will supply a list of all websites that utilized the Tidbit code by Tuesday 1/21/14 and will provide responses to the State's interrogatories by Monday 1/27/14. I thank you for your cooperation.

PRIVILEGED & CONFIDENTIAL

Glenn T. Graham
Deputy Attorney General
Division of Law
124 Halsey Street
Newark, New Jersey 07101
phone: (973) 648-4846
fax: (973) 648-4887
glenn.graham@dol.lps.state.nj.us
>>> hanni <hanni@eff.org> 1/9/2014 5:02 PM >>>
Mr. Graham,

Looks like I just missed your call. I called back and left you another message on your voicemail. Apologies for the phone tag. I should be in my office the rest of the day. Feel free to call at your convenience.

Hanni Fakhoury
Staff Attorney
Electronic Frontier Foundation
415 436 9333 x. 117

On 09.01.2014 12:45, Glenn Graham wrote:
> Mr. Fakhoury:
>
> Please see the attached correspondence. Please do not hesitate to
> contact me should you have any questions.
>
> PRIVILEGED & CONFIDENTIAL
>
> Glenn T. Graham
> Deputy Attorney General
> Division of Law
> 124 Halsey Street
> Newark, New Jersey 07101
> phone: (973) 648-4846
> fax: (973) 648-4887

>>>> Hanni Fakhoury <hanni@eff.org> 1/7/2014 7:32 PM >>>
> Mr. Graham,
>
> The Electronic Frontier Foundation ("EFF") represents Jeremy Rubin
> and
> Tidbit in connection with the subpoena duces tecum and
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> time. But, as explained in the letter, that is because Tidbit's code
> has never been functional and no bitcoins have been mined.
>
> Should you have any questions or concerns, please feel free to call
> or
> email at your convenience.
>
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