

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, ESSEX COUNTY
DOCKET NO. ESX-L-567-14

JEREMY RUBIN d/b/a TIDBIT,

Plaintiff,

Civil Action

v.

STATE OF NEW JERSEY DIVISION OF
CONSUMER AFFAIRS,

Defendant.

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FINANCE DIVISION
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SUPERIOR COURT OF NJ
CIVIL DIVISION
ESSEX VICINAGE

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S ORDER TO SHOW CAUSE AND IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS AND MOTION FOR AN ORDER DIRECTING PLAINTIFF TO
RESPOND TO DEFENDANT'S INVESTIGATORY SUBPOENA DUCES TECUM AND
INTERROGATORIES**

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PRELIMINARY STATEMENT

Plaintiff Jeremy Rubin d/b/a Tidbit (“Tidbit” or “Plaintiff”) filed this action by Order to Show Cause with Temporary Restraints (“Order to Show Cause”) seeking to quash the investigatory Subpoena Duces Tecum (“Subpoena”) and Interrogatories served upon Plaintiff by the Attorney General of the State of New Jersey on behalf of the New Jersey Division of Consumer Affairs, Office of Consumer Protection (“Division”).¹

The Division issued the Subpoena and Interrogatories in furtherance of its investigation into an entity called Tidbit. Tidbit is a group of students who developed a software code that may have hijacked the computer resources of consumers within the State of New Jersey (“New Jersey” or “State”) and improperly accessed and/or used such computer resources to mine for bitcoins for the benefit of Tidbit and its customers and without any notice to, or obtaining consent from, New Jersey consumers, in possible violation of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (“CFA”), the New Jersey Computer Related Offenses Act, N.J.S.A. 2A:38A-1 et seq. (“CROA”), and related statutes and regulations. Bitcoins are a digital medium of exchange that can be traded on online exchanges for a dollar value. Bitcoins are “mined” through the use of computer resources to solve complex algorithms. Many times, consumers’ computer resources are unknowingly accessed by entities through software code or otherwise in order to mine for bitcoins.

Plaintiff’s own description of its services strongly suggests that the code it developed is, in fact, designed to hijack consumer’s computers. Through this action, Plaintiff seeks to quash

¹ Plaintiff has filed this action against the State of New Jersey Division of Consumer Affairs; however, the Subpoena and Interrogatories were issued pursuant to the investigatory authority of John J. Hoffman, Acting Attorney General of the State of New Jersey.

the Subpoena and Interrogatories, and advances the following arguments: (1) the issuance of the Subpoena and Interrogatories comprise the Division's unconstitutional attempt to regulate interstate commerce; and (2) Tidbit does not have sufficient contacts with New Jersey to confer personal jurisdiction notwithstanding. Plaintiff further argues that if the Subpoena and Interrogatories are not quashed, he must be given immunity from prosecution based upon the privilege against self-incrimination.

To the contrary, Plaintiff has sufficient contacts specific with New Jersey that clearly confer jurisdiction to the State in this matter. First, Plaintiff would only provide its bitcoin mining code if its customer provided particular information. Customers could not simply download the code from Plaintiff's website; rather Plaintiff required customers to create an account and submit certain information, including their e-mail address and "bitcoin wallet id," which is essentially an online account in which persons deposit and maintain bitcoins, before it affirmatively sent the code to its customers unique to the wallet id. Second, Plaintiff actively and deliberately sent its bitcoin mining code to customers in New Jersey. In addition, when Plaintiff sent the code to customers in New Jersey, it specifically advised them how to place the code on their websites so that the computer resources of consumers who visited such websites would be accessed without authorization and/ or hijacked to mine for bitcoins. Plaintiff's business model apparently envisions that Tidbit would mine for bitcoins from the hijacked computers and compensate its customers for using its code. Thus, Plaintiff would unlawfully access and/ or mine for bitcoins using the computers of New Jersey consumers and then distribute a portion of any mined bitcoins to its customers, some of which were located in New Jersey.

Further, contrary to Plaintiff's allegations in its brief, the Division specifically found Plaintiff's code on the websites of entities located in New Jersey. Furthermore, the Division determined that the code was active. Lastly, Plaintiff has been communicating directly with its customers in New Jersey concerning the operation of its code and the Division's investigation of Plaintiff's business activities.

Additionally, Plaintiff's assertion of the privilege against self-incrimination as to the requests for documents and information within the Subpoena and Interrogatories must fail, among other things, in that there is no authority supporting a blanket refusal to provide testimony based upon the privilege.

As detailed below, Plaintiff has failed to meet the standards to warrant this Court's grant of injunctive relief precluding the Division's issuance of investigatory subpoenas and the taking of testimony. Among other things, Plaintiff has failed to demonstrate "a reasonable probability of ultimate success on the merits."

STATEMENT OF FACTS AND PROCEEDINGS

I. THE DIVISION'S INVESTIGATION

In November 2013, the Division commenced an investigation to determine whether the business practices of Tidbit were in violation of the CFA and other relevant statutes and regulations ("Investigation"). (Certification of Brian Morgenstern, dated March 6, 2014 ("Morgenstern Cert."), ¶3.)

A. Tidbit Code

The Division became aware that Tidbit developed a bitcoin mining software code to be implemented on websites ("Tidbit Code"). (Morgenstern Cert. ¶9.) When users visit a website

utilizing the Tidbit Code, those users' computer resources may unknowingly be used to mine for bitcoins. (Id.)

On or about November 20, 2013, and following a random website search, the Division confirmed that the Tidbit Code was present on at least three (3) websites registered and located in New Jersey ("New Jersey Coded Websites"). (Morgenstern Cert. ¶10.) During the course of the Investigation, the Division confirmed that the Tidbit Code was active on all New Jersey Coded Websites by accessing the source code for each website. (Id. ¶11.)

B. Tidbit Website

On or about November 12, 2013, the Division became aware of Tidbit's advertisement of the Tidbit Code through a website located at <http://www.tidbit.co.in> ("Tidbit Website"). (Morgenstern Cert. ¶12, Ex. A.) The Division confirmed that Tidbit is the registrant of the Tidbit Website. (Id. ¶13, Ex. B.)

The following representations, among other things, are made on the Tidbit Website: "Monetize without ads;" "Let your visitors help you mine for Bitcoins;" and "Built on the bleeding edge." (Morgenstern Cert. ¶14, Ex. A.) The Tidbit Website further provides: "How does it work? ... [1] Make an account – Sign up with your Bitcoin wallet ... [2] Paste the code – We'll give you a snippet to put in your website ... [3] Cash Out! – We'll send a transaction to your Bitcoin wallet." (Id. ¶15, Ex. A.)

The Division's Investigation further revealed that the Tidbit Website features a "Sign up" button for visitors to register to receive the Tidbit Code. (Morgenstern Cert. ¶¶16-17, Ex. C.) On November 12, 2013, the Division accessed the "Sign up" button. (Id. ¶16.) To receive the Tidbit Code, Tidbit requires visitors to submit the following information: (1) E-mail address;

(2) Bitcoin Wallet ID; and (3) Password (“Sign-up Information”). (Id.) As of this date, Tidbit continues to require visitors to submit Sign-up Information to receive the Tidbit Code. (Id. ¶17, Ex. C.) Further, the Tidbit Website is still active. (Id. ¶19.)

C. Issuance of Subpoena and Interrogatories to Tidbit

On December 4, 2013, the Division issued the Subpoena and Interrogatories and served them upon Tidbit via Certified and Regular Mail. (Certification of Glenn T. Graham, dated March 6, 2014 (“Graham Cert.”), ¶4.) The Subpoena and Interrogatories were returnable December 20, 2013. (Id.)

The Subpoena requested, among other things, the following: (1) documents and correspondence concerning all breaches of security and/or unauthorized access of computers by Tidbit; (2) documents and correspondence concerning the Tidbit Code; (3) all codes, source codes, control logs, and installation logs concerning the Tidbit Code; (4) all documents, correspondence and agreements between Tidbit and any website publisher, affiliate, advertiser and/or any other third party concerning the Tidbit Code; (5) all documents concerning the bitcoin accounts associated with the Tidbit Code, including account information and account statements for each website that contains the Tidbit Code; (6) all documents concerning the bitcoin wallet addresses used and/or associated with the Tidbit Code; (7) all documents concerning users of the Tidbit Code, including all agreements, correspondence and account information; and (8) all consumer and users complaints received by Tidbit concerning the Tidbit Code. (See Subpoena and Interrogatories, attached as Exhibit A to the Certification of Hanni M. Fakhoury (“Fakhoury Cert.”), submitted with Plaintiff’s initial papers.)

The Interrogatories requested that Tidbit, among other things, respond to the following inquiries: (1) describe the services and products offered by Tidbit; (2) identify all customers of Tidbit and the services or products they purchased from you; (3) describe the method, manner, and process in which the Tidbit Code was developed and deployed; (4) describe the method, manner and process your customers use the Tidbit Code, including the benefit(s) of the Tidbit Code to customers; (5) describe the benefits of the Tidbit Code to users; (6) describe the benefit Tidbit receives from having customers and/or websites utilize the Tidbit Code, including transaction fees and newly minted bitcoins; (7) identify the person(s) who developed the Tidbit Code and produce all versions of the code; (8) how many websites utilized and/or were affected by the Tidbit Code; (9) identify all persons whose computers were caused to mine for bitcoins through the Tidbit Code; (10) identify all bitcoin wallet addresses associated with the Tidbit Code; (11) does Tidbit conduct quality control, compliance and/or other reviews prior to permitting customers and/or websites from utilizing the Tidbit Code; (12) identify all instances where Tidbit, its employees and/or websites utilizing the Tidbit Code accessed consumer computers without express written authorization or accessed consumer computers beyond what was authorized; and (13) what disclosures did Tidbit provide website publishers and/or Tidbit Code users concerning bitcoin mining. (Fakhoury Cert. Ex. A.)

On December 10, 2013, Deputy Attorney General Glenn T. Graham ("DAG Graham") received a telephone call from David Wexler, Esq. ("Mr. Wexler") on behalf of Tidbit and concerning the Division's Subpoena and Interrogatories. (Graham Cert. ¶5.) At that time, Mr. Wexler requested an extension to respond to the Subpoena and Interrogatories until after Mr.

Rubin's final exams. (Id.) DAG Graham granted an extension to respond to January 13, 2014.

(Id.)

On January 7, 2014, DAG Graham received an e-mail with attached correspondence from Hanni Fakhoury, Esq. ("Mr. Fakhoury") indicating that he was 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."

(Graham Cert. ¶6, Ex. A.)

On January 9, 2014, DAG Graham sent a letter to Mr. Fakhoury explaining that the Division issued its Subpoena and Interrogatories pursuant to the CFA and demanding that Tidbit fully respond by January 13, 2014. (Graham Cert. ¶7, Ex. B.) That same day, DAG Graham and Mr. Fakhoury had a telephone conversation, at which time DAG Graham informed Mr. Fakhoury that the Division has information concerning the Tidbit Code's activity and presence on websites registered and located in New Jersey. (Id. ¶8.) During the call, Mr. Fakhoury requested an additional extension to respond to the Subpoena and Interrogatories. (Id.) Mr. Fakhoury and DAG Graham 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. (Id. ¶8, Ex. C.) DAG Graham confirmed the production schedule via e-mail. (Id.)

After the issuance of the Subpoena and Interrogatories, the Division accessed the New Jersey Coded Websites and determined that the Tidbit Code had been removed from such websites. (Morgenstern Cert. ¶18.)

D. Issuance of Subpoenas to New Jersey Coded Websites

On January 24, 2014 and January 30, 2014, the Division served Administrative Subpoenas Duces Tecum and Interrogatories upon two (2) New Jersey Coded Websites (“New Jersey Website Subpoenas”). (Certification of Edward J. Mullins III, dated March 6, 2014 (“Mullins Cert.”), ¶4.)

In response to the New Jersey Website Subpoenas, one of the New Jersey Coded Websites produced, among other things, the following documents: (1) the user’s Tidbit account dashboard (“Account Dashboard”); and (2) an e-mail from Tidbit advising it users of the Division’s issuance of the Subpoena and Interrogatories (“Tidbit User E-mail”). (Mullins Cert. ¶5, Exs. A, B.)

The Account Dashboard states, among other things, the following: (1) “**Your embed code** – Paste this at the bottom of your HTML page, and your visitors will start mining Bitcoins for you!;” (2) “Here’s how much you’ve made so far with Tidbit;” and (3) “Average Difficulty – 2.” (Mullins Cert. ¶6, Ex. A (emphasis in original).)

The Tidbit User E-mail is addressed to “Tidbit users,” from the “Tidbit team,” and states that “Tidbit was served a subpoena by the New Jersey Attorney General.” (Mullins Cert. ¶7. Ex. B.) The Tidbit User E-mail further states, among other things: (1) “Typically, legal issues are an unavoidable growing pain for startups. For Tidbit, they’ve arrived quite a bit earlier;” (2) “Don’t worry, we haven’t released any of your information;” (3) “We’ve gotten word from some of our Tidbit users that the NJ Attorney General has served them subpoenas requesting information regarding Tidbit. If you get served one, don’t worry. Get in touch with your legal counsel. If you don’t have immediate legal counsel, email info@eff.org for assistance in finding

representation;” and (4) “We don’t know why the NJ Attorney General is targeting Tidbit so aggressively, but it hurts all of us.” (Id. ¶8, Ex. B (emphasis added).)

E. The Division’s Undercover Investigation

On February 7, 2014, the Division re-accessed the Tidbit Website and “Sign up” button. (Morgenstern Cert. ¶20.) While on the Tidbit Website, the Division submitted Sign-up Information to Tidbit using an undercover e-mail address and an undercover bitcoin wallet id. (Id. ¶20, Ex. D.) In response to receiving the Division’s undercover Sign-up Information, Tidbit sent the Tidbit Code to the Division’s investigator via a confirmation page on the Tidbit Website (“Confirmation Page”). (Id.)

The Tidbit Code that the Division received includes the Division’s undercover bitcoin wallet id. (Morgenstern Cert. ¶21, Ex. D.) Additionally, among other things, the Confirmation Page states: “**Your embed code** – Paste this at the bottom of your HTML page, and your visitors will start mining Bitcoins for you!” (Id. ¶22, Ex. D (emphasis in original).)

The Division’s Investigation further revealed that Mr. Rubin identifies himself as the “founder” of Tidbit and lists same as work experience on his resume. (Morgenstern Cert. ¶23, Ex. E.)

II. COMMENCEMENT OF THIS ACTION

On January 21, 2014, DAG Graham received a copy of the Complaint and Order to Show Cause with supporting documentation via e-mail from Frank L. Corrado, Esq. (“Mr. Corrado”), acting as local counsel for Tidbit. (Graham Cert. ¶9.) The Order to Show Cause seeks the following relief: (1) quashing the Division’s Subpoena and Interrogatories; and (2) enjoining

the Division from issuing subpoenas seeking documents and testimony from Plaintiff without judicial review. (Id.)

In addition, Plaintiff has filed a three (3) count Complaint against the Division. (See Complaint.) Count I one of the Complaint alleges a violation of the Dormant Commerce Clause pursuant to 42 U.S.C. § 1983 and N.J.S.A. 10:6-2(c).² (See Complaint ¶¶25-29.) Specifically, Plaintiff alleges “[t]he state of New Jersey only has authority under federal and state law to investigate and regulate conduct occurring within the state of New Jersey” and “Defendant has no authority to issue a subpoena duces tecum and interrogatories to investigate and regulate behavior occurring outside of the state of New Jersey, in violation of Article I, section 8, clause 3 of the United States Constitution.” (See Compl. ¶¶26, 28.)

Similarly, Count II of the Complaint alleges an Ultra Vires Action pursuant to 42 U.S.C. § 1983 and N.J.S.A. 10:6-2(c). (See Compl. ¶¶30-33.) Count III of the Complaint alleges that Plaintiff’s issuance of the Subpoena and Interrogatories violates Plaintiff’s right against compelled self-incrimination. (See Compl. ¶¶34-36.)

² N.J.S.A. 10:6-2(c) of the New Jersey Civil Rights Act provides:

Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief. The penalty provided in subsection e. of this section shall be applicable to a violation of this subsection.

For the reasons set forth below, Plaintiff has failed to establish its entitlement to injunctive relief as to the Subpoena and Interrogatories. Further, Plaintiff has failed to state a cause of action, thus necessitating this Court's dismissal of the Complaint in its entirety. Finally, the Court should Order Plaintiff to fully respond to the Division's Subpoena and Interrogatories.

ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO ESTABLISH ITS ENTITLEMENT TO INJUNCTIVE RELIEF

The standards governing the issuance of injunctive relief, which Plaintiff fails to cite let alone meet, are well established. A court should grant injunctive relief if the movant demonstrates the following:

- (1) It will suffer immediate and irreparable injury if the injunction is not issued;
- (2) the legal right underlying the claim for relief is well settled;
- (3) a reasonable probability of ultimate success on the merits;
and
- (4) the harm to the movant if the injunction is denied will be greater than the harm to the opposing party if the injunction is granted.

[Crowe v. DeGioia, 90 N.J. 126, 132-33 (1982).]

Further, "[t]he issuance of an injunction, even when only interlocutory and only to preserve the status quo, represents 'the strongest weapon at the command of the court of equity.'"

Waste Mgmt. of N.J., Inc. v. Union Cty. Util. Auth. & IWS Transfer Sys. of N.J., Inc., 399 N.J.

Super. 508, 538 (App. Div. 2008) (quoting Light v. Nat'l Dyeing & Printing Co., 140 N.J. Eq. 506, 510 (Ch. 1947). Accordingly, “[a] party who seeks mandatory preliminary injunctive relief must satisfy a ‘particularly heavy’ burden.” Guaman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006)) (citations omitted). “An injunction is a drastic remedy because it instantly reaches into a dispute and compels a party, under pain of contempt or other coercive powers of the court, to do or not do a particular act. Broadly speaking, it is a command which prohibits the exercise of free choice or action.” Sherman v. Sherman, 330 N.J. Super. 638, 644 (Ch. Div. 1999). Thus, Further, all of the Crowe factors must weigh in favor of the relief sought in order for an injunction to issue. See Id. at 642-43 (citation omitted). For the reasons set forth below, Plaintiff has failed to satisfy this burden.

First, Plaintiff has failed to establish that it will suffer irreparable harm by responding to the Division’s Subpoena and Interrogatories as issued. The Subpoena and Interrogatories were issued pursuant to the CFA’s broad grant of investigatory authority to the Attorney General and they were properly served. The Subpoena and Interrogatories are limited in scope and seek only those documents and information related to Plaintiff’s development, use, advertisement and deployment of the Tidbit Code, which are relevant to the Division’s Investigation.

Second, and as detailed below, Plaintiff has failed to demonstrate a likelihood of success on the merits of its Complaint, alleging a violation of the Dormant Commerce Clause pursuant to 42 U.S.C. § 1983 and N.J.S.A. 10:6-2(c), an Ultra Vires Action pursuant to 42 U.S.C. § 1983 and N.J.S.A. 10:6-2(c), and a violation of Plaintiff’s right against compelled self-incrimination.

Plaintiff has failed to “clearly and convincingly show that the material facts are not in dispute.” Sherman, 330 N.J. Super. at 645 (citation omitted).

Third, Plaintiff has failed to establish that the legal right to his underlying claim for relief is well settled. As discussed in detail in Point VI below, Plaintiff has failed to assert viable causes of action.

Finally, the harm to Plaintiff if this Court declines its request for injunctive relief is negligible compared to the burden on the Division if the injunctive relief were granted.

[T]he propriety of an interlocutory injunction has to be viewed not only with a mind toward the irreparable injury allegedly faced by plaintiff, and the hardship to befall the other affected parties if it issues, but also from the vantage point of the public. In the matter at hand, the public interest is significantly impacted, and, once defined, should play a significant role in the judge’s determination.

[Waste Mgmt. of N.J., Inc., 399 N.J. Super. at 536 (emphasis added).]

“[W]hen the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant.” Id. at 520; see Yakus v. United States, 321 U.S. 414, 440 (1944). In this action, not only has Plaintiff failed to establish irreparable harm, but also the Division’s statutory mandate to protect the privacy and well-being of citizens of New Jersey would be significantly harmed by the issuance of injunctive relief.

POINT II

THE CFA EXPRESSLY AUTHORIZES THE ATTORNEY GENERAL TO ISSUE AND ENFORCE THE DIVISION'S SUBPOENA AND INTERROGATORIES

The Attorney General is charged with the responsibility of enforcing the CFA, while the Division is charged with the responsibility of administering the CFA on behalf of the Attorney General. The CFA focuses on commercial deception and provides, in pertinent part:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing[] concealment suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice

[N.J.S.A. 56:8-2 (emphasis added).]

The CFA defines “person” to include “any natural person . . . partnership, corporation, company . . . business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate” N.J.S.A. 56:8-1(d). The CFA defines “merchandise” as “any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale.” N.J.S.A. 56:8-1(c).

“[T]he Legislature passed the [CFA] ‘to permit the Attorney General to combat the increasingly widespread practice of defrauding the consumer.’” Cox v. Sears Roebuck & Co., 138 N.J. 2, 14 (1994) (quoting legislative history). The CFA “evinces a clear legislative intent that its provisions be applied broadly in order to accomplish its remedial purpose, namely, to root

out consumer fraud.” Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 264 (1997); see Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 69 (1985); Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 376-77 (1977). “Thus, the [CFA] is designed to protect the public even when a merchant acts in good faith.” Cox, 138 N.J. at 16 (citation omitted).

Consistent therewith, the CFA provides the Attorney General with broad investigatory authority. Among other things:

When it shall appear to the Attorney General that a person has engaged in, is engaging in, or is 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 be 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 other such data and information as he may deem necessary

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

[N.J.S.A. 56:8-3 (emphasis added).]

The CFA further provides that:

To accomplish the objectives and to carry out the duties prescribed by this act, the Attorney General, in addition to other powers conferred upon him by this act, 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 (emphasis added).]

Further, the CFA provides:

Service by the Attorney General of any notice requiring a person to file a statement or report, or of a subpoena upon any person . . . may be made in the following manner:

....

(a) Personal service thereof without this State; or

(b) The mailing thereof by registered mail to the last known place of business, residence or abode, within or without this State of such person for whom the same is intended

[N.J.S.A. 56:8-5 (emphasis added).]

If a person, as defined in the CFA, fails to obey a subpoena issued pursuant to the CFA, the Attorney General can enforce the subpoena through the filing of a Superior Court action.

N.J.S.A. 56:8-6. By way of relief, the Attorney General may apply to the Superior Court and obtain an order:

(a) Adjudging such person in contempt of court;

(b) Granting injunctive relief without notice restraining the sale or advertisement of any merchandise by such persons;

(c) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or revoking or suspending the certificate of authority to do business in this State of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(d) Granting such other relief as may be required; until the person files the statement or report, or obeys the subpoena.

[Ibid.]

The Division commenced an investigation of Tidbit in furtherance of its duty to protect the consuming public, specifically the privacy and well-being of New Jersey citizens as well as to ensure that the computer resources of New Jersey citizens are not subject to access by Plaintiff without providing adequate notice and obtaining meaningful consent. In order to ensure a thorough investigation and obtain information it deemed necessary, the Division issued the Subpoena and Interrogatories to Tidbit pursuant to the broad grant of investigatory authority provided for in the CFA.

POINT III

THE DIVISION'S ISSUANCE OF A SUBPOENA AND INTERROGATORIES DOES NOT UNDULY BURDEN INTERSTATE COMMERCE

As an initial matter, Tidbit alleges that the Division's issuance of the Subpoena and Interrogatories is tantamount to the Division "attempting to use the CFA to regulate Internet conduct" in violation of the Dormant Commerce Clause. (Tidbit Br. at 8.) For the reasons set forth below, Plaintiff's arguments are without merit.³

Pursuant to the Commerce Clause, Congress has the power to "regulate Commerce . . . among the several States . . ." U.S. Const. Art. I § 8, cl. 3. Generally, the Supreme Court has identified two types of state statutes or regulations which violate the Commerce Clause, namely: (1) those statutes that directly regulate or discriminate against interstate commerce; or (2) those statutes that exert an indirect effect on interstate commerce, in that they favor in state economic interests over out-of state interests. Brown-Forman Distillers, Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

³ This argument is the basis for the injunctive relief requested by Tidbit, as well as Count I

However, “[n]ot every exercise of state power with some impact on interstate commerce is invalid.” Edgar v. MITE Corp., 457 U.S. 624 (1982). If the statute indirectly affects interstate commerce and “the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). To that extent, “the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.” Maine v. Taylor, 477 U.S. 131, 138 (1986) (citation omitted). Further, the “[r]egulation of consumer protection is historically a matter of legitimate local concern.” SPGGC, Inc. v. Blumenthal, 408 F. Supp. 2d 87, 96 (D. Conn. 2006); see Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963) (State regulations designed to prevent the deception of consumers is a valid exercise of state police powers.)

In contending that the Division’s issuance of the Subpoena and Interrogatories pursuant to the CFA would constitute an undue burden on interstate commerce, Plaintiff’s analysis is misplaced from both a factual and legal perspective.

First, Plaintiff cites to American Libraries Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997), for the proposition that the CFA violates the Dormant Commerce Clause “[b]ecause the unique nature of the Internet allows anyone anywhere to access any website, the typical geographical limits on a state’s enforcement authority is a ‘virtually meaningless construct on the Internet.’” (Tidbit Br. at 8 (quoting Pataki, 969 F. Supp. at 169.)) As such, Plaintiff argues that the Division’s issuance of the Subpoena and Interrogatories pursuant to the

of the Complaint. (See generally, Tidbit Br. and Compl. ¶¶25-29.)

CFA constitutes a per se violation of the Dormant Commerce Clause because “neither Mr. Rubin nor Tidbit have any ability to control who uses its code once it has been downloaded by anyone with an Internet connection.” Ibid.

Plaintiff’s contention is simply belied by the law and record. A state statute comprises a per se violation of the Dormant Commerce Clause only if it seeks to regulate commerce that which occurs wholly outside its borders and/ or discriminates against out-of-state interests in favor of in-state interests. See Granholm v. Heald, 544 U.S. 460, 473-77 (2005); Healy v. Beer Inst., 491 U.S. 324, 342-43 (1989). Plaintiff relies upon Pataki and American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003), both of which concern state statutes that are direct regulators of interstate commerce and thus are per se invalid. Plaintiff’s reliance upon these cases is misplaced because the requested compliance with the CFA does not seek to regulate commerce that occurs wholly outside of New Jersey, nor does it discriminate against out-of-state interests in favor of in-state interests. Indeed, Plaintiff’s interpretation would lead to every state consumer protection statute being held invalid merely because the internet exists. Further, Plaintiff’s compliance with the Subpoena and Interrogatories, at most, will exert a negligible effect upon interstate commerce.

Second, the Division’s Subpoena and Interrogatories seek documents and information concerning Plaintiff’s advertisement, use, deployment and presence of the Tidbit Code in New Jersey in order to fulfill its mission to protect New Jersey consumers. (Graham Cert. ¶¶ 3-4.) As Plaintiff acknowledged, “New Jersey certainly has a legitimate interest in trying to investigate and deter consumer fraud.” (Tidbit Br. at 9.) Further, as discussed in detail above, the

Division's investigation revealed that the Tidbit Code was present and active on the New Jersey Coded Websites. (Morgenstern Cert. ¶11.)

The practical effect of the Division's requested compliance is certainly not one of nationwide or substantial extraterritorial proportions. The negligible burden on commerce between Massachusetts and New Jersey must be balanced against the Division's interest, which is clearly legitimate and substantial. Pike, 397 U.S. at 142. Plaintiff ignores this analysis and rests its argument on its claim that the CFA is somehow attempting to regulate the internet and therefore must be unconstitutional. (See Tidbit Br. at 9-10). As stated above, the Division's interest in investigating Plaintiff's advertisement, use and deployment of the Tidbit Code to New Jersey consumers is clearly legitimate and substantial: namely, the protection of the privacy and well-being of its citizens as well as to ensure that their computer resources are not subject to access by Plaintiff without providing adequate notice and obtaining meaningful consent. As discussed above, Plaintiff's arguments that "Mr. Rubin and Tidbit have no connection to New Jersey and no ability to control who downloads their code" are inapposite to the facts revealed by the Division's Investigation because Plaintiff requires users to submit Sign-up Information before affirmatively sending the Tidbit Code and has continued to maintain contact with the New Jersey Coded Websites. (Morgenstern Cert. ¶¶15-22, Exs. A-D; Mullins Cert. ¶¶5-8, Exs. A, B.)

For the foregoing reasons, Plaintiff has simply failed to demonstrate that the Division's issuance of a Subpoena and Interrogatories pursuant to the CFA is in violation of the Dormant Commerce Clause.

POINT IV

**THE DIVISION HAS SPECIFIC JURISDICTION TO ISSUE
THE SUBPOENA AND INTERROGATORIES BECAUSE
PLAINTIFF HAS SUFFICIENT MINIMUM CONTACTS WITH,
AND HAS PURPOSEFULLY DIRECTED THE TIDBIT CODE
TO, THE NEW JERSEY CODED WEBSITES**

Additionally, Plaintiff alleges that the Division lacks jurisdiction to issue the Subpoena and Interrogatories because: (1) "Tidbit has no contracts or agreements with anyone in New Jersey;" (2) "the state cannot point to any specific activity that indicates Mr. Rubin or Tidbit expressly aimed any conduct towards New Jersey;" (3) "Mr. Rubin could neither direct nor control who could or would download Tidbit;" (4) "the CFA statutes that empower the Attorney General to issue subpoenas . . . say nothing about investigating conduct occurring outside New Jersey;" and (5) "[w]hile New Jersey certainly has an interest in investigating potential violations of the CFA, that interest is no stronger than any other state's interest in protecting its consumers." (See Tidbit Br. at 10-15.) For the reasons set forth below, Plaintiff's arguments are without merit.

New Jersey's long-arm statute, R. 4:4-4(b)(1), allows courts to "exercise in personam jurisdiction over a non-resident defendant 'consistent with due process of law.'" Bayway Ref. Co. v. State Util., Inc., 333 N.J. Super. 420, 428 (App. Div. 2000) (citing R. 4:4-4(b)(1)). Further, such jurisdiction extends to the "outermost limits permitted by the United States Constitution." Avdel Corp. v. Mecure, 58 N.J. 264, 268 (1971). The United State Supreme Court in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), established when the exercise of personal jurisdiction over a non-resident defendant is appropriate. "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not

present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”

Id. at 316.

In Silverman v. Berkson, 141 N.J. 412 (1995), the New Jersey Supreme Court addressed whether a state agency can be granted “extraterritorial authority over nonresident witnesses consistent with due process principles.” Id. at 414. The Court first held that powers extended to state agencies should be “liberally construed so that the agency can fulfill its legislative purpose.” Silverman, 141 N.J. at 414. The Court then examined the limits of due process upon that power, stating that “the power to issue a subpoena and the power to enforce a subpoena are different incidents of sovereignty, and such powers are not necessarily identical.” Id. at 422. The Court ultimately determined that the permissible exercise of jurisdiction and reach of compulsion to respond to investigative inquires is equal:

The concepts of “jurisdiction to prescribe” (“the authority of a state to make its law applicable to persons or activities”) and “jurisdiction to adjudicate” (“the authority of a state to subject particular persons or things to its judicial process”) are closely linked.

[Id. at 425 (quoting Restatement (Third) of Foreign Relations Laws of the United States Part IV, at 231 (1987).]

The scope of jurisdiction and enforcement is not considered individually. The question is whether a state “may require the attendance of one who has purposely availed himself of the privilege” of the forum state. Id. at 426. “[A]bsent ‘purposeful availment,’ the jurisdiction to proscribe conduct in another forum would not suffice” to enforce investigative requests. Id.

As discussed in detail above, the CFA expressly authorizes the Division to issue the Subpoena and Interrogatories to Plaintiff. See N.J.S.A. 56:8-2 to -5. Additionally, the CFA grants the Division authority to apply to Superior Court for an Order enforcing the Subpoena and Interrogatories. See N.J.S.A. 56:8-6.

A. Plaintiff has Purposefully Directed the Tidbit Code to New Jersey

Plaintiff alleges that the Tidbit Code was not aimed or targeted towards New Jersey. (Tidbit Br. at 14.) As set forth above, Plaintiff's allegation is belied by the facts revealed to date by the Division's Investigation.

Specifically, the Division discovered the Tidbit Code on the New Jersey Coded Websites (Morgenstern Cert. ¶10.) In addition, the Division determined that Plaintiff requires users to submit Sign-up Information via the Tidbit Website before Plaintiff sends the Tidbit Code to such users, which is clearly contrary to Plaintiff's allegation that "Mr. Rubin could neither direct nor control who could or would download Tidbit." (Id. ¶¶15-17, 20-22, Exs. A-D; Tidbit Br. at 12.)

Furthermore, the Investigation revealed that Plaintiff has affirmatively contacted the New Jersey Coded Websites to inform them that they may receive a subpoena from the Division. (Mullins Cert. ¶5.) Clearly, Plaintiff has purposefully availed itself of entering the New Jersey market by directing the Tidbit Code to the New Jersey Coded Websites and the Division's issuance of the Subpoena and Interrogatories was warranted.

B. The Division's Issuance of the Subpoena and Interrogatories are Consistent with Due Process

In accordance with International Shoe, "[a] three-pronged test has emerged for determining whether the exercise of specific personal jurisdiction over a non-resident defendant

is appropriate: (1) the defendant must have 'minimum contacts' with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable." Zippo Mfg. Co. v. Zippo DOT Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997)) (citations omitted).

Further:

[t]he likelihood that personal jurisdiction can be constitutionally exercised [over internet-based entities] is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.

[Id. at 1124, (quoting Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996)) (emphasis added).]

"At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction." Id. (citations omitted).

The Division's issuance of the Subpoena and Interrogatories is clearly consistent with due process. First, it should be noted that the Division did not file an action to enforce its Subpoena and Interrogatories, rather Plaintiff himself initiated this action seeking affirmative and declaratory relief in New Jersey, thus subjecting himself to litigation in this forum. See Halak v. Scovill, 296 N.J. Super. 363, 370 (App. Div. 1997) (filing of a complaint to be considered in minimum contacts analysis as the filing party is not being haled into a New Jersey court solely as a result of random, fortuitous or attenuated contacts.) Second, Plaintiff has sufficient minimum

contacts with New Jersey in that he affirmatively sent the Tidbit Code to the New Jersey Coded Websites and has maintained contact with such websites. (Morgenstern Cert. ¶¶15-17, 20-22, Exs. A-D; Mullins Cert. ¶¶5-8, Exs. A, B.) Also, the Tidbit Website is not a passive website, but one in which Plaintiff requires users to submit Sign-up Information and to send the Tidbit Code to New Jersey, thus making jurisdiction over Plaintiff proper. See Zippo Mfg. Co., 952 F. Supp. at 1124.

Further, it appears the computer resources of New Jersey consumers who visit any of the Coded Websites may be unknowingly accessed by Plaintiffs via the Tidbit Code. (Morgenstern Cert. ¶3.) In addition, the Division's Subpoena and Interrogatories concern Plaintiff's development, advertisement, use and deployment of the Tidbit Code which, as noted above, was found on the New Jersey Coded Websites. (Fakhoury Cert. Ex. A.) Last, the issuance of the Subpoena and Interrogatories is certainly reasonable given the Division's statutory responsibility to protect the privacy interests and well-being of New Jersey consumers.

C. Asserting Personal Jurisdiction Over Plaintiff Does Not Offend Fair Play and Substantial Justice:

Further, contrary to Plaintiff's assertion, this Court's maintenance of jurisdiction over Plaintiff does not offend traditional notions of fair play and substantial justice. See Waste Mgmt., Inc. v. Admiral Ins. Co., 138 N.J. 106, 124-25 (1994); (Tidbit Br. at 14-15). Courts consider the following factors in determining whether the assertion of jurisdiction comports with fair play and substantial justice: "(1) the burden on defendant of litigating in a foreign forum; (2) the forum's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining effective and convenient relief; (4) the interstate judicial system's interest in efficiently resolving

controversies; and (5) the several states' interest in further substantive social policies.” Harley Davidson Motor Co., Inc. v. Advance Die Casting, Inc., 292 N.J. Super. 62, 75 (App. Div. 1996).

Each factor weighs heavily in favor of the Division in this action. As acknowledged by Plaintiff and as discussed above, the Division issued the Subpoena and Interrogatories pursuant to its statutory responsibility to protect the privacy and well-being of citizens of New Jersey. (Tidbit Br. at 14.) In addition, Plaintiff's argument that “[t]here is a significant burden on forcing a 19-year-old college student who lives more than 200 miles away in another state, to answer a detailed subpoena and interrogatories in New Jersey” is belied by the fact that Plaintiff filed this action in New Jersey, including detailed and specific factual background, and has subjected himself to litigation in this forum. (Tidbit Brief at 14); see Halak, 296 N.J. Super. at 370. In any event, the negligible burden on Plaintiff to produce responses to the Subpoena and Interrogatories pales in comparison to the Division's statutory mandate to investigate potential violations of the CFA in order to prevent and address conduct that has the capacity to harm the consuming public.

For the foregoing reasons, the Division's issuance of the Subpoena and Interrogatories to Plaintiff is appropriate. As such, the Division submits that this Court should exercise its jurisdiction to enforce the Division's Subpoena and Interrogatories.

POINT V

**PLAINTIFF'S REQUEST FOR AN ORDER
GRANTING MR. RUBIN IMMUNITY FROM
PROSECUTION IS PREMATURE, AND PLAINTIFF
HAS FAILED TO PROPERLY ASSERT HIS
PRIVILEGE AGAINST SELF-INCRIMINATION**

Plaintiff further alleges that in the event the Court refused to quash the Division's Subpoena and Interrogatories, it should hold that they infringe upon Plaintiff's right to not be compelled to provide incriminating testimony against himself; an assertion he sought to make for the first time upon his application for temporary restraints. (Tidbit Br. at 15.)

The CFA, specifically N.J.S.A. 56:8-7, provides:

If any person shall refuse to testify or produce any book, paper or other document in any proceeding under this act for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him, convict him of a crime, or subject him to a penalty or forfeiture, and shall, notwithstanding, be directed to testify or to produce such book, paper or document, he shall comply with such direction.

A person who is entitled to law, and does assert such privilege, and who complies with such direction shall not thereafter be prosecuted or subjected to any penalty or forfeiture in any criminal proceeding which arises out of and relates to the subject matter of the proceeding. No person so testifying shall be exempt from prosecution or punishment for perjury or false swearing committed by him in giving such testimony.

[N.J.S.A. 56:8-7.]

In order to assert the privilege against self-incrimination, Plaintiff must show: "(1) compulsion, (2) testimonial communication or act, and (3) incrimination." In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011, 670 F.3d 1335, 1341 (11th Cir. 2012) (citations omitted).

However, Plaintiff must assert such privilege with particularity as to the Division's Subpoena and Interrogatories. Plaintiff does not "have a 'blanket' right to refuse to respond to all

questions. If Plaintiff refuses to answer some questions, whether that refusal was the product of a legal exercise of the Fifth Amendment and what consequences may be triggered by such refusal, can then be addressed by the trial judge.” State Farm Indem. Co. v. Warrington, 350, N.J. Super. 379, 388 (App. Div. 2002).

Here, Plaintiff has failed to delineate each element of each particular request within the Subpoena and Interrogatories to which he is asserting the privilege against self-incrimination. As such, it is impossible to determine whether Plaintiff’s refusal to respond to the Subpoena and Interrogatories is a legal exercise of the Fifth Amendment and/ or whether Plaintiff has waived his privilege.⁴ Plaintiff’s assertion of the privilege is inadequate at law and, even if the Court could grant it, it cannot be ordered. Accordingly, Plaintiff’s request for the privilege must fail.

⁴ For example, Plaintiff’s Complaint acknowledges the development of the Tidbit Code and its intent to mine for bitcoins, as well as asserting that it is non-functional. Such assertions may be tantamount to a waiver of the Fifth Amendment privilege pursuant to Mahne v. Mahne, 66 N.J. 53 (1974).

In addition, documents in which the Division know exists, such as the Tidbit User E-mail and other documents are exempt from the Fifth Amendment Privilege under the foregone conclusion doctrine. See United States v. Doe, 465 U.S. 605, 612 (1984).

Further, “an individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally.” Matter of Grand Jury Proceedings of Guarino, 104 N.J. 218, 222 (1986) (quoting Bellis v. United States, 417 U.S. 85, 88 (1974)). Despite Plaintiff’s assertion that it is an informal entity, Tidbit has clearly held itself out as being a “startup” to its users and, as a startup, the Fifth Amendment may not apply to

POINT VI

PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND, AS SUCH, THE COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY

Further, the Division moves for dismissal of Plaintiff's Complaint in its entirety, for failure to state a claim, pursuant to R. 4:6-2(e).

A. Plaintiff's Complaint

As described above, in its three (3) Count Complaint Plaintiff asserts: (1) a violation of the Dormant Commerce Clause premised upon the Division's alleged attempt to investigate and regulate conduct occurring outside of New Jersey; (2) an unconstitutional ultra vires action in violation of the Due Process Clause of the Fourteenth Amendment premised upon the Division's alleged attempt to exercise personal jurisdiction over Plaintiff when he has no "continuous and systematic" contacts with New Jersey and has not committed any act to purposefully avail himself of the privilege of conducting activities in New Jersey; and (3) a violation of the Fifth and Fourteenth Amendments and New Jersey Common Law, premised upon the Division's attempt to compel Plaintiff to provide testimony in violation of his right to be free from compelled self-incrimination. (See generally Complaint.) In connection therewith, Plaintiff, among other things, seeks a declaration that the Subpoena and Interrogatories violate the Dormant Commerce Clause, constitute an ultra vires action and are unenforceable, as well as an injunction prohibiting the Division from moving to enforce the Subpoena until a scheduled hearing. (See Complaint at 7-8.) For the reasons set forth below, the Complaint should be dismissed in its entirety.

business records in Plaintiff's possession. (See Mullins Cert, Exs. A, B.)

B. Standards for Dismissal Under R. 4:6-2(e)

Pursuant to R. 4:6-2(e), a party, in lieu of an answer, may file a motion to dismiss based on a Plaintiff's failure to state a claim upon which relief can be granted. For such motions, "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P.&J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1962). When deciding a motion to dismiss, the Court "may not consider anything other than whether the Complaint states a cognizable cause of action." Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (citation omitted). Further, "a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Ibid.

The Plaintiff has the burden of establishing that the allegations contained in the Complaint constitute a valid cause of action. Island Mortg. of N.J. & Perennial Lawn Care, Inc. v. 3M, 373 N.J. Super. 172, 175 (App. Div. 2004). While a Defendant must accept as true all well-pleaded factual allegations, the Defendant need not accept legal conclusions or legal theories espoused by the Plaintiff. Novack v. Cities Service Oil Co., 149 N.J. Super. 542, 545 n.1 (Law Div. 1997) (subsequent history omitted).

Accordingly, where a Plaintiff has failed to articulate a legal basis entitling it to relief, a motion to dismiss must be granted. Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). Such is the case because a Defendant should not have to suffer the burden of continued litigation for a complaint that is untimely, or procedurally or substantively defective. Milford Mill 128, LLC v. Borough of Milford, 400 N.J. Super. 96, 109 (App. Div. 2008).

**C. Plaintiff Fails to Assert
Viable Causes of Action**

First, the three (3) counts in Plaintiff's Complaint purport to allege violations of 42 U.S.C. § 1983 as to the Division. Section 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[42 U.S.C. §1983.]

To be liable under 42 U.S.C. § 1983, a defendant must be a "person" acting under color of State law. West v. Atkins, 487 U.S. 42, 48 (1988). It is well established that the State is not a "person" subject to suit under Section 1983. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989). As the United States Supreme Court stated:

Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity . . . , or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to over-ride that immunity. . . . Given that a principal purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims, and the Congress did not provide such a federal forum for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be brought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983.

[Id. at 66. (citation omitted).]

Similarly, “governmental entities that are considered ‘arms of the State’ for Eleventh Amendment purposes are not considered “persons” subject to suit under Section 1983. Id. at 70. As such, the Will Court held “that neither a State nor its officials acting in their official capacities are ‘person’ under § 1983.” Id. at 71. Thus, the Division, as an agency and instrument of the State, is immune from suit under Section 1983. See Thompson v. Burke, 556 F.2d 231, 239 (3d Cir. 1977). On this basis, Plaintiff is precluded from seeking recovery against the Division in this action.

Second, and as discussed above, Plaintiff’s assertion that the Division violated the Dormant Commerce Clause through the issuance of the Subpoena and Interrogatories is simply unfounded. Under the CFA, the Division had express statutory authority to issue the Subpoena and Interrogatories to Plaintiff, notwithstanding the fact that he resides outside of New Jersey. See N.J.S.A. 56:8-3 to -6. In doing so, the Division is not seeking to regulate commerce that occurs wholly outside of New Jersey and/or discriminates against out-of-state interests in favor of in-state interests. See Taylor, 477 U.S. at 138; Pike, 397 U.S. at 142. As detailed above, by issuing the Subpoena and Interrogatories, the Division seeks documents and information concerning Plaintiff’s advertisement, use, deployment and presence of the Tidbit Code in New Jersey which was found to be present and active on the New Jersey Coded Websites. (See Compl. ¶¶19-20.) Such investigation clearly advances the Division’s mission to protect the privacy and well-being of the citizens of New Jersey. For this additional reason, this Court’s dismissal of Count I of the Complaint is warranted.

Third, Plaintiff’s assertion that the Division cannot exercise personal jurisdiction over Tidbit because it does not have sufficient minimum contacts with New Jersey is belied by the

Division's Investigation. Plaintiff alleges the Tidbit Code was developed for the "Node Knockout hackathon" and was "intended to allow developers to mine for Bitcoins on a client's computer as a substitute for advertising." (See Compl. ¶¶9-10 (emphasis added).) Additionally, Plaintiff alleges "[a]t the Node Knockout hackathon, Tidbit was clearly presented as a 'proof of concept,' meaning the code was never fully functional and could not actually mine for Bitcoins." (See Compl. ¶15). However, Plaintiff further states "[a]fter the hackaton [sic], Tidbit set up its own website where developers could download the Tidbit code, which they could embed onto their own websites." (See Compl. ¶17 (emphasis added).) As detailed above, the Division's Investigation revealed that the Tidbit Code was present and active on the New Jersey Coded Websites, Plaintiff affirmatively sent the Tidbit Code to New Jersey, and maintained contact with the developers in New Jersey concerning Tidbit and the Tidbit Code. Thus, Plaintiff has sufficient contacts with New Jersey for the Division to exercise jurisdiction through the issuance of the Subpoena and Interrogatories. For this additional reason, this Court's dismissal of Count II of the Complaint is warranted.

Fourth, as discussed above, Plaintiff cannot rely upon a blanket assertion of the privilege against compelled self-incrimination to avoid providing testimony in response to the Division's Subpoena and Interrogatories. In accordance with the relevant case law, Plaintiff must affirmatively assert the Fifth Amendment with respect to each document request in the Subpoena and to each Interrogatory, as well as any oral testimony in connection therewith State Farm Indem. 350, N.J. Super. at 388. For this additional reason, this Court's dismissal of Count III of the Complaint is warranted.

Finally, Plaintiff's Complaint appears to be nothing more than an effort thwart the Division's Investigation and to preclude any potential prosecution of Tidbit for violations of the CFA, CROA and related statutes and regulations. To that extent this action is not justiciable as the Division asserts, Plaintiff's claims are purely speculative, requiring their dismissal as unripe. See Rego Indus., Inc. v. Am. Modern Metals Corp., 91 N.J. Super. 447, 453 (App Div. 1966) (judicial discretion should not be extended to granting declaratory relief where a plaintiff's purpose is to have the court adjudicate in advance the validity of its possible defense to defendant's imminent law suit). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. United States, 523 U.S. 296, 300 (1998). (citation omitted). For this additional reason, this Court's dismissal is warranted.

For the foregoing reasons, the Division submits that this Court's dismissal of Plaintiff's Complaint in its entirety for failure to state a claim is warranted.

POINT VII

THIS COURT'S ENFORCEMENT OF THE SUBPOENA AND INTEROGATORIES IS WARRANTED

If a person (as defined in the CFA) fails to obey a subpoena issued pursuant to the CFA, the Attorney General can enforce the subpoena through the filing of a Superior Court action.

N.J.S.A. 56:8-6. By way of relief, the Attorney General may apply for an order:

- (a) Adjudging such person in contempt of court;
- (b) Granting injunctive relief without notice restraining the sale or advertisement of any merchandise by such persons;
- (c) Vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this State or

revoking or suspending the certificate of authority to do business in this State of a foreign corporation or revoking or suspending any other licenses, permits or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

- (d) Granting such other relief as may be required; until the person files the statement or report, or obeys the subpoena.

[Id.]

As discussed above, the Division has express statutory authority to investigate Tidbit and its development, advertisement, use and deployment of the Tidbit Code to New Jersey consumers for potential violations of the CFA and related statutes and regulations. For this reason, this Court's enforcement of the Subpoena and Interrogatories is warranted.

CONCLUSION

For the reasons set forth herein and in the supporting Certifications, the Division respectfully requests that the Court deny the Plaintiff's application for injunctive relief in its entirety and enter and Order dismissing Plaintiff's Complaint and directing Plaintiff to respond to the Division's Subpoena and Interrogatories.

Respectfully submitted,

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