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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 **PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE TO QUASH SUBPOENA AND FOR INJUNCTIVE RELIEF**

INTRODUCTION

In opposing Mr. Rubin and Tidbit's motion to quash, the State focuses on three facts to show that the subpoena and interrogatories do not violate the Dormant Commerce and Due Process Clauses of the U.S. Constitution: (1) Tidbit's code appeared on websites hosted and controlled in New Jersey; (2) Tidbit's website requires users to submit an email address and Bitcoin wallet ID in order to download Tidbit's code; and (3) Tidbit sent an email to its developers after the filing of this case, notifying Tidbit developers of the State's subpoena and interrogatories. *See* Defendant's Memorandum of Law in Opposition to Plaintiff's Order to Show Cause ("State's Brief") at 23; *see also* March 19, 2014 Certification of Hanni M. Fakhoury at ¶¶ 5-9. It also asserts that Mr. Rubin failed to properly raise his privilege against self-incrimination. State's Brief at 27-28. Instead of quashing, it asks this Court to enforce the subpoena and interrogatories and dismiss Mr. Rubin's complaint. *Id.* at 34.

But the State's arguments fail as Mr. Rubin has demonstrated the need for an injunction quashing the subpoena. The mere fact Tidbit's code appeared on New Jersey websites is not enough to permit New Jersey to regulate Tidbit – an out of state actor – under the dormant Commerce Clause. The State is absolutely capable of regulating and investigating the specific New Jersey websites running Tidbit code. But its powers cannot extend to Tidbit or Mr. Rubin. Any other result has the effect of requiring Tidbit and Mr. Rubin to configure its code to determine where a specific user is geographically located in order to comply with New Jersey regulations, the specific type of inconsistent and patchwork state law that the dormant Commerce Clause prohibits.

Moreover, the mere presence of Tidbit's code on New Jersey websites is not enough to show Mr. Rubin and Tidbit purposefully availed itself of the forum because as the State itself has

confirmed, neither Mr. Rubin or Tidbit required users to submit information about where they were geographically located in order to download and use the code. Nor does the email message repeatedly referenced by the State show any purposeful availment of New Jersey on the part of Mr. Rubin or Tidbit. The message was sent to all Tidbit developers, not just those in New Jersey, *after* the filing of this suit. March 19, 2014 Fakhoury Certification at ¶¶ 5-9. Because Tidbit took no deliberate steps to forge commercial relationships with anyone in New Jersey specifically, the State cannot exercise specific personal jurisdiction over Mr. Rubin or Tidbit.

Finally, Mr. Rubin has properly asserted his privilege against self-incrimination and this Court is in a position to decide whether the privilege applies with respect to each specific document request and interrogatory made by the State. The Fifth Amendment of the U.S. Constitution and the New Jersey common law prohibit the State from compelling Mr. Rubin to testify by both answering questions and producing documents.

Thus, the subpoena and interrogatories should be quashed.

ARGUMENT

AN INJUNCTION QUASHING THE SUBPOENA AND INTERROGATORIES IS PROPER.

There are four factors Mr. Rubin must demonstrate before this Court can grant an injunction: (1) an immediate and irreparable injury; (2) claims involving settled legal rights; (3) a reasonable probability of success on the merits; and (4) the balance of hardships favor the granting of an injunction. *Crowe v. Di Goia*, 90 N.J. 126, 132-34 (1982).

Mr. Rubin has met each of these elements.

A. Mr. Rubin Faces Immediate and Irreparable Injury From the Subpoena and Interrogatories.

Harm is "irreparable" if it cannot be "redressed adequately by monetary damages." *Crowe*, 90 N.J. at 132-33. Contrary to the State's claim, Mr. Rubin has clearly demonstrated immediate and irreparable injury. *See* State's Brief at 12.

The subpoena and interrogatories here compel him to produce documents – including source code – and answer questions under threat of an enforcement action, already filed by the Attorney General's office. *See* State's Brief at 34-35. If Mr. Rubin declines to comply with the subpoena and interrogatories, he may be subjected to punishment, including a finding of contempt of court. *See* N.J.S.A. § 56:8-6(a). If Mr. Rubin complies with the subpoena and answers the interrogatories, he faces the threat of civil liability under the Consumer Fraud Act ("CFA"), a fact already acknowledged by the State which made clear in the subpoena itself that there is "an official investigation" open against Tidbit for potential CFA violations. *See* January 21, 2014 Certification of Hanni M. Fakhoury, Exhibits A and C. And as Mr. Rubin explained in his opening brief, the line of questioning in the interrogatories, including Interrogatory #20 which requests a list of "all instances where Tidbit, its employees and/or websites utilizing the Bitcoin code accessed consumer computers without express written authorization or accessed consumer computers beyond what was authorized" suggests the state believes Mr. Rubin has potentially violated New Jersey's computer crime law, N.J.S.A. § 2C:20-25(a), and the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030. *See* January 21, 2014 Fakhoury Certification, Exhibit A; *see also* Plaintiff's Brief in Support of Motion for Order to Show Cause to Quash Subpoena and For Injunctive Relief ("Opening Brief") at 20-12.

In addition, because the State has claimed – incorrectly – that personal jurisdiction defenses are waived by merely engaging with the forum of New Jersey both inside and outside of the legal system, even partial answers to the subpoena could be deemed a waiver of any

jurisdictional defenses Mr. Rubin wishes to raise. *See* State's Brief at 24 ("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.").

Additionally, the subpoena and interrogatories have a potential chilling effect on Mr. Rubin's continued development of Tidbit. Computer code is protected speech under the First Amendment. *See Universal City Studios, Inc. v. Corley,* 273 F.3d 429, 449 (2d Cir. 2001); *Bernstein v. U.S. Dep't of State*, 922 F. Supp. 1426, 1434-36 (N.D. Cal. 1996). The Supreme Court has warned the exercise of compulsory process must "be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957); *see also Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (worrying that subpoena compelling production of documents to the government "carries with it a real potential for chilling the free exercise of political speech and association guarded by the [F]irst [A]mendment"). As the State makes clear in its response, after issuing the subpoena it has continued to monitor the activities of Tidbit and Mr. Rubin specifically even after the filing of this complaint. It created a dummy Tidbit account, has subpoenaed other website operators who have Tidbit code installed on their sites and even found Mr. Rubin's resume online to somehow prove its case. *See* State's Brief at 8-9. Faced with this unwarranted scrutiny, Tidbit – despite winning an award for being an innovative project – has shut down operations. March 19, 2014 Fakhoury Certification at ¶ 11. Even the administration, faculty, staff and students at the Massachusetts Institute of Technology ("MIT") itself – where Mr. Rubin is a student – has

warned the Attorney General about the chilling effect of the State's subpoena and interrogatories on other students and faculty at the University itself. *See* Exhibits A, B and C to March 19, 2014 Fakhoury Certification.

It is clear then there is an "irreparable injury" here warranting injunctive relief.

B. <u>The Legal Claims Here Are Settled and Ripe For Adjudication.</u>

The Dormant Commerce Clause of the U.S. Constitution, the Due Process Clause of the U.S. Constitution and the privilege against providing compelled incriminating testimony under the Fifth Amendment to the U.S. Constitution are clearly settled legal rights which can also be raised under New Jersey's Civil Rights Act, N.J.S.A. § 10:6-2(c) and New Jersey common law. *See also* N.J.S.A. §§ 2A:84A-19, and 56:8-7, and N.J.R.E. 503 (right against incrimination).[1]

Moreover, the State is incorrect that Mr. Rubin's claims are not ripe. *See* State's Brief at 34. A legal claim is not ripe "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) (quotations and citation omitted). But if some action taken by the defendant will have "sufficiently direct and immediate" impact on a plaintiff, then the claims are ripe. *Abbot Laboratories v. Gardner*, 387 U.S. 136, 152 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). That can include a situation when a party must engage in time consuming compliance with regulations or risk civil and criminal penalties for noncompliance. *Abbot Laboratories*, 387 U.S. at 152-53; *see also Texas*, 523 U.S. at 301. An inquiry into

[1] The state is correct that a state cannot be a "person" subject to suit under 42 U.S.C. § 1983. *See* State's Brief at 31 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 66 (1989). Mr. Rubin aims to remedy that minor pleading defect by moving to file an amended complaint, identical in all respects to the original complaint, but substituting the New Jersey Division of Consumer Affairs with the New Jersey Attorney General in his official capacity as the defendant instead. State officials can be sued in their official capacity under 42 U.S.C. § 1983. *See Ex Parte Young*, 209 U.S. 123 (1908).

ripeness requires this Court to evaluate "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Texas*, 523 U.S. at 300-01 (quoting *Abbott Laboratories*, 387 U.S. at 149) (quotations omitted).

Contrasting *Texas* and *Abbot Laboratories* highlights how this works. In *Texas*, the state of Texas sought preclearance under the Voting Rights Act ("VRA") from the U.S. Department of Justice for certain changes to Texas voting law. *Texas*, 523 U.S. at 298-99. The Department of Justice found it did not need to preclear certain portions of the law, but cautioned that "under certain foreseeable circumstances," the implementation of two portions of the law could require preclearance. *Id.* at 299. The state brought suit, seeking a declaratory judgment that it would not need to seek preclearance under those provisions of the law. The district court dismissed the suit as unripe and the Supreme Court affirmed. *Id.* Because the merits of the suit could not be determined until the state actually implemented the portions of the law in a way that triggered the VRA, the Supreme Court had "no idea" when the federal government could order a "sanction." *Id.* at 300. Plus, it found there was no hardship to Texas because it had not been ordered to engage in or refrain from any conduct unless and until it implemented the law in a way that violated the VRA. *Id.* at 301.

Texas stands in sharp contrast with *Abbott Laboratories*, which involved a lawsuit brought by a number of pharmaceutical companies over new FDA labeling requirements. *Abbott Laboratories*, 387 U.S. at 138-39. The FDA claimed the suit was not ripe because it needed the Department of Justice to authorize legal action to bring criminal and seizure claims against violators of the new policies, which had not been done yet. *Id.* at 151-52. But the Supreme Court rejected this argument, finding the claims were ripe because the regulations were in effect and placed the companies in the position where they either had to go through the time and

expense of complying with the new regulations or risk civil and criminal penalties for noncompliance with regulations it believed were invalid. *Id.* at 152-53.

This case is more like *Abbott Laboratories* than *Texas.* There is no contingent future event that still needs to occur before Mr. Rubin's claim are ripe because the State has already issued the subpoena and interrogatories. If Mr. Rubin had filed suit merely on the threat of investigation by New Jersey and *before* the subpoena and interrogatories had issued, then like the state of Texas, its claims would be unripe as there would be "no idea" whether New Jersey would issue the subpoena or not. *Texas*, 523 U.S. at 300. But once the subpoena and interrogatories issued, the case was fit for judicial decision as this Court is in a position to assess whether the subpoena was proper and whether Mr. Rubin raised valid legal challenges to the subpoena and interrogatories. *Id.* at 300-01. Even if the mere issuance of the subpoena and interrogatories was not the triggering event, the State's request to have this Court enforce the subpoena certainly makes the case ripe for adjudication. *See* State's Brief at 34-35.[2]

Moreover, the "hardship" to Mr. Rubin is similar to that of the pharmaceutical companies in *Abbott Laboratories*. It either must engage in the time consuming task of complying with the subpoena – including turning over source code and risking civil and criminal liability under the CFA or New Jersey and federal criminal law – or risk the penalties of noncompliance.

Thus, these settled legal claims are ripe for dispute

C. <u>There Is a Reasonable Probability that Mr. Rubin Will Succeed on the Merits.</u>

[2] Thus, to the extent that declaratory relief is improper for adjudicating the merits of future possible defenses, *see Rego Industries, Inc. v. Am. Modern Metals*, 91 N.J. Super. 447, 453 (App. Div. 1966), at this point, the Court can construe Mr. Rubin's motion for an order to show cause to quash the subpoena as a motion to dismiss the enforcement action.

Mr. Rubin has clearly shown a reasonable probability of success on all three claims he raised against the subpoena and interrogatories.

1. The Dormant Commerce Clause Prohibits New Jersey From Attempting to Regulate Interstate Commercial Activity.

Regulations or laws that "clearly discriminate" against interstate commerce are *per se* violations of the Dormant Commerce Clause. *American Booksellers Foundation v. Dean*, 342 F.3d 96, 102 (2d Cir. 2003); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). That includes state laws that attempt to regulate commerce occurring outside that State's borders, "whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion) (quotations omitted)).

The State defends its subpoena and interrogatories by arguing that it is not attempting to regulate commerce outside of New Jersey and distinguishes the cases Mr. Rubin relied on – *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003) and *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) – by noting that unlike here, those cases involve a state statute attempting to directly regulate interstate commerce. *See* State's Brief at 19. But the concerns in those cases are present here.

Dean involved a statute passed by Vermont that prohibited the dissemination of nude images on the Internet. *Dean*, 342 F.3d at 99. In defending the law from constitutional attack, the state of Vermont claimed – like New Jersey here – that the statute only regulated material sent to minors in Vermont, and not any activity occurring outside of the state. *Id.* at 103; *see* State's Brief at 19. But the Second Circuit rejected that argument, noting that a person who posts information on the web cannot meaningfully prevent someone from another state from accessing the material. *Dean*, 342 F.3d at 103. As a result, the entire country was required to

comply with Vermont law or risk prosecution. *Id.* While the court recognized that the nature of the Internet gave the state a stronger interest in out of state Internet activity than would be typical of non-Internet activity, there were still dormant Commerce Clause problems because regulation creates "inconsistent legislation" that websites and other online actors have to follow. *Id.* at 104 (citing *Healy*, 491 U.S. at 337 (dormant Commerce Clause "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.")).

In *Pataki*, the state of New York passed a law similar to the one at issue in *Dean* that criminalized the dissemination of nude images that could be deemed harmful to a minor. *Pataki*, 969 F. Supp. at 163-64. In finding the statute violated the dormant Commerce Clause, the district court noted that the "nature of the Internet" made it "impossible" to restrict the statute only to conduct occurring within New York because "[a]n Internet user may not intend that a message be accessible to New Yorkers, but lacks the ability to prevent New Yorkers from visiting a particular Website or viewing a particular newsgroup posting or receiving a particular mail exploder." *Id.* at 177. The result is that conduct that could be legal in one state could lead to prosecution in New York, subordinating one state's law over another, which is a *per se* violation of the dormant commerce clause. *Id.*

The same concerns are present here. Both *Dean* and *Pataki* were predicated on the understanding that once someone places material online, they are unable to control who accesses that information. Here, Tidbit has no control over who downloads its code. The state claims otherwise, asserting that its undercover investigation reveals Tidbit requires "sign-up information" before affirmatively sending the Tidbit code. *See* State's Brief at 20. But the fact the state could download Tidbit's code *after* the initiation of the lawsuit undermines its own claim.

First, Tidbit does not require a user's physical address in order to obtain the code. The certification of Attorney General investigator Brian Morgenstern shows that the only thing he needed to open a Tidbit account was an email address, password and a Bitcoin wallet ID. *See* Certification of Brian Morgenstern at ¶ 16, 20. Second, the process of downloading the code is clearly automated. Once Mr. Morgenstern submitted the "sign-up information," there was no person making a determination on whether to give him the code or not. Since the issuance of the subpoena and interrogatories, the students stopped working on Tidbit and ceased operations altogether on February 27, 2014. *See* March 19, 2014 Fakhoury Certification at ¶ 11. Given the Attorney General's investigation and Tidbit's efforts to fight the subpoena and interrogatories, it would be foolish for Tidbit to hand over code to anyone appearing to come from New Jersey. And from a technical point of view, given the myriad ways a person can obscure their physical located on the Internet – for example, by using a virtual private network ("VPN") that shows a user coming from an IP address that may not correlate with their true location – figuring out a potential user's geographical location through anything other than expressly asking for an address would be an ineffective way to determine whether to allow a person from New Jersey to download Tidbit or not.[3] In short, there is no evidence that Mr. Rubin or Tidbit could or did control which users could download Tidbit code based on their geographical location.

But under the State's theory, there is a real risk that every state which claims Tidbit code is running on a website hosted in their state can drag Mr. Rubin and Tidbit into state court. Forcing Mr. Rubin and Tidbit to comply with inconsistent and perhaps competing regulations is the precise type of state regulation the dormant Commerce Clause prohibits. The courts in

[3] Even asking for a physical address is not all that effective since people often use other people's mailing addresses or could use a post office box for certain types of mailings.

Pataki and *Dean* recognized this dilemma and struck the state laws down under the dormant Commerce Clause for this reason. This Court should reach the same result.

Finally, the State's belief that Mr. Rubin and Tidbit are arguing the state cannot regulate the Internet are clearly overstated. *See* State's Brief at 20. New Jersey can absolutely regulate websites hosted in New Jersey, managed and maintained by individuals in New Jersey, or specifically catering to New Jersey consumers. For example, the State could investigate a local New Jersey hardware store[4] whose website shows pictures of an item that is assembled when it is sold unassembled and contains no notice that the item is unassembled, in violation of the CFA. *See* N.J.S.A. § 56:8-2.4. If a privately owned and operated New Jersey tourism website[5] violated the CFA by alerting a user on its website it had won a prize but required the user to perform some additional act to claim the prize, a violation of N.J.S.A. § 56:8-2.3, the State could issue a subpoena and interrogatories to investigate. And in connection with Tidbit specifically, it is consistent with the dormant Commerce Clause for the State to serve subpoenas and interrogatories on local websites running the code, which it has already done. *See* State's Brief at 8-9.

But the State cannot do what it attempts to do here: investigate and regulate an out of state actor running an out of state website and out of state code. Merely making code available to anyone on the Internet is insufficient to permit state regulation. Thus, the dormant Commerce Clause prohibits the State from issuing the subpoena and interrogatories to Mr. Rubin and Tidbit.

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[4] For examples of local New Jersey hardware store websites, *see* http://shoemakerlumber.com/ or http://www.cammpshardware.com/cammps/. Mr. Rubin and Tidbit are in no way suggesting these sites have violated the CFA, but rather that New Jersey based websites clearly exist.

[5] There are numerous websites catering to individuals in New Jersey, such as http://bestofnj.com/, http://njmonthly.com/ and http://www.funnewjersey.com/ that meet this description. Again, Mr. Rubin and Tidbit are in no way suggesting that these sites are violating the CFA.

2. New Jersey Has No Specific Personal Jurisdiction Over Mr. Rubin or Tidbit.

Mr. Rubin argued in his motion to quash that New Jersey could not exercise either general or specific personal jurisdiction over him because he did not have "continuous and systematic contacts" with New Jersey, *see Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989), or sufficient minimum contacts with New Jersey that demonstrated he had "purposefully avail[ed] itself of the privilege of conducting activities" in the state. *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 120 (1994).

The state, foregoing reliance on general jurisdiction, responds with three reasons why it can exercise specific jurisdiction over Mr. Rubin without offending notions of fair play and substantial justice: (1) Tidbit's code appeared on websites hosted and controlled in New Jersey; (2) Tidbit's website requires users to submit an email address and Bitcoin wallet ID in order to download Tidbit's code; and (3) Tidbit sent an email to its developers after the filing of this case notifying Tidbit developers of the state's subpoena and interrogatories. *See* State's Brief at 23. But these facts do not give the state personal specific jurisdiction over Mr. Rubin.

a. Neither Mr. Rubin Nor Tidbit Has Sufficient Minimum Contacts with New Jersey to Show it Purposefully Availed Itself of the State.

After Mr. Rubin filed his complaint, the U.S. Supreme Court decided *Walden v. Fiore*, 134 S.Ct. 1115 (2014) which shows how this Court must conduct its minimum contact analysis here.

Plaintiffs, residents of Nevada, were returning from an international vacation and entered the United States through the Hartsfield-Jackson Airport in Atlanta, Georgia en route to their home in Las Vegas. 134 S.Ct. at 1119. Defendant, a Georgia police officer and DEA agent, seized $97,000 in cash from plaintiffs, suspecting it was drug proceeds. *Id.* The defendant then drafted an affidavit in support of an asset seizure action, which he sent to the U.S. Attorney's

Office in Georgia. *Id.* Ultimately, the government did not move to seize the funds and instead returned the money to plaintiffs. The plaintiffs filed suit in Nevada federal court, alleging the seizure violated the Fourth Amendment to the U.S. Constitution. *Id.* at 1120. The defendant successfully moved to dismiss the complaint for lack of personal jurisdiction, but the Ninth Circuit Court of Appeals reversed. *Id.* at 1121. The Supreme Court agreed with the district court, holding there was no personal jurisdiction over the defendant in Nevada, reiterating important principles of personal jurisdiction. *Id.*

First, it noted that the relationship that forms the basis for the alleged "minimum contacts" must arise out of contacts the defendant himself creates with the forum state, and not contacts created by the plaintiff or third parties. *Id.* at 1122. Moreover, "minimum contacts" analysis focuses on the defendant's contacts with the state itself, and not merely the defendant's contacts with people who reside in the state. *Id.* While a defendant's contacts with other people in the forum are relevant, these contacts "standing alone" are insufficient to find jurisdiction. *Id.* at 1123. Instead, the defendant must have "purposefully 'reach[ed] out beyond' their State." *Id.* at 1122 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 479-80 (1985)). That could be satisfied by a defendant who entered into contractual relationships that envision "continuing and wide reaching contacts" into the state or "deliberately exploit[ing]" a particular market in the forum. *Walden*, 134 S.Ct. at 1122 (quoting *Burger King*, 471 U.S. at 479-80 and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984)).

On the specific facts before it, the Supreme Court found the officer had insufficient "minimum contacts" with Nevada to warrant personal jurisdiction there. *Walden*, 134 S.Ct. at 1124. Nothing the officer did occurred in Nevada. *Id.* More relevant here, although the effect of the injury – the plaintiffs' inability to access and use their money – occurred in Nevada, that

alone was insufficient to find "minimum contacts" in New Jersey. *Id.* at 1125. The effects of an injury are relevant only to show the defendant made a contact with the forum. *Id.* But the fact the plaintiffs could have felt the effects of this injury in any other state it travelled without the money, showed the effects were not "tethered to Nevada in any meaningful way." *Id.*[6]

While *Walden* specifically declined to address situations involving the Internet, it nonetheless squarely controls this case. *See Walden*, 134 S.Ct. at 1125 n. 9. Like the defendant there, nothing Mr. Rubin did, such as developing or storing the code, occurred in New Jersey. *See* January 21, 2014 Certification of Jeremy Rubin at ¶¶ 3-4. While Tidbit's code appears on New Jersey based websites, the State can point to no evidence showing Mr. Rubin or anyone from Tidbit specifically placed the code on those sites, as opposed to the operator of the site who downloaded the code from Tidbit. Nor can the State point to any facts that suggest Mr. Rubin or Tidbit attempted to deliberately target websites in New Jersey. Tidbit's code was placed on the Internet for anyone to download, regardless of where they were located. While the state may argue that Tidbit should have known its code would end up on New Jersey websites, "mere foreseeability" of an event happening in another state is not a "sufficient benchmark" for the exercise of personal jurisdiction. *Halak v. Scovill*, 296 N.J. Super. 363, 368 (App. Div. 1997) (quoting *Lebel*, 115 N.J. at 324 (quotations omitted). Plus the mere "effect" of having Tidbit

[6] The New Jersey Supreme Court explained in *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38 (2000) that under *Calder v. Jones*, 465 U.S. 783 (1984), out of state actions causing effects in New Jersey are sufficient to state personal jurisdiction. *Blakey*, 164 N.J. at 67. *Calder* involved an actress who brought a libel suit against the National Enquirer, which was based in Florida. *Calder*, 465 U.S. at 784-86. The Supreme Court found ample contacts between the magazine and California because of the magazine's use of California sources to report the story and the reputational harm the actress would feel in California specifically. That was in fact the "focal point" of the story since the magazine's largest circulation was in California. *Id.* at 789. But *Walden* explained that *Calder* was "largely a function of the nature of the libel tort" and that "*Calder* made clear that *mere injury* to a forum resident is not a sufficient connection to the forum." *Walden*, 114 S.Ct. at 1124, 1125 (emphasis added).

code appear on New Jersey websites is not in and of itself enough to permit New Jersey to exercise personal jurisdiction over Mr. Rubin or Tidbit. Like the effect in *Walden*, Tidbit's code could have been installed on any website hosted in any state in the country. Thus, Tidbit's contacts were not meaningfully "tethered" to New Jersey as opposed to any other forum. *Walden*, 134 S.Ct. at 1125.

The State argues that because Tidbit is not a "passive" website and relies on users to submit sign-up information to the site, New Jersey has personal jurisdiction over it. *See* State's Brief at 25. It reaches this result by quoting this passage from *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (1997):

> the likelihood that personal jurisdiction can be constitutionally exercised 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. *E.g. CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). 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 personal jurisdiction.

Zippo, 952 F. Supp. at 1124; *see also* State's Brief at 24. The State claims Tidbit falls on the end of the spectrum as a website that "clearly does business over the Internet" for which personal jurisdiction is proper. *Zippo*, 952 F. Supp. at 1124. But the State omits the next and most important sentence from *Zippo,* which clearly applies to Tidbit:

> The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Id. That examination requires the Court to look more thoroughly at the commercial website and its contacts with the forum.

After the district court opinion in *Zippo*, the Third Circuit shed more light on what this examination looked like, ruling that *Zippo* explains "the mere operation of a commercially interactive web site should not subject the operator to jurisdiction anywhere in the world." *Toys 'R' Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003). Instead, there must be evidence the website "purposefully availed" itself of the forum state by either "directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts." *Id.* Merely sending email correspondence to customers, without more to show purposeful availment, is not enough to qualify as "purposeful targeting required under the minimum contacts analysis." *Id.* (quoting *Barrett v. Catacombs Press*, 44 F.Supp.2d 717, 729 (E.D.Pa. 1999) (quotations omitted); *see also Machulsky v. Hall*, 210 F.Supp.2d 531, 542 (D.N.J. 2002) (minimal email correspondence, "by itself or even in conjunction with a single purchase, does not constitute sufficient minimum contacts.").

The website at issue in *Zippo* clearly met this standard. That site, based in California, distributed an online newsletter and required users to sign up with their physical address in order to bill their credit card. *Zippo*, 952 F. Supp. at 1121. It was sued in Pennsylvania where 3,000 of its 140,000 customers – 2% – resided. Nonetheless the site had entered into contractual agreements with seven Pennsylvania based Internet service providers (ISP), including two in the federal district where the suit was filed, in order to ensure the ISP's customers could access the online newsletter. *Id.* The site had thus purposefully availed itself of Pennsylvania – indeed of the specific district itself – through knowing contractual relationships with both persons and ISPs in Pennsylvania. The contracts with the ISPs demonstrated intent to deliberately exploit the

Pennsylvania market for potential customers. *Id.* at 1126. This was more than just mere email correspondence.

Here, in contrast, the State cannot meet the *Toys "R" Us* standard. Merely sending an email to Tidbit's entire mailing list is insufficient to prove purposeful availment with New Jersey. The fact that the email was sent *after* the initiation of this lawsuit suggests it is irrelevant altogether in determining whether personal jurisdiction is proper. Moreover, as demonstrated by the State's own investigation, Tidbit does not require a user submit their address in order to download the code. The certification of Attorney General investigator Brian Morgenstern shows that the only thing needed to open a Tidbit account was an email address, password and a Bitcoin wallet ID. *See* Morgenstern Certification ¶ 16, 20. Far from the website in *Zippo* that needed to know the address of its customers in order to bill their credit cards, Tidbit does not request any geographically information – let alone a real name or any other identifying information – whatsoever. That means Mr. Rubin and Tidbit were not making a deliberate, purposeful choice to establish contacts in New Jersey.

Absent any showing that Mr. Rubin or Tidbit had sufficient minimum contacts with New Jersey to show it purposefully availed itself with the forum, the State's exercise of specific personal jurisdiction is improper.

b. Imposing Personal Jurisdiction Over Mr. Rubin Offends Notions of Fair Play and Substantial Justice.

Because personal jurisdiction is ultimately an issue of due process, this Court must be convinced that allowing New Jersey to exercise personal jurisdiction over Mr. Rubin does "not offend traditional notions of fair play and substantial justice." *Waste Mgmt., Inc.*, 138 N.J. at 120 (quoting *World–Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) (quotations omitted)). Ultimately, "[d]ue process requires that a defendant be haled into court in a forum

State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 134 S. Ct. at 1123 (quoting *Burger King*, 471 U.S. at 475). As explained above, Mr. Rubin and Tidbit are being haled to New Jersey because the Tidbit code appears on New Jersey websites, which is clearly a "random, fortuitous [and] attenuated" contact given it does not require a user provide their location in order to download the code. But under the State's standard, Mr. Rubin and Tidbit could be haled into any state in the country where Tidbit code appears on a website based in the forum state, precisely what due process prohibits.

The state also makes other problematic claims to suggest that Mr. Rubin and Tidbit are subject to personal jurisdiction in New Jersey. First, the state places significant emphasis on the letter sent to Tidbit developers after the filing of this suit to assert that Mr. Rubin and Tidbit have purposefully availed itself of New Jersey. But as explained above, the email was sent to *all* Tidbit developers, and not specifically New Jersey developers. March 19, 2014 Fakhoury Certification at ¶¶ 5-9. Nor did the email reveal or discuss anything about Tidbit's minimum contacts with New Jersey specifically. *See* Certification of Edward J. Mullins III, Exhibit B. More critically, the letter was prompted by the Attorney General's subpoena and interrogatories to Mr. Rubin and Tidbit in the first place. *See* March 19, 2014 Fakhoury Certification at ¶¶ 5-9. That is, but for the Attorney General issuing the subpoena, no email would have been issued. To use that email to somehow assert personal jurisdiction over Mr. Rubin or Tidbit after the fact is certainly unfair.

Second, the state claims that since Mr. Rubin initiated the action, he subjected himself to litigation in New Jersey because the state "did not file an action to enforce its Subpoena and Interrogatories." *See* State's Brief at 24. It cites *Halak v. Scovill*, 296 N.J. Super. 363 (App. Div.

1997) for the proposition that the "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." *See* State's Brief at 24 (quoting *Halak*, 296 N.J. Super. at 370).

Both of these points are wrong. Mr. Rubin only filed suit *after* the State attempted to improperly exercise personal jurisdiction over him by issuing the subpoena and interrogatories. *See Silverman v. Berkson*, 141 N.J. 412 (1995) (personal jurisdiction and minimum contacts analysis applies to state issued subpoenas). In any event, the state has now asked this Court to enforce the subpoena, making it clear that it is the State and not Mr. Rubin who wishes to subject Tidbit to litigation in New Jersey.

Moreover, the State's citation to *Halak* is misleading as the "complaint" referenced in that case is nothing like the civil complaint filed by Mr. Rubin. In *Halak*, the plaintiff, a New Jersey resident, chartered a boat in Maryland from the defendant that ultimately malfunctioned. *Halak*, 296 N.J.Super. at 366. The parties could not agree on the proper refund amount and plaintiff stopped paying. The defendant filed a criminal complaint against the plaintiff for the stopped payments and an arrest warrant was issued. After charges were dropped, the plaintiff sued for a number of torts, including breach of contract and malicious arrest. *Id.* In determining whether there was personal jurisdiction over the defendant in the civil lawsuit, the court considered the criminal complaint with the other facts to determine whether the defendant's actions were purposefully directed toward a New Jersey resident. *Id.* at 369-70.

The reason the criminal complaint was relevant in *Halak* was precisely because it was filed *before* the civil complaint alleging breach of contract and malicious prosecution. But the

civil complaint here is not the beginning or even part of the underlying legal dispute, but rather a means to adjudicate the legal dispute. In other words, *Halak* is completely irrelevant to this case.

Finally, one of the factors the Court must consider in deciding whether the exercise of personal jurisdiction over Mr. Rubin is fair is to consider "the burden on defendant of litigating in a foreign forum." *Harley Davidson Motor Company, Inc. v. Advance Die Casting, Inc.*, 292 N.J. Super. 62, 75 (App. Div. 1996). As explained in more detail below, the burden on Mr. Rubin is significant enough to warrant this Court to find the state has no personal jurisdiction over Mr. Rubin or Tidbit and quash the subpoena.

3. Mr. Rubin Properly Raised his Privilege Against Self-Incrimination.

Mr. Rubin's final claim was that the privilege against self-incrimination prohibits the state from compelling him to provide incriminating testimony absent immunity from prosecution. *See* Opening Brief at 15-22. The State complains that Mr. Rubin did not properly assert the privilege because it failed to do so with "particularity" and that under *State Farm Indem. Co. v. Warrington*, 350 N.J. Super. 379 (App.Div. 2002), Mr. Rubin cannot raise a "blanket" refusal to testify. State's Brief at 27-28. It also hints at a number of reasons why Mr. Rubin cannot invoke the privilege. Yet it is clear that Mr. Rubin not only properly raised the privilege but is entitled to its protections.

The blanket refusal in *State Farm* referred to a refusal to appear before a grand jury to testify in person. 350 N.J. Super. at 380-82. In that situation, it is difficult for a court to determine whether the invocation of the privilege is appropriate because "the materiality of any particular question cannot be determined." *Id.* at 387. *State Farm* relied on *Hudson Tire Mart, Inc. v. Aetna Cas. & Sur. Co.*, 518 F.2d 671 (2d Cir. 1975), where the Second Circuit noted that "since there are numerous relevant matters with respect to which [the suspect] may be examined

without necessarily incriminating himself, the requirement of his appearance alone in no way violates his due process rights. Only after the incriminating question is asked, is he in a position to assert his immunity and seek a protective order." *Hudson Tire*, 518 F.2d at 674-75.

Here, in contrast, the questions have already been asked in the form of the subpoena demanding production of certain documents[7] and the interrogatories calling for detailed answers. *See* January 21, 2014 Fakhoury Certification, Exhibit A. This Court is therefore in the position of assessing whether Mr. Rubin is entitled to raise the privilege with respect to each of the specific questions and production demands.

The State also suggests, without elaborating in any detail, that even if the Court were to determine the merits, Mr. Rubin is not entitled to assert the privilege. First, it quickly claims Mr. Rubin may have waived the privilege by making certain assertions about the development of the Tidbit code and noting that it is not functional. *See* State's Brief at 28 n. 4. But the New Jersey Supreme Court has already made clear that "the state may not force an individual to choose between his or her Fifth Amendment privilege and another important interest because such choices are deemed to be inherently coercive." *State v. P.Z.*, 152 N.J. 86, 106 (1997) (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-08 (1977)).

In fact, the case cited by the State in its own brief, *Mahne v. Mahne*, 66 N.J. 53 (1974) supports Mr. Rubin's argument. *See* State's Brief at 28 n. 4. In a divorce proceeding, the defendants filed an answer to the complaint. When the plaintiff served interrogatories on the

[7] As Mr. Rubin explained in his opening brief, "testimony" for purposes of the privilege against self-incrimination refers not simply to the act of speaking words from a person's mouth, but also to the act of producing documents that would essentially be an admission that documents existed, were authentic and in Mr. Rubin's possession or control. *See United States v. Hubbell*, 530 U.S. 27, 36 (2000); *Fisher v. United States*, 425 U.S. 391, 410 (1976); *see also* Opening Brief at 16-18.

defendants afterwards, they claimed their privilege against self-incrimination. The Superior Court allowed the defendants to assert the privilege but struck their answers as a sanction for their refusal to answer. *Mahne*, 66 N.J. at 54-55. The New Jersey Supreme Court reversed, finding that sanction unwarranted. It specifically noted that "the mere filing" of pleadings by the defendants was not a waiver of the privilege against self-incrimination. *Id.* at 56. The same is true here; Mr. Rubin's act of filing the complaint – again a response to action initiated by the State when it issued the subpoena and interrogatories – is not a waiver of the privilege against self-incrimination.

The State also claims that an individual cannot assert the privilege against self-incrimination with respect to business records in his possession regarding a collective entity. *See* State's Brief at 28 n. 4. It asserts that Tidbit is a "startup" based on statements made by Mr. Rubin in his publicly available resume. *Id.*; *see also* Morgenstern Certification, Exhibit E. But this is both factually and legally wrong. A "startup" is hardly a collective entity on par with a corporation and its officers, a partnership, a political organization or parties, a labor union, or any other *formal* entity. *Matter of Grand Jury Proceedings of Guarino*, 104 N.J. 218, 223 (1986) (citing cases). A "startup" has no accepted meaning, and could refer to anything from an emerging company supported with venture capital to four classmates working on a project from their apartment.[8] In the absence of any evidence from the State that Tidbit is formal business entity, Mr. Rubin is entitled to raise the privilege.

[8] *See, e.g.,* Natalie Robehmed, "What is a Startup?" *Forbes*, December 16, 2013 ("The term 'startup' has been bandied around with increasing frequency over the past few years to describe scrappy young ventures, hip San Francisco apps and huge tech companies. But what is a startup, really?"), *available at* http://www.forbes.com/sites/natalierobehmed/2013/12/16/what-is-a-startup/.

Even if Tidbit is considered a "collective entity" for purposes of the privilege, the State misunderstands the limitations of the "collective entity" doctrine. That doctrine only "applies to voluntarily-prepared business records." *Guarino*, 104 N.J. at 222. The protections of the Fifth Amendment do not apply to the *contents* of these forms of documents. *See United States v. Doe*, 465 U.S. 605, 610-11 (1984) ("Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents 'does not compel oral testimony.'") (quoting *Fisher*, 425 U.S. at 409).

But New Jersey's common law privilege is broader than the Fifth Amendment and the New Jersey Supreme Court has made clear the common law privilege applies to the contents of the documents themselves, including business records, to the extent necessary to protect an individual's expectation of privacy. *See Guarino*, 104 N.J. at 229-32; *see also State v. Mollica*, 114 N.J. 329, 341 (1989) ("not all business records are devoid of genuine privacy expectations."). The subpoena and interrogatories repeated request for emails and other correspondence will clearly capture private conversations between members of the Tidbit team and is thus privileged. *See* January 21, 2014 Fakhoury Certification, Exhibit A.

Moreover, under both the Fifth Amendment and the New Jersey common law, requests for a person to "restate, repeat, or affirm the truth of the contents of the documents sought" qualify as "compelled" testimony for purposes of the Fifth Amendment. *Doe*, 465 U.S. at 611; *Fisher*, 425 U.S. at 410; *Guarino*, 104 N.J. at 225. So too do questions posed to a custodian of documents "designed to determine whether he has produced everything demanded by the subpoena." *Hubbell*, 530 U.S. at 37.

That is precisely what the subpoena and interrogatories here purports to do. In addition to producing documents, it seeks to have Mr. Rubin "restate, repeat, or affirm the truth of the

contents of the documents sought." *Doe*, 465 U.S. at 611. For example, Interrogatory #17 requests Plaintiff "[i]dentify all website publishers, advertisers, affiliates and/or other third-parties with whom you have a contractual relationship" as well as "[a]ttach a copy of all contracts." *See* January 21, 2014 Fakhoury Certification, Exhibit A. Interrogatory #18 questions whether Tidbit "review[s] the privacy policies of websites utilizing the Bitcoin code" and to not only "describe the process" but also to "produce all documents and correspondence in support of your response to this Interrogatory." *See id.*

Since the state is seeking to compel Mr. Rubin to provide incriminating testimony, Mr. Rubin must be given immunity under the Fifth Amendment and New Jersey common law.[9]

D. Since The Balance of Hardships Favors Mr. Rubin, This Court Should Grant an Injunction.

Contrary to the State's claim, it is not "significantly harmed" from protecting the public interest if this Court quashes the subpoena and interrogatories. State's Brief at 13. As explained above, New Jersey is not precluded under the dormant Commerce Clause from investigating potential CFA violations by sending subpoenas to local websites or individuals to whom it can exercise personal jurisdiction consistently with due process. The state has explained that it has been investigating Tidbit even after the filing of Mr. Rubin's complaint, sending *subpoena duces*

[9] The state also claims it has satisfied the "foregone conclusion" doctrine with respect to the user email and "other documents." *See* State's Brief at 28 n. 4. Under this doctrine, the privilege does not apply to documents that would not reveal anything to the government that it did not already know, making the testimony simply a "foregone conclusion." *Fisher*, 425 U.S. at 411. The state must "establish the existence of the documents sought and [the witness's] possession of them with 'reasonable particularity' before the existence and possession of the documents could be considered a foregone conclusion and production therefore would not be testimonial." *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 910 (9th Cir. 2004) (citing *Hubbell*, 530 U.S. at 44). While the state may have satisfied that standard with respect to the user email referenced in its pleadings, it certainly had not demonstrated to this Court that it has satisfied that standard with respect to any other documents.

tecum to New Jersey websites running Tidbit's code on January 24 and 30, 2014 – after Mr. Rubin filed this action – and has received responses from these sites. *See* State's Brief at 8-9. It also accessed information from Tidbit's website directly on February 7, 2014 by creating a fake user account with an "undercover" email address. *Id.* at 9. Thus, even without receiving information from Mr. Rubin or Tidbit itself, it is still able to carry out its duties investigating Tidbit specifically and potential CFA violations more broadly.

The harm to Mr. Rubin is much more significant. As a 19 year old college student forced to fight an out of state subpoena with the help of pro bono counsel on the other side of the country, he has had to take time and energy away from his academic studies to deal with this dispute. Although Mr. Rubin filed the lawsuit, it was the State's action in issuing the subpoena and interrogatories – during his finals period and without so much a courtesy notice – that prompted him to do so. Compliance with the subpoena and interrogatories will require Mr. Rubin to expend more time and resources to compile documents and produce his source code to the State and subject him to the threat of civil and criminal liability. Noncompliance with the subpoena and interrogatories presents the same threat of civil and criminal penalties. Under either scenario, the subpoena has caused a chilling effect on Mr. Rubin and the MIT community as a whole, prompting Tidbit to shut down.

Thus, this Court should quash the subpoena.

CONCLUSION

For the reasons stated above and in Mr. Rubin's opening brief, this Court should grant an injunction quashing the subpoena and interrogatories.

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