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

JEREMY RUBIN d/b/a TIDBIT,

Plaintiff,

v.

STATE OF NEW JERSEY DIVISION OF CONSUMER AFFAIRS,

Defendant.

Civil Action

DEFENDANT'S REPLY MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE AND MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT AND IN FURTHER 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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BACKGROUND

Pursuant to the Management Order, dated March 5, 2014, Defendant New Jersey Division of Consumer Affairs ("Division") submits this Reply Memorandum of Law in opposition to Plaintiff's Order to Show Cause and Motion for Leave to File an Amended Complaint[1], and in further support of the Division's Motion to Dismiss and Motion for an Order Directing Plaintiff to Respond to Defendant's Investigatory Subpoena Duces Tecum and Interrogatories ("Division's Motion").

In all of its submissions to this Court, Plaintiff has grossly mischaracterized the nature of the Division's actions to date. The Division has not filed an enforcement action under the CFA[2] or any other action against Plaintiff; rather, the Division merely commenced an investigation and issued the Subpoena and Interrogatories. In addition, Plaintiff's legal analysis is misplaced; relying on legal concepts that may merit the Court's consideration if the Division filed a CFA action against Plaintiff, but not in Plaintiff's apparent attempt to thwart any initial investigation of its business practices. Further, Plaintiff's characterization of this matter as an enforcement action is completely erroneous as Plaintiff is the party that initiated this action via the filing of the Complaint and Order to Show Cause.

As described in more detail in the Morgenstern Cert., Graham Cert., Mullins Cert. and accompanying Memorandum of Law (collectively, "Division's Initial Papers"), the Division issued the Subpoena and Interrogatories to Plaintiff in furtherance of its investigation into

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[1] On or about March 20, 2014, Plaintiff filed a Motion for Leave to File an Amended Complaint ("Motion to Amend") along with its reply to the Division's Initial Papers. This submission opposes Plaintiff's Motion to Amend and further opposes its Order to Show Cause.

[2] For the sake of simplicity, certain capitalized terms are defined as set forth in the Division's Initial Papers.

Plaintiff's development, use and deployment of the Tidbit Code which, by Plaintiff's own description, strongly suggests the code was designed to hijack consumer's computers to mine for bitcoins, including the computers of New Jersey consumers. Further, prior to the issuance of the Subpoena and Interrogatories, the Division determined that the Tidbit Code was present and active on the websites of entities located in New Jersey and Plaintiff affirmatively sent the Tidbit Code to the New Jersey based entities.

In response, Plaintiff commenced this action by Order to Show Cause seeking to thwart the Division's Investigation by quashing the Subpoena and Interrogatories. In seeking such relief, Plaintiff alleges a violation of the Dormant Commerce Clause as well as an absence of personal jurisdiction to issue the Subpoena and Interrogatories. Plaintiff further alleges that, if this Court declines to quash the Subpoena and Interrogatories, it has a right against self-incrimination that extends to testimony as well as the production of documents.

For the reasons set forth below and in the Division's Initial Papers, Plaintiff's arguments are legally insufficient, contrary to the facts within the record, and based upon hearsay and other unsupported statements and accusations advanced by Plaintiff's counsel, which have been furthered to mislead this Court and an entire educational community as to the nature of Plaintiff's activities and the Division's Investigation. Furthermore, Plaintiff has failed to squarely respond to the Division's Motion. As such, Plaintiff's application for injunctive relief should be denied, and this Court should enter an Order dismissing Plaintiff's Complaint in its entirety and directing Plaintiff to respond to the Division's Subpoena and Interrogatories. Additionally, this Court's denial of Plaintiff's Motion to Amend is appropriate, as the requested amendment is futile.

ARGUMENT

POINT I

THE FACTUAL STATEMENTS SUPPORTING PLAINTIFF'S ORDER TO SHOW CAUSE ARE UNSUPPORTED AND SHOULD BE EXCLUDED PURSUANT TO R. 1:6-6

As a preliminary matter, Plaintiff's Complaint, Order to Show Cause and supporting papers are premised upon factual statements made without reference to a supporting affidavit or certification.

Pursuant to R. 1:6-6:

> If a motion is based on facts not appearing in the record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein.

Significantly, the commentary to R. 1:6-6 states: "Affidavits by attorneys of facts not based on their personal knowledge, but related to them by and within the primary knowledge of their clients constitute objectionable hearsay." Comment, R. 1:6-6.

Further, "[e]ven more egregious is the attempted presentation of facts which are neither of record, judicially noticeable, nor stipulated, by way of statements of counsel made in supporting briefs, memoranda and oral argument. Such statements do not constitute cognizable facts." Comment to R. 1:6-6. See Gonzalez v. Ideal Tile Importing Co., 371 N.J. Super. 349, 358 (App. Div. 2004), aff'd 184 N.J. 415 (2005).

In the instant action, the only cognizable facts submitted by Plaintiff are those statements contained within the Certification of Jeremy Rubin, dated January 19, 2014 ("Rubin Cert."), which include the following:

> . . . .
>
> 2. I am 19-year-old electrical engineering and computer science student at the Massachusetts Institute of Technology ("MIT") in Cambridge, Massachusetts. I live in Boston, Massachusetts. For the last month, I have been living in New York City as part of a paid internship. When the internship ends and the MIT school year starts, I will be returning to Massachusetts.
>
> 3. Other than to attend my grandmother's funeral about 5 or 6 years ago, I have otherwise never been to, worked in, or lived in New Jersey.
>
> 4. Tidbit was not developed in New Jersey and the server the code currently resides on is not in the state of New Jersey. Tidbit has no contracts or agreements with anyone in New Jersey and has not marketed itself exclusively or primarily to individuals in New Jersey. The Tidbit computer code can be downloaded from the Tidbit website by anyone on the Internet . . . .
>
> [(Rubin Cert. ¶¶2-4.)]

Plaintiff's opposition to the Division's Motion ("Plaintiff's Reply") is replete with statements that are devoid of any factual and/or documentary support. Among other things, Plaintiff fails to provide any evidence supporting its statements concerning the development and functionality of the Tidbit Code, that Tidbit has no control over who downloads the Tidbit Code, whether Plaintiff has stopped working on the Tidbit Code, or the information Plaintiff requires prior to sending the Tidbit Code to developers[3]. In addition, Plaintiff has failed to squarely

[3] Examples of Plaintiff's unsupported statements include, but are not limited to:

address the detailed factual statements within the Division's Initial Papers that clearly gave the Division more than sufficient grounds to commence and proceed with its Investigation of Tidbit, specifically through the issuance of the Subpoena and Interrogatories.

Further, the Certification of Hanni M. Fakhoury, dated March 19, 2014 ("Fakhoury Cert.") is replete with statements and facts not based upon Mr. Fakhoury's personal knowledge, but rather apparently relayed to him by his client, thus constituting impermissible hearsay[4]. See

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> "Faced with this unwarranted scrutiny, Tidbit – despite winning an award for being an innovative project – has shut down operations." (Tidbit Reply Br. at 4.);
>
> "Here, Tidbit has not control over who downloads its code." Id. at 9;
>
> "Tidbit does not require a user's physical address in order to obtain the code." Id. at 10;
>
> "[T]he process of downloading the code is clearly automated." Id.;
>
> "Tidbit's code was placed on the Internet for anyone to download, regardless of where they are located." Id. at 14;
>
> "[T]he [Tidbit] e-mail was sent to all Tidbit developers, and not specifically New Jersey developers." Id. at 18;
>
> "[T]he letter was prompted by the Attorney General's subpoena and interrogatories to Mr. Rubin and Tidbit in the first place." Id.;
>
> "It asserts that Tidbit is a "startup" based on statements made by Mr. Rubin in his publicly available resume. (citation omitted). But this is both factually and legally wrong. Id. at 22.

[4] The Division objects to Mr. Fakhoury's assertion that "[a]fter filing, both the students and the Electronic Frontier Foundation ("EFF") remained deliberately quiet about the case, not discussing it publicly." (Fakhoury Cert. ¶5.) The relevancy of this information is lost on the Division, but its inaccuracy is not. This assertion is belied by Mr. Fakhoury's admission that "EFF published a statement about the case on its blog," in which it specifically and inappropriately compares the Division's issuance of the Subpoena and Interrogatories to the Aaron Schwartz incident, in which Mr. Schwartz, a former MIT student, tragically committed suicide during an investigation into whether he had committed criminal violations of the

Gonzalez, 371 N.J. Super. at 358. For example, Mr. Fakhoury's Certification describes how Plaintiff discovered that the Division issued subpoenas to the New Jersey Coded Websites, Plaintiff's state of mind upon discovering this information, and Plaintiff's decision to send an email to its entire list of users. (See Fakhoury Cert. ¶¶5-14.)

Under this analysis, the Court should disallow all unsupported and/or improperly supported statements made by Plaintiff in support of its Complaint and Order to Show Cause, in accordance with R. 1:6-6. For this reason, Plaintiff has failed to sustain its burden to demonstrate that the Division's issuance of the Subpoena and Interrogatories warrants this Court's issuance of injunctive relief. For this reason, the Court should enter an Order dismissing the Complaint in its entirety and ordering Plaintiff to respond to the Subpoena and Interrogatories.

POINT II

PLAINTIFF HAS FAILED TO ESTABLISH ITS ENTITLEMENT TO INJUNCTIVE RELIEF

In Plaintiff's Reply, Tidbit discusses for the first time the legal standard governing a Court's issuance of injunctive relief[5]. In doing so, Plaintiff erroneously states that it has

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Computer Fraud and Abuse Act by the United States Attorneys' Office, Criminal Division. (Id. ¶10.) See https://www.eff.org/deeplinks/2014/02/eff-challenges-new-jersey-subpoena-issued-mit-student-bitcoin-developers.

Further, Plaintiff and Mr. Fakhoury have participated in numerous interviews and have been quoted in various articles concerning the Order to Show Cause, including the following: http://venturebeat.com/2014/02/12/new-jersey-slaps-mit-bitcoin-hackers-with-subpoena-and-they re-fighting-back/; http://www.bostonmagazine.com/news/blog/2014/02/13/mit-subpoena-tidbit-new-jersey/.

[5] It should be noted that Plaintiff's discussion of the applicable legal standard for injunctive relief was only done in response to the Division's citation and discussion of this standard in the

satisfied the substantial burden required to establish its entitlement for injunctive relief by demonstrating:

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

"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 to 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). Accordingly, all Crowe factors must weigh in favor of the relief sought in order for an injunction to issue. See id. at 642-43 (citation omitted).

Plaintiff advances the following arguments in its attempt to establish an entitlement to injunctive relief: (1) Plaintiff may be subjected to punishment if it complies with the Subpoena and Interrogatories[6]; (2) Plaintiff's claims are ripe for adjudication; (3) the CFA unduly burdens

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Division's Initial Papers.

[6] Although Tidbit does not allege any potential First Amendment violations in its Complaint, Plaintiff's Reply suggests that computer code may be protected speech under the First Amendment. (Tidbit Reply Br. at 4.) To the extent Tidbit intends to advance this argument, it should be noted that "the interest in preventing commercial harms justifies more intensive regulation of commercial speech than noncommercial speech." Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 n.21 (1993); see Bolger v. Youngs Drug Prods. Corp., 463 U.S.

interstate commerce in violation of the Dormant Commerce Clause; (4) the Division lacks jurisdiction to issue the Subpoena and Interrogatories; (5) Plaintiff has properly raised the privilege against self-incrimination; and (6) the harm to Plaintiff in responding to the Subpoena and Interrogatories is greater than the harm to the Division if the Subpoena and Interrogatories are quashed and the Division is precluded from fulfilling its statutory mandate to protect consumers. As Plaintiff has failed to satisfy any of the Crowe factors, this Court's denial of the requested injunctive relief is warranted.

A. Plaintiff Has Failed To Establish It Will Suffer Immediate And Irreparable Injury If The Injunction Does Not Issue

Plaintiff alleges it will suffer immediate and irreparable injury because "[i]f Mr. Rubin declines to comply with the subpoena and interrogatories, he may be subjected to punishment, including a finding of contempt of court." (Tidbit Reply Br. at 3.) Plaintiff further alleges it may suffer immediate and irreparable injury because "[i]f Mr. Rubin complies with the subpoena and answers the interrogatories, he faces the threat of civil liability under the Consumer Fraud Act ("CFA")," as well as possible criminal liability. Id. As demonstrated below, Plaintiff's arguments that Mr. Rubin may be subjected to punishment or civil liability under the CFA are without merit.

First, Plaintiff cites no case law supporting its position. Plaintiff's statements that it may suffer immediate irreparable injury if Plaintiff refuses to respond to the Subpoena and Interrogatories because he may be subjected to punishment, or in the alternative, if Plaintiff responds to the Subpoena and Interrogatories he faces the threat of liability under the CFA or criminal liability demonstrate that there is no immediate nor irreparable injury to Plaintiff should

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60, 68 (1983).

he respond to the Subpoena and Interrogatories as the threat of liability or possibility of other punishment are speculative and based on contingent future events that have not yet occurred, such as the filing of a CFA action.

In reality, Plaintiff seeks this Court's determination that it is immune from investigation by the Division under the CFA. Such requested relief is clearly contrary to the expansive authority afforded the Attorney General and the Division under the CFA. See Lemelledo v. Beneficial Mgmt. Corp., 150 N.J. 255, 264 (1997); Fenwick v. Kay Am. Jeep, Inc., 72 N.J. 372, 376-77 (1977). Further, the Subpoena and Interrogatories were issued pursuant to the CFA's broad grant of investigatory authority and 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 is necessary for the Division's Investigation. Plaintiff's bald assertion of immediate and irreparable injury provides no basis for this Court to enjoin the Division's Investigation, if it did, then the Attorney General would not be able to issue any subpoena.

B. Plaintiff Has Failed to Establish That The Legal Right To His Underlying Claim For Relief Is Well Settled

Plaintiff next alleges that it is entitled to injunctive relief because: (1) the Dormant Commerce Clause, Due Process Clause and the privilege against providing compelled incriminating testimony are well-settled legal rights; and (2) Plaintiff's claims are ripe for adjudication. (See Tidbit Reply Br. at 5.)

While Plaintiff is correct that the Dormant Commerce Clause, Due Process Clause and the privilege against self-incrimination are well-settled legal principles, as discussed in the Division's Initial Papers and in Point II C and Point III below, Plaintiff has failed to assert viable

causes of action and, therefore, failed to establish that any legal right to the injunctive relief sought in the instant action.

Plaintiff also contends that the legal right to the underlying claim for relief is well-settled because his claims are ripe for adjudication. (See Tidbit Reply Br. at 5.) The ripeness of this dispute is not relevant to this element of the Crowe analysis. As discussed below and in the Division's Initial Papers, however, the Division maintains Plaintiff's claims are not ripe and constitute a basis for dismissal of this action pursuant to R. 4:6-2(e)[7].

C. Plaintiff Has Failed To Establish A Reasonable Probability Of Success On The Merits

Plaintiff next alleges he has established a reasonably probability of success on the merits because: (1) the Dormant Commerce Clause prohibits the Division from issuing the Subpoena and Interrogatories to Plaintiff; (2) the Division lacks jurisdiction to issue the Subpoena and Interrogatories to Plaintiff; and (3) Plaintiff has properly asserted the privilege against self-incrimination. As discussed in the Division's Initial Papers and below, Plaintiff's arguments are without merit and belied by the facts of the Division's Investigation.

1. The CFA Does Not Unduly Burden Interstate Commerce

First, Plaintiff's allegation that the Division's issuance of the Subpoena and Interrogatories violated the Dormant Commerce Clause is severely misguided and fails to apply appropriate law[8]. The Supreme Court has identified two types of state statutes that violate the Commerce Clause: (1) those statutes that directly regulate or discriminate against interstate

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[7] In Plaintiff's Reply, Tidbit fails to respond to the Division's Motion to Dismiss the Complaint for failing to state a claim upon which relief can be granted and, thus, it is uncontested.

[8] It should be noted that Plaintiff does not specify which provisions of the CFA allegedly

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). 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 on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Accordingly, "the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce is 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), aff'd in part, vac. in part, 505 F.3d 183 (2d Cir. 2007); 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.) Accordingly, it is certainly appropriate for the Division to investigate whether Tidbit deployed the Tidbit Code onto the New Jersey Coded Websites to determine the extent to which Tidbit hijacked and accessed such computers without the knowledge or consent of consumers.

Plaintiff completely ignores this proper legal analysis and, instead, alleges that the CFA comprises a per se violation of the Dormant Commerce Clause because "Tidbit has no control over who downloads its code" and "making the code available to anyone on the Internet is

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violate the Dormant Commerce Clause.

insufficient to permit state regulation." (Tidbit Reply Br. at 9, 11) First, Plaintiff's allegations are not supported by the requisite certifications and documents. To the contrary, Plaintiff's allegations are belied by the uncontroverted and admissible facts advanced by the Division and supported by proper certifications; specifically, that Plaintiff requires users to submit Sign-up Information before affirmatively sending the Tidbit Code to them, with instructions concerning how to paste the code on the user's website to have the computers of the their visitors mine for bitcoins. (Morgenstern Cert. ¶¶20-22, Ex. D.) Second, a statute comprises a per se violation of the Dormant Commerce Clause if it seeks to regulate commerce that 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). As discussed in the Division's Initial Papers, Plaintiff relies upon American Libraries Association v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997) and American Booksellers Foundation v. Dean, 342 F.3d 96 (2d Cir. 2003), both of which contain state statutes that are direct regulators of interstate commerce by directly attempting to regulate the dissemination of images via the internet, and thus are per se invalid. Plaintiff's reliance on these cases is misplaced and perplexing, as it fails to apply the appropriate balancing test discussed in Pike, 397 U.S. at 142. As noted above, the Division's issuance of the Subpoena and Interrogatories was in furtherance of its investigatory powers under the CFA. Whether such investigation would result in an enforcement proceeding has not yet been determined. In any event, an application of the CFA to Tidbit's activity will 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.

Additionally, as described in detail in the Division's Initial Papers, the Division's Investigation revealed that the Tidbit Code was present and active on the New Jersey Coded Websites and that Plaintiff required users to submit Sign-up Information before affirmatively sending the Tidbit Code and has continued to maintain contact with the New Jersey Coded Websites, despite Plaintiff's unsupported arguments to the contrary. (Morgenstern Cert. ¶¶11, 15-22, Exs. A-D; Mullins Cert. ¶¶5-8, Exs. A,B.) Tidbit has not and cannot refute these facts.

As Plaintiff admits, "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." (Tidbit Reply Br. at 11.) Plaintiff admits that it has sent the Tidbit Code to New Jersey Coded Websites, but is attempting to use the Dormant Commerce Clause as an absolute shield from investigation merely because it is not physically located in New Jersey. See id. Under Plaintiff's analysis, this would lead to the absurd result[9] wherein the Division could potentially file a CFA action against the New Jersey Coded Websites for their use of the Tidbit Code, but neither the Division nor the New Jersey Coded Websites could bring an action or third-party complaint against Plaintiff, the entity that advertised, developed and deployed the code to these New Jersey based entities.

2. The Division Has Jurisdiction To Issue The Subpoena And Interrogatories

Plaintiff alleges it has established a reasonable probability of ultimate success on the merits by reiterating its argument that the Division lacks jurisdiction to issue the Subpoena and Interrogatories. (See Tidbit Reply Br. at 12-20.) Further, Plaintiff cites the recent Supreme

[9] Plaintiff also argues that the Division could investigate New Jersey based websites for potential CFA violations, but appears to suggest that New Jersey is the sole sovereign that could investigate such websites, even if such websites advertised and sell merchandise to residents of

Court decision in Walden v. Fiore, 134 S. Ct. 1115 (2014), for the proposition that Plaintiff did not purposefully avail itself of the State. For the reasons set forth below and in the Division's Initial Papers, Plaintiff's arguments are without merit.

First, the CFA expressly authorizes the Division to issue the Subpoena and Interrogatories to Plaintiff in order to fulfill its duty to protect the consuming public, which in this instance concerns 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[10]. See N.J.S.A. 56:8-2 to -5.

Second, Walden, which has no practical impact on this action, is a Nevada case where airline passengers from Nevada brought a Bivens action against a police officer for a search of them conducted in Atlanta, reaffirms, as has long been the case for specific jurisdiction, that "[f]or a State to exercise jurisdiction consistent with due process, that relationship must arise out of contacts that the 'defendant himself' creates with the forum[.]" Walden, supra, 134 S. Ct. at 1118 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985)). Accordingly, Walden does nothing to advance Plaintiff's argument and simply applies longstanding jurisdictional law to matters with no factual similarity to this action. In fact, the Supreme Court explicitly stated:

> Respondents warn that if we decide petitioner lacks minimum contacts in this case, it will bring about unfairness in cases where intentional torts are committed via the Internet or other electronic means (e.g., fraudulent access of financial accounts or "phishing schemes"). As an initial matter, we reiterate that the "minimum contacts" inquiry principally protects the liberty of the non-resident

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foreign states. (See Tidbit Reply Br. at 11.)

[10] Plaintiff does not dispute, nor could it, that the CFA expressly authorizes the Division to issue the Subpoena and Interrogatories to Plaintiff, and therefore has conceded this point.

> defendant, not the interests of the plaintiff. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980). In any event, this case does not present the very different questions whether and how a defendant's virtual "presence" and conduct translate into "contacts" with a particular State. To the contrary, there is no question where the conduct giving rise to this litigation took place: Petitioner seized physical cash from respondents in the Atlanta airport, and he later drafted and forwarded an affidavit in Georgia. We leave questions about virtual contacts for another day.
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> [Walden, 134 S. Ct. at 1125 n.9 (emphasis added).]

What the Supreme Court has never held is, as is the case here, that a party may seek the affirmative relief of a Court via the filing of a Complaint and application for temporary restraints, hail a defendant to Court to defend itself, and then turn around and argue that the Court does not have personal jurisdiction. As the Court made clear, the minimum contact analysis protects the interest of defendants, not the Plaintiff in this matter. See id. Accordingly, the jurisdictional analysis within the Division's Initial Papers remains the proper analysis.

Third, the Division has clearly established that Plaintiff purposefully directed the Tidbit Code to New Jersey. (See Morgenstern Cert. ¶¶10-11, 15-17, 20-22, Exs. A-D; Mullins Cert. ¶6, Ex. A.) Plaintiff's statements that "the State can point to no evidence showing Mr. Rubin or anyone from Tidbit placed the code on those [New Jersey based] sites, as opposed to the operator of the site who downloaded the code from Tidbit" and "Tidbit's code was placed on the Internet for anyone to download, regardless of where they were located" are not only unsupported, but also completely at odds with the facts revealed by the Division's Investigation. (See Tidbit Reply Br. at 14.) As discussed in detail in the Division's Initial Papers, the Investigation revealed that Plaintiff required users to submit Sign-up Information via the Tidbit Website before

affirmatively sending the Tidbit Code to such users, with specific instructions regarding how such users can place the Tidbit Code on their websites to have their visitors mine for bitcoins. (Morgenstern Cert. ¶¶15-17, 20-22, Exs. A-D.) Further, while Plaintiff argues that "Tidbit's code could have been installed on any website in any state in the country," Plaintiff ignores the fact the Tidbit Code was on the New Jersey Coded Websites. (Tidbit Reply Br. at 15; Morgenstern Cert. ¶¶10-11.) Thus, Plaintiff's contacts were specifically and meaningfully tethered to New Jersey.

Furthermore, as Plaintiff correctly explains in a footnote, "out of state actions causing effects in New Jersey are sufficient to state personal jurisdiction." (Tidbit Reply Br. at 14 n. 6 (quoting Blakley v. Continental Airlines, Inc., 164 N.J. 38, 67 (2000).) Here, Plaintiff's actions clearly have an impact in New Jersey as the Tidbit Code was present and active on the New Jersey Coded Websites. (Morgenstern Cert. ¶11.) Such is not "mere foreseeability" of an event happening as Plaintiff alleges, the event already occurred prior to the Division's issuance of the Subpoena and Interrogatories.

Fourth, while the Division maintains that the Tidbit Website is one in which Plaintiff clearly does business over the internet and entered into the knowing and repeated transmission of computer files to New Jersey, making jurisdiction proper, assuming arguendo that the Tidbit Website falls within the "middle ground" on the Zippo sliding scale, jurisdiction is still proper[11]. See Zippo Mfg. Co. v. Zippo DOT Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D. Pa 1997). This "middle ground is occupied by interactive Web sites where a user can exchange information

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[11] Plaintiff has abandoned its argument that the Tidbit Website is a passive website and now maintains it is within the "middle ground" on the Zippo sliding scale. (See Tidbit Reply Br. at 15-16.)

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. at 1124. As the Division has discussed in detail, Plaintiff required Sign-up Information, including bitcoin wallet ids, incorporated these ids into the unique Tidbit Code for each user and affirmatively sent the unique code to each user. (Morgenstern Cert. ¶¶15-17, 20-22, Exs. A-D.) Further, Plaintiff acknowledges that it can and has maintained a list of all such users, including the New Jersey Coded Websites, and has maintained contact with such users. (Fakhoury Cert. ¶¶7, 9.) Clearly, Plaintiff has sufficient contacts with New Jersey and the Division's issuance of the Subpoena and Interrogatories were reasonable given the Division's statutory responsibility to protect the privacy interests and well-being of New Jersey consumers, including those whose computer resources may have been unknowingly accessed by Plaintiff when they visited the New Jersey Coded Websites or any other website with the Tidbit Code. (Morgenstern Cert. ¶3.)

Fifth, this Court's exercise 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), cert. denied, 513 U.S. 1183 (1995). Plaintiff astonishingly contends that "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." (Tidbit Reply Br. at 18.) As discussed above, Plaintiff initiated this action, not the Division, which is a factor to be considered in the jurisdictional analysis. 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.) Contrary to Plaintiff's arguments, Halak is relevant to this action because the complaint was filed in that matter by the defendant prior to the plaintiff filing its civil action. See Halak, 296 N.J. Super. 363.

Likewise, in this case, Plaintiff has filed this action prior to the Division's commencement of an action to enforce the Subpoena and Interrogatories, thus further subjecting itself to this Court's jurisdiction[12]. Further, as discussed above and in detail in the Division's Initial Papers, Plaintiff has more than sufficient minimum contacts to warrant the Division's issuance of the Subpoena and Interrogatories and the negligible burden on Plaintiff to produce responses to the Subpoena and Interrogatories pales in comparison to the detrimental effect upon the Division if it is precluded from exercising its 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.

3. Plaintiff Has Failed To Properly Assert The Privilege Against Self-Incrimination

Finally, Plaintiff alleges it has established a reasonable probability of ultimate success on the merits because it has properly raised the privilege against self-incrimination. For the reasons set forth in detail in the Division's Initial Papers, Plaintiff's assertion is incorrect. First, Plaintiff dismisses the legal standard that it does not "have a 'blanket' right to refuse to respond to all questions" by declaring, without citing any legal support, that the "blanket refusal in State Farm referred to a refusal to appear before a grand jury to testify in person" and . . . . "[i]n that situation

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[12] Plaintiff further attempts to mischaracterize the nature of this proceeding through its request that the Court consider its reply a "motion to dismiss the enforcement action." (Tidbit

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.'" (Tidbit Reply Br. at 20 (quoting State Farm Indem. Co. v. Warrington, 350 N.J. Super 379, 387 (App. Div. 2002)).)

Despite Plaintiff's unsupported argument to the contrary, the prohibition on blanket refusals to respond to questions is valid law and controlling in this matter. Further, the same concerns as described in State Farm are present here; in other words it is impossible to determine whether the invocation of the privilege is appropriate with respect to each question. For example, Plaintiff now acknowledges that "[w]hile the state may have satisfied that standard [the forgone conclusion doctrine] 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." (Tidbit Reply Br. at 24.) It is impossible for the Division to assert that an exception to the privilege against self-incrimination applies when Plaintiff has failed to delineate each element of each particular request within the Subpoena and Interrogatories to which he is asserting the privilege. Only after Plaintiff properly does so, can the Division assert an exception to a particular request, such as to the user e-mail reference by Plaintiff. See State Farm, 350 N.J. Super. at 387.

D. The Public Interest Would Be Adversely Impacted If An Injunction Were Issued

Plaintiff's allegation that the Division would not be significantly harmed from protecting the consuming public is severely misguided. As discussed above, Plaintiff's argument that the Subpoena and Interrogatories should be quashed because "New Jersey is not precluded under the dormant Commerce Clause from investigating potential CFA violation by sending subpoenas to

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Reply Br. at 7 n. 2.)

local websites or individuals" and therefore cannot investigate Plaintiff is nonsensical and flies in the face of the Division's statutory mandate to protect the privacy and well-being of the citizens of New Jersey. Furthermore, "when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant." Waste Mgmt. of N.J., Inc. v. Union Cty. Util. Auth. & IWS Transfer Sys. of N.J., Inc., 399 N.J. Super. 508, 520 (App. Div. 2008); see Yakus v. United States, 321 U.S. 414, 440 (1944).

For the foregoing reasons and as set forth in the Division's Initial Papers, Plaintiff has failed to demonstrate any of the Crowe v. DeGioia factors necessary to warrant injunctive relief and, as such, Plaintiff's application should be denied.

POINT III

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

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 (Minnesota Min. and Mfg. Co., 373 N.J. Super. 172, 175 (App. Div. 2004) (citations omitted). 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), cert. denied, 185 N.J. 297. 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).

Plaintiff has failed to respond to the Division's Motion to Dismiss for failure to state a claim, pursuant to R. 4:6-2(e) and accordingly, has conceded this point. Further, as discussed above and in the Division's Initial Papers Plaintiff fails to assert viable causes of action. Accordingly, the Complaint should be dismissed in its entirety.

POINT IV

THE COURT SHOULD ENTER AN ORDER ENFORCING THE DIVISION'S SUBPOENA AND INTERROGATORIES

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.

As discussed above and in the Division's Initial Papers, 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 and for those same reasons the Court should dismiss Plaintiff's Complaint as there is no remaining basis for the ultimate relief sought.

POINT V

PLAINTIFF'S APPLICATION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED AS ANY AMENDMENT IS FUTILE

On or about March 20, 2014, Plaintiff filed the Motion to Amend and supporting papers. The sole proposed amendment to Plaintiff's Complaint is the substitution of John J. Hoffman, Acting Attorney General of New Jersey, in his official capacity, as the Defendant in place of the New Jersey Division of Consumer Affairs. Whether as against the Division or the Attorney General, this does nothing to save the Complaint. (See Proposed First Amended Complaint.)

Rule 4:9-1 governs the amendment of pleadings and provides:

> A party may amend any pleading as a matter of course at any time before a responsive pleading is served or, if the pleading is

> one to which no responsive pleading is to be served, and the action has not been placed upon the trial calendar, at any time within 90 days after it is served. Thereafter a party may amend a pleading only by written consent of the adverse party or by leave of court which shall be freely given in the interests of justice. A motion for leave to amend shall have annexed thereto a copy of the proposed amended pleading. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 20 days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.
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> [R. 4:9-1]

"The broad power of amendment should be liberally exercised at any stage of the proceedings, including on remand after appeal, unless undue prejudice would result or unless the amendment would be futile." Pressler & Verniero, Current N.J. Court Rules, comment 2 on R. 4:9-1 (2014); see Franklin Med. V. Newark Pub. Sch., 362 N.J. Super. 494, 506-08 (App. Div. 2003); Bustamante v. Borough of Paramus, 413 N.J. Super. 276, 298 (App. Div. 2010). Plaintiff's proposed substitution of the Acting Attorney General as Defendant should be denied as futile because, as discussed above and in the Division's Initial Papers, Plaintiff has failed to state any viable cause of action thus necessitating the dismissal of his Complaint.

Claims against the state, state entities and/or individual state employees in their official capacities must be dismissed because they are not "persons" amenable to suit under §1983. A defendant, to be liable within the meaning of §1983, must be a "person." The Supreme Court held in Will v. Michigan Deptartment of State Police, 491 U.S. 58 (1989), that a State, or an official of the State while acting in his or her official capacity, is not a "person" within the meaning of §1983. While state officials literally are persons, a suit against a state official in his

or her official capacity is not a suit against the official, but is a suit against the official's office. "As such, it is no different from a suit against the State itself." Will, supra, 491 U.S. at 71.

The Court in Will also relied on the finding that, in enacting §1983, Congress did not intend to override well-established common law immunities or defenses -- specifically that of a state not to be sued without its consent. Id. While §1983 is a remedy for an official violation of federal rights, it "does not suggest that the State itself was a person that Congress intended to be subject to liability." Id. at 68.

Further, to bring a civil rights claim under the New Jersey Civil Rights Act ("NJCRA") for the recovery of damages or injunctive relief for the violation of a state constitutional right, a plaintiff must allege a cause of action under the NJCRA. N.J.S.A. 10:6-1 et seq. The NJCRA, N.J.S.A. 10:6-1 to -2, authorizes a private right of action for civil rights claims alleging a deprivation, "by a person acting under color of law," of "any substantive rights, privileges or immunities secured by the Constitution or laws of this State." N.J.S.A. 10:6-2(c).

The term "person" as used in legislative enactments is defined in N.J.S.A. 1:1-2 as follows:

> The word "person" includes corporations, companies, associations, societies, firms, partnerships and joint stock companies as well as individuals, unless restricted by the context to an individual as distinguished from a corporate entity or specifically restricted to 1 or some of the above enumerated synonyms and, when used to designate the owner of property which may be the subject of an offense, includes this State, the United States, any other State of the United States as defined infra and any foreign country or government lawfully owning or possessing property within this State. (Emphasis added).
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> [N.J.S.A. 1:1-2.]

Thus, the term "person" only includes the State of New Jersey in the context of a victimized property owner, and not when named as a defendant in a civil rights action. See Didiano v. Balicki, 488 F. App'x. 634, 637-39 (3d. Cir. 2012) (holding that the State of New Jersey is not a "person" for the purposes of the NJCRA).

Further, the NJCRA is modeled after the federal Civil Rights Act, 42 U.S.C.A. §1983, and courts have consequently construed the NJCRA as an analog to 42 U.S.C.A. §1983. Chapman v. State of New Jersey, 2009 U.S. Dist. LEXIS 75720, at *7 (D.N.J. Aug. 25, 2009) (citations and subsequent history omitted); see also Sponsor's Statement to Assembly Bill No. 2073, 2004 Legis. Bill Hist. NJ Assembly Bill 2073 (2004), available at http://www.judiciary.state.nj.us/legis/2004cl43.pdf. Indeed, the NJCRA "was designed to incorporate and integrate seamlessly with existing civil rights jurisprudence." Chapman, supra, 2009 U.S. Dist. LEXIS 75720, at *7 (citing Slinger v. State of New Jersey, 2008 U.S. Dist. LEXIS 71723, at *15 (D.N.J. Sept. 4, 2008), rev'd on other grounds, 2010 U.S. App. LEXIS 3642 (3rd Cir. Feb. 22, 2010)).

Furthermore, as noted above, the Legislature intended the NJCRA to serve as an analog to 42 U.S.C.A. §1983 and to "incorporate and integrate seamlessly" with existing civil rights jurisprudence. See Chapman, supra, 2009 U.S. Dist. LEXIS 75720, at *7. See also Sponsor's Statement, supra. Moreover, the NJCRA did not override existing statutes of limitations, waive immunities, or alter jurisdictional or procedural rules "that are otherwise applicable to the assertion of constitutional or statutory rights." See Chapman, supra, 2009 U.S. Dist. LEXIS 75720, at *7 (citations omitted); Sponsor's Statement, supra. Given this legislative history, the Court should apply existing 42 U.S.C.A. §1983 civil rights jurisprudence to the NJCRA.

Section 1983 requires that the party sued be a "person" and that a superior official have personal involvement to be liable. In light of its text and legislative history, the NJCRA should be interpreted to require the same. See Didiano, supra, 488 F. App'x. At 637-39; Chapman, supra, 2009 U.S. Dist. LEXIS 75720, at *7-8 (citations omitted). For a defendant to be liable under §1983, he or she must meet the statute's definition of a "person." The United States Supreme Court has held that neither a State, nor an arm of the State, nor an official of the State acting in his or her official capacity, meet that definition. Howlett v. Rose, 496 U.S. 356, 365 (1990); Will, supra, 491 U.S. at 71. As the Court concluded, although State officials "literally are persons," an official-capacity claim "is not a suit against the official but rather a suit against the official's office. As such, it is no different from a suit against the State itself." Will, supra, 491 U.S. at 58. The Court also recognized that Congress, in enacting 42 U.S.C.A. §1983, did not intend to override well-established common law immunities or defenses, namely that of a State not to be sued without its consent. See id.

Accordingly, the Acting Attorney General is not a "person" as defined by 42 U.S.C.A. §1983. Thus, so too under the NJCRA, must the party sued be a "person." Didiano, supra, 488 F. App'x. At 637-39; Chapman, supra, 2009 U.S. Dist. LEXIS 75720, at *7 (citations omitted). As with 42 U.S.C.A. §1983, suits under the NJCRA are precluded against the State, including State officials acting in their official capacity, such as the Acting Attorney General. Chapman, supra, 2009 U.S. Dist. LEXIS 75720 at *7-8.

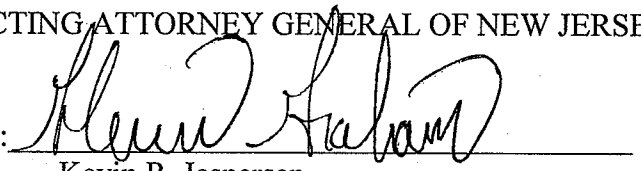
Accordingly, Plaintiff's Motion to Amend should be denied as futile, as both the Acting Attorney General and the New Jersey Division of Consumer Affairs are immune from Plaintiff's cause of action under §1983.

CONCLUSION

For the reasons set forth herein and in the Division's Initial Papers, the Division respectfully requests that this Court enter an Order: (1) denying the Plaintiff's application for injunctive relief in its entirety; (2) denying Plaintiff's Motion to Amend; (3) dismissing Plaintiff's Complaint and; (4) directing Plaintiff to respond to the Division's Subpoena and Interrogatories.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: 

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Dated: March 27, 2014