

**UNITED STATES OF AMERICA  
IN THE FEDERAL TRADE COMMISSION**

**IN THE MATTER OF** Compete Inc. a Delaware )  
corporation, with its principal place of business at )  
501 Boylston Street, Suite 1600, Boston, )  
Massachusetts. )

**File No. 102 3155**

)  
**COMMISSIONERS:** Jon Leibowitz esq. )  
Chairman, J. Thomas Rosch, Edith Ramirez, Julie )  
Brill, and Maureen K. Ohlhausen )

**PUBLIC COMMENTS SUBMITTED BY STEERADS INC. REGARDING THE AGREEMENT  
CONTAINING CONSENT ORDER ACCEPTED BY THE FEDERAL TRADE COMMISSION  
SUBJECT TO FINAL APPROVAL IN THE ABOVE-CAPTIONED MATTER**

**STATEMENT OF INTEREST**

On October 29, 2012, the Federal Trade Commission (“Commission”) issued a notice in the Federal Register, 77 Fed. Reg. 65,550 (2012), inviting public comments as to an agreement containing consent order, in the above-captioned matter. Steerads, hereby, submits public comments for the Commission’s consideration. Steerads is a corporation governed by the laws of the Province of Québec, Canada, having its principal place of business at 3535 Queen Mary Street, Suite 200, Montréal, Québec, H3V 1H8, Canada, and an office in the United States, at 461 22<sup>nd</sup> Street West, Suite E, New York City, New York 10111, USA. The solutions developed by Steerads improve on-line advertisers’ return on investment by optimizing user-specific advertisements bids. [www.steerads.com](http://www.steerads.com).

Needless to say, honest advertising on the Internet is paramount. Businesses should maintain and improve competitiveness by transmitting truthful and accurate information to consumers in the marketplace. The nonadjudicative proceeding initiated by the Commission is in the public interest. The Internet has created a new market dimension, with communications and transactions occurring in a context where there is no in-person contact, making it more difficult for consumers to ask and

obtain information. In this new market environment, most transactions are contracts of adhesion. For that reason, interstate commerce over the Internet deserves to be closely monitored by the Commission, in order to ensure that consumers make informed judgments based on truthful, reliable information.

### **PUBLIC COMMENTS**

The Commission issued a draft complaint against Compete Inc. The draft complaint alleges unfair and deceptive acts or practices, in violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45 (1) (a)): misrepresentations, omissions, and failure to implement effective mechanisms to protect consumers' privacy. Those claims of deceptive acts and practices concern "Compete Toolbar" and "Consumer Input Panel" two software programs developed and made available on the Internet by Compete. Complaint, ¶¶ 20-27. Importantly, Compete's two consumer tracking software programs were licensed for third-party use. Ibid., ¶ 5. Compete's misrepresentations and omissions, allegedly, "caused or was likely to cause substantial injury to four (4) millions consumers". Ibid., ¶ 6.

We have reviewed the draft complaint, agreement containing consent order ("consent order"), analysis of agreement containing order to aid public comment, and attached materials, with a view to assessing the consent order's "purpose, meaning, and efficacy". *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (1995) (Silberman, C.J.). The remedial provisions in the consent order (I - XI) to cease and desist from making misrepresentations, provisions directing specific remedial actions to clarify prior omissions, and divestiture provisions meet the applicable standard of clarity, and are enforceable. Accordingly, the consent order is "within the reach of the public interest". Ibid., at 1458 citing *United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C.

Cir. 1990) quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9<sup>th</sup> Cir.), cert. denied, 454 U.S. 1083, 102 S.Ct. 638, 70 L.Ed. 2d 617 (1981), in turn quoting *United States v. Gillette Co.*, 406 F.Supp. 713, 716 (D.Mass1975).

## I.

The consent order is a notable improvement over recent settlements in matters affecting consumers's privacy on the Internet. New remedial provisions further protect consumers: (i) the notification provision aimed at informing consumers of Compete's past data collection activities; (ii) the provision as to mandatory technical support to uninstall Compete Toolbar and Consumer Input Panel; and (iii) the provision ordering service of the consent order on third parties. Agreement Containing Consent Order, II- III. The divestiture provision ordering destruction of data collected by Compete before February 1, 2010, however, may be incomplete. Ibid., VII.

Our comments concentrate on the "efficacy", *Microsoft Corp.*, 56 F.3d, at 1462, of the consent order's divestiture provision, mindful that the agreement reached by the Commission and Compete, " is for settlement purposes only and does not constitute an admission by [Compete] that the law has been violated as alleged in the draft complaint". Complaint.<sup>1</sup> The efficacy of the divestiture provision is of particular concern. Any shortcomings regarding this aspect of contemplated relief could compromise substantial efforts to address very serious invasions of privacy uncovered in the course of the Commission's investigation of Compete's activities and by implications of Compete's licensees.

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<sup>1</sup> "When a consent decree is brought to a district judge, because it is a settlement, there are no findings that the defendant has actually engaged in illegal practices. It is therefore inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial". *Microsoft Corp.*, 56 F.3d., at 1460-61 (italics omitted) citing *Maryland v. United States* 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting).

The consent order's divestiture provision provides in relevant part that Compete shall "delete or destroy, Collected Information in respondent's custody or control that was collected prior to February 1, 2010". *Ibid.*, VII. Since the Commission claims in the draft complaint that Compete obtained personal data by engaging in deceptive practices in violation of section 5 of the Federal Trade Commission Act, divestiture is the appropriate relief to redress the antitrust injury suffered by consumers. Divestiture is "[t]he most drastic, but most effective, of antitrust remedies". *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961) (Brennan, J.). This form of relief "has been called the most important of antitrust relief. It is simple, relatively easy to administer, and sure". *Ibid.*, at 330-31. The importance of divestiture as a form of antitrust relief is such that a private plaintiff is entitled to a divestiture order, a form of discretionary relief. *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (Stevens, J.). ("[A] district court has the power to order divestiture under § 16 of the Clayton Act").

But, there must be a correlation between an alleged antitrust violation and a divestiture order. In other words, divestiture must be "effective to redress the antitrust violation proved". *E.I. du Pont de Nemours & Co.*, 366 U.S., at 323. The legal standards for approval of consent decrees under the Antitrust Procedures and Penalties Act (15 U.S.C. §16) and injunctive relief provisions (15 U.S.C. §§ 25-26), provide useful guidelines for assessing the "efficacy", *Microsoft Corp.*, 56 F.3d, at 1462, of the consent order reached between the Commission and Compete, although the legal standard for divestiture relief governs in the context of a finding of an antitrust violation after trial.<sup>2</sup>

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<sup>2</sup> Again, we are mindful that we owe deference to the Commission's prosecutorial discretion to settle antitrust disputes, especially the negotiation of a pre-litigation agreement. *Microsoft Corp.*, 56 F.3d, at 1461. ("[W]hen the proposed decree comes to a district judge in the first place as a settlement between the parties that may well reflect weaknesses in the government's case, the district judge must be even more deferential to the government's prediction as to the effects of the proposed remedies than he would be when a modification request is presented").

## II.

The divestiture provision in the consent order is incomplete, directing divestiture of consumer data under Compete's possession and control, without imposing a corresponding legal obligation on third-party licensees. The two software programs developed by Compete track consumer activities on the Internet; Compete uses consumer data obtained online to produce marketing reports. Complaint, § 3. In addition, Compete licenses the two software programs to third parties for their own use; it appears that licensing agreements with third parties provide that licensees act as "data collection agents" for Compete. Agreement Containing Consent Order, (Definitions). Arguendo, third-party licensees collect consumer data, which they store on their servers, for their own use. So, third-party licensees have under their custody and control, also, consumer data illegally obtained through Compete's two software tracking programs.<sup>3</sup>

Moreover, we assume third-party licensees have consumer data under their custody and control, based on a remedial provision in the consent order. Specifically, the consent order imposes on Compete a positive obligation to serve the consent order on present and future licensees. Agreement Containing Consent Order, III. If Compete is to be ordered to divest ("delete or destroy", Ibid., VII) all Collected Information under its custody and control, then a similar obligation must be imposed on third-party licensees, similarly situated. Otherwise, the consent order's effectiveness is compromised, as consumer data illegally obtained remains in circulation.

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<sup>3</sup> "[...] Compete licensed its data collection software for third parties for their use, including incorporating into their own toolbars or rewards programs. In all cases *the data gathered through Compete's data collection software was sent to Compete*". (Emphasis added). Complaint, ¶ 5. Third-party licensees gather data both on behalf of Compete and for their own use. Unless we misread ¶ 5, that means third parties store consumer data on computer servers, which they use eventually for marketing, or other purposes.

We submit that all Data Collection Agents with whom Compete has concluded any contract, agreement, license, sale or arrangement, shall be notified and ordered to divest all Collected Information under their custody or control. The proposed modification to the consent order, whereby third-parties would be ordered to divest Collected Information, is necessary, inter alia, to protect consumers against “misuse of [sensitive information gathered by Compete], particularly financial account information and Social Security numbers, [which may] facilitate identity theft and related consumer harms”. Complaint, ¶ 18. These very serious consequences flowing from Compete’s conduct call for “drastic” and “effective, *E.I. du Pont de Nemours & Co.*, 366 U.S., at 326 , remedial action.

The consent order’s notification and divestiture provisions (III-VII) are insufficient, in our view, to remedy antitrust wrongs identified in the complaint. The proposed modification to the consent order advanced is required, we submit, to make consumers whole, to the fullest extent possible. The modification we propose is by no means a “punitive” measure, and no “economic hardship” would fall on Compete if it was incorporated in the consent order. *E.I. du Pont de Nemours & Co.*, 366 U.S., at 326-327. As we have noted in previous public comments submitted to the Commission in matters involving invasion of privacy over the Internet, a consent order contains no damage award. Injunctive relief provisions in a consent order must, therefore, be broad enough to cure past illegal conduct effectively.

#### **CONCLUSION**

As we mentioned at the outset, the consent order is in the public interest. New remedial provisions improve consumers’ privacy significantly, retroactively and prospectively. Nevertheless, the divestiture provision in the consent order should be broadened to include third parties which

can be done without causing any hardship. We acknowledge that a consent order can hardly make all victims whole, especially when respondent has invaded the privacy of millions of individuals, by way of deceptive practices. Crafting a consent order that makes victims of invasion of privacy whole, to the fullest extent possible, is an ongoing process. We are confident that the Commission will consider this very important issue in this and future enforcement actions.

Submitted this 18th day of November 2012

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