



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

June 19, 2014

Marc Rotenberg, Executive Director
Julia Horwitz, Consumer Protection Counsel
Khaliah Barnes, Administrative Law Counsel
Electronic Privacy Information Center
1718 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20009

Re: In the Matter of Apperian, Inc., File No. 1423017; Atlanta Falcons Football Club LLC, File No. 1423018; Baker Tilly Virchow Krause, LLP, File No. 1423019; BitTorrent, Inc., File No. 1423020; Charles River Laboratories International, Inc., File No. 1423022; DataMotion, Inc., File No. 1423023; DDC Laboratories, Inc., File No. 1423024; Level 3 Communications, LLC, File No. 1423028; PDB Sports, Ltd. d/b/a Denver Broncos Football Club, File No. 1423025; Reynolds Consumer Products Inc., File No. 1423030; The Receivable Management Services Corporation, File No. 1423031; and Tennessee Football, Inc., File No. 1423032.

Dear Mr. Rotenberg, Ms. Horwitz, and Ms. Barnes:

Thank you for your comment on behalf of the Electronic Privacy Information Center (“EPIC”) regarding the Federal Trade Commission’s (“Commission” or “FTC”) consent agreements in the above-entitled proceedings. The Commission has placed your comment on the public record pursuant to Rule 4.9(b)(6)(ii) of the Commission’s Rules of Practice, 16 C.F.R. § 4.9(b)(6)(ii), and has given it serious consideration.

In these 12 cases, the Commission alleges that Respondents violated Section 5 of the Federal Trade Commission Act (“FTC Act”) by misrepresenting that they were current participants in the U.S.-EU Safe Harbor framework and/or U.S.-Swiss Safe Harbor framework (collectively “Safe Harbor framework”) when in fact each company allowed its self-certification to lapse. In addition, the proposed complaints against Apperian, Inc., Baker Tilly Virchow Krause, LLP, DataMotion, Inc., and the Receivable Management Services Corporation allege that these companies deceptively displayed the Safe Harbor Certification Mark. The complaints do not allege that any Respondent committed any substantive violations of the privacy principles of the Safe Harbor framework.

The proposed orders prohibit each company from misrepresenting the extent to which each is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy or security program sponsored by the government or any other self-

regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework or the U.S.-Swiss Safe Harbor Framework to directly address the complaint allegations in these cases. The proposed orders, which terminate after 20 years, include standard record-keeping and service provisions, as well as requirements for each Respondent to file a compliance report with the Commission.

These cases reflect an ongoing effort by the Commission to enforce compliance with the Safe Harbor framework. The Commission brought 10 previous cases against companies for misrepresentations related to Safe Harbor. From late 2009 through early 2010, the Commission brought a series of cases against six companies that violated Section 5 by falsely representing on their websites that they held current self-certifications to the Safe Harbor Framework.¹ In addition, in 2011, the Commission's action against Balls of Kryptonite included a count alleging the respondent violated Section 5 by misrepresenting its status with Safe Harbor.² Finally, the FTC has brought Section 5 cases against Google, Facebook and Myspace that included counts relating to substantive noncompliance with the Safe Harbor principles.³

Your comment notes EPIC's support of the 12 proposed consent orders but urges the Commission to make a number of revisions to the orders. Specifically, you request that the Commission: (1) require Respondents to comply with the President's Consumer Privacy Bill of Rights; (2) publish the Respondents' compliance reports; and (3) strengthen the sanctions against respondent DDC Laboratories, specifically.

Your comment recommends that the Commission require Respondents to conform to the substantive protections of the President's Consumer Privacy Bill of Rights ("CPBR"). The Commission supports the goals laid out in the CPBR and highlighted a number of these principles in our March 2012 Privacy Report, "Protecting Consumer Privacy in an Era of Rapid

¹ *Directors Desk LLC*, No. C-4281 (Jan. 12, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/01/100119directorsdeskcmt.pdf>; *World Innovators, Inc.*, No. C-4282 (F.T.C. Jan. 12, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/01/100119worldinnovatorscmt.pdf>; *Collectify LLC*, No. C-4272 (F.T.C. Nov. 9, 2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/01/100119collectifycmt.pdf>; *ExpatEdge Partners, LLC*, No. C-4269 (F.T.C. Nov. 9, 2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/01/100119expatedgecmt.pdf>; *Onyx Graphics, Inc.*, No. C-4270 (F.T.C. Nov. 9, 2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/01/100119onyxgraphicscmt.pdf>; *Progressive Gaitways LLC*, No. C-4271 (Nov. 9, 2009), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/01/100119progaitwayscmt.pdf>.

² *FTC v. Karnani*, No. CV-05276-DDP-E (C.D. Cal., filed May 16, 2011) (alleging that defendants falsely stated that they had self-certified to the Safe Harbor Framework).

³ See *MySpace, LLC*, No. C-4369 (F.T.C. Aug. 13, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/09/120911myspacecmt.pdf>; *Facebook, Inc.*, No. C-4365 (F.T.C. Jul. 27, 2012), available at <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookcmt.pdf>; *Google Inc.*, No. C-4336 (F.T.C. Oct. 13, 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/10/111024googlebuzzcmt.pdf>.

Change: Recommendations for Businesses and Policymakers.”⁴ However, the order is designed to address specific conduct as alleged in the complaint—which did not include substantive violations of the Safe Harbor framework—not to impose obligations that may not be tied to such conduct.

Your comment further urges the Commission to make Respondents’ compliance reports publicly available. As the Commission has stated with regard to the third-party assessments required by many of our privacy and data security orders, there is a public benefit to providing transparency regarding a company’s compliance with an FTC order. The public may seek access to compliance reports required by the orders by making a request under the Freedom of Information Act.⁵ If the compliance reports contain any trade secrets or other confidential commercial or financial information, or information about consumers or other third parties, the Commission is prohibited from disclosing that information.⁶ Upon receipt of a request for confidential treatment of all or part of the compliance report, the Commission will conduct a careful review to determine whether confidential treatment is warranted. We will make every effort to be transparent regarding the compliance reports, consistent with the applicable law. If the Commission determines that a report has been frequently requested, the agency will post such portions as may be released to the public on the FTC’s website.

Moreover, you request that the Commission strengthen the sanctions against DDC Laboratories (“DDC”) due to the type of consumer data that DDC collects and the fact that “[b]y misrepresenting its compliance with privacy standards, DDC Labs puts highly sensitive, extremely intimate personal data at risk.” It is important to reiterate that the proposed complaint against DDC alleges that the company misrepresented that it was a current participant in the Safe Harbor framework, when, in fact, its self-certification had lapsed. There was no allegation that DDC substantively violated any of the privacy principles of the Safe Harbor framework or that personal data was at risk. The proposed orders in all 12 cases include fencing-in relief that enjoins the companies from making such misrepresentations in the future. If they do, or if Respondents violate any other term of the final order, they could be liable for civil monetary penalties of up to \$16,000 per violation, or up to \$16,000 per day in the case of continuing violations (as provided by Section 5(l) of the FTC Act). Thus, the order has the effect of requiring the company to abide by the substantive Safe Harbor principles for as long as it chooses to represent that it complies with the Safe Harbor Framework. In addition, if one of the Respondent companies chooses to leave Safe Harbor, it must continue to apply the Safe Harbor principles to the covered data it collected while participating in the program for as long as it stores, uses, or discloses that data. Accordingly, the Commission believes that the proposed order appropriately addresses the conduct at issue in this case.

⁴ FED. TRADE COMM., *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (2012), available at <http://www.ftc.gov/os/2012/03/120326privacyreport.pdf>.

⁵ 5 U.S.C. § 552, *et seq.*

⁶ 15 U.S.C. § 46(f) (“the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential”); Commission Rule of Practice § 4.10.

Finally, you reference past comments that EPIC has submitted to the Commission regarding other settlements and state that the Commission's failure to implement your proposed changes is: "(1) contrary to the explicit purpose of the statutory provision that allows the Commission to request comments from the public; (2) contrary to the broader purpose of the Commission to police unfair and deceptive trade practices; and (3) contrary to the interests of American consumers." (EPIC Comment at 4, references omitted). The Commission Rules of Practice, 16 C.F.R. § 2.34, do not require that the Commission accept proposed changes filed by commenters. Rather, the applicable Rule of Practice directs the Commission to receive and consider any "comments or views" concerning the order that may be filed by "any interested person," and states that, thereafter, the Commission may "withdraw its acceptance of the agreement . . . [and] take such other action as it may consider appropriate." The Commission carefully considers, and has a practice of responding to, public comments filed in reference to its administrative settlements. But only when the Commission determines that the public interest would be best served by amending the consent order does the Commission take such action, which requires the consent of the respondent. There have been such modifications in a number of matters.⁷ Where the Commission seeks a modification to which the respondent does not agree, the Commission may proceed to litigation, where a court will ultimately determine what relief is warranted under the FTC Act or other applicable law. In this case and others in which the Commission has not sought to modify a proposed consent order as recommended by EPIC or another commenter, it is because the Commission has concluded that the public interest is best served by final adoption of the original order.

In light of the considerations discussed above, the Commission has determined that the public interest would best be served by issuing the Decision and Orders in the above-titled proceedings in final form without any modifications. The final Decision and Orders and other

⁷ See, e.g., *Motorola Mobility LLC*, No. C-4410 (F.T.C. July 23, 2013) (amending final consent order based on public comments), available at <http://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter>; *Phusion Projects, LLC*, C-4382 (F.T.C. Feb. 6, 2013) (same), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/02/130212phusioncmpt.pdf>; *Sony BMG Music Entm't*, No. C-4195 (F.T.C. June 28, 2007) (same), available at <http://www.ftc.gov/sites/default/files/documents/cases/2007/06/0623019cmp070629.pdf>; see also Letter from Deborah L. Feinstein, Federal Trade Commission, to Roxana Tatman, Georgia Department of Community Health (May 20, 2014) (explaining how the Commission is currently weighing its options in a competition matter in light of information received after seeking public comment on a proposed consent order); Letter from Matthew Jarrad, Georgia Department of Community Health, to G. Edward Alexander, North Albany Health Center, In re Request for Letter of Determination Regarding Facility Divestiture, at 2 (June 3, 2014) (referring to the May 20 Feinstein letter), available at http://scni.media.clients.ellingtoncms.com/news/documents/2014/06/04/DET2014033_Determ_Response.pdf.

relevant materials are available from the Commission's website at <http://www.ftc.gov>. It helps the Commission's analysis to hear from a variety of sources in its work, and it thanks you again for your comment.

By direction of the Commission, Commissioner McSweeney not participating.

Donald S. Clark
Secretary