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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. ______________ CIVIL ACTION **BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE TO QUASH SUBPOENA AND FOR INJUNCTIVE RELIEF**

PRELIMINARY STATEMENT

Plaintiff Jeremy Rubin d/b/a Tidbit moves this Court for an order directing Defendant State of New Jersey Division of Consumer Affairs to show cause why its December 4, 2013 subpoena and interrogatories should not be quashed.

Crucial to this case is the fact that neither Mr. Rubin nor Tidbit are located in New Jersey or have directed their conduct toward this state. The Dormant Commerce Clause prohibits the state of New Jersey from attempting to investigate and regulate commerce, including activity occurring solely online from outside of New Jersey. Moreover, because Mr. Rubin has no contacts with New Jersey, and Tidbit has not purposefully directed its activities toward New Jersey, the State has no personal jurisdiction over Mr. Rubin or Tidbit and no ability to issue a subpoena to either. Thus, the subpoena and interrogatories should be quashed.

Even if this Court finds the subpoena and interrogatories valid, Mr. Rubin's privilege against self-incrimination prohibits the state from compelling him to produce the documents requested in the subpoena and to answer the interrogatories unless he is given immunity from criminal prosecution for not only the documents and answers, but any evidence derived from them.

STATEMENT OF FACTS

A. Bitcoins

Bitcoin is software and an associated network that provides a method for direct person-to-person payments over the Internet, without the involvement of a centralized bank or clearinghouse.[1] In Bitcoin, participants' balances are listed in a very large public ledger called the "blockchain," which records every transaction that occurs within the system. This allows anyone

[1] For additional explanations of what Bitcoin is, *see* "How Bitcoin Works," *Forbes*, August 1, 2013, available at http://www.forbes.com/sites/investopedia/2013/08/01/how-bitcoin-works/.

to determine the current balance of any Bitcoin virtual account (called an "address") and to verify whether or not a claimed payment has taken place. A payment represents transferring a specified amount of value between specified addresses.

The Bitcoin ledger is maintained collaboratively by a large and constantly-shifting community of participants known as "miners," who collectively follow a set of rules (the "Bitcoin protocol") that describe the structure of the ledger and the conditions under which information can be added to it. Because compliance with these rules can be checked by any party, there is no central authority in the Bitcoin system. When miners add information to the ledger, they publicly announce their additions, and other parties can see that these additions were made in conformance with the protocol and are therefore valid.

The main purpose of the ledger is to prevent anyone from spending the same Bitcoin value twice ("double-spending"). In traditional financial systems, this function is performed by central banks (which issue hard-to-counterfeit physical currency instruments) and commercial banks (which maintain accounts and account ledgers). In Bitcoin, the first transaction in the ledger that purports to transfer a certain balance is presumptively valid and any subsequent contradictory attempt to transfer that balance is presumptively invalid.

A miner's authority to add to the ledger is demonstrated by solving an extremely difficult mathematical problem. The difficulty of this problem ensures that the ledger is extended at a steady pace and distinguishes the genuine ledger (which contains correct, genuine solutions to a series of mathematical problems) from any purported alternative version. The particular miner who first extends the ledger by solving the relevant problem is credited with a "block reward," which is a certain amount of Bitcoin value paid directly to the miner, and which is metaphorically described as having been "mined" or "discovered" by that miner.

Because mining is defined to require solving a difficult mathematical problem, the process consumes computing resources. Originally mining was performed by searching for solutions to these problems on ordinary desktop computers and using their computing power. When a computer operated by a miner found a solution, it would inform the network of Bitcoin users of its solution and extension to the ledger. Other users would recognize this solution as correct and valid.

Over the last year, Bitcoins have grown in prominence and a growing number of retailers and services now accept payment through Bitcoin, including Overstock.com[2] and the NBA's Sacramento Kings franchise.[3] As Bitcoin has grown in popularity, several active markets exchange Bitcoins for dollars and other currencies, and vice versa. While the value of a Bitcoin has fluctuated, as of January 20, 2014, one Bitcoin was valued at $834.94 on one exchange.[4]

B. Jeremy Rubin and Tidbit

Plaintiff Jeremy Rubin is a 19-year-old college student at the Massachusetts Institute of Technology ("MIT") who lives in Boston, Massachusetts. *See* Certification of Jeremy Rubin ¶ 2.[5] Together with three other MIT students, Mr. Rubin developed Tidbit for the Node Knockout "Hackathon" held in November 2013.[6] Tidbit is a computer code that allows developers to replace

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[2] "Online retailer Overstock to accept Bitcoin," *CNN Money*, December 20, 2013, available at http://money.cnn.com/2013/12/20/technology/innovation/overstock-bitcoin/.

[3] "Sacramento Kings Crowned First Pro Sports Team to Accept Bitcoin," *Wired*, January 16, 2014, available at http://www.wired.com/business/2014/01/sacramento-kings-bitcoin/

[4] See http://www.bitcoinexchangerate.org/.

[5] Because Mr. Rubin is seeking to preserve his privilege against being compelled to provide testimony that may incriminate him, he has only submitted a limited certification, attesting to the facts necessary for the Court to decide whether the state can exercise personal jurisdiction over him. *See* NJRE 503(d); NJSA 2A:84A-19(d) ("a party in a civil action who voluntarily testifies in the action upon the merits does not have the privilege to refuse to disclose in that action, any matter relevant to any issue therein.").

[6] A "hackathon" is an event where a number of computer programmers gather together in a compressed time frame to collaborate and compete on developing computer programs or applications. The "Node Knockout" Hackathon was a 48-hour hackathon held online between

website advertising by instead using a client's computer to mine for Bitcoins. Tidbit was clearly identified as a "proof of concept" on the Node Knockout's website, where the developers stated "[a]gain, it is important to note that the whole infrastructure is only a proof of concept and not ready for production. We have left out the final interaction with P2Pool while we put together a Terms and Conditions, so we currently do not receive any Bitcoins."[7] As a proof of concept, that meant Tidbit's code was never fully functional and could not mine for Bitcoins. Tidbit's computer code is stored on a server located outside of New Jersey. *See* Certification of Jeremy Rubin at ¶ 4.

C. The Subpoenas

On December 4, 2013, the New Jersey Division of Consumer Affairs, Office of Consumer Protection issued a subpoena duces tecum and interrogatories to Jeremy Rubin d/b/a Tidbit due to an investigation being pursued by the state under the Consumer Fraud Act ("CFA"). *See* Exhibit A to Certification of Hanni M. Fakhoury. The subpoena requested production to Deputy Attorney General Glenn T. Graham of the Consumer Fraud Prosecution Section in Newark, New Jersey, by December 20, 2013. *Id.*

The subpoena requests 14 sets of documents, including Tidbit's source code and any prior version of the code. *See* Fakhoury Certification, Exhibit A, Subpoena Item #5 and Interrogatory ("Interrog.") #12. Additionally, there are 27 interrogatories requesting not just documents, but also narrative descriptions seeking, among other things:

November 9 and 11, 2013 that featured contestants working on various projects built around the Node.js computer platform. *See* http://nodeknockout.com/. Node Knockout featured sponsorships by major companies, including Amazon.com's web services division, Groupon and Paypal. *See* http://nodeknockout.com/sponsors. Tidbit won an award for achieving the highest innovation total.

[7] http://nodeknockout.com/teams/shoop-team.

- "the method, manner, and process in which the Bitcoin code was developed and deployed" (Interrog. #8)
- "the method, manner and process your customers use the Bitcoin code, including the benefit(s) of the Bitcoin code to customers" (Interrog. #9)
- the number and identity of all "websites utilized and/or . . . affected by the Bitcoin code" (Interrog. #14)
- the identity of "all persons whose computers were caused to mine for Bitcoins through the Bitcoin code" (Interrog. #15)
- the identity of "all Bitcoin wallet addresses associated with the Bitcoin code" (Interrog. #16)
- a description of the process by which "Tidbit review[s] the privacy policies of websites utilizing the Bitcoin code" (Interrog. #18)
- 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." (Interrog. #20)

See Fakhoury certification, Exhibit A. The subpoena repeatedly requests information about Bitcoins mined by Tidbit, ignoring the fact that no Bitcoins have been mined by Tidbit at all.

D. Procedural History

Mr. Graham agreed to extend the compliance deadline to January 13, 2014. *See* Fakhoury certification, Exhibit B. After Mr. Rubin and Tidbit secured representation, counsel sent a letter to Mr. Graham on January 7, 2014, notifying him Tidbit would be unable to comply with the

subpoena for two reasons. *Id.* First, the Dormant Commerce Clause would foreclose New Jersey from using state law to regulate interstate commercial activity. Second, since Tidbit's code was never functional and incapable of mining for Bitcoins, the subject matter of the subpoena was essentially moot. *Id.*

Two days later, the State responded via letter, informing Tidbit that the CFA supplied the Attorney General with investigative powers to "investigate whether any person, whether located in New Jersey or elsewhere" has violated the CFA in a way that affects New Jersey customers. *See* Fakhoury certification, Exhibit C. On January 9, 2014, counsel for Tidbit spoke with Graham directly on the phone, and Graham again agreed to extend the compliance deadline, so that Tidbit would be required to disclose a list of websites that utilized Tidbit's code by January 21, 2014 and provide responses to the state's interrogatories by January 27, 2014. *See* Fakhoury certification, Exhibit D.

On January 21, 2014, Rubin filed a complaint asserting that the subpoena duces tecum and accompanying interrogatories were unconstitutional, ultra vires and unenforceable. The complaint was accompanied by an order to show cause why the subpoena duces tecum and interrogatories should not be quashed, together with a request for temporary restraints.

ARGUMENT

A. THE DORMANT COMMERCE CLAUSE PROHIBITS NEW JERSEY'S ATTEMPT TO REGULATE INTERSTATE COMMERCE.

The Commerce Clause of the United States Constitution gives Congress the power to regulate interstate commerce. U.S. Const. art. I, § 8, cl. 3. The Commerce Clause also has a

negative or dormant power that limits the power of the state "to interfere with or burden interstate commerce." *Courier-Post Newspaper v. Cnty. of Camden*, 413 N.J. Super. 372, 392 (App. Div. 2010) (*citing W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981)). Regulations or laws that "clearly discriminate" against interstate commerce are *per se* unconstitutional. *American Booksellers Foundation v. Dean*, 342 F.3d 96, 104 (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)).

A state law that only has an indirect effect on interstate commerce will be declared invalid if the burden on interstate commerce exceeds local benefits. *See Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 372 (3d Cir. 2012) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Numerous courts have struck down state attempts to restrict Internet activity occurring in other states under the Dormant Commerce Clause. *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227, 240-41 (4th Cir. 2004); *Dean*, 342 F.3d at 104; *ACLU v. Johnson*, 194 F.3d 1149, 1161-63 (10th Cir. 1999); *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183-84 (S.D.N.Y. 1997). To the extent New Jersey is trying to use the CFA's subpoena power to investigate, and to enforce the CFA against, activity occurring online and outside the boundaries of New Jersey, its actions violate the Dormant Commerce Clause.

1. New Jersey's Attempt to Reach Conduct Occurring Outside Its Borders is a Per Se Violation of the Dormant Commerce Clause.

State laws and regulations that have the "practical effect" of regulating commerce occurring outside of New Jersey violate the Commerce Clause. *Dean*, 342 F.3d at 103. "Because

the [I]nternet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate [I]nternet activities without 'project[ing] its legislation into other States.'" *Id.* (citing *Healy*, 491 U.S. at 332); *see also Johnson*, 194 F.3d at 1161 ("the nature of the Internet forecloses the argument" that state statute regulating Internet speech only applies to intrastate communications).

In *Pataki*, the state of New York passed a law 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. There is no question that New Jersey is attempting to use the CFA to regulate Internet conduct that occurs outside the boundaries of New Jersey. Because the unique nature of the Internet allows anyone anywhere to access any website, the typical geographical limits on a state's enforcement authority is a "virtually meaningless construct on the Internet." *Pataki*, 969 F. Supp. at 169. The result here is that New Jersey is issuing a subpoena to an out of state witness concerning software stored out of state and which is accessible to every user everywhere with an Internet connection. Moreover, neither Mr. Rubin nor Tidbit have any ability to control who uses its code once it has been downloaded by anyone with an Internet connection.

To the extent the subpoena duces tecum and interrogatories at issue here are predicated on New Jersey's using the CFA to investigate and regulate activity occurring outside of the state, its conduct is a per se violation of the dormant Commerce Clause.

2. <u>The Burdens on Interstate Commerce Exceed Any Local Benefit to New Jersey.</u>

Even if this Court finds New Jersey is only attempting to indirectly regulate and affect interstate commerce, the local benefits to New Jersey do not outweigh the burden on interstate commerce. *See Sidamon-Eristoff*, 669 F.3d at 372. New Jersey certainly has a legitimate interest in trying to investigate and deter consumer fraud. But that "does not end the inquiry." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). And here, the burden on interstate commerce is great.

The dormant Commerce Clause protects against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337. Certain types of commerce typically require national regulation by Congress to create one set of rules to apply nationwide in order to create a clear standard of what is and not permitted across the country. *Johnson*, 194 F.3d at 1162 (citing *Wabash, St. L. & P.R. Co. v. Illinois*, 118 U.S. 557, 574-75 (1886)). As the Tenth Circuit has noted, the Internet is "surely" one of those mediums that require national regulation, rather than piecemeal, state-by-state legislation. *Johnson*, 194 F.3d at 1162; *see also Pataki*, 969 F. Supp. at 182. State regulations of the Internet create an "extreme burden on interstate commerce" and a "chilling effect" on the use of the Internet given fears of being hailed into another state to face civil suit or criminal prosecution. *Pataki*, 969 F. Supp. at 179.

Here, Mr. Rubin and Tidbit would be subject to inconsistent regulation if New Jersey claims Tidbit's code is somehow in violation of the CFA. Given the fact Mr. Rubin and Tidbit

have no connection to New Jersey and no ability to control who downloads their code once accessed from the Tidbit website, they cannot control which state's laws they will be subject to. The same problem extends to developers outside of New Jersey who decide to download the Tidbit code. Without knowing which court they may be hailed to if they download the code, users will likely stay clear of Tidbit, casting the chilling effect the Dormant Commerce Clause is intended to prohibit.

Thus, the subpoena and interrogatories must be quashed as they are part of New Jersey's unconstitutional attempt to regulate interstate commerce.

B. NEITHER RUBIN NOR TIDBIT HAS CONTACTS WITH NEW JERSEY SUFFICIENT TO ALLOW THE STATE TO EXERCISE PERSONAL JURISDICTION OVER THEM.

The Due Process Clause of the Fourteenth Amendment "sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011). New Jersey's long arm statute, codified in R. 4:4-4(b)(1), reaches to the limits of due process. *Avdel Corp. v. Mercure,* 58 N.J. 264, 268 (1971).

To comply with due process, a state court can only exercise personal jurisdiction over an out of state defendant if he has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); *see also Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 66 (2000). It is "essential" that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities" with the state. *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 120 (1994) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). These "fundamental concept[s] of jurisdiction" apply equally when assessing the state's long-arm jurisdiction to behavior occurring over the Internet.

Goldhaber v. Kohlenberg, 395 N.J. Super. 380, 386 (App. Div. 2007) (citing *Blakey*, 164 N.J. at 66).

Personal jurisdiction can be either "general" or "specific." *State Dept. of Treas. v. Qwest Communications Int'l, Inc.*, 387 N.J. Super. 487, 498 (App. Div. 2006). The quantum of contacts required varies with the asserted jurisdictional basis. *Waste Management*, 138 N.J. at 119. New Jersey can exercise neither general nor specific jurisdiction on Mr. Rubin or Tidbit.

1. **Mr. Rubin and Tidbit Do Not Have "Continuous and Systematic" Contacts with New Jersey, Making General Jurisdiction Improper.**

"General jurisdiction subjects the defendant to suit on virtually any claim, even if unrelated to the defendant's contacts with the forum, but is unavailable unless the defendant's activities in the forum state can be characterized as 'continuous and systematic' contacts." *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989). General jurisdiction requires "substantially more than mere minimum contacts." *Jacobs v. Walt Disney World Co.*, 309 N.J. Super. 443, 452 (App. Div. 1998) (citation omitted).

Here, there are no contacts at all between Rubin and New Jersey, much less anything that could be characterized as "continuous and systematic." Plaintiff has only been to New Jersey once, years ago, to attend his grandmother's funeral. *See* Rubin certification at ¶ 3. The servers housing Tidbit's code are not in New Jersey and Tidbit has no contracts or agreements with anyone in New Jersey. *See* Rubin certification at ¶ 4. New Jersey therefore has no basis for general jurisdiction.

2. **There Is No Specific Jurisdiction on Mr. Rubin or Tidbit Since They Did Not Target or Aim Their Conduct at New Jersey.**

Specific jurisdiction exists when the cause of action arises directly out of the defendant's contacts with the forum. *Lebel*, 115 N.J. at 322. The exercise of specific jurisdiction requires that

a defendant have "minimum contacts" with the forum state, evaluated on a "case-by-case" basis. *Waste Management*, 138 N.J. at 122. "In the context of specific jurisdiction, the minimum contracts inquiry must focus on 'the relationship among the defendant, the forum and the litigation.'" *Lebel*, 115 N.J. at 323 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The question in any case is "whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Blakey*, 164 N.J. at 67 (quoting *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 197 (1980) (quotations omitted)). In assessing specific jurisdiction, New Jersey has adopted the "effects test" of *Calder v. Jones*, 465 U.S. 783, 789 (1984). *See Blakey*, 164 N.J. at 70; *Goldhaber*, 395 N.J. Super. at 389. To establish jurisdiction, a plaintiff must show the defendant expressly target or aimed his conduct at New Jersey, so that the state was the focal point of the tortious activity. *Goldhaber*, 395 N.J. Super. at 388-89. The "mere allegation that the plaintiff feels the effect of the tortious conduct in the forum because plaintiff is located there is insufficient to satisfy *Calder*." *Imo Industries, Inc. v. Kiekert AG*, 155 F.3d 254, 263 (3d Cir. 1998). Rather, plaintiff must "point to specific activity indicating that defendant expressly aimed its tortious conduct at the forum." *Id.* at 266.

Here, the state cannot point to any specific activity that indicates Mr. Rubin or Tidbit expressly aimed any conduct towards New Jersey. Tidbit was never marketed exclusively or primarily to New Jersey customers. Once Tidbit's code was placed on the Internet for download, it was accessible to anyone in the world with an Internet connection. *See* Rubin certification at ¶ 4. While the state may claim that the code appeared on websites operated or maintained in New Jersey, it was through no purposeful act of Mr. Rubin or Tidbit. Mr. Rubin could neither direct nor control who could or would download Tidbit. Allowing New Jersey to exercise specific jurisdiction under these circumstances means that any computer developer in any state is subject

to the state's authority merely because their code is viewed online somewhere in the state, regardless of whether they direct their behavior to the specific state. Such a broad exercise of jurisdiction would violate the Fourteenth Amendment's guarantee of due process.

3. **The Principles of Personal Jurisdiction Apply to a Subpoena Issued to an Out of State Witness.**

These jurisdiction-limiting principles apply to a subpoena issued upon an out of state witness. *See Silverman v. Berkson*, 141 N.J. 412, 424-25 (1995). If the state legislature has authorized a state agency to investigate activity occurring both inside and outside the state, then a subpoena can only issue to out of state witnesses who have "purposefully availed" themselves of the privileges of the state. *Silverman*, 141 N.J. at 432; *see also* Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery,* 88 Minn. L. Rev. 968, 985 (2004). Like the test for determining whether specific jurisdiction is proper, before a court can enforce a subpoena issued to an out of state witness, it "must determine that the party subpoenaed has engaged in such deliberate conduct." *Silverman*, 141 N.J. at 432. Without "purposeful availment," "the jurisdiction to proscribe conduct in another forum would not suffice to confer jurisdiction to enforce a civil investigative demand." *Id.* at 426.

In *Silverman*, the state Supreme Court held that the State's Bureau of Securities could issue a subpoena upon an out of state witness who resided in New York because the New Jersey legislature had clearly intended for the Bureau of Securities to subpoena out of state witnesses. *Silverman*, 141 N.J. at 432. The legislature had enacted a statute authorizing the Bureau to investigate activity occurring both "within or outside of this State." N.J.S.A. 49:3-68(a)(1). Since the witness had "purposely availed himself of the privilege of entering regulated securities markets in" New Jersey, the subpoena was properly issued and could be enforced. *Silverman,* 141 N.J. at 426.

Here, unlike the Bureau of Securities' power under N.J.S.A. 49:3-68 to investigate out of state activity, the CFA statutes that empower the Attorney General to issue subpoenas in connection with CFA investigation, N.J.S.A. 56:8-3 and 56:8-4, say nothing about investigating conduct occurring outside of New Jersey. Even if the CFA permitted the State to serve a subpoena on an out of state witness, as explained above, Mr. Rubin and Tidbit have not purposefully availed themselves of the privileges and benefits of the state. Since Mr. Rubin has no systematic and continuous contacts in New Jersey, and Tidbit was not aimed at or targeted towards New Jersey, it is clear the state cannot satisfy the "purposeful availment" requirement of *Silverman*. Thus, the subpoena was improperly issued, unconstitutional, and an ultra vires act.

4. Asserting Personal Jurisdiction on Mr. Rubin and Tidbit Offends the Interests of "Fair Play and Substantial Justice."

Ultimately, personal jurisdiction, whether general or specific, requires the Court to find that "maintenance of the suit [does] not offend traditional notions of fair play and substantial justice." *Waste Management*, 138 N.J. at 124-25 (citing *World-Wide Volkswagen*, 444 U.S. at 292); *Lebel*, 115 N.J. at 327-28. To make this determination, a court must consider factors such as "(1) the burden on defendant of litigating in a foreign forum; (2) the forum's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining effective and convenient relief; (4) the interstate judicial system's interest in efficiently resolving controversies; and (5) the several states' interest in furthering substantive social policies." *Harley Davidson Motor Company, Inc. v. Advance Die Casting, Inc.*, 292 N.J. Super. 62, 75 (App. Div. 1996); *see Lebel*, 115 N.J. at 328.

These factors weigh in favor of Mr. Rubin. There is a significant burden on forcing a 19-year-old college student who lives more than 200 miles away in another state, to answer a detailed subpoena and interrogatories in New Jersey. While New Jersey certainly has an interest in investigating potential violations of the CFA, that interest is no stronger than any other state's

interest in protecting its consumers. Moreover, New Jersey can obtain effective and convenient relief through alternative means. If Tidbit's code was found on websites in New Jersey, the state could certainly investigate those websites to determine whether any potential CFA violation had occurred in intrastate commerce by individuals for whom the state has personal jurisdiction over. And given the dormant commerce clause concerns outlined above, both the interstate judicial system and the several state's interest are best served by limiting New Jersey's ability to regulate interstate commerce by not extending the state's long-arm statute to cover any computer program developer anywhere in the United States whose software is seen or used by someone in New Jersey.

Accordingly, even if the Court were to find "minimum contacts" here, it should nonetheless decline to assert jurisdiction and quash the subpoena and interrogatories.

C. IF THE SUBPOENA IS NOT QUASHED, PLAINTIFF MUST BE GIVEN IMMUNITY SINCE THE SUBPOENA COMPELS HIM TO PROVIDE INCRIMINATING TESTIMONY.

If the Court upholds the subpoena duces tecum and interrogatories, it should nonetheless find the subpoena and interrogatories infringes on Plaintiff's right to not be compelled to provide incriminating testimony against himself.

The CFA permits the recipient of a subpoena to raise their privilege against self-incrimination. Specifically, N.J.S.A. 56:8-7 states that a person who received a subpoena under the CFA and believes the testimony "may tend to incriminate him, convict him of a crime, or subject him to a penalty or forfeiture" must nonetheless comply with the request, but cannot "thereafter be prosecuted or subjected to any penalty or forfeiture in any criminal proceeding which arises out of and relates to the subject matter of the proceeding." N.J.S.A. 56:8-7. To receive immunity under this section, the recipient of a subpoena must "identify some law" as the source

for the privilege against self-incrimination. *Verniero v. Beverly Hills, Ltd., Inc.*, 316 N.J. Super. 121, 127 (App. Div. 1998).

In this case, responding to the subpoena duces tecum and interrogatories issued by the state would constitute compelled incriminating testimony under both the Fifth Amendment to the United States Constitution and New Jersey common law.

The Fifth Amendment to the United States Constitution protects an individual from being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The privilege is "applicable to any state proceeding through the due process clause of the Fourteenth Amendment" and in state proceedings, must be applied "consistent with federal constitutional standards." *Matter of Ippolito*, 75 N.J. 435, 440 (1978) (citing *Malloy v. Hogan*, 378 U.S. 1, 6 (1964)).

Under New Jersey state law, the privilege against self-incrimination, though not written into the State Constitution, is "firmly established" as part of New Jersey's common law. *Ippolito*, 75 N.J. at 440. Both New Jersey Rule of Evidence 503 and N.J.S.A. 2A:84A-19 state "every natural person has a right to refuse to disclose in an action . . . or other official any matter that will incriminate him or expose him to a penalty or a forfeiture."

To be protected by the privilege, a person must show three things: (1) compulsion; (2) incrimination; and (3) a testimonial communication or act. *In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1341 (11th Cir. 2012) (citing *United States v. Ghidoni*, 732 F.2d 814, 816 (11th Cir. 1984) and *United States v. Authement*, 607 F.2d 1129, 1131 (5th Cir. 1979) (per curiam)). Plaintiff satisfies all three prongs.

1. **<u>The Subpoena Seeks Mr. Rubin's Testimony.</u>**

First, it is clear that the subpoena seeks Mr. Rubin's "testimony." The narrative responses in the interrogatories seeking not only documents, but descriptions, lists and identities of things like websites, users and developers, and Bitcoin wallets are all clearly "testimony." *See United States v. Hubbell*, 530 U.S. 27, 35 n. 8 (2000) (Fifth Amendment intended to "prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him.").

But "testimony" refers not simply to the act of speaking words from a person's mouth, but also to the act of producing documents. *Hubbell*, 530 U.S. at 36. In essence, the Fifth Amendment is implicated anytime a person must make use of the "contents of his own mind" to communicate a statement of fact. *Curcio v. United States*, 354 U.S. 118, 128 (1957). Therefore, the act of producing documents would be "testimonial" if by producing the documents, the witness would be admitting that documents existed, were authentic, and in his possession or control. *Fisher v. United States*, 425 U.S. 391, 410 (1976).

The only way the state can defeat the privilege is to demonstrate that turning over the requested documents would not reveal anything to the government that it did not already know, and the testimony is therefore simply a "foregone conclusion." *Fisher*, 425 U.S. at 411. To satisfy this standard, 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); *see also In re Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335, 1344 (11th Cir. 2012); *United States v. Ponds*, 454 F.3d 313, 320-21