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FILED

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Division of Consumer Affairs

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STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS

In the Matter of

DATAIUM, LLC

Respondent.

Administrative Action
No. _____

CONSENT ORDER

This matter was opened by the New Jersey Division of Consumer Affairs, Office of Consumer Protection (“Division”), as an investigation to ascertain whether violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (“CFA”) have been or are being committed by Dataium LLC (“Dataium” or “Respondent”) (collectively the Division and Respondent, the “Parties”).

The Division alleges that Dataium engaged in a practice known as “history sniffing” to track the websites visited by consumers without their notice and consent. The Division further alleges that Dataium transferred consumer information to a third-party marketing company without notice and consent from users. Dataium denies the Division’s allegations and has fully cooperated with the Division’s investigation.

In the interest of settling this matter without incurring the time and expense of litigation and trial, both the Division and Dataium have agreed to resolve this matter amicably as set forth below.

1. FACTUAL BACKGROUND

1.1 Dataium is a Tennessee limited liability company, headquartered at 2525 Perimeter Place Drive, Suite 105, Nashville, Tennessee 37214-3674, which advertises and sells data analytic services within the State of New Jersey and nationwide.

1.2 Dataium is a data analytics company that serves the automotive industry. Dataium aggregates and analyzes billions of internet-based consumer car-shopping sessions to enable its clients to understand consumer demands and trends.

History-Sniffing

1.3 In October 2010, researchers from the University of California- San Diego, published a report entitled, An Empirical Study of Privacy- Violating Information Flows in JavaScript Web Applications, available at: <http://cseweb.ucsd.edu/~hovav/dist/history.pdf>, describing history sniffing as a technique whereby a person can learn about the other websites a user has visited. When a user visits a “history sniffer’s” website, that history sniffer may determine the specific websites the user has visited by creating, in javascript, a link to a “target URL in a hidden part of the page,” and then using a “browser’s DOM [or Document Object Model] interface to inspect how the link is displayed.” Since web browsers display links in different colors after a user visits a particular website, the history sniffer is able to determine the websites visited by a user based on the color of the link.

1.4 The Division alleges that in six “internal trials” over a two-year period, from November 2010 through November 2012, Dataium engaged in “history sniffing.”

1.5 The Division alleges that in Dataium’s November 2012 internal trial, Respondent tracked approximately 181,080 user visits to various car dealerships’ websites, popular search engines, and news articles. Dataium contends that its internal trials tested the total number of

website visits – approximately 181,080 for the November 2012 internal trial – made by consumers who initially visited car-shopping websites bearing Dataium’s software and then visited one or more of a group of less than 100 other websites unrelated to cars specifically selected by Dataium for trial purposes only.

1.6 The Division alleges that during Dataium’s internal trials Respondent collected the browsing history of individualized user browsers. Dataium denies the Division’s allegation. Dataium represents that the information gathered during its internal trials was aggregated for research purposes and never monetized, associated with individual names, or used for online behavioral targeting.

1.7 Dataium represents that it has destroyed all data obtained from its trials, except for data obtained during its November 11, 2012 trial, which Dataium did not destroy before the commencement of the Division’s investigation. Dataium shall destroy all data from its November 2012 trial upon the conclusion of the Division’s investigation.

1.8 The Division alleges that Dataium’s statements describing its privacy and online behavioral targeting practices did not adequately disclose that Dataium collected consumer browsing activities on other websites. Dataium denies the Division’s allegation.

Unauthorized Use of Personal Information

1.9 The Division alleges that in September 2012 Dataium entered into a “Data Supplier Test Agreement” to transfer the personal information of 400,000 consumers to Acxiom, one of the world’s largest data analytics companies, “to determine the value of marrying online behavior from Dataium with offline behavior from Acxiom.”

1.10 The Division alleges that in exchange for \$2,500.00 Dataium transferred the following information for 400,000 consumers nationwide:

- Name
- Phone
- E-mail Address
- Dataium ID
- Consumer ASI [Advanced Segment Insight] irrespective of vehicle
- First Activity Date
- First Activity Date vehicle viewed
- Last activity Date
- Number of vehicles viewed between first and last activity
- Last Activity Vehicle viewed
- #1 Vehicle Preference (with intensity rating)
- #2 Vehicle Preference (with intensity rating)
- #3 Vehicle Preference (with intensity rating)

Dataium represents that it did not possess each type of personal information referenced above for all 400,000 consumers.

1.11 The Division alleges that Dataium transferred the consumer information identified in Section 1.10 without the knowledge or express consent of the consumers. Dataium denies the Division's allegation.

1.12 The Data Supplier Test Agreement between Dataium and Acxiom, stated that:

- Records will be run through Reverse Phone Append & Reverse E-mail Append to obtain Address.
- With Name & Address Appended, Records will be sent through InfoBase enhancement to append the Acxiom Global Consulting element package.
- Once the global consulting element package is appended, and other baseline data the records will be stripped of Name and address. NOTE: Zip and Zip+4 will remain on each record.
- The anonymous file will then be transferred to Acxiom's Global Consulting Team to begin the Evaluation.

1.13 Dataium and the Division have entered into this Consent Order to resolve the Division's investigation into the Covered Conduct (as defined below) and without the need for further action.

IT IS ORDERED AND AGREED as follows:

2. EFFECTIVE DATE

2.1 This Consent Order is effective on the date that it is filed with the Division ("Effective Date").

3. DEFINITIONS

As used in this Consent Order, the following words or terms shall have the following meanings, which meanings shall apply wherever the words and terms appear in this Consent Order:

3.1 "Attorney General" shall refer to the Attorney General of the State of New Jersey and the Office of the Attorney General of the State of New Jersey.

3.2 "Clearly and Conspicuously" shall mean a statement that, regardless of the medium in which it is made, is presented in such type, size, color, contrast, duration, location and audibility, compared to the other information with which it is presented, that it is readily apparent and understandable and in language and terms used in accordance with their common or ordinary usage and meaning. If such statement modifies, explains or clarifies other information with which it is presented, it must be presented in proximity to the information it modifies, explains or clarifies and in a manner that is readily apparent and understandable.

3.3 "Consumer" shall refer to any Person, defined in accordance with N.J.S.A. 56:8-1(d), who is offered Merchandise, defined in accordance with N.J.S.A. 56:8-1(c), for Sale, defined in accordance with N.J.S.A. 56:8-1(e).

3.4 “Consumer Information” shall mean information Respondent collects from or about a person, including but not limited to: (a) first and last name; (b) home or other physical address, including street name and city; (c) email address or other online contact information, such as a user identifier or screen name; (d) unique identifier, such as a unique mobile device identifier, I.P. address, or cookie identifier; (e) telephone number; (f) contact lists or address books; or (g) any other information about a person that is combined with subsections (a) through (f) above.

3.5 “Covered Conduct” shall mean:

- (a) Dataium’s alleged use of history sniffing to track specific websites visited by users from November 2010 through November 2012; and
- (b) Dataium’s alleged transfer of the personally identifiable information of 400,000 consumers to Acxiom without the notice and consent of those consumers.

3.6 “Person[s],” “Consumer,” or “User” shall mean “Person” as defined in N.J.S.A. 56:8-1(d).

3.7 “Represent” shall mean to state or imply through claims, statements, questions, conduct, graphics, symbols, lettering, formats, devices, language, documents, messages or any other manner or means by which meaning might be conveyed. This definition applies to other forms of the word “Represent” including, without limitation, “Representation” and “Misrepresent.”

3.8 “State” shall refer to the State of New Jersey.

4. INJUNCTIVE RELIEF

4.1 Respondent shall not engage in any unfair or deceptive acts or practices in the conduct of its business in the State and shall comply with all applicable State and/or Federal

laws, rules and regulations as now constituted or as may hereafter be amended including, but not limited to, the CFA.

4.2 Respondent shall not collect information about the websites visited by consumers without explicitly disclosing the manner in which it collects such information and offering consumers a mechanism for opting-out of such information collection.

4.3 Respondent shall not, sell, rent, or otherwise transfer Consumer Information to persons or entities other than the Dataium clients owning or operating the websites on which consumers submitted information without those consumers' express consent or is otherwise permitted to do so by providing proper disclosure about the manner in which it intends to collect and use such information and offering a mechanism for opting-out of such information collection in accordance with this Consent Order.

4.4 Respondent shall not misrepresent or omit a material fact regarding: (1) the purposes for which it collects and uses Consumer Information; or (2) the extent to which consumers may exercise control over the collection, use, or disclosure of their Consumer Information.

4.5 No later than 30 days from the Effective Date, Respondent shall provide a page or pages within its website to provide consumers with information about the types of Consumer Information it collects and the manner such Consumer Information is used ("Consumer Information Page"). A link to the Consumer Information Page shall be clearly and conspicuously posted on the homepage of Respondent's website(s). Respondent shall include provisions in its customer agreements requiring its customers to include a link to its Consumer Information Page on their respective privacy policy pages. The contents of the Consumer Information Page shall include:

- a. a detailed list of the types of Consumer Information Respondent collects from consumers from both online and offline sources;
- b. a detailed description of how each type of Consumer Information listed in subsection (a) is maintained and used and whether such Consumer Information is transferred to third parties; and
- c. information about how consumers can restrict, limit, opt-out or otherwise control the Consumer Information collected by Respondent about them.

4.6 Within 90 days of the Effective Date, Respondent shall implement a privacy program (“Privacy Program”), that contains comprehensive privacy controls and procedures and that is designed to protect the privacy and confidentiality of Consumer Information. Respondent shall maintain the Privacy Program for a period of at least five years after the Effective Date.

4.7 The Privacy Program shall include:

- a. the designation of an employee or employees responsible for such program;
- b. an independent privacy assessment report (“Privacy Assessment Report”); and
- c. the designation and implementation of reasonable privacy controls and procedures to assess the risks identified in the Privacy Assessment Report, and regular testing or monitoring of the effectiveness of those privacy controls and procedures.

4.8 Respondent’s Privacy Assessment Report shall be prepared by an independent third-party professional who uses procedures and standards generally accepted in the profession. A person qualified to prepare such Privacy Assessment Report shall have a minimum of three years of experience in the field of privacy and data protection. All persons preparing a Privacy Assessment Report shall be approved by the New Jersey Office of the Attorney General, Division of Law at its sole discretion. The reporting period shall cover: (1) the first 365 days after the Effective Date; and (2) every two year period thereafter for five years after the Effective Date. Respondent shall submit the Privacy Assessment Report to the Division no later than ten days after each reporting period. The Privacy Assessment Report shall:

- a. set forth the privacy controls that Respondent has implemented and maintained during the reporting period;
- b. explain how such privacy controls are appropriate to adequately protect the Consumer Information collected by Respondent;
- c. identify each type of Consumer Information collected by Respondent, the purpose(s) for which each type of Consumer Information is collected, and how each type of Consumer Information is used;
- d. identify each third-party receiving Respondent's Consumer Information and the type of Consumer Information each third-party is receiving;
- e. measure the effectiveness of Respondent's data collection opt-out mechanism and propose improvements to such opt-out;
- f. identify reasonably foreseeable material risks, both internal and external, that could result in Respondent's unauthorized collection, use, or disclosure of Consumer Information; and
- g. certify that Respondent's privacy controls are operating with sufficient effectiveness to protect the privacy of Consumer Information and that the controls have so operated throughout the reporting period.

4.9 Within 30 days of the Effective Date, Respondent shall:

- a. deliver this Consent Order to Respondent's executive management;
- b. deliver this Consent Order to employees of Respondent having supervisory responsibilities for implementation of the Privacy Program; and
- c. deliver this Consent Order to Respondent's attorneys whose responsibilities include providing advice about the privacy of Consumer Information.

4.10 Respondent shall cooperate with any further requests made by the Office of the Attorney General and the Director, with respect to any practices, documents, or information relating to itself or any third-party with which it has or has had a business relationship with. Respondent shall produce all such requested documents or information within 30 days of receiving such request.

5. SETTLEMENT PAYMENT

5.1 The Parties have agreed to a settlement of the Division's investigation into the Covered Conduct for the amount of Four Hundred Thousand and 00/100 (\$400,000.00) ("Settlement Payment").

5.2 From the Settlement Payment, Three Hundred One Thousand and 00/100 Dollars (\$301,000.00) shall be suspended and automatically vacated within five years of the Effective Date ("Suspended Amount"), provided:

- a. Respondent complies with the restraints and conditions set forth in this Consent Order; and
- b. Respondent does not engage in any acts or practices in violation of the CFA.

5.3 In the event that Respondent fails to comply with the restraints and conditions of this Consent Order, the entire Suspended Amount shall be immediately due and payable to Plaintiffs.

5.4 The Settlement Payment, excluding Suspended Amount, consists of Forty-Seven Thousand Two Hundred Forty-One and 01/100 Dollars (\$47,241.01) as a compromise of the claim, pursuant to N.J.S.A. 56:8-13; Thirty Thousand Eleven and 00/100 Dollars (\$30,011.00), as reimbursement of the Division's attorneys' fees; One Thousand Seven Hundred Forty-Seven and 99/100 Dollars (\$1,747.99) as reimbursement of the Division's investigative costs; and Twenty Thousand Dollars (\$20,000.00) to be used at the sole discretion of the Attorney General for the promotion of consumer privacy programs, including the purchase of investigative tools and the retention of technologies, consultants, and experts.

5.5 Respondent shall make the remaining Settlement Payment, excluding Suspended Amount, of Ninety-Nine Thousand and 00/100 (\$99,000.00) in installments as follows:

- a. Respondent shall pay Nineteen Thousand and 00/100 Dollars (\$19,000.00) on or before the Effective Date; and
- b. Respondent shall pay the remaining Eighty Thousand and 00/100 Dollars (\$80,000.00) in four equal installments of Twenty Thousand and 00/100 (\$20,000.00) due six months after the Effective Date, one year after the Effective Date, and 18 months after the Effective Date, and two years after the Effective Date.

5.6 The Settlement Payment shall be made by bank check, attorney trust account check, or other guaranteed funds made payable to the "New Jersey Division of Consumer Affairs" and forwarded to the undersigned:

Jah-Juin Ho, Deputy Attorney General
Office of the Attorney General
Division of Law
124 Halsey Street, 5th Floor
Newark, New Jersey 07101

5.7 Upon making the Settlement Payment, Respondent shall immediately be fully divested of any interest in, or ownership of, the monies paid. All interest in the monies, and any subsequent interest or income derived therefrom, shall inure entirely to the benefit of the Division pursuant to the terms herein.

6. GENERAL PROVISIONS

6.1 This Consent Order is entered into by the Parties as their own free and voluntary act and with full knowledge and understanding of the obligations and duties imposed by this Consent Order.

6.2 This Consent Order shall be governed by, and construed and enforced in accordance with, the laws of the State.

6.3 The Parties have negotiated, jointly drafted and fully reviewed the terms of this Consent Order and the rule that uncertainty or ambiguity is to be construed against the drafter shall not apply to the construction or interpretation of this Consent Order.

6.4 This Consent Order contains the entire agreement among the Parties. Except as otherwise provided herein, this Consent Order shall be modified only by a written instrument signed by or on behalf of the Parties.

6.5 Except as otherwise explicitly provided in this Consent Order, nothing herein shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State.

6.6 If any portion of this Consent Order is held invalid or unenforceable by operation of law, the remaining terms of this Consent Order shall not be affected.

6.7 This Consent Order shall be binding upon Respondent as well as its owners, officers, directors, managers, agents, employees, representatives, subsidiaries, successors and assigns, and any Person through which it may now or hereafter act, as well as any Persons who have authority to control or who, in fact, control and direct its business.

6.8 This Consent Order shall be binding upon the Parties and their successors in interest. In no event shall assignment of any right, power or authority under this Consent Order avoid compliance with this Consent Order.

6.9 This Consent Order is entered into by the Parties for settlement purposes only, and does not constitute an admission of liability, or a finding or admission of any wrongdoing or of the validity of any claim alleged herein. Neither the fact of, nor any provision contained in this Consent Order shall be construed as an approval, sanction or authorization by the Division or any other governmental unit of the State of any act or practice of Respondent. Neither the

existence of, nor the terms of this Consent Order shall be deemed to constitute evidence or precedent of any kind except in: (a) an action or proceeding by one of the Parties to enforce, rescind or otherwise implement any or all of the terms herein; or (b) an action or proceeding involving a Released Claim to support a defense of res judicata, collateral estoppel, release or other theory of claim preclusion, issue preclusion or similar defense.

6.10 Unless otherwise prohibited by law, any signatures by the Parties required for filing of this Consent Order may be executed in counterparts, each of which shall be deemed an original, but all of which shall together be one and the same Consent Order.

6.11 The Parties Represent and warrant that their signatories to this Consent Order have authority to act for and bind the respective Parties.

7. RELEASE

7.1 In consideration of the payments, undertakings, mutual promises and obligations provided for in this Consent Order and conditioned on Respondent making the Settlement Payment, the Division hereby releases Respondent from any and all civil claims or Consumer related administrative claims, to the extent permitted by State law, which the Division could have brought prior to the Effective Date against Respondent for violations of the CFA arising out of the Covered Conduct ("Released Claims").

7.2 Notwithstanding any term of this Consent Order, the following do not comprise Released Claims: (a) private rights of action; (b) actions to enforce this Consent Order; and (c) any claims against Respondent by any other agency or subdivision of the State.

8. PENALTIES FOR FAILURE TO COMPLY

8.1 The Attorney General (or designated representative) shall have authority to enforce the injunctive provisions of this Consent Order or to seek sanctions for violations hereof or both.

8.2 The Parties agree that any future violations of the injunctive provisions of this Consent Order and the CFA shall constitute a second or succeeding violation under N.J.S.A. 56:8-13 and that Respondent may be liable for enhanced civil penalties, as provided therein.

9. COMPLIANCE WITH ALL LAWS

9.1 Except as provided in this Consent Order, no provision herein shall be construed as:

- a. Relieving Respondent of its obligation to comply with all State and Federal laws, regulations or rules, as now constituted or as may hereafter be amended, or as granting permission to engage in any acts or practices prohibited by any such laws, regulations or rules; or
- b. Limiting or expanding any right the Attorney General or the Director may otherwise have to obtain information, documents or testimony from Respondent pursuant to any State or Federal law, regulation or rule, as now constituted or as may hereafter be amended, or limiting or expanding any right Respondents may otherwise have pursuant to any State or Federal law, regulation or rule, to oppose any process employed by the Attorney General or the Director to obtain such information, documents or testimony.

10. NOTICES UNDER THIS CONSENT ORDER

10.1 Except as otherwise provided herein, any notices or other documents required to be sent to the Attorney General and the Director or the Respondent pursuant to this Consent Order shall be sent by United States mail, Certified Mail Return Receipt Requested, or other nationally recognized courier service that provides for tracking services and identification of the

Person signing for the documents. The notices and/or documents shall be sent to the following addresses:

For the Division:

Jah-Juin Ho, Deputy Attorney General
Office of the Attorney General
Division of Law
124 Halsey Street, 5th Floor
Newark, New Jersey 07101

For the Respondent:

Craig A. Domalewski, Esq.
Dughi, Hewit & Domalewski, P.C.
340 North Avenue
Cranford, New Jersey 07016

IT IS ON THE 15th DAY OF November, 2013 SO ORDERED.

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____


ERIC T. KANEFSKY, DIRECTOR
DIVISION OF CONSUMER AFFAIRS

**THE PARTIES CONSENT TO THE FORM, CONTENT AND ENTRY OF THIS
CONSENT ORDER ON THE DATES BESIDE THEIR RESPECTIVE SIGNATURES.**

FOR THE DIVISION:

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By:  _____

Jah-Juin Ho
Deputy Attorney General

Dated: November 15, 2013

Glenn Graham
Deputy Attorney General

Edward Mullins
Deputy Attorney General

Kevin Jespersen
Assistant Attorney General

Brian McDonough
Assistant Attorney General

FOR THE RESPONDENT:

DATAIUM LLC

By: 

Jason Ezell, President

Dated: 11-12, 2013

DUGHI, HEWIT & DOMALEWSKI, P.C.
ATTORNEY FOR THE RESPONDENT

By: 

Craig A. Domalewski, Esq.
Partner

Dated: 11-14, 2013