

BEFORE THE  
FEDERAL TRADE COMMISSION

In the matter of:

Sears Holdings Management Corporation

FTC Docket No. C-4264

October 30, 2017

**PETITION OF SEARS HOLDINGS MANAGEMENT CORPORATION  
TO REOPEN AND MODIFY FINAL ORDER**

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## INTRODUCTION

Pursuant to Section 2.51 of the Rules of Practice and Procedure of the Federal Trade Commission (the “**FTC**” or the “**Commission**”), 16 C.F.R. § 2.51, Sears Holdings Management Corporation (together with its affiliates and subsidiaries, “**Sears**” or the “**Company**”) hereby submits to the Commission this petition (the “**Petition**”) to reopen and modify the Final Order entered by the Commission on August 31, 2009, in *In the Matter of Sears Holdings Management Corporation*, FTC docket number C-4264 (the “**Order**”).

The Commission entered the Order after determining that, from approximately April 2007 to January 2008, the Company disseminated a desktop software application through its websites that contained inadequate disclosures regarding the scope of the application’s data collection. Among other mandates, the Order required Sears, in Parts II and III, to take several steps related to the specific application at issue. In addition, the Order required Sears, in Part I, to disseminate all “Tracking Applications” (as that term is defined in the Order) in a specified manner, and to make certain disclosures and obtain consent using processes stipulated by the Order, for a twenty-year term.

Sears has complied with its obligations under the Order, and there has been no allegation otherwise since the Order took effect eight years ago. Sears does not seek to modify or set aside the Order’s core continuing requirements: to “clearly and prominently” provide notice and obtain consent regarding applications that may not align with consumer expectations.

Today, however, changed circumstances demonstrate that the now eight-year-old Order defines “Tracking Applications” too broadly, in a manner that puts Sears out of step with current market practices without a corresponding benefit in combatting threats to consumer privacy. The definition of Tracking Application in the Order applies to nearly all software on all platforms, including those that bear little relation to the desktop software application that gave rise to the Order, in a way that does not align with today’s mobile application ecosystem and consumer expectations. In addition, the competitive burdens imposed by the Order’s overly broad definition of Tracking Application are heavy, and significantly disadvantage Sears in the marketplace.

Sears therefore seeks modest changes that would align the Order with the Commission’s more recent consent orders, reports, and guidance materials, which include carve-outs for certain commonly accepted practices. For the reasons explained herein, Sears petitions the Commission to modify the Order on the grounds of (1) changed circumstances, because the definition of Tracking Application has become impracticable and forbids intra-application activities that are now consistent with both consumer expectations and FTC guidance, and (2) the public interest, because the Order’s current definition of Tracking Application unnecessarily restricts Sears’ ability to compete in the mobile application marketplace.

## RELIEF REQUESTED

For the reasons set forth herein, Sears requests that the FTC amend the Order to exclude monitoring, recording or transmitting information that involves (a) the configuration of the software program or application itself; (b) whether the program or application is functioning as represented; or (c) the consumer's use of the program or application itself.

This request would require changing only one term of the Order. Specifically, Sears requests that the Order's definition of "Tracking Application" be modified to read (proposed addition in underlined text):

"Tracking Application" shall mean any software program or application disseminated by or on behalf of respondent, its subsidiaries or affiliated companies, that is capable of being installed on consumers' computers and used by or on behalf of respondent to monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed, unless the information monitored, recorded, or transmitted is limited solely to the following: (a) the configuration of the software program or application itself; (b) information regarding whether the program or application is functioning as represented; or (c) information regarding consumers' use of the program or application itself.

As explained below, this proposed modification is necessary to carve out commonly accepted and expected behaviors from the scope of the Order. It would not modify the Order's core continuing mandate—to provide notice to consumers when software applications engage in potentially invasive tracking—but it would exclude, through sub-parts (a) and (b), activities common to all modern software applications and, through sub-part (c), information tracking that is commonly accepted by consumers and that does not present the type of risks to consumer privacy that the Order was intended to remedy. This proposed modification mirrors language that the FTC has used to exclude such commonly accepted practices from more recent consent orders.

## ARGUMENT

### I. Background

#### A. Sears' Transformation

Sears is an iconic American company, an employer of well over 100,000 individuals across more than a thousand stores, and the country's leading provider of home services.<sup>1</sup> Sears is also a leading retailer of home appliances, tools, lawn and garden supplies, fitness equipment, automotive repair, and connected solutions, and offers a number of flagship brands, including Kenmore, DieHard, Jaclyn Smith, Joe Boxer, and Adam Levine. Like many physical retailers that historically focused on transactional sales strategies and brick-and-mortar storefronts, Sears is affected by the ongoing dramatic transformation of the retail industry and the shift towards commerce enabled by the Internet, mobile connectivity, social networks, and social media.<sup>2</sup> The Company's Chairman and Chief Executive Officer recently noted that "The past year will be remembered as one of the most challenging periods for 'brick and mortar' retailers—and our company was one of the many affected by these headwinds."<sup>3</sup>

In response, Sears has adopted a transformational strategy to reimagine the way the Company interacts with its core customers. This strategy leverages Shop Your Way, Sears' free, membership-based social shopping platform that allows members to obtain rewards points, access personalized services and experiences (such as Sears' Personal Shopper service or in-vehicle pick-ups, returns, and exchanges), and utilize a network of Shop Your Way partners (such as Uber, Synapse/Time, Inc., and Restaurant.com).<sup>4</sup> The Shop Your Way platform has tens

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<sup>1</sup> SHC Staff, *Sears Holdings Continues to Contribute Significant Value to the U.S. Retail Industry and Our Local Communities*, SHC Speaks (May 25, 2017), <http://blog.searsholdings.com/shc-updates/sears-holdings-continues-to-contribute-significant-value-to-the-u-s-retail-industry-and-our-local-communities/> ("As one of the nation's largest and longest standing retailers, Sears Holdings has been a major employer in the U.S. for decades.").

<sup>2</sup> See, e.g., Sears Holdings Corporation, Annual Report (Form 10-K), at 2 (Mar. 21, 2017), *available at* <https://searsholdings.com/invest/annual-reports>.

<sup>3</sup> Eddie Lampert, *SHC Chairman and CEO: "We Are Fighting Like Hell,"* SHC Speaks (May 11, 2017), <http://blog.searsholdings.com/eddie-lampert/shc-chairman-and-ceo-we-are-fighting-like-hell/>.

<sup>4</sup> See, e.g., Press Release, Sears Holdings, *Sears Holdings Provides Strategic Restructuring Update* (June 13, 2017), *available at* <https://searsholdings.com/press-releases/pr/2047> ("Since the beginning of the calendar year 2017, we have taken decisive steps to improve our operational performance, enhance our financial flexibility and drive our strategic transformation, including: . . . [c]ontinued growth of our Shop Your Way ecosystem through strategic partnerships and value offerings, including recently announced partnerships with Citi and Time Inc. . . . Going forward, we will focus our investments to drive the growth of our valuable assets, such as our Shop Your Way platform . . .").

of millions of participating members, as well as thousands of business partners,<sup>5</sup> and Shop Your Way members now account for over 70 percent of Sears’ sales.<sup>6</sup> As the Company’s Chairman and Chief Executive Officer described it, the end-result of Sears’ digital transformation is “a company focused on serving members broadly through Shop Your Way rather than exclusively or predominantly through our stores. Our stores remain extremely important to our future, but as part of an overall focus on serving our Shop Your Way members.”<sup>7</sup>

Sears is at an inflection point in its transition from a brand-driven, brick-and-mortar retailer to a member-centric retailer that combines digital commerce and marketing channels with Sears’ extensive retail footprint. Sears’ members are increasingly engaging with the Company through mobile channels—from 2015 to 2016, for example, Sears’ online sales increased 100 percent and mobile traffic increased nearly 50 percent. This focus on Sears’ members’ digital experience is essential to its approach to combining digital and physical distribution channels, and in 2015 Sears categorized 74 percent of its sales as “integrated” in this respect.<sup>8</sup>

The development, distribution, and adoption of mobile software applications (“**mobile apps**”) are therefore integral to Sears’ transformation.<sup>9</sup> Sears currently operates more than a dozen mobile apps,<sup>10</sup> ranging from the Company’s flagship Sears, Kmart, and Shop Your Way apps, to apps that allow consumers to manage connected devices sold under the umbrella of Sears’ flagship brands (*e.g.*, the Diehard Smart Battery Maintainer), to social discovery and shopping apps (*e.g.*, Fount), to apps that provide personal services to Sears’ members (*e.g.*, Personal Shopper by Shop Your Way, Shop Your Way Relay). Consumers’ adoption of Sears’ mobile

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<sup>5</sup> SHC Staff, *supra* note 1 (“Our Shop Your Way platform has tens of millions of Members actively engaging with us both in-store and online, as well as a rapidly expanding partnership network of thousands . . .”).

<sup>6</sup> Eddie Lampert, *Our Chairman and CEO Shared His Thoughts Today with the Company’s Associates About 2016 and Our Continued Strategy to Transform Our Company and Return to Profitability*, SHC Speaks (Mar. 9, 2017), <https://blog.searsholdings.com/eddie-lampert/our-chairman-and-ceo-shared-his-thoughts-today-with-the-companys-associates-about-2016-and-our-continued-strategy-to-transform-our-company-and-return-to-profitability/>.

<sup>7</sup> Eddie Lampert, *Committed to our Members, Kmart and our Transformation*, SHC Speaks (Oct. 3, 2016), <https://blog.searsholdings.com/eddie-lampert/committed-to-our-members-kmart-and-our-transformation/>.

<sup>8</sup> Sears Holdings, *Chairman’s Letter* (Feb. 25, 2016), <https://searsholdings.com/invest/chairmans-letters/february-2016>.

<sup>9</sup> *See* Aff. of E. Chung ¶ 7.

<sup>10</sup> *See id.* ¶ 7.

apps will enable Sears to further leverage its physical assets in a retail environment that is increasingly digital.<sup>11</sup>

The centrality of mobile apps to the Company’s long-term strategy is illustrated by Sears’ strategic priorities. Sears is focused on attracting more Shop Your Way members, increasing the engagement of those members, and encouraging Shop Your Way members to use Sears’ mobile app–driven integrated retail offerings.<sup>12</sup> These offerings include Shop Your Way’s Integrated Fulfillment option, where members can use their mobile apps to initiate pick-ups, returns, and exchanges without ever having to leave their cars.<sup>13</sup> Despite these efforts, Sears still faces intense competitive pressure to develop its digital and integrated-retail capabilities, particularly given the ascendance of digital-first retailers.<sup>14</sup>

## **B. The 2009 FTC Complaint and Order**

In 2009, the FTC issued a Complaint based on a type of desktop software application that has since fallen out of favor in the marketplace. That application tracked user activities and collected personal information beyond the boundaries of the application itself. By contrast, all of Sears’ current mobile apps—like the vast majority of applications on the market today—are available only through app stores operated by Apple and Google,<sup>15</sup> and do not involve tracking of personal information outside of the Sears family of apps.<sup>16</sup> However, the broad definition of “Tracking Application” in the Order nonetheless encompasses all of Sears’ current mobile apps, forcing Sears to handle disclosures differently than other companies with mobile apps and disadvantaging Sears in the marketplace.<sup>17</sup>

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<sup>11</sup> *See id.*

<sup>12</sup> Lampert, *supra* note 6; *see also* Aff. of E. Chung ¶ 7.

<sup>13</sup> Sears Holdings, *supra* note 8.

<sup>14</sup> *See, e.g.*, John Hagel III et al., Deloitte Center for the Edge, *The Retail Transformation: Cultivating Choice, Experience, and Trust* (2015), [https://dupress.deloitte.com/content/dam/dup-us-en/articles/retail-transformation-choice-experience-trust/DUP-955\\_Future-of-retail\\_vFINAL.pdf](https://dupress.deloitte.com/content/dam/dup-us-en/articles/retail-transformation-choice-experience-trust/DUP-955_Future-of-retail_vFINAL.pdf).

<sup>15</sup> *See* Aff. of E. Chung ¶ 13.

<sup>16</sup> *See id.* ¶ 8.

<sup>17</sup> *See id.* ¶ 9.

1. *The FTC's concern about tracking consumers outside of their use of a given application gave rise to the Order.*

The desktop software application that prompted the FTC's Complaint had the capability to track users' activities outside of the application's boundaries. Significantly, that application supported the tracking of consumers' online browsing, which included most Internet activity that a consumer engaged in while the application was installed on the consumer's machine.

The FTC's Complaint and press releases regarding the software illustrate that the FTC was particularly concerned with this ability to track users online beyond the confines of the application. The FTC emphasized that the application permitted the Company to track sessions "including information exchanged between consumers and websites other than those owned, operated, or affiliated with [the Company]" and "information provided in secure sessions when interacting with third-party websites."<sup>18</sup> The Complaint also demonstrated concern regarding the potential for collection and tracking of consumers' sensitive personal information outside their use of the application. For example, the Complaint noted that the tracked information included the text of secure pages, rather than just "information about websites consumers visited and links that they clicked."<sup>19</sup> Ultimately, the Complaint hinged on the allegation that the Company's "failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice."<sup>20</sup>

The first sentence of the FTC's press release announcing the initial settlement drove home this focus: "Sears Holdings Management Corporation . . . has agreed to settle [FTC] charges that it failed to disclose adequately the scope of consumers' personal information it collected via a downloadable software application."<sup>21</sup> The FTC's press release accompanying the final consent order similarly highlighted that the application "collected consumers' personal information transmitted in [online secure] sessions."<sup>22</sup> It is therefore clear from the FTC's Complaint and press releases that the FTC was particularly concerned about the potential disconnect between consumer expectations and the software's operation with respect to collection of consumer

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<sup>18</sup> Complaint para. 13; *see also* Press Release, FTC, Sears Settles FTC Charges Regarding Tracking Software (June 4, 2009), *available at* <https://www.ftc.gov/news-events/press-releases/2009/06/sears-settles-ftc-charges-regarding-tracking-software>.

<sup>19</sup> Complaint para. 12.

<sup>20</sup> *Id.* para. 13.

<sup>21</sup> Press Release, *supra* note 18.

<sup>22</sup> Press Release, FTC, FTC Approves Final Consent Order Requiring Sears to Disclose the Installation of Tracking Software Placed on Consumers Computers; FTC Approves Final Consent Order in Matter Concerning Enhanced Vision Systems, Inc. (Sept. 9, 2009), *available at* <https://www.ftc.gov/news-events/press-releases/2009/09/ftc-approves-final-consent-order-requiring-sears-disclose>.



personal information entered during consumers' Internet sessions—behavior decidedly outside of the application's boundaries.

2. *The Order's definition of Tracking Application is broader than more recent FTC precedent.*

The Order defines "Tracking Application" as follows:

"Tracking Application" shall mean any software program or application disseminated by or on behalf of respondent, its subsidiaries or affiliated companies, that is capable of being installed on consumers' computers and used by or on behalf of respondent to monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed.<sup>23</sup>

Although the software that led to the Complaint involved a desktop software application, the combined effect of the Order's definitions of Computer and Tracking Application is that virtually all software on all platforms is covered by the Order. In today's world, all of Sears' mobile apps—and almost any software application—is capable of "monitor[ing], record[ing], or transmit[ing] information about activities occurring on [devices] on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the [devices] on which it is installed."

For this reason, more recent FTC precedent has recognized exceptions to terms such as Tracking Application, to allow for the normal functioning of computer applications in a way that is expected by consumers and to not unfairly disadvantage companies in the market. For example, the definition of tracking software in a 2013 FTC consent order excludes circumstances where "(a) the activity involves transmission of information related to the configuration of the software program or application itself; (b) the transmission is limited to information about whether the program is functioning as intended; or (c) the activity involves a consumer's interactions with respondent's websites and/or forms."<sup>24</sup>

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<sup>23</sup> In turn, the Order defines a "Computer" as any "electronic product or device" that can "download, install, or run any software program," and "play any digital audio, visual, or audiovisual content."

<sup>24</sup> *In the Matter of Compete, Inc.*, Dkt. No. C-4384 (FTC Feb. 20, 2013), available at <https://www.ftc.gov/sites/default/files/documents/cases/2013/02/130222competedo.pdf> [hereinafter 2013 Compete Order].

A 2012 FTC consent order contains similar exceptions.<sup>25</sup> The definition of tracking software in that order excludes circumstances where “(a) the activity involves transmission of information related to the configuration of the software program or application itself; (b) the activity involves a consumer’s interactions with respondent’s websites, services, applications, and/or forms; or (c) the activity involves a consumer’s interactions with respondent’s member merchants and that information is collected, retained, or used only as necessary for the purpose of providing the consumer’s reward service benefits for transactions involving those merchants.”<sup>26</sup>

In comparison, the Sears Order is uniquely broad, insofar as it defines “Tracking Application” to include applications that merely track activity related to the normal functioning of the application and the consumer’s interactions with the application—thereby covering all of Sears’ mobile apps.

### C. The Modern Mobile App Ecosystem

Changes in technology and consumer expectations, particularly in the mobile app ecosystem, have rendered the Order’s definition of Tracking Application obsolete and impractical. At the time of the Complaint and subsequent Order, the mobile app ecosystem was in its infancy—the Apple App Store opened in July 2008, and Google Play’s predecessor, Android Market, first launched in October 2008. Early offerings were “a kitschy catalog of novelty applications,”<sup>27</sup> such as lighthearted mobile apps that, though popular, did not presage a paradigm shift in the way software is developed and distributed.<sup>28</sup> Like many businesses, Sears’ early efforts at adapting to the emerging mobile ecosystem were focused on developing mobile-optimized versions of its e-commerce websites.<sup>29</sup> That is no longer the case, but the Order’s definition of Tracking Application has led to unintended negative consequences for Sears in the critical mobile app marketplace.

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<sup>25</sup> *In the Matter of Upromise, Inc.*, Dkt. No. C-4351 (FTC Apr. 3, 2012), available at <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120403upromisedo.pdf> [hereinafter 2012 Upromise Order].

<sup>26</sup> *Id.*

<sup>27</sup> Jenna Wortham, *Apple’s Game Changer, Downloading Now*, N.Y. Times (Dec. 5, 2009), <http://www.nytimes.com/2009/12/06/technology/06apps.html>.

<sup>28</sup> Douglas MacMillan & Peter Burrows, *Inside the App Economy*, Bloomberg Businessweek (Oct. 22, 2009), <https://www.bloomberg.com/news/articles/2009-10-22/inside-the-app-economy> (describing popular apps such as Farmville, which allows users to grow and sell digital crops, or “I Am T-Pain,” an app which allowed users to mimic the popular performer’s voice).

<sup>29</sup> *See* Aff. of E. Chung ¶ 6.

1. *The Order does not account for the dramatic growth and consolidation of the mobile app ecosystem, which did not resemble its current form at the time of the Complaint and subsequent Order.*

At the time of the Order, many experts were skeptical that app stores would evolve into a dominant means for distributing software. Indeed, in July 2009—approximately one month after the FTC announced its Complaint and proposed Order—Google’s vice president for engineering declared that “the web has won,” and that “the browser . . . will become the platform that matters” for the delivery of software applications.<sup>30</sup> In other words, it appeared that software would continue to be distributed in the manner contemplated by the Order, despite the nascent emergence of the mobile app ecosystem. Experts believed that mobile-optimized websites’ low development costs, ability to be indexed by search engines, and widespread availability offered the best approach for accommodating mobile users.<sup>31</sup>

Yet the popularity of app stores in fact grew exponentially in the months and years subsequent to the Order. On September 28, 2009, Apple announced that apps had been downloaded two billion times, with 85,000 apps available on the App Store;<sup>32</sup> less than a year later, Apple announced that downloads and number of apps had tripled (to 6.5 billion downloads and 250,000 apps).<sup>33</sup> The market for Android apps experienced a similar trajectory, with exponential growth in the number of apps and downloads subsequent to the Complaint and Order.<sup>34</sup> Apple and Google’s app platforms now both exceed 2 million apps available for download,<sup>35</sup> with Apple announcing over 140 billion app downloads as of September 2016.<sup>36</sup>

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<sup>30</sup> Brian X. Chen, *Google Says Mobile App Stores Have No Future*, Wired (July 17, 2009), <https://www.wired.com/2009/07/google-app-store/>.

<sup>31</sup> See, e.g., DudaMobile, *Mobile Web vs. Mobile Apps*, DudaBlog (Sept. 7, 2009) <https://www.dudamobile.com/blog/mobile-web-vs-mobile-apps/#>; see also Aff. of E. Chung ¶ 6 (noting that “in 2009, the Sears mobile app amounted to little more than an in-app display of the Sears website that was accessible via the Internet”).

<sup>32</sup> Press Release, Apple, *Apple’s App Store Downloads Top Two Billion* (Sept. 28, 2009), available at <http://www.apple.com/pr/library/2009/09/28Apples-App-Store-Downloads-Top-Two-Billion.html>.

<sup>33</sup> Press Release, Apple, *Statement by Apple on App Store Review Guidelines* (Sept. 9, 2010), available at <http://www.apple.com/pr/library/2010/09/09Statement-by-Apple-on-App-Store-Review-Guidelines.html>.

<sup>34</sup> See, e.g., MG Siegler, *Google: Android Cost “Isn’t Material” for the Company – Android Search Up 300% in 2010*, TechCrunch (July 15, 2010), <https://techcrunch.com/2010/07/15/android-costs/> (noting that there were 70,000+ apps available in the Android Market as of September 2010).

<sup>35</sup> Jordan Golson, *Apple’s App Store Now Has Over 2 Million Apps*, The Verge (June 13, 2016), <http://www.theverge.com/2016/6/13/11922926/apple-apps-2-million-wwdc-2016> (Apple announcing over 2 million apps available in June 2016); AppBrain, *Number of Android Applications*,

The growth and dominance of Apple and Google’s app platforms demonstrate both the widespread adoption of mobile apps as a mechanism for distributing software *and* a dramatic consolidation in the number of mobile app platforms. Apple and Google currently operate the two dominant mobile app platforms, but this consolidation could not have been anticipated at the time of the Complaint and subsequent Order. Indeed, by mid-2010 there were 68 mobile app platforms, and the number was rapidly expanding, not contracting, leading some analysts to believe that Apple’s share of the market would fall below 30 percent by 2013.<sup>37</sup> Instead, the consolidation among mobile app platforms allows the two dominant platforms to exercise tight control over the practices of mobile app developers like Sears—including data collection and disclosure practices governed by the Order.<sup>38</sup>

2. *The Order’s definition of Tracking Application has an unintended negative impact in the modern mobile application marketplace.*

Sears currently offers more than a dozen different mobile apps.<sup>39</sup> These range from full retail shopping apps for Sears, Kmart, and Shop Your Way to applications that simply allow a user to remotely open a Craftsman toolbox. None of Sears’ mobile apps involve monitoring of personal information outside of the Sears family of apps.<sup>40</sup> However, they are all covered by the Order’s definition of “Tracking Application,” which—as described—applies to virtually all forms of software on all devices.

Given the importance of Sears’ mobile apps to the Company’s strategic vision, the 2009 Order’s applicability to and requirements for mobile apps substantially impact Sears’ ability to compete in this highly competitive and evolving marketplace.<sup>41</sup> The processes mandated by the Order are a poor fit in a mobile app ecosystem where two dominant mobile app marketplaces dictate how

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<http://www.appbrain.com/stats/number-of-android-apps> (last updated Oct. 29, 2017) (showing Google exceeding 2 million apps available in by October 2016).

<sup>36</sup> Leena Rao, *Apple’s App Store Has Achieved 140 Billion Downloads*, Fortune (Sept. 7, 2016), <http://fortune.com/2016/09/07/apple-app-downloads/>; *see also* Randy Nelson, *Sensor Tower’s Q3 2016 Data Digest: Pokémon GO Leads App Downloads to 15% YoY Growth*, SensorTower (Oct. 20, 2016), <https://sensortower.com/blog/q3-2016-data-digest> (stating that 18.1 billion total app downloads occurred in Q3 2016 alone).

<sup>37</sup> *See* Linda Bustos, *Application Stores: The New Explosion in Ecommerce*, GetElastic (Apr. 7, 2010), <http://www.getelastic.com/app-store-recap/>.

<sup>38</sup> *See infra* Part III.A; Aff. of E. Chung ¶ 14.

<sup>39</sup> *See* Aff. of E. Chung ¶ 7.

<sup>40</sup> *See id.* ¶ 8.

<sup>41</sup> *See id.* ¶ 9.

consumers download and install mobile apps and receive disclosures.<sup>42</sup> The mandatory disclosures required by the Order also interfere with Sears’ ability to encourage potential users to engage with Sears’ mobile apps, because those users must click through a multi-screen “onboarding” process for each Sears app they wish to use—even if they have previously downloaded other of Sears’ apps and consented to the disclosures contained therein.<sup>43</sup> The Order mandates disclosures that disrupt a mobile app user’s experience the first time they interact with the app—a time that is critical for user retention.<sup>44</sup> Indeed, Sears’ competitors’ apps typically utilize less disruptive (and more consumer-friendly) disclosure methods, such as “just-in-time” disclosures.<sup>45</sup> And the discrepancy between the disclosures made by Sears in connection with its mobile apps and those made by Sears’ competitors inaccurately and unfairly suggest to consumers that Sears’ data collection practices are more intrusive than those of competing apps.<sup>46</sup> This puts Sears at a competitive disadvantage.

## II. Legal Standard

The Commission may reopen Orders for consideration of whether they should be set aside or modified where the petitioner demonstrates that at least one of two requirements have been met. First, the respondent may make a “satisfactory showing that changed conditions of law or fact” require modification to the applicable order.<sup>47</sup> In these cases, the FTC shall reopen the Order for consideration of modification where the petitioner makes “a satisfactory showing” of changed circumstances, which is accomplished “if the petition states with particularity the changed conditions” that underlie the petition.<sup>48</sup> Second, the Commission may reopen an Order where “the public interest shall so require.”<sup>49</sup> While a petitioner need not demonstrate changed circumstances in these cases, the petitioner must “make a *prima facie* showing of a legitimate ‘public interest’ reason or reasons justifying relief.”<sup>50</sup> The petitioner may satisfy this requirement by demonstrating “that there is a more effective or efficient way of achieving the purposes of the

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<sup>42</sup> See *infra* Part III.A; Aff. of E. Chung ¶ 14.

<sup>43</sup> See Aff. of E. Chung ¶ 10.

<sup>44</sup> See *id.* ¶ 10.

<sup>45</sup> See *id.* ¶ 11.

<sup>46</sup> See *id.* ¶ 12.

<sup>47</sup> 16 C.F.R. § 2.51(b).

<sup>48</sup> *United States v. La.-Pac. Corp.*, 654 F. Supp. 962, 965 (D. Or. 1987).

<sup>49</sup> 15 U.S.C. § 45(b); see also 16 C.F.R. § 2.51(b).

<sup>50</sup> Requests to Reopen, 65 Fed. Reg. 50,636, 50,637 (Aug. 21, 2000).

order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief.”<sup>51</sup>

Once reopened, the Commission “will then consider and balance all of the reasons for and against modification.”<sup>52</sup> The Commission has discretion to grant or deny the modification sought by the petitioner,<sup>53</sup> although the petitioner retains the burden of demonstrating why the Order should be modified.<sup>54</sup>

### **III. The Order Should Be Modified**

Both changes in circumstances and the public interest require the Order to be modified. Rapid technological developments, the growing importance of mobile apps to e-commerce, the increasing dominance of two mobile app stores, and evolving consumer expectations have resulted in an Order that is too broad in scope to be practicable in today’s mobile app ecosystem. This impairs Sears’ ability to compete in the marketplace for mobile apps and deprives consumers the benefit of vigorous competition in the online retail space.

Sears does not seek to modify the Order’s core continuing mandate: that the Company “clearly and prominently” provide notice and obtain consent regarding software applications that may not align with consumer expectations and commonly accepted practices. As noted in the Relief Requested section above, Sears instead seeks modest changes that would make the scope of the Order consistent with more recent FTC consent orders by excluding software applications that engage in data collection and analysis that is limited to (a) the configuration of the software program or application itself; (b) whether the program or application is functioning as represented; or (c) the consumer’s use of the program or application itself.

#### **A. Changed Circumstances in the Mobile App Ecosystem Have Rendered the Broad Definition of Tracking Application Impracticable**

The Order predates the rise of app stores as the primary means through which consumers identify, download, and install applications. The Order consequently evidences a clear concern for desktop software that consumers would download from a website controlled by Sears. The

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See United States v. La.-Pac. Corp.*, 754 F.2d 1445, 1449 n. 3 (9th Cir. 1985).

<sup>54</sup> Requests to Reopen, 65 Fed. Reg. at 50,637.

drafters of the Order evidently did not, and could not, anticipate that software distribution would undergo a paradigm shift shortly after the Order was entered.<sup>55</sup>

This shift—the dominance of the two primary mobile app marketplaces, along with exponential growth in the use of smart phones and tablets—has dramatically altered industry-standard practices for collecting information and providing consumer disclosures. For today’s consumers, an app store is the way in which they will discover, select, download and install Sears’ apps.<sup>56</sup> Now, Apple’s App Store and Google Play exert control over the manner and form in which Sears, like virtually all other app developers, provides disclosures to consumers relating to a given mobile app.<sup>57</sup> The rules and restrictions imposed by the app platform providers also impose restrictions on the ability of Sears, like other app developers, to collect information from consumers.<sup>58</sup>

These rules and restrictions are in tension with the disclosure and content processes mandated by the Order. The overly broad definition of “Tracking Application” in the Order is now impracticable as a consequence of these changes, justifying Sears’ petition to modify the Order.

Both the Apple and Google app platforms provide app purveyors with a means to present a description of the mobile app, as well as a way to link to the privacy policy and terms of use related to that app. As a result, consumers can readily learn, prior to application download and installation, about how their information is collected, used, and shared. This allows consumers to make an informed decision regarding whether to download, install, and use that mobile app. Notably, however, the Apple and Google app platforms do not provide a means to display a separate screen with additional disclosure information and then require the consumer to accept the disclosure before proceeding with the download and installation of the app as the Order requires. Instead, the app stores have a standardized workflow in which a user clicks to “get” or “install” the app, coupled with a means by which the user authenticates to the app platform to confirm the download and installation, after having an opportunity to review the app provider’s data collection, use and sharing practices.

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<sup>55</sup> See *supra* Part I.C.1.

<sup>56</sup> See *Aff. of E. Chung* ¶ 13.

<sup>57</sup> See *id.* ¶ 14.

<sup>58</sup> See, e.g., FTC, *Mobile Privacy Disclosures: Building Trust Through Transparency* 19 (Feb. 2013), available at <https://www.ftc.gov/sites/default/files/documents/reports/mobile-privacy-disclosures-building-trust-through-transparency-federal-trade-commission-staff-report/130201mobileprivacyreport.pdf>; Office of the Attorney General of California, *Joint Statement of Principles* (Feb. 22, 2012), available at [https://oag.ca.gov/system/files/attachments/press\\_releases/n2630\\_signed\\_agreement.pdf](https://oag.ca.gov/system/files/attachments/press_releases/n2630_signed_agreement.pdf); see also *Aff. of E. Chung* ¶ 14.

Both the Apple and Google app platforms also enforce rules on how and when app developers may collect information from app users. For example, Apple’s App Store Review Guidelines require that “[a]pps that collect user or usage data must have a privacy policy and secure user consent for the collection,” and stipulate that “[d]evelopers that use their apps to surreptitiously discover passwords or other private data will be removed from the [App Store] Developer Program.”<sup>59</sup> The Google Play Developer Policy Center similarly requires detailed privacy disclosures, and further states that:

If your app collects and transmits personal or sensitive user data unrelated to functionality described prominently in the app’s listing on Google Play or in the app interface, then prior to the collection and transmission, it must prominently highlight how the user data will be used and have the user provide affirmative consent for such use.<sup>60</sup>

In other words, the desktop software that led to the Complaint and subsequent Order would be impermissible under the rules of the two dominant mobile app stores.<sup>61</sup>

The changed circumstances through which Apple’s App Store and Google Play evolved into the dominant means for mobile software distribution following the 2009 Order thus has significant implications for the applicability of the Order to mobile apps. The app stores’ collection and disclosure requirements render the Order’s broad definition of “Tracking Application” obsolete and impractical when applied to modern mobile apps, given that app stores prescribe the method for providing apps and prevent app purveyors like Sears from engaging in the behavior in its mobile apps that motivated the FTC’s concern in the Order. Notably, both Apple and Google regularly enforce the privacy restrictions reflected in their developer policies.<sup>62</sup>

Sears firmly believes in the principles underpinning the Order—that personal information should be collected from consumers with their understanding and consent, and data collection should be

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<sup>59</sup> Apple, *App Store Review Guidelines*, <https://developer.apple.com/app-store/review/guidelines/> (last visited Oct. 29, 2017).

<sup>60</sup> Google Play, Developer Policy Center, *Privacy, Security, and Deception: User Data*, <https://play.google.com/about/privacy-security/personal-sensitive/> (last visited Oct. 29, 2017).

<sup>61</sup> There are no allegations that any of Sears’ mobile apps violate the requirements of Apple’s App Store or Google Play, and Sears’ mobile apps are developed to conform with Apple and Google’s respective app development rules. *See* Aff. of E. Chung ¶ 14.

<sup>62</sup> *See, e.g.*, Nick Statt, *Apple Bans over 250 Apps that Secretly Accessed Users’ Personal Info*, Verge (Oct. 16, 2015), <https://www.theverge.com/2015/10/19/9567447/apple-banned-apps-youmi-privacy-personal-data>; Graham Kates, *Google Removes Apps that Use Ultrasonic Frequencies to Track Users*, CBS News (May 24, 2017), <http://www.cbsnews.com/news/google-removes-apps-that-use-ultrasonic-frequencies-to-track-users/>.



limited to the extent necessary to provide the app’s function or service.<sup>63</sup> However, the Order’s definition of Tracking Application is not compatible with the current state of the mobile app ecosystem. These changed circumstances require that the Commission reopen and modify the Order to account for what are now commonly accepted and well understood data collection practices. These changes are required to prevent the Order from continuing to unfairly prejudice Sears in the mobile app marketplace.

## **B. The Proposed Modifications to the Order Are in the Public Interest**

The evolution of the mobile app ecosystem, as described above,<sup>64</sup> has created a disconnect between the Order’s original purpose and its primary current effect. While the Order was intended to protect consumers from undisclosed and invasive tracking of consumers outside of a given company’s software,<sup>65</sup> the Order’s effect is to impose on Sears obligations that are poorly adapted to today’s mobile app ecosystem. Consumers benefit from rigorous retail competition, particularly when incumbent physical retailers enter into, and compete in, the online retail marketplace. By constraining the competitiveness of Sears’ mobile apps in a manner that does not provide the Order’s intended benefits to consumer privacy, the Order operates counter to the public interest.

It is also now clear that certain data collection and information tracking practices are necessary, expected, and reasonable practices to support the functionality and operation of an application. Consumers know and understand that mobile apps such as those provided by Sears engage in “tracking” that is necessary to provide an app’s features and benefits. For example, when a consumer places an order through a mobile shopping app, the consumer understands that the mobile app tracks the items in the consumer’s order in a shopping cart in order to complete the transaction. The FTC has acknowledged previously the need for a distinction between the collection of information that is, for example, “need[ed] for a requested service or transaction” and other, more invasive, forms of tracking.<sup>66</sup> The tracking that is required to provide an app’s function or service can be easily distinguished from the sharing of information with third parties, for which consumers may need additional notice in order to understand and consent to such practices. Sears’ proposed modifications to the Order would enable the Company to offer disclosures consistent with what consumers expect from apps that engage in only expected and commonly accepted forms of data collection and information tracking, and are therefore in furtherance of the public interest.

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<sup>63</sup> See Aff. of E. Chung ¶ 8.

<sup>64</sup> See *supra* Part I.C.

<sup>65</sup> See *supra* Part I.B.1.

<sup>66</sup> See FTC, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers 33 (Mar. 2012), available at <http://ftc.gov/os/2012/03/120326privacyreport.pdf>.

1. *Modifying the Order would bolster competition in the mobile app marketplace and is therefore in the public interest.*

Consumer adoption of Sears' mobile apps is integral to the Company's ongoing transformation from a purely brick-and-mortar retailer to a member-centric retailer with extensive and integrated digital and physical footprints.<sup>67</sup> And consumers benefit from better prices and services when large physical retailers like Sears enter into—and vigorously compete in—the online retail marketplace. However, the overly broad definition of “Tracking Application” has caused significant hardship to both the Company and its consumers by requiring that disclosures appear to every user as the user's first interaction with every application, regardless of the specific data practices involved.<sup>68</sup>

The Order's strictures have a direct and negative effect on Sears' ability to compete in the marketplace for mobile apps, as no other competitor uses a similarly disruptive approach to mobile app disclosures.<sup>69</sup> Sears members who download multiple Sears apps (*e.g.*, Shop Your Way and Shop Your Way Relay) must read and consent to nearly identical disclosures multiple times, despite having previously logged into each app through the same account (using Sears' single-sign-on process).<sup>70</sup> And by focusing on disclosures shown at the user's first interaction with an app, the Order tacitly discourages other, potentially more useful, forms of disclosure, such as just-in-time notification.

Because the Order impairs the competitiveness of Sears' mobile apps, the Order's requirements do more harm than good when applied to a category of software applications that (i) were not contemplated at the time of the Order and (ii) do not—and effectively cannot—engage in the type of tracking that gave rise to the Order.<sup>71</sup> Modifying the Order to enable Sears' mobile apps to compete on a more level playing field with other retail-focused mobile apps is therefore in the public interest.

2. *Data collection and sharing limited to intra-app activities are both common in today's marketplace and serve the public interest.*

Sears' mobile apps, like virtually all modern software applications, collect a variety of information that supports the normal operation and function of the application. For example,

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<sup>67</sup> See *supra* Part I.A.

<sup>68</sup> See Aff. of E. Chung ¶ 10.

<sup>69</sup> See *id.* ¶ 9.

<sup>70</sup> See *id.* ¶ 10.

<sup>71</sup> See *supra* Parts I.C.1. and III.A.

device configuration information supports the installation of the correct version of the application and applicable software updates or patches.

Sears' mobile apps also regularly collect data in order to provide the services and functions that Sears' users expect. For example, many of Sears' mobile apps involve the submission of forms and other information to a server in order to access the requested information, service, or functionality. Whether it's purchasing a new product, selecting an appliance's model to access related product information, or browsing available hardware, any number of application interactions involve some manner of data collection and sharing. And the express purpose of many connected device or Internet of Things apps is to utilize the app interface to enable collection of information from, and interaction with, physical devices. For example, Sears' WallyHome sensors enable users to track the temperature and humidity in their home or business through a connected mobile app.

In addition, Sears' mobile apps—again, like virtually all modern software applications—rely on communications with remote servers to support their operation. Cloud services support scalability so that millions of consumers can access the latest information related to a product or service. Applications do not need to download and locally maintain all the information that a consumer may wish to interact with. Instead, these applications make requests to remote servers for the specific information that a consumer seeks at the time that the consumer seeks it. For this process to work, Sears' mobile apps must collect, transmit, and share data with remote servers to fulfill the consumer's request. Leveraging remote servers to support application functionality also enables Sears and other software providers to keep information current for consumers without requiring constant updates to the application itself.

Furthermore, data collection and sharing can support the security of the application. Device configuration information can reveal when applications or the computers on which the application is running are in need of a security patch or update. Data collection regarding usage of the application can support detection of suspicious or unauthorized activity.

It is counterproductive for such innocuous and consumer-friendly behavior to trigger burdensome disclosure obligations like those contained in the Order. Consumers expect modern applications like Sears' mobile apps to stay up-to-date and communicate with remote servers to provide the requested services. Furthermore, Sears' consumers expect that in order to interact with the Company's sites, forms, and offerings, some data collection, use, and sharing is necessary. It is not surprising to a consumer that when they provide log-in information on an application, that information will go to the company's servers for confirmation that the account information is correct and that the user is authorized to connect to the company's product or service. In addition, when a consumer fills out a form in order to seek additional information, receive customer support, or enroll in a particular service or feature, in each instance it would not be surprising to the consumer if that information were transmitted to the company providing the information, support, or service. Indeed, the consumer would be upset if the information were not transmitted, since the feature would then be useless. For example, users of Sears' Personal

Shopper mobile app expect that their personal information will be collected by the app and disclosed to their chosen personal shopper, because such collection and disclosure is necessary to support the service that the mobile app provides.

The FTC has recognized that such “commonly accepted”<sup>72</sup> practices do not raise substantial privacy risks. The FTC’s seminal 2012 privacy report explains that companies need not obtain consumer consent where the company’s data collection and usage practices are “consistent with the context of the transaction or the company’s relationship with the consumer.”<sup>73</sup> Consumers benefit when companies make concise and meaningful disclosures,<sup>74</sup> and there are countervailing harms when companies make overly detailed, complex, or meaningless disclosures. There is little appreciable public benefit in requiring Sears to disclose that Sears’ mobile apps engage in commonly accepted forms of data collection, and any such benefit is outweighed by the Order’s hindrance on Sears’ competitiveness in the mobile app ecosystem. Sears’ users are inconvenienced, not enlightened, by such disclosures.

### **C. The Requested Relief is Appropriate Given FTC Precedent and Priorities**

The relief Sears has requested is narrow, and is appropriate in light of more recent FTC consent orders and guidance. As discussed above, the combined effect of the Order’s definitions of Computer and Tracking Application is that all of Sears’ mobile apps—and nearly all software on all platforms—is covered by the Order’s requirements.<sup>75</sup> The broad definition of Tracking Application even includes applications that do not collect any personal information, or engage in inter-app tracking or third-party sharing. For example, the Order’s disclosure requirements apply to an application that collects only device configuration information sufficient to support installation and proper operation of the software, or that supports the ability to send crash reports (*i.e.*, information regarding software malfunctions)—which includes almost all software on the market today.

Significantly, an application does not need to collect, use, or share personal information regarding a consumer or engage in third-party sharing in order to be characterized as a Tracking Application under the Order. A number of more recent consent orders, conversely, make

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<sup>72</sup> See FTC, *supra* note 66, at 36.

<sup>73</sup> *Id.* at 48.

<sup>74</sup> See, e.g., Ryan Mehm et al., Panel Discussion Regarding Mobile Privacy Disclosures at In Short: Advertising & Privacy Disclosures in a Digital World at 214, *available at* [https://www.ftc.gov/sites/default/files/documents/public\\_events/short-advertising-privacy-disclosures-digital-world/finalworkshoptranscriptaugust72012.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/short-advertising-privacy-disclosures-digital-world/finalworkshoptranscriptaugust72012.pdf) (noting that the panel “examine[d] privacy disclosures on mobile devices and consider[ed] how they can be short, effective and accessible to consumers on small screens”). See generally FTC, *supra* note 58, at 19.

<sup>75</sup> See *supra* Part I.B.2.

distinctions based on the types of information at issue. Sears seeks a modification to the Order that makes this same distinction.

As noted above, this narrow modification would still leave key consumer protections in place afforded by the modern mobile app ecosystem. Specifically, both the Apple and Google app platforms require Sears and other app purveyors to follow restrictions on data collection and present consumers information regarding a mobile app's data practices.<sup>76</sup> The desktop software that led to the Complaint and subsequent Order would be impermissible not just under the Order but also under the rules of the two dominant mobile app stores.

The modifications to the Order proposed by Sears would not threaten consumers' privacy interests. Consumers understand that certain forms of "tracking" are necessary for the basic operation of mobile apps,<sup>77</sup> and these behaviors are distinguishable from tracking that occurs outside the boundaries of the mobile app.<sup>78</sup> However, in the Order's current form, Sears' mobile apps trigger the Order's disclosure obligations despite engaging in activities that are consistent with consumer expectations and FTC guidance.

This limited modification also would bring the Order into alignment with recent and comparable FTC orders. As noted above, the FTC entered orders in 2012 and 2013 that exclude from any restrictions circumstances such as where (a) the activity involves transmission of information related to the configuration of the software program or application itself; (b) the transmission is limited to information about whether the program is functioning as intended; or (c) the activity involves a consumer's interactions with respondent's websites and/or forms, or interactions that ensure that a consumer is properly receiving the benefits he or she expects from the application, such as completing a transaction.<sup>79</sup>

Similarly, the FTC's COPPA Rule, amended subsequent to the Order, includes a number of exceptions to COPPA's parental consent requirements, including one specifically designed to recognize that certain uses of persistent identifiers "are fundamental to the smooth functioning of the Internet, the quality of the site or service, and the individual user's experience."<sup>80</sup> Thus the FTC included an exception to the normal parental consent requirement where persistent identifiers are used for "providing support for the internal operations of the Web site or online

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<sup>76</sup> See *supra* Part III.A.

<sup>77</sup> See *supra* Part III.B.2.

<sup>78</sup> See FTC, *supra* note 66, at 33.

<sup>79</sup> See 2013 Compete Order, *supra* note 24; 2012 Upromise Order, *supra* note 25.

<sup>80</sup> Children's Online Privacy Protection Rule; Final Rule, 78 Fed. Reg. 3972, 3980 (Jan. 17, 2013).

service.”<sup>81</sup> The FTC’s inclusion of this exception illustrates that even with respect to children’s privacy rights, a categorical approach to information tracking is impracticable and undesirable, as certain forms of tracking are so fundamental that they do not require disclosure or consent.

The FTC’s approach in more recent enforcement actions and the exceptions to COPPA’s consent requirements discussed above are consistent with both consumer expectations and FTC guidance regarding privacy disclosures. Amending the Order to more closely resemble the FTC’s more recent orders is appropriate in light of the significant changed circumstances since the Order was entered and the considerable public interest in a modification to the Order.

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<sup>81</sup> 16 C.F.R. § 312.5(c)(7).

## CONCLUSION

For the foregoing reasons, Sears respectfully requests that the 2009 Order be modified to amend the definition of Tracking Application as set forth in this petition. Such a modification is both in the public interest and reflects changed circumstances regarding developments in the mobile app ecosystem and consumer expectations that emerged subsequent to the 2009 Order.

Respectfully submitted,

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Corporation

## **APPENDICES**

### **Appendix 1: Affidavit of Eui Chung**



BEFORE THE  
FEDERAL TRADE COMMISSION

In the matter of:

Sears Holdings Management Corporation

FTC Docket No. C-4264

AFFIDAVIT OF

EUI CHUNG

**AFFIDAVIT IN SUPPORT OF PETITION  
TO REOPEN AND MODIFY ORDER**

I, Eui Chung, declare and state as follows:

**I. Background**

1. I am the Vice President, Social Commerce of Sears Holdings Management Corporation (with its subsidiaries and affiliates, “**Sears**”), the respondent in the above-captioned matter.
2. I have been employed by Sears for more than 27 years. In 2009, when the Federal Trade Commission entered the Order, I was Sears’ Director of Information Technology. In that role, I was responsible for application software development for online and mobile. In my current role, I lead technology strategy, architecture, and software development for the Shop Your Way business unit of Sears. Thus I

- am familiar with the technology development processes Sears currently has in place, and that Sears had in place in and leading up to 2009.
3. I have, at all relevant times, been deeply involved in the development, distribution, and maintenance of Sears' mobile applications. As a consequence, I have witnessed how the Order has impacted Sears' internal decision-making with respect to mobile application data collection practices and disclosures.
  4. I monitor applicable developments with regards to the retail mobile application landscape. I have attended conferences such as WWDC, participated in development labs, and conducted competitive and market analysis of different mobile applications. I have read publications such as Internet Retailer, Baymar.com, and UseronBoard.com to understand how others are creating their apps. My team also does internal analysis of competitor apps, going screen by screen comparing our apps to our peer apps, and looking at what is common and what is not. I have been a mentor at a hackathon for the University of Pennsylvania. I am active in the mobile software development community in the Chicago area. I also teach young kids how to write code through my church and in the community.
  5. I therefore have an appreciation for how elements of the Order have impaired Sears' ability to compete, and have required Sears to adopt data collection and disclosure techniques that are inconsistent with widespread industry practice. The facts expressed below are based on my experience with Sears as well as my understanding of how the retail industry generally deploys mobile apps.

## **II. The Evolving Mobile App Landscape**

6. The landscape for mobile apps has changed substantially since 2009. At that time, there were approximately three native Sears mobile apps available for Apple iOS devices and none for Google Android devices. In the time period leading up to the Order, Sears' software development efforts remained predominantly focused on website-based e-commerce (including mobile-optimized websites) and desktop software, and Sears' early adaptation to the evolving landscape was focused on developing mobile-optimized websites. Sears' limited app offerings at the time of the Order had little in common with the apps that Sears currently offers. For example, in 2009, the Sears mobile app amounted to little more than an in-app display of the Sears website that was accessible via the Internet.
7. Today, Sears relies on mobile apps to compete with other retailers—the development, distribution, adoption, and utilization of mobile app technology has become a business imperative and is integral to Sears' transformation. To that end, Sears currently deploys more than a dozen apps to support its brands and

business lines (*e.g.*, Sears, Kmart, Kenmore, Diehard) as well as related business initiatives such as Shop Your Way. Sears is particularly focused on attracting more Shop Your Way members and increasing those members' engagement and utilization of Sears' mobile applications. While certain of Sears' businesses, such as Shop Your Way Relay, are now mobile-only, consumer adoption of those businesses' mobile apps will enable Sears to leverage its physical assets in new ways.

8. Sears firmly believes in the principles of the Order, and does not believe that user information should be collected or shared without a user's permission. As a consequence, none of Sears' apps engage in the monitoring of information outside of the Sears family of apps that prompted the Complaint and Order.

### **III. Competitive Effects of the Order**

9. Given the centrality of Sears' mobile apps to the current viability of Sears' businesses, the disclosures mandated by the Order directly and negatively affect Sears' competitiveness in the mobile space. While I have not reviewed every mobile app that offers retail services, based on my own experiences and my team's analysis of competitors' mobile apps, it is my understanding that Sears' primary competitors do not use such disruptive disclosures.
10. The mandatory disclosures that Sears must display as a consequence of the Order have caused significant hardship to Sears and its users. The disclosures interfere with Sears' ability to encourage users to engage with its mobile apps. Sears' predominant method for compliance with the Order in the context of mobile apps is to utilize a multi-screen graphical "onboarding" process that includes all mandatory disclosures and consents. The inclusion of the mandatory disclosures and consents creates friction in the initial application launch process, disrupting the mobile app's user experience during a user's first interaction with each mobile app—a time that is critical to user retention. As a consequence, the timing of the mandatory disclosures that Sears must display results in an initial app flow that unavoidably discourages adoption of Sears' apps as compared to similar apps offered by Sears' primary competitors. Furthermore, the mandatory disclosures appear in each Sears app, regardless of the app's specific data practices and even if the user previously has downloaded, installed, and provided express consent to the nearly identical disclosures multiple times in related apps using the same consumer account (*i.e.*, single-sign-on)—further hindering usability and consumer understanding of the data practices involved.
11. It is my understanding that many of Sears' competitors' mobile apps do not require consumers to expressly assent to legal disclosures at the beginning of the user experience, in addition to user terms and conditions. Sears' competitors' apps

that I have studied also typically make pop-up-style disclosures akin to those required for Sears by the Order for collection of certain information (such as location) just prior to data collection (*i.e.* “just-in-time”), and only a single time, which is a less disruptive and more consumer-friendly approach to making disclosures.

12. Moreover, the mandatory disclosures required by the Order intimidate potential users and impair Sears’ ability to engender trust and credibility with consumers. As a consequence of the Order, Sears’ process for making disclosures is necessarily more disruptive than the process used by Sears’ competitors’ apps. This discrepancy inaccurately and unfairly suggests to consumers that Sears’ data collection practices are more intrusive than those of competing apps.

**IV. Sears’ Apps Are Distributed Only Through App Marketplaces, Which Exercise Tight Control Over App Development**

13. Sears, like most mobile app developers, relies on (a) the Apple App Store to distribute its iOS apps and (b) the Google Play store to distribute its Android apps. Consumers cannot obtain mobile apps directly from Sears—consumers discover, select, download, and install Sears’ apps through these two channels, which are managed by third parties.
14. Apple and Google exercise tight control over the user experience in their respective mobile app marketplaces. Both companies also exercise oversight over, and impose stringent restrictions upon, mobile app developers using their respective app marketplaces. Sears’ mobile apps are developed to conform with Apple and Google’s respective app development requirements, which—along with the Order—impose numerous obligations and restrictions upon Sears, including restrictions that relate to Sears’ ability to gather information from users.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: \_\_\_\_\_

\_\_\_\_\_

Eui Chung