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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION Plaintiff, v. WYNDHAM WORLDWIDE CORPORATION, et al., Defendants.	Civil Action No.: 2:13-cv-01887-ES-SCM **MOTION TO DISMISS BY DEFENDANTS WYNDHAM WORLDWIDE CORPORATION, WYNDHAM HOTEL GROUP, LLC, AND WYNDHAM HOTEL MANAGEMENT, INC.** **ORAL ARGUMENT REQUESTED** **MOTION DATE JUNE 17, 2013**

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INTRODUCTION

Concurrently with this motion, defendant Wyndham Hotels and Resorts, LLC ("WHR") has filed a motion to dismiss the FTC's Amended Complaint for failure to state a claim under Rule 12(b)(6). As that motion explains, the FTC's novel legal theories in this case have no basis in law or logic: Section 5's prohibition on "unfair" trade practices does not give the FTC authority to prescribe data-security standards for the private sector, particularly through selective enforcement actions that seek to impose after-the-fact Section 5 liability without any fair notice as to what the Commission believes Section 5 prohibits or requires. And the FTC's deception allegations completely ignore explicit disclosures that foreclose the possibility that any reasonable consumer could have been "deceived" by WHR's statements concerning its data-security practices. For those reasons alone, the Amended Complaint should be dismissed.

Wyndham Worldwide Corp. ("WWC"), Wyndham Hotel Group, LLC ("WHG"), and Wyndham Hotel Management, Inc. ("WHM")—corporate affiliates of WHR—file this separate motion to address certain elements of the FTC's allegations that pertain only to them. The Amended Complaint does not allege that WWC, WHG, or WHM ***themselves*** engaged in any activity prohibited by Section 5. Instead, the FTC seeks to hold those separate corporate entities derivatively liable for the allegedly unlawful conduct that was undertaken by WHR alone. Although highly disfavored, the FTC maintains that this kind of derivative liability is justified in this case because WWC, WHG, WHM, and WHR all purportedly operated as a "common enterprise" in disregard of their legally separate corporate identities.

The FTC's "common enterprise" allegations fail as a matter of law, and thus WWC, WHG, and WHM must be dismissed from this case regardless of how the Court resolves WHR's motion to dismiss. In FTC enforcement actions such as this, distinctions in corporate identities must be adhered to absent "highly unusual circumstances." *P.F. Collier & Son Corp. v. FTC*,

427 F.2d 261, 266 (6th Cir. 1970). The FTC's allegations fall well short of that demanding standard. Courts typically impose "common enterprise" liability only in cases where a defendant is trying to use the corporate form as a tool to escape Section 5 liability. But the FTC does not (and could not) allege that WHR is trying to use its corporate status to avoid liability here—dismissal of WWC, WHG, and WHM would have no effect on whatever Section 5 liability the FTC might conceivably be able to establish against WHR (although WHR believes no such liability can be established). In addition, the Amended Complaint does not adequately allege the great majority of facts that are typically necessary to establish "common enterprise" liability. For example, although the FTC had the benefit of a two-year investigation prior to commencing this lawsuit, the Amended Complaint does not allege that defendants' commingle corporate funds or assets, fail to observe corporate formalities, fail to adhere to corporate distinctions when dealing with third parties, or fail to maintain separate books and records. And although the Amended Complaint does allege that defendants have common ownership and a common corporate headquarters, those facts alone have ***never*** been held sufficient to result in "common enterprise" treatment. Indeed, virtually all corporate affiliates in today's business world share common ownership and office space, and finding a "common enterprise" on those facts alone would subject all private companies—large and small—to derivative liability for the acts of any entity in the corporate family.

In short, this case is far afield from those instances in which courts have typically felt compelled to set aside corporate identities and declare a "common enterprise," and the FTC has not alleged any facts that would justify making any of the defendants here derivatively liable for the acts of an affiliate. For these reasons, and those explained below, WWC, WHG, and WHM should be dismissed from this case.

BACKGROUND

Many of the basic facts relevant to this case are set forth in the motion to dismiss filed by WHR. Rather than repeat those facts here, WWC, WHG, and WHM state only those facts that are directly relevant to this motion.

Defendant WWC is a diversified hospitality company that, through its ownership interest in various corporate subsidiaries, is active in a number of different hospitality related areas. Am. Compl. ¶ 13. Defendant WHG is a wholly owned subsidiary of WWC and constitutes one of WWC's three main business units. *Id*. Through its own group of subsidiaries, WHG franchises a number of well-known hotel brands, such as Days Inn, Super 8, Ramada, Howard Johnson, Travelodge, and Wyndham Hotels.

WHR and WHM are subsidiaries of WHG that are responsible for providing services to independent hotels operating under the "Wyndham Hotels" brand, a full-service hotel chain with over 70 locations in the United States. *Id*. ¶ 9. Most of those independent hotels are licensed to use the "Wyndham Hotels" brand name pursuant to franchise agreements with WHR, through which WHR licenses the use of the "Wyndham Hotels" brand and agrees to provide certain services to the franchisee, who retains day-to-day responsibility for running the hotel. *Id*. Other independent owners operate under the "Wyndham Hotels" brand pursuant to management agreements with WHM, under which WHM agrees to manage the property as the agent of the independent owner. *Id*. ¶ 10.

On three separate occasions from 2008 to 2010, criminal computer hackers gained unauthorized access into WHR's computer network and into the separate computer networks of several Wyndham-branded hotels. *Id*. ¶ 25. Those attacks might have resulted in the criminal hackers gaining access to payment card data that had been collected by the Wyndham-branded

hotels. Citing those criminal cyberattacks as evidence of some alleged wrongdoing by WHR, the FTC commenced this unprecedented action seeking to impose liability under Section 5 of the FTC Act for a private company's alleged failure to maintain reasonable and appropriate data security for consumers' personal information. *See id.* ¶ 1.

In addition to WHR, the FTC named WWC, WHG, and WHM as defendants in this case. The allegations in the Amended Complaint, however, assert that the criminal cyberattacks impacted only WHR's network and networks maintained by a small number of independently owned, Wyndham-branded hotels. Nonetheless, the FTC maintains that WWC, WHG, and WHM should be held "jointly and severally" liable for WHR's alleged failure to maintain reasonable and appropriate data security because all of the entities named in the Amended Complaint allegedly operate as a "common enterprise." *Id.* ¶ 11.

LEGAL STANDARD

WWC, WHG, and WHM bring this motion under Federal Rule of Civil Procedure 12(b)(6), which requires dismissal if the complaint fails to state a claim upon which relief can be granted. To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quotations omitted). This "plausibility" determination is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Matthews v. Carson*, 2010 WL 572101, at *2 (D.N.J. Feb. 17, 2010) (quotations omitted). A plaintiff's obligation to cross the plausibility threshold "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

ARGUMENT

I. The Amended Complaint Does Not Allege Direct Liability Against WWC, WHG, Or WHM

The Amended Complaint contains no allegations that WWC, WHG, or WHM ***themselves*** engaged in any "deceptive" or "unfair" conduct in violation of Section 5. To the contrary, the FTC's allegations of wrongdoing focus entirely on WHR. For example, the FTC's deception claim pertains exclusively to "[WHR's] website," Am. Compl. ¶ 20, and the only allegedly "deceptive" statements were all "disseminated on the [WHR] website," *id*. ¶ 21. Similarly, the FTC's Count II unfairness claim points only to certain alleged data-security failures by WHR or the independently owned hotels. *See id*. ¶ 24. Thus, in purporting to list a series of alleged data-security failures, the Amended Complaint points only to practices related to WHR's corporate network or to the separate networks maintained by the Wyndham-branded hotels. *See, e.g.*, *id*. ¶ 24(g) ("failed to adequately inventory computers connected to the [WHR] network"); *id*. ¶ 24(i) ("fail[ed] to monitor [WHR's] computer network for malware"); *id*. ¶ 24(j) ("failed to adequately restrict third-party vendors' access to [WHR's] network"). The FTC also concedes, as it must, that the three criminal cyberattacks alleged in the Amended Complaint resulted in criminal hackers gaining access to only the computer networks of WHR and certain independently owned, Wyndham-branded hotels. *See id*. ¶¶ 2, 25. The hackers did not breach any networks maintained by WWC, WHG, or WHM.

To be sure, the Amended Complaint does at times allege that all of the "Defendants" made deceptive statements or engaged in unfair conduct. *See, e.g.*, *id*. ¶¶ 44-46 (alleging that "Defendants" made "representations" that were "false or misleading and constitute deceptive acts or practices"); *id*. ¶¶ 47-49 (alleging that "Defendants … failed to employ reasonable and appropriate measures to protect personal information" and thus engaged in "unfair acts or

practices in violation of Section 5"). But those allegations are empty contentions unsupported by any specific factual development showing how WWC, WHG, or WHM made any deceptive representations or engaged in any unfair conduct. Such "naked assertions" of liability, "devoid of further factual enhancement," are precisely the kind of conclusory allegations that fail bedrock federal-pleading requirements. *Iqbal*, 556 U.S. at 678 (quotations omitted); *accord FTC v. Kuykendall*, 371 F.3d 745, 758 (10th Cir. 2004) (reversing district court order finding affiliates liable for conduct of another corporation where the FTC "failed to provide … any reason to believe the other corporate defendants could control DMS, or that the corporate structure was nothing more than an effort to conceal the assets of DMS and not a legitimate liability-limiting arrangement").[1]

II. WWC, WHG, & WHM Cannot Be Held Derivatively Liable For WHR's Alleged Violations of Section 5

Unable to allege that WWC, WHG, and WHM themselves committed any direct violation of Section 5, the FTC maintains that those separate corporate entities should nonetheless be held "jointly and severally" liable for any Section 5 violation committed by WHR. Am. Compl. ¶ 11. That is so, the FTC claims, because all of the separate corporate defendants in this case "have operated as a common business enterprise," *id*., and thus can all be treated as one for purposes of assigning liability. But the Amended Complaint does not allege the rigorous factual

[1] Even if the Amended Complaint could be construed to allege specific unlawful conduct by WWC, WHG, and WHM, any such claims would fail as a matter of law for the same reasons that the FTC's Section 5 claims against WHR fail as a matter of law: the FTC has no authority to police private-sector data-security standards under the "unfairness" prong of Section 5, and the statements on which the FTC relies for its deception claim would not have deceived a consumer acting reasonably. *See* WHR's Mot. to Dismiss at 6-26. To the extent the Court reads certain portions of the FTC's Amended Complaint as adequately alleging unlawful conduct by WWC, WHG, or WHM, those defendants join in and incorporate by reference all of the arguments contained in WHR's Motion to Dismiss. Just as those arguments justify dismissal of the Amended Complaint with respect to WHR, they also justify dismissal with respect to WWC, WHG, and WHM.

prerequisites necessary to establish this extraordinary theory of imputed liability. And, if sustained, the FTC's "common enterprise" theory would potentially subject all manner of modern corporations (large and small) to liability for the actions of any of their corporate affiliates.

To begin with, WWC, WHG, and WHM can be found derivatively liable only if there is an underlying Section 5 violation by WHR. But as explained in WHR's motion to dismiss, none of the conduct alleged in the Amended Complaint violates Section 5 of the FTC Act. There is thus no underlying violation on which derivative liability for WWC, WHG, and WHM could be based, and the claims against those entities should be dismissed on that ground alone.

But even looking past that fatal stumbling block, the FTC's "common enterprise" allegations fail on their own terms. "The general rule is that, absent ***highly unusual circumstances***, the corporate entity will not be disregarded" in Section 5 cases. *P.F. Collier & Son Corp.*, 427 F.2d at 266 (emphasis added). The Amended Complaint falls well short of meeting that demanding standard.

As an initial matter, the policy reasons that typically compel courts to treat separate corporate entities as a "common enterprise" are entirely absent in this case. Common enterprise liability is generally invoked when a defendant is trying to use the corporate form as a tool to escape Section 5 liability altogether. *See id*. at 267; *FTC v. NHS Sys., Inc.*, 2013 WL 1285424, at *7 (E.D. Pa. Mar. 28, 2013) ("Courts have found a common enterprise where the corporations are so entwined that a judgment absolving one of them of liability would provide the other defendants with a clear mechanism for avoiding the terms of the order." (quotations omitted)); *cf. Nassau Const. Co., Inc. v. Pulte Homes, Inc.*, 2008 WL 2235609, at *3 (D.N.J. May 29, 2008) (holding courts generally should pierce the corporate veil when a parent corporation's attempt to

avoid liability by channeling its activities through an "undercapitalize[ed]" and "judgment-proof" subsidiary). That is plainly not true here. The Amended Complaint nowhere alleges that defendants are attempting to use their separate corporate identities as part of a scheme to evade liability. Nor could it: dismissing WWC, WHG, and WHM would have no effect at all on the FTC's ability or inability to hold WHR liable under Section 5.

The FTC also does not allege the key facts that courts normally look for in determining whether separate corporate entities are operating as a "common enterprise." The Amended Complaint does not allege that WWC, WHG, WHR, and WHM commingle corporate funds or assets, lack their own substantive businesses, "engage in unified advertising with shared trademarks or brands," fail to maintain separate books and records, or disregard corporate formalities in dealing with third parties. *FTC v. Millennium Telecard, Inc.*, 2011 WL 2745963, at *8 (D.N.J. July 12, 2011) (quotations omitted). In other words, there is nothing in the Amended Complaint to suggest that "no real distinction exists between the [c]orporate [d]efendants." *Id*. (quotations omitted). The absence of such allegations is telling, and only confirms that WWC, WHG, and WHR should be dismissed from this case.

Unable to allege any of the facts on which common-enterprise liability under Section 5 is normally predicated, the "common enterprise" allegations the FTC ***does*** make in this case are remarkably thin. The Amended Complaint devotes only one sentence to explaining why the FTC believes that the corporate separateness of the defendants in this case should be set aside: "Defendants have conducted their business practices described below through an interrelated network of companies that have common ownership, business functions, employees, and office locations." Am. Compl. ¶ 11. That conclusory assertion, however, is legally insufficient to establish common-enterprise liability.

In the usual case, it takes much more than those barebones allegations to set aside corporate formalities. *See Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1162 (5th Cir. 1983) (refusing to pierce the veil when presented with "nothing more nefarious than the interest and involvement that properly may be demonstrated by an active parent corporation"); *Nassau*, 2008 WL at 2235609, at *4-5; *Allied Corp. v. Frola*, 701 F. Supp. 1084, (D.N.J. 1988) (requiring allegations of "some wrongdoing on the part of a parent corporation before a corporate veil may be pierced"). Indeed, courts "routinely refuse" to disregard corporate distinctions "based on allegations limited to the existence of shared office space or overlapping management, allegations that one company is the wholly-owned subsidiary of another, or that companies are to be 'considered as a whole.'" *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 87 (S.D.N.Y. 2010); *see also United States v. Universal Health Servs., Inc.*, 2010 WL 4323082, at *4 (W.D. Va. Oct. 31, 2010); *In re BH S&B Holdings, LLC*, 420 B.R. 112, 138 (Bankr. S.D.N.Y. 2009) (explaining that it is "well-established" that corporate affiliates "may share officers, directors, and employees … without requiring the court to infer that the subsidiary is a mere instrumentality for the parent"); *Sieko Epson Corp. v. Print-Rite Holdings, Ltd.*, 2002 WL 32513403, at *23 (D. Or. Apr. 30, 2002) (refusing to disregard corporate distinctions "even though Management performs some functions on behalf of [both entities] and some overlap of personnel and resources exists between these companies"). And for good reason. "[T]he type of overlap the [FTC] allege[s] is hardly unusual in corporate structure," *Universal Health Servs.*, 2010 WL 4323082, at *4, and ruling that such facts alone are sufficient to establish a Section 5 "common enterprise" would greatly expand the scope of liability under the Act. *Cf. Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 149-152 (3d Cir. 1988) (declining to pierce the corporate veil where evidence showed nothing beyond a typical parent-subsidiary corporate relationship). Under such a rule,

corporations of all kinds could be held liable under Section 5 for deceptive or unfair practices that were undertaken by any member of the corporate family. Disregard of corporate distinctions, in other words, would go from being "highly unusual" to routine practice. *P.F. Collier & Son Corp.*, 427 F.2d at 266.

CONCLUSION

For these reasons, WWC, WHG, and WHM cannot be held directly or derivatively liable for any violation of Section 5 of the FTC Act. The Amended Complaint thus should be dismissed with respect to those entities.

Dated: April 26, 2013

Respectfully submitted,

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