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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 **REPLY IN SUPPORT OF 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

The FTC rests its opposition brief on the false premise that the Commission does not have to play by the same rules as other litigants. It is a bedrock principle of law that distinctions in corporate identities must be respected absent extraordinary circumstances. The FTC says that it should not be held to that demanding standard. Routine features of doing business among corporate affiliates—such as sharing office space and having employees with overlapping job responsibilities—are typically insufficient to hold all affiliates jointly and severally liable. The FTC says that those facts suffice here. And although common enterprise liability is typically limited to circumstances in which individuals move funds and assets back and forth between shell entities to avoid liability, the FTC says that the doctrine can apply to the defendants in this case, each of which is engaged in legitimate (and separate) business pursuits.

The FTC's arguments lack merit. In actions brought under Section 5 of the FTC Act, no less than other areas of the law, courts respect corporate distinctions except in the "highly unusual circumstance[]" in which a defendant is trying to use the corporate form to escape liability. *P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 266 (6th Cir. 1970). That is not what is going on here. Wyndham Worldwide Corp. ("WWC"), Wyndham Hotel Group, LLC ("WHG"), Wyndham Hotel Management, Inc. ("WHM"), and Wyndham Hotels and Resorts, LLC ("WHR") are each separate corporate entities with their own separate businesses. They are not the types of companies that are typically targeted by the FTC's "common enterprise" theory. And although each of the defendants is related to one another, those ties are hardly unusual in modern day corporate America. For that reason, finding a "common enterprise" based on the FTC's allegations would mean that a common enterprise would exist in nearly every Section 5 case, unless the corporate defendant had no corporate affiliates at all. In short, this is not a case in which common-enterprise liability is recognized or warranted. The complaint against WWC, WHG, and WHM should therefore be dismissed.

I. The FTC's Common Enterprise Allegations Fail as a Matter of Law

As WWC, WHG, and WHM explained in their motion to dismiss, the Amended Complaint nowhere sets forth the rigorous factual prerequisites that would justify setting aside corporate distinctions and treating all of the defendants as a common enterprise. Mot. to Dismiss by Defs. WWC, WHG, & WHM ("WWC MTD") 6-9. The Amended Complaint devotes only one paragraph to explaining why the defendants should be treated as a common enterprise, *see* Am. Compl. ¶ 11, and that paragraph is bereft of any developed factual allegations showing why the Court should ignore corporate formalities. Unable to strengthen those thin allegations, the FTC attempts first to lower the high legal hurdle to establishing common-enterprise liability, and then to morph those few facts that it has alleged from routine corporate practices into indicia of wrongdoing. Under well-established law, however, common-enterprise liability is appropriate only when (i) separate corporations "[do] not operate as arm's length entities, but instead [are] so interrelated that no real distinction exist[s] between them," *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 463 (D. Md. 2004) (quotations omitted), and (ii) a failure to hold multiple corporations liable would provide "a clear mechanism for avoiding the terms of the [FTC or court] order," *Delaware Watch Co. v. FTC*, 332 F.2d 745, 747 (2d Cir. 1964). Neither situation is applicable here.

A. WWC, WHG, WHR, and WHM Are Distinct and Separate Corporate Entities

The FTC argues that "no real distinction exists among the Defendants." FTC Opp. 7. But as defendants explained in their motion to dismiss, and as the FTC does not dispute, the Amended Complaint does not allege that the defendants commingle corporate funds or assets, lack their own substantive businesses, engage in unified advertising, fail to maintain separate books and records, or disregard corporate formalities when dealing with third parties. *See* WWC MTD at 8; *see also FTC v. Millennium Telecard, Inc.,* 2011 WL 2745963, at *8 (D.N.J. July 12, 2011). Instead, to support the argument that "no real distinction exists" between the defendants, the FTC cherry-picks factors from cases in which courts have found a common enterprise, combines these factors to create a new legal

test in which "[n]o one factor is controlling," FTC Opp. 4, and argues that under the test it has invented, WWC, WHG, WHM, and WHR constitute a common enterprise. This is so, according to the FTC, because (i) the defendants share office space; (ii) some employees have overlapping responsibilities with several entities; and (iii) WWC and WHG "have performed various business functions on behalf of [WHR] … including legal assistance, human resources, finance, and information technology and security." Am. Compl. ¶ 9; *see also* FTC Opp. 5-7.[1]

Finding a common enterprise on these facts alone would drastically expand the scope of Section 5 by subjecting essentially every corporation to derivative liability for the acts of any other member of its corporate family. *See* WWC MTD 8-9. The organization of WWC and its subsidiaries reflects the structure of almost every well-known business in America today, through which affiliated companies maintain their legal separateness, but also synergize by sharing certain functions. *See United States. v. Universal Health Servs., Inc.*, 2010 WL 4323082, at *4 (W.D. Va. 2010) (explaining that the type of overlap alleged by the FTC is "hardly unusual in corporate structure"). Courts "routinely refuse" to disregard corporate distinctions merely because corporate affiliates share employees or because parent companies perform services for their subsidiaries. *See, e.g.*, *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 87 (S.D.N.Y. 2010) (refusing 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'"); *In re BH S & B Holdings, LLC*, 420 B.R. 112, 138 (Bankr. S.D.N.Y. 2009) (noting 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"); *Seiko Epson Corp. v. Print-Rite Holdings, Ltd.*, 2002 WL 32513403, at *23 (D. Or. 2002) (refusing to

[1] The FTC also argues that defendants conduct business "through a maze of interrelated companies." FTC Opp. 6. That argument has no independent substantive content, but merely restates under a different heading the facts and circumstances that the FTC believes justify common-enterprise treatment in this case. Moreover, if the defendants' clear relationships constitute a "maze," nearly every corporate structure in the nation would be a maze as well.

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").

In its attempt to draw common enterprise liability from standard American corporate structure, the FTC cites cases so factually distinct from this case that they undermine the FTC's argument and confirm that the FTC has alleged no facts upon which defendants could be treated as a common enterprise. For example, in *FTC v. Network Servs. Depot, Inc.*, the FTC targeted a "classic ponzi scheme" in which a husband and wife owned several companies that defrauded investors through a "sham business opportunity" involving nonexistent internet kiosks. 617 F.3d 1127, 1131-32 (9th Cir. 2010). The court found a common enterprise because the companies "regularly transferred money to one another and paid each others' expenses" to such an extent that an FTC financial expert "could not state conclusively which company initially generated the funds." *Id.* at 1142. Similarly, in *FTC v. NHS Sys., Inc.*, the court found "no real distinction" between a group of corporations that obtained consumer bank account numbers through a fraudulent telemarketing scheme and passed profits from the accounts to the same three "siphoning entities." 2013 WL 1285424, at *2 (E.D. Pa. Mar. 28, 2013). And in *FTC v. Wolf*, thirty corporations providing fraudulent investment opportunities in vending machines "operated as a single unit under the direction and control of the defendant," "maintained a single contract for all 800 numbers," and "used nearly identical telemarketing sales scripts and the same fake references." 1996 WL 812940, at *3 (S.D. Fla. Jan. 31, 1996).[2]

Those cases do not bear even the slightest resemblance to the defendants in this case—even when all of the allegations in the Amended Complaint are accepted as true. The defendants are well-known companies engaged in legitimate and separate business endeavors in the hospitality industry.

[2] The other cases cited by the FTC simply miss the mark. In one case, the corporations so clearly overlapped that the defendants "[did] not expressly dispute the existence of a common enterprise." *FTC v. Millennium Telecard, Inc.*, 2011 WL 2745963, at *8 (D.N.J. 2011). The other case did not involve common-enterprise liability at all, but instead found the defendants directly liable under Section 5. *See Waltham Watch Co. v. FTC*, 318 F.2d 28, 31-32 (7th Cir. 1963); *Waltham Precision Instrument Co. v. FTC*, 327 F.2d 427 (7th Cir. 1964).

They are not mere shell companies designed to perpetrate fraud and to hide ill-gotten gains. Sharing office space, employees, and business functions, in other words, is a far cry from using the corporate form to "siphon[]" fraudulent profits, *NHS Sys.*, 2013 WL 1285424, at *3, or to operate a "ponzi scheme," *Network Servs. Depot*, 617 F.3d at 1131-32. The FTC's case law, therefore, only underscores how far afield this case is from the circumstances in which common-enterprise liability applies.

B. In Any Event, Including WWC, WHG, And WHM In The FTC's Amended Complaint Is Not Necessary To An Effective Order Or Injunction

As to the second prong of the test for "common enterprise" liability under Section 5, the FTC surmises that in this case, "if the Court were to enter an order against only [WHR], Wyndham would be able to transfer responsibility for information security to another entity … and, as a result, avoid prospective enforcement actions." FTC Opp. 9. But that makes no sense. Under the FTC's own interpretation of Section 5, legal obligations attach to the entity that collects or uses consumer information, not to the entity that provides data-security services. *See* FTC, *Protecting Consumer Privacy in an Era of Rapid Change*, at 22 (2012), available at http://www.ftc.gov/os/2012/03/120326privacyreport.pdf (acknowledging that the Commission's "privacy framework" applies to "commercial entities that collect or use consumer data that can be reasonably linked to a specific consumer, computer, or other device"). Under the FTC's rule, WHR itself will bear ultimate legal responsibility for the consumer information that it collects and stores on its own computer network, regardless of what entity in the corporate family provides data-security services, just as it would if it had outsourced its data-security efforts to an independent third party. Joining the separate and distinct WWC, WHG, and WHM to the FTC's Amended Complaint is therefore wholly unnecessary to prevent WHR from avoiding the terms of any order that this Court might enter.

II. The Amended Complaint Fails to Adequately Allege Direct Liability Against WWC, WHG, Or WHM

The FTC's Amended Complaint does not allege, when read fairly and naturally, that WWC, WHG, or WHM ***themselves*** engaged in any "deceptive" or "unfair" conduct. *See* WWC MTD 5-6. To the contrary, the great majority of the FTC's deception and unfairness allegations focus solely on the statements and conduct of WHR and the independently owned Wyndham-branded hotels. *Id*. at 5. Those few paragraphs that do allege conduct by all "defendants" are too conclusory and undeveloped to comply with basic federal-pleading requirements. *Id*. at 5-6. Nonetheless, seizing on those few paragraphs that it can identify, the FTC maintains that the Amended Complaint "alleges direct liability as to each" of the Wyndham entities. FTC Opp. 1. That is simply wishful thinking.[3]

A. The Amended Complaint Does Not Allege Deception By WWC, WHG, or WHM

Contrary to the FTC's assertions, the Amended Complaint does not allege that "all four Wyndham entities have made deceptive representations." FTC Opp. 10. The ***only*** allegedly deceptive statements identified in the Amended Complaint are those included in an online privacy policy that was "disseminated on [WHR]'s website." Am. Compl. ¶ 21; *id*. ¶ 22 ("There is a link to this privacy policy on each page of the [WHR] website."). The Amended Complaint alleges no other purportedly deceptive statements made by any of the other defendants in this case. Instead, through various means, the FTC seeks to attribute the privacy policy on WHR's website to WWC, WHG, and WHM. None of those arguments is convincing.

First, the FTC argues that WWC is directly liable for deception because it "was responsible for the data security of the [WHR] network during the third breach." FTC Opp. 10. But whether WWC

[3] As an initial matter, defendants reiterate that even if the Amended Complaint could be construed to allege direct liability against WWC, WHG, and WHM, any such claims would fail as a matter of law for the reasons stated in the motion to dismiss filed by defendant WHR. *See* WWC Mot. to Dismiss at 6 n.1. Thus, to the extent the Court reads some or all of the Amended Complaint as adequately alleging direct liability again WWC, WHG, and WHM, those defendants join in and incorporate by reference all of the arguments contained in WHR's motion to dismiss and WHR's reply brief in support of its motion to dismiss.

had responsibility for data-security at WHR for a period of time does nothing at all to establish that WWC made the allegedly deceptive statements included in the WHR privacy policy. Indeed, WWC is not mentioned at all in the privacy policy, other than to ***dissociate*** WWC from the other corporate entities that are identified. *See* WHR MTD, Ex. A. That is hardly a basis for alleging deception.

Second, even though the privacy policy contains no reference ***at all*** to WHM, the FTC argues that the statements in the policy nonetheless can be attributed to WHM through a chain of causation: WHM manages certain hotels on behalf of independent hotel owners, and those hotel owners "have websites that direct consumers interested in reservations to [WHR's] website, where the privacy policy is hosted." FTC Opp. 10. It is inconceivable that such a tenuous line of reasoning could result in direct liability for deception. First of all, it is doubtful that the mere act of directing someone to another website could result in liability for any representations made on that website. If it could, Orbitz and Expedia would be responsible for the representations on almost every hotel website in existence, and just as liable as WHM here. But even assuming that it could, the Amended Complaint does not allege that WHM actually created, operated, or maintained the websites that allegedly referred consumers to the WHR privacy policy. Indeed, the Amended Complaint does not even allege that the hotels with such websites were managed by WHM at all. These omissions are fatal to the FTC's attempts to hold WHM directly liable for deception.

Third, the FTC argues that WHG is liable for deception because the privacy policy "is identified as being the privacy policy of [WHG]." FTC Opp. 10. But simply alleging that WHG made statements about data security in the privacy policy is not sufficient to allege a plausible claim for deception. Instead, the FTC must also allege sufficient facts showing ***why*** WHG's statements about its own data-security practices were deceptive. It has not done that. The Amended Complaint contains no developed factual allegations explaining how WHG's data-security practices were not "commercially reasonable" or compliant with "industry standard practices." Am. Compl. ¶ 21

(quoting privacy policy). Indeed, the compromised network was controlled by WHR, not by WHG. The FTC has thus failed to adequately allege deceptive statements by WHG.

B. The Amended Complaint Does Not Allege Unfair Acts By WWC, WHG, or WHM

The FTC also cannot replead its Amended Complaint to include claims of "unfair acts or practices" against WWC, WHG, and WHM that it has not previously alleged. *See* FTC Opp. 10-11. The Amended Complaint's unfairness allegations are directed solely at the conduct of WHR and the independently-owned Wyndham-branded hotels. *See, e.g.*, Am. Compl. ¶ 24(a) (referring to "the Wyndham-branded hotels property management system" and "the Hotels and Resorts' corporate network"); ¶ 24(b) (referring to software at the "Wyndham-branded hotels"); ¶ 24(d) (referring to "Wyndham-branded hotels' servers" and the "Hotels and Resorts' computer network"); ¶ 24(e) (referring to "Hotels and Resorts' network"); ¶ 24(g) (referring to the "Hotels and Resorts' network"); ¶ 24(i) (referring to "Hotels and Resorts' computer network"). Other than a few stray instances in which the FTC alleges that all of the "Defendants" engaged in certain conduct, the Amended Complaint contains no developed factual allegations explaining how WWC, WHG, or WHM engaged in any unfair conduct. *See* WWC MTD 5-6. That should be the end of the matter.

The FTC's attempts to argue otherwise miss the mark. The fact that WWC and WHG allegedly "assumed responsibility for the information security program" at WHR at various times, FTC Opp. 11, is simply a repackaging of the FTC's argument that all of the defendants in this case were engaged in a common enterprise because "various business functions … are shared," *id*. at 6. It is not an allegation of direct liability, and, if it were, it would mean that third-party information security providers were part of a "common enterprise" with the entities to which they provide services. The Amended Complaint, moreover, contains no developed allegations explaining what "unfair" conduct WHM engaged in while performing management duties for certain independently owned Wyndham-branded hotels.

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Respectfully submitted,

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