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FTC and Wyndham Settle Landmark Data Breach Action

Noted hospitality company Wyndham Worldwide Corporation (and certain of its hotel business subsidiaries) and the Federal Trade Commission (FTC) last month entered into a landmark settlement resolving an FTC enforcement action¹ related to hackers breaching the Wyndham Hotels and Resorts network on three occasions between May 2008 and January 2010 and obtaining the personal and financial data of guests from the networks of several Wyndham-branded hotels.

The Stipulated Order,² entered by the U.S. District Court on Dec. 11, 2015, is remarkable for the reasons set forth below and should prove of great comfort to franchisors nationwide who now face, or in the future may face, similar actions relating to data breaches occurring in their networks.

Most significantly, the Stipulated Order settling the FTC's action confines virtually all of its requirements to Wyndham Hotels and not to any of the other guest lodging franchise networks owned by ultimate parent Wyndham Worldwide Corporation (those networks include Ramada Worldwide, Baymont Inns & Suites, Days Inn, Super 8, Howard Johnson, Travelodge and Dolce Hotels & Resorts). By focusing solely on the only franchise network that experienced the data hack and resultant breach, the settlement eases concerns of other major franchisor holding companies that a data breach at one of their networks will ensnare all of them.

Another truly critical element of the Stipulated Order is that it relieves Wyndham Hotels of any responsibility whatsoever for data breaches that may take place at franchised Wyndham Hotels. This is most significant, as the FTC in its complaint strongly urged the

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court to impose vicarious liability for franchisee data breaches upon Wyndham Hotels, which would make it responsible for all data security practices and lapses at franchised hotels.

Current Climate

The FTC action against Wyndham was a bellwether case, and franchisors nationwide were anxious to see if liability for their franchisees' data breaches and/or privacy violations would now be thrust upon them. The FTC/Wyn-

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dham settlement eliminating any such liability should prove of great comfort to franchisors.

This is especially so against the background of the National Labor Relations Board's "joint employer" thrust against franchising, in which the NLRB issued complaints against McDonald's Corporation alleging that, as a franchisor, McDonald's is a "joint employer" of its franchisees' employees (which would make McDonald's Corporation jointly liable with its franchisees for any violations of the National Labor Relations Act and all other employer-related liabilities and obligations). Those NLRB complaints³ against McDonald's Corporation are currently being heard. Franchisors can be relieved that in this trend-setting settlement, the FTC ultimately agreed not to thrust liability for franchisee data breach errors and omissions upon franchisor

Wyndham Hotels.

Nor did the FTC in its settlement with Wyndham Hotels seek to make it liable for all of its franchisees' possible data violations upon a "vicarious liability" theory (under which third parties sustaining injuries at a franchised outlet seek to hold the "deep pocket" franchisor responsible alleging actual or apparent agency, negligence or respondeat superior). While most courts over the past two decades have evolved and crafted a doctrine under which a franchisor will not be held liable for its franchisees' misdeeds unless the franchisor controlled the day-to-day operations of the franchisee and/or the franchisee's instrumentality of harm, this evolution is not complete and there is still the occasional judicial decision imposing such liability upon a franchisor.⁴ But the FTC/Wyndham settlement eschewed any such "vicarious liability" approach.

Guidance on Data Security

Another truly notable aspect of the FTC/Wyndham Hotels settlement is that, for the first time in history, the Stipulated Order provides specific guidance as to what the FTC believes constitutes reasonable data security and grants Wyndham Hotels a "safe harbor" if the company meets or exceeds certain standards for reasonable data security identified in the Stipulated Order (another entirely unprecedented aspect of the FTC/Wyndham settlement).

The Stipulated Order requires Wyndham Hotels to establish and implement "...a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of Cardholder Data that it collects or receives in the United States from or about consumers." These measures include identifying risks to personal data security, confidentiality and integrity; engaging in employee training and management regarding data security; and, implementing reasonable safeguards to control any risks identified through a risk assessment.

Notably, the Stipulated Order imposes no fines, pen-

alties or other monetary obligations upon Wyndham Hotels or Wyndham Worldwide Corporation.

So it is that the FTC/Wyndham settlement, the first of its kind in the franchise sector, furnishes guidance and principles concerning franchisor data breach liabilities which are quite limited in nature and thus should prove good news to franchisors nationwide.

1. *Federal Trade Commission v. Wyndham Worldwide Corporation*, Civil Action No. 2:13-CV-01887-ES-JAD (U.S. District Court, D. N.J.).

2. *Id.*, Document 283.

3. See <https://www.nlrb.gov/news-outreach/news-story/nlrb-office-general-counsel-issues-consolidated-complaints-against>.

4. See, for example, *Solis v. McDonald's Corp.*, 2011 WL 27467539 (Sup. Ct. N.Y. Cty. 2011).