

Dissenting Statement of Commissioner Maureen K. Ohlhausen
FTC v. LifeLock, Inc.
Matter No. X100023
December 17, 2015

I dissent from this proposed order settling the FTC's allegations against LifeLock, Inc. for the same reason I voted against the decision to file the initial contempt motion.¹ The record lacks clear and convincing evidence that LifeLock failed to establish and maintain a comprehensive information security program designed to protect the security, confidentiality, and integrity of consumers' personal information.

During the relevant period, reputable third parties certified that LifeLock complied with the industry-standard Payment Card Industry Data Security Standard (PCI DSS)² and other data security standards.³ The record does not rebut the existence of LifeLock's biennial PCI DSS or other certifications or show they were not performed by qualified, third-party professionals. Nor is there evidence that LifeLock subscribers' information suffered a breach.

Importantly, this matter involves a contempt motion, filed in July 2015, and which remains sealed. The motion alleged that LifeLock, Inc. violated a 2010 Stipulated Final Judgment and Order for Permanent Injunction (2010 Order),⁴ which required it to "establish and implement, and thereafter maintain, a comprehensive information security program that is designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers."⁵ The 2010 Order also required LifeLock to obtain initial and biennial assessments and reports on its information security program from a properly qualified third-party

¹ See Press Release, Fed. Trade Comm'n, FTC Takes Action Against LifeLock for Alleged Violations of 2010 Order (July 21, 2015), <https://www.ftc.gov/news-events/press-releases/2015/07/ftc-takes-action-against-lifelock-alleged-violations-2010-order>.

² The major payment card brands formed the PCI Security Standards Council to create, update, and maintain PCI DSS as the industry standard security framework required for any organization that accepts payment cards or handles payment card data. See Branden R. Williams and Anton Chuvakin, PCI COMPLIANCE, THIRD EDITION: UNDERSTAND AND IMPLEMENT EFFECTIVE PCI DATA SECURITY STANDARD COMPLIANCE, 3rd Edition at 13-14, Syngress, 2012.

³ See LifeLock, Inc., Annual Report (Form 10-K), 13 (Feb. 19, 2015), <http://www.sec.gov/Archives/edgar/data/1383871/000162828015000863/lock-20141231x10k.htm> ("We received our annual PCI-DSS Level 1 certifications for our enterprise business in June of 2014 and for our consumer business in July of 2014. Additionally, we obtained a SOC I report in our enterprise business for our information security systems in April 2014 and a SOC II report for our consumer business in October 2014."); LifeLock, Inc., Annual Report (Form 10-K), 11 (Feb. 19, 2014), http://www.sec.gov/Archives/edgar/data/1383871/000156459014000269/lock-10k_20131231.htm (similar language); LifeLock, Inc., Annual Report (Form 10-K), 14 (Feb. 26, 2013) (similar language), <http://www.sec.gov/Archives/edgar/data/1383871/000119312513076898/d455353d10k.htm>; LifeLock, Inc., Registration Statement (Form S-1), 111 (Aug. 28, 2012) (similar language), <http://www.sec.gov/Archives/edgar/data/1383871/000119312512372029/d361263ds1.htm>.

⁴ Plaintiff Federal Trade Commission's Notice of Lodging Proposed Documents Under Seal, FTC v. LifeLock Inc., No. 2:10-cv-00530-MHM (D. Ariz. July 21, 2015). The matter remains under seal.

⁵ Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief as to Defendants LifeLock and Davis, FTC v. LifeLock, Inc., No. 2:10-cv-00530-NVW, 5 (D. Ariz. Mar. 15, 2010), <https://www.ftc.gov/sites/default/files/documents/cases/2010/03/100309lifelockstip.pdf>.

professional.⁶ The July contempt motion alleged that LifeLock violated the 2010 Order by 1) failing to implement and maintain a comprehensive information security program; 2) falsely advertising the protection it provided consumers' information; and 3) falsely advertising the frequency of its identity theft alerts.⁷

To succeed on a contempt motion, the Commission must establish, by clear and convincing evidence, that LifeLock violated a clear and unambiguous provision of the 2010 Order.⁸ Courts vigorously apply that high standard.⁹ And under that standard, courts have declined to find an order violation when testifying experts differ over whether defendant engaged in typical industry practices that satisfy the order's provisions.¹⁰

In this case, LifeLock's PCI DSS and other data security certifications undermine staff's ability to clear the high threshold for finding contempt. In fact, our recent data breach settlement with Wyndham shows that the FTC considers PCI DSS certifications to be important evidence of reasonable data security.¹¹

The courts demand transparency and predictability in FTC enforcement of consent orders. These orders are vital tools in our law enforcement toolbox, and we have successfully and appropriately enforced them in the past. But the utility of such orders and our credibility diminish if we attempt to hold companies to standards not adequately disclosed within the four corners of the agreement and in some tension with the agency's actions in similar matters.

⁶ *Id.* at 7.

⁷ My dissent focuses on the data security issues that underlie allegations one and two. The third allegation also has substantial weaknesses, but there is little I can say about it as the case remains sealed.

⁸ *See* FTC v. Lane Labs-USA, 624 F.3d 575, 582 (3d Cir. 2010) (quoting *John T. v. Del. Cnty. Intermediate Unit*, 318 F.3d 545, 552 (3d Cir. 2003)); FTC v. Kuykendall, 371 F.3d 745, 756-57 (10th Cir. 2004); *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992).

⁹ *See, e.g.*, *McGregor v. Chierico*, 206 F.3d 1378, 1383-84 (11th Cir. 2000) (reversing district court finding of contempt with regard to one defendant because "[n]one of the facts presented by the FTC provide clear and convincing evidence that" defendant participated in the prohibited activity); *FTC v. Odysseus Mktg.*, No. 05-cv-330-SM, 2008 U.S. Dist. LEXIS 94213, *11 (D.N.H. 2008) (declining, under the clear and convincing standard, to find contempt based on a thin record, but opining that "[a] different result would likely obtain on a lower, preponderance standard of proof..."); *FTC v. Garden of Life*, 845 F. Supp. 2d 1328 (S.D. Fla. 2012) *aff'd in part and vacated in part*, 516 Fed. Appx. 852 (11th Cir. 2013).

¹⁰ *See, e.g.*, *FTC v. Garden of Life*, 845 F. Supp. 2d at 1334-35 (finding that a battle of the experts was insufficient to show clear and convincing evidence that defendant violated the terms of the relevant order). Indeed, even when litigation posture has only required the FTC to meet the lower "preponderance of the evidence" standard, some courts have declined to find contempt in a battle of the experts. *See* *Basic Research, LLC v. FTC*, No. 2:09-cv-0779 CW, 2014 U.S. Dist. LEXIS 169043 (D. Utah Nov. 25, 2014).

¹¹ Press Release, Fed. Trade Comm'n, *Wyndham Settles FTC Charges It Unfairly Placed Consumers' Payment Card Information At Risk* (Dec. 9, 2015), <https://www.ftc.gov/news-events/press-releases/2015/12/wyndham-settles-ftc-charges-it-unfairly-placed-consumers-payment>.