City Of Chicago v. Marriott International, Inc. et al

2019 | Cited 0 times | D. Maryland | December 13, 2019

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Southern Division CITY OF CHICAGO, * Plaintiff, * v. * Case Nos.: PWG-19-654; 19-2879 MARRIOTT INTERNATIONAL, INC., * et al., *

Defendants. * * * * * * * * * * * * * * * *

MEMORANDUM OPINION AND ORDER Pending before me is a Multidistrict Litigation action against Marriott International, Inc. and related entities concerning a data breach incident. In re Marriott, No. PWG- 19-2879. One of the), which seeks relief under a local consumer protection 1

data security incident. First Am. Compl. 1, ECF No. 294. 2

, ECF No. 331. Marriott seeks to dismiss arguing that, as applied

r the Illinois Constitution. Id. at 6-8. The motion to dismiss the FAC is fully briefed, ECF Nos. 331-1, 384, 425. A hearing is not necessary. See 1

Chicago brought this action against two defendants: Marriott International, Inc. and Starwood Hotels & Resorts Worldwide, LLC. They otherwise indicated. First Am. Compl. 1, ECF No. 294.

2 All citations are to the MDL, PWG-19-2879 unless otherwise indicated.

facts because, as alleged, Chicago has standing to request an injunction and monitoring fund as relief for its own injuries. And under the facts pleaded in the FAC, the municipal ordinance under which Chicago has filed suit addresses a local problem, making it a legitimate exercise of the home rule authority as granted by the Illinois Constitution. Finally, in the event that Chicago establishes liability for breach of its ordinance, relief could be fashioned that would prevent the ordinance from having an extraterritorial effect. Therefore, the motion to dismiss is denied.

Factual Background

properties across 131 countries, including 33 hotels throughout the City of Chicago. First Am.

Compl. ¶ 17. In 2016, Marriott acquired Starwood Hotels & Resorts Worldwide, LLC Id. ¶ 18.

On November 30, 2018, Marriott announced that it was the subject of the second largest data breach in history. Id. ¶ 1. Marriott revealed that hackers had obtained access to the Starwood reservation database for four years, which it failed to detect until September 8, 2018. Id. ¶¶ 35- 36. The breached database contained information about approximately 500 million guests. Id. ¶ 38. For an estimated 327 million guests, the compromised information includes some or all of the following personal information: full names, mailing addresses, phone numbers, email addresses, passport numbers, Starwood Preferred Guest account information, dates of birth, gender, arrival and departure information, reservation dates, and communication preferences. Id. ¶ 39.

expiration dates, and, possibly, the information needed to decrypt those numbers. Id. ¶ 43.

On June 20, 2019, Chicago filed its first amended complaint against Marriott. Chicago contends that Marriott violated its municipal ordinance, MCC § 2-25-090(a), because it failed to inadequately responded to the breach, and failed to implement reasonable safeguards that would

have prevented the breach and/or detected it sooner. Id. ¶¶ 83 86, 95. The City also alleges that Marriott mispresented to Chicago residents that it had reasonable security safeguards in place. Id. ¶¶ 100 02. Chicago alleges these acts or omissions occurred in the City, and that the breach affected Chicago residents, thus empowering the City to sue on its own and their behalf.

Chicago states that it does not need to allege injury or causation to state a claim for violations of its Municipal Code. Id. ¶ 54. Nonetheless, the City alleges that Marriott injured

Id. Chicago alleges its residents have

uct has substantially increased the risk that the affected Marriott customers will be, or already have become, victims of identity theft or financial Id. ¶¶ 60, 67.

Chicago is seeking declaratory relief that Marriott violated MCC § 2-25-090(a); an

and mitigate the effects of d of up to $10,000 for each day a violation this data breach, as well as for all precautions - and post-judgment interest; and any other relief the Court deems reasonable. Id. at 28.

Marriott moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the City of Chicago lacks standing. - Chicago, to regulate conduct that is of local concern, rather than statewide or national. Kalomidos

v. Vill. of Morton Grove, 470 N.E.2d 266, 275 (Ill. 1984). Accordingly, Marriott also moves to dismiss

pursuant to Fed. R. Civ. P. 12(b)(6), arguing that MCC § 2-25- is unconstitutional due to its extraterritorial effect and because it views the data breach as a

national, as opposed to a local, problem.

Standard of Review

Specifically, Ashcroft v.

Iqbal, 556 U.S. 662, 678 (2009). Id. I must accept the well

pleaded See Aziz v. Alcolac, 658 F.3d 388, 390 (4th Cir. 2011). plaintiff. Adcock v. Freightliner LLC, 550 F.3d 369, 374 (4th Cir. 2008) (quoting Battlefield

Builders, Inc. v. Swango, 743 F.2d 1060, 1062 (4th Cir. 1984)).

Discussion

Chicago brings this law suit under § 2-25-090(a) of its Municipal Code, which forbids any -25-

by reference to the Illinois Consumer Fraud 815 Ill. Comp. Stat. 505/2 (1961); Id. In addition to the specific definitions of unlawful practices set forth in the ICFA, it also incorporates as prohibited conduct knowing violations of certain state statutes, including the Illinois Personal

under its ordinance, the ICFA, and the IPIPA.

Marriott argues that the action should be dismissed because: (1) Chicago lacks Article III standing to obtain the relief it seeks on behalf of Chicago residents; and (2) under the Illinois Constitution, application of MCC § 2-25-090(a) to the data breach is unconstitutional. Mem. 3, ECF No. 331-1. nstitutional argument is twofold in this context exceeds its home rule authority under the Illinois Constitution because it seeks to

solve a statewide or national problem rather than one of local concern, and because it is attempting to regulate conduct beyond its borders. Id. at 4.

Chicago Has Standing to Sue

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Article III

standing must be found to exist before a court may address the merits. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998). behalf of its citizens because its a to obtain the injunctive

and equitable relief it requests, specifically, requiring Marriott to implement reasonable security measures and requiring Marriott to create a fund that helps Chicago residents mitigate the impact

of the data breach, respectively. Because Chicago has sufficiently alleged a concrete injury to its own proprietary interests, it has standing to sue.

States may, under certain conditions, sue on behalf of their citizens. Massachusetts v. EPA, 549 U.S. 497 (2007). But this authority generally does not extend to subordinate governmental units, like counties or cities, to sue to vindicate the rights of their residents. v. Levi, 79 F.R.D. 1, 4 (D. Md. 1977) residents. The power of a may only sue to vindicate its own interests); see also Bd. of Supervisors of Fairfax Cty., Virginia

v. United States, 408 F. Supp. 556 (E.D. Va. 1976) (holding that a county may not sue on behalf of its residents by exercising parens patriae authority). 3

For Chicago to have standing, it must rest upon its own injury not its injuries.

Marriott argues that Chicago does not have standing to seek the injunctive and equitable relief it requested. , 554 U.S. 724, 734 (2008) (internal quotation

marks omitted); Because municipalities, such as Chicago, cannot assert parens patriae standing, Marriott argues that Chicago cannot demand the above relief because they are both requested 3

Although this case was originally filed in the Northern District of Illinois, Compl. 1, ECF No. 1 in PWG-19-654, for questions concerning federal law in multidistrict litigation cases I must apply the law that would be binding had it been filed in this court. In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 97 F.3d 1050, 1055 (8th Cir. 1996) federal law in multidistrict litigation, transferee court should apply law of the circuit in which it is Poole v. Ethicon, Inc., No. 2:12-CV-01978, 2013 WL 6164078 at *2 (S.D.W. Va. Nov. 25, 2013) (using the Fourt because it was a question of federal procedural law). rule authority, of course, I must look to Illinois law.

Mem., 13. Marriott contends that effort to force it to adopt additional data security measures is intended n belonging that Id. at 14. Chicago

counters that it is seeking to enforce its municipal code on its own behalf, and therefore it is not exercising parens patriae standing

Both Chicago and Marriott cite a Ninth Circuit case that holds that a municipality must establish concrete injury to its proprietary interests to have standing. , 386 F.3d 1186, 1198 (9th Cir. 2004). There, the court explained that a municipal proprietary ry - Id.

In that case, Sausalito sought to prevent the National Park Service from developing Fort Baker, a nearby former military base. Id. at 1194. The court held that Sausalito had alleged injury to its increase in t and impaired air quality

Id. at 1198 99.

Chicago adequately has alleged injury to its municipal interests. It argues that, as applied to the facts alleged in the FAC, MCC § 2-25-090(a)

and that will diminish the revenue Chicago receives by way of hotel accommodation. City of Sausalito, 386

they consider that when making purchasing decisions

7. Therefore, the facts as pleaded (which must be taken as true at the motion to dismiss stage), plausibly alleged injury to Chicago proprietary interests. 4

Preliminarily, Marriott challenges the application of MCC § 2-25-090(a) as applied to them on the basis that its enforcement home rule authority, as granted by the Illinois Adoption of Section 6 represented a dramatic shift in power between the State of Illinois and its local governments. City of Chicago v. StubHub, Inc., 979 N.E.2d 844, 850 (Ill. 2011) Constitution, the balance of power between our state and local governments was heavily weighted towards the state. The 1970 Illinois Constitution drastically altered that balance, giving local A review of the opinions of the Illinois Supreme Court and Court of Appeals since 1970 reveals a progression in their analysis of the scope of the home rule authority , over time, that scope has broadened and become more refined. Id. [in restricting home rule authority] under

4 Chicago is correct that injury in fact can stem from a loss in tax revenue. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 110 (1979) (holding that the harm of loss of tax revenue was sufficient injury when there was a reduction in the number of buyers in the housing market, leading to a decrease in property values). And while discovery may reveal facts that would meaningfully distinguish Gladstone Realtors if Chicago is unable to provide admissible evidence that the data breach caused an actual reduction in hotel reservations in Chicago (and a corresponding loss of tax revenue owed to the City), I am bound by the allegations in the complaint at this stage of the litigation. Id.

section 6(a) as narrow, and over time we developed an analytical framework consistent with that Accordingly, care must be taken not to focus too narrowly on what may appear to be more restrictive statements about the scope of home rule authority in early court decisions, without keeping in mind later developments in the law that viewed that authority more expansively.

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In the course of nearly fifty years of analysis of home rule authority by Illinois courts, the following overview emerges. First, home rule authority was intended to be broad in scope, and it allows concurrent local and state regulation of the same problem, unless the Illinois General Assembly explicitly has preempted home rule authority or made findings in enacting legislation that make it clear that statewide, as opposed to local, authority to legislate was intended. Park Pet Shop, Inc. v. City of Chicago, 872 F.3d 495, 500 (7th Cir. 2017) (the Illinois Constitution expressly requires a clear statement from the state legislature to oust a

- ; Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1158 (Ill. 1992) (Section Second, reviewing courts have been cautioned not to find implied preemption

of home rule authority where neither the express language of state legislation nor its legislative history evidences the clear intent of the General Assembly to preempt local home rule units from regulating a particular problem. Park Pet Shop, Inc., 872 F.3d at 500 (holding home rule [s]tate government never had an exclusive role in addressing animal - Blanchard v. Berrios, 72 N.E.3d 309, 318 (Ill. 2016) (.

Third, as a general matter, local home rule units may not regulate beyond their borders. Accel of Elmwood Park, 46 N.E.3d 1151, 1160 (Ill. App. Ct. 2015) (holding

that an ordinance requiring licensing of video game terminals was a valid exercise of home rule video-gaming regulation generally but regulation . And, finally, Illinois courts have acknowledged that determining whether home rule authority exists in a particular case may be hard to do at times, requiring case-by-case analysis of the underlying facts. StubHub, Inc., 979 N.E.2d ; Kalodimos v. Village of Morton Grove,

dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution But, however challenging the analysis may be to apply in a particular case, the Illinois courts have given a clear analytical framework for courts to follow when undertaking to do so.

The first step is to determine whether the ordinance enacted by a local home rule unit is within the express scope of authority granted by Article VII § 6 of the 1970 Constitution. It states, relevantly: A home rule unit government and affairs including, but not limited to, the power to regulate for the protection of the

Ill. CONST. art. VII, § 6(a). Additionally, [h]ome rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be Ill. CONST. art. VII, § 6(i). . CONST. art. VII, § 6(m).

The key is to determine its own government and affairs. It does if it regulates for the protection of

the public health, safety, morals and welfare of its residents. In order to correctly answer this question, it is important to define the problem StubHub, Inc., 979 N.E.2d at 853 (acknowledging that the City has explicit home rule authority to tax, but problem [solved by the ordinance] is not the tax, but its collection by internet auction listing

As applicable to this case, the problem that Chicago attempts to reach through MCC § 2-25-090(a) is the protection of personal identifying information of Chicago residents who provide it to data holders such as Marriott who do business within Chicago. The problem is not fairly characterized as regulating online data security at large or in the abstract, as Marriott suggests. -4, ECF No. and that alleg

ment

and affairs. Vill. of Bolingbrook v. Citizens Utilities Co. of Ill., 632 N.E.2d 1000, 1001 (Ill. 1994). As the Illinois Supreme Court put it, home rule unit where the ordinance relates to problems that are local in nature rather than State or

Id. at 1002; see also People ex rel. Bernardi v. City of Highland Park, 520 N.E.2d 316, 320 (Ill. 1988); Kalodimos, 470 N.E.2d at 274; Ampersand, Inc. v. Finley, 338 N.E.2d 15, 18 (Ill. 1975); Cty. of Cook v. Vill. of Bridgeview, 8 N.E.3d 1275, 1279 (Ill. App. Ct. 2014). This seemingly simple distinction is anything but. Problems can be local, regional, statewide, or national. See, e.g., City of Des Plaines v. Chicago & N. W. Ry. Co., 357 N.E.2d 433, 435 (Ill.

1976) (noise caused by single automobile honking louder than allowed by municipal noise control ordinance of local concern; noise caused by train travelling interstate across municipal boundaries is not); Metro. Sanitary Dist. of Greater Chicago v. City of Des Plaines, 347 N.E.2d 716, 718 (Ill. 1976) (environmental regulation of sewage plant serving multiple municipalities of regional concern); Cty. of Cook, 8 N.E.3d at 1279 (spread of rabies by overpopulation of feral cats statewide or national issue)). [d]ifficulty arises, however, when a problem has a local as well as a statewide or national imVill. of Bolingbrook, 632 N.E.2d at 1002.

When problems are both local and statewide, Illinois courts use a three factor test to [w]hether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution but with regard for the nature and extent of the problem, the units of government which have the most vital interest in its solution, and the role traditionally Kalodimos, 470 N.E.2d at 274; Cty. of Cook, 8 N.E.3d at 1279.

First Factor

Chicago has alleged that the nature and extent of the problem is local. The nature of the problem is the protection of personal identifying information of Chicago residents. Illinois courts assess the

extent of the problem by determining whether the problem is pervasive throughout the state or nation, or merely within the home to rectify a problem that persists beyond its borders, it is not of local concern. For example, in Vill. of Bolingbrook, the court held that the extent of the problem, sewage discharges, was local in nature because the Village suffered the main impact of the problem, not the state, and because the problem amounted to isolated incidents in the Village and was not common in other localities. 632

N.E.2d at 1003 ( ). Chicago has argued that it seeks to rectify only misrepresentations to Chicagoans regarding its data security practices, its failure to protect

data, and its delayed notice to Chicagoans about the breach all while operating with Opp. 13. As pleaded, the extent of the problem protection of personal identifying information provided to businesses doing business in Chicago by Chicago residents who will feel the impact of that data breach within Chicago is local.

Further, at this stage in the proceedings there are insufficient facts known to determine whether the extent of the problem is statewide or national. Chicago was not affected differently than any other city in the United States by this incident is just that argument. Its ipse dixit pronouncements are not facts. Cf. Cty. of Cook v. Vill. of Bridgeview, 8

N.E.3d 1275, 1279 (Ill. App. Ct. 2014) (holding, on appeal from cross motions of summary judgment, that the extent of the problem the spread of rabies was not local based entirely upon expert testimony that the feral cat problem was of national concern.).

For this reason, given the record as it now stands, the first Kalodimos factor favors the City.

Second Factor

The second Kalodimos factor focuses on which unit of government has the most vital interest in resolving the problem. Here, Illinois courts have been informed by the text of the state legislation (whether it expressly preempts local regulation), as well as legislative history of the state statute enacted by the General Assembly that addresses the same problem that the local home rule unit has sought to regulate. In particular, the focus has been on whether the Illinois General

Assembly has made legislative findings or otherwise clearly stated a preference for statewide as opposed to local regulation of a problem. City of Des Plaines, 357 N.E.2d at 436 (referencing the legislative findings made by the General Assembly when enacting the Illinois Environmental Protection Act -wide program, as well as the comments of the Local Government Committee in its report to the Illinois Constitutional Convention).

Here, the parties have not cited, nor has my own research revealed, any legislative history regarding

the passage of the ICFA or IPIPA that would suggest that the Illinois General Assembly considered consumer protection at large and the protection of personal information privacy in particular to be uniquely within the purview of the state, as opposed to local, regulation. 5

Nor is there any language in either the ICFA or IPIPA that expressly preempts or restricts local consumer protection and personal information privacy protection regulation. 6

City of Chicago v. Roman,

5 The original passage of the ICFA was in 1961 and . In re Facebook, Inc. v. Consumer Privacy User Profile Litig., 354 F. Supp. 3d 1122, 1133 (N.D. Cal. 2019). In looking through the legislative history that is available, I found nothing in the House or Senate Transcripts that evinces an intent of the General Assembly that the law should operate on an exclusively statewide basis. Therefore, [t]he plain language of the Consumer Fraud and Deceptive Business Practices Act is the best indicator of the , and there is nothing explicit in the text of the law concerning an intent to preempt local law. Bank One Milwaukee v. Sanchez, 783 N.E.2d 217, 221 (Ill. App. Ct. 2003). Similarly, in looking through the legislative history for the passage of IPIPA, I found nothing bearing on the intent of the General Assembly to preempt local legislation on the subject. 6 For evidence that the Illinois General Assembly knew how to limit home rule authority, but chose not to, I look to another provision in the ICFA that specifically preempts home rule authority with respect to the regulation of immigration assistance services:

No unit of local government, including any home rule unit, shall have the authority to regulate immigration assistance services unless such regulations are at least as stringent as those contained in this amendatory Act of 1992. It is declared to be a law of this State pursuant to paragraph (i) of Section 6 of Article VII of the Illinois Constitution of 1970, that this amendatory Act of 1992 is a limitation on the authority of a home rule unit to exercise powers concurrently with the State.

Again focusing on the second factor, Illinois courts have also looked to see whether the local ordinance and state statute are complementary, such that they are capable of being enforced together, or whether they are incom

Assembly. Cty. of Cook, 8 N.E.3d at 1277 79 (reasoning that because there was an incompatible conflict between the regulation of feral cats by the Village, a home rule municipality, and the of the same problem, the court had to decide which had a more vital role in regulating rabies control and ruled that the County ordinance prevailed, because the municipal ordinance prohibited conduct that the County regulations specifically allowed); Gaming, LLC, 46 N.E.3d at 1161 (holding that the Video Gaming Act did not evidence such a

vital state interest in regulating video games that home rule units cannot concurrently regulate plaintiff has not demonstrated that the Village under its Ordinance will interfere with the When a

local home rule units ordinance operates in harmony with state statutes regulating the same problem, Illinois courts have found that the local regulation is within the home rule authority granted by the Illinois Constitution. Id. When they clash, and t s authority under Article VII, § 6 of the 1970 Constitution. City of Des Plaines, 357 N.E.2d at 436

815 Ill. Comp. Stat. 505/2AA(n) (1961) (amendment added by P.A. 87,1211, Art. 2, § 1, eff. Jan. 1, 1993). The narrow scope of this limitation supports a view that the Illinois General Assembly did not intend to foreclose any other aspects of local consumer protection regulation.

(holding that the fact that the legislature intended - that the conflicted with,

Under the facts as pleaded in the FAC, it is difficult to imagine a more harmonious -25-090(a) and the consumer protection and personal information privacy protection legislation enacted by the Illinois General Assembly. This is IPIPA. There simply is no basis for conclu in protecting the integrity

protecting citizens statewide from the same risks associated with data security breaches, especially when the vehicle for doing so exactly mirrors the protections afforded by the state statutes. Nor is there any indication here that the ability of Illinois to enforce the ICFA and IPIPA is in any way undermined by MCC § 2-25-090(a).

For these reasons, the second Kalodimdos factor militates in favor of finding that MCC § 2-25-090(a) ule authority.

Third Factor

The third Kalodimos factor focuses on whether the local government unit or the state traditionally has played the dominant role in dealing with the problem regulated by the local home rule unit ordinance. The Illinois Supreme Court recently summarized this factor as follows mere existence of comprehensive state regulation is insufficient to preclude the exercise home rule

-limits to local government control only where the state has a vital inte Blanchard v. Berrios, 72 N.E. 3d 313,319 (Ill. 2016) (internal citations omitted); City of Chicago

v. StubHub, Inc., 979 N.E. 2d 844, 852 (Ill. 2012).

sumers, dating back to 1961 with Stubhub, 979 N.E.2d at 855. Similarly, it cannot be disputed that the State of Illinois has played an important role in the regulation of data collectors that store the personal information of Illinois residents, through its enactment of IPIPA in 2006. But, considering that this statute is only thirteen years old, it is difficult to describe the s ,ulatory concerns about the protection of personal data is of relatively recent vintage. , 46 N.E.3d at 1162 (holding that although the state has a traditional role regulating commercial to the video

Id. Nor is there anything in the sparse text of the IPIPA itself that reflects an intent on the part of the Illinois General Assembly that this authority be exclusive to the state, to the exclusion of local regulation. And, finally, as discussed above, the parties have not cited, nor has my research disclosed, any findings in the legislative history of the IPIPA that reflects an intent on the part of the General Assembly that the IPIPA preempted home rule units from passing ordinances to protect their residents from the effects of data breaches that jeopardize the protection of their personal information. Therefore, the third Kalomidos factor also militates against a finding that the protection of personal information is a matter of exclusive statewide regulation.

-25-090(a) to the data security breach that underlies this case does not violate the home rule provisions of Article VII § 6 of the 1970 Constitution. The next issue that must be addressed is whether the City impermissibly seeks to enforce this ordinance extraterritorially.

Can be Enforced in a Non-Extraterritorial Fashion

In addition to the requirement that home rule units may only legislate to address local, as opposed to regional, state, or national problems, the Illinois Supreme Court ruled, not long after the Illinois Constitutional Convention adopted home rule authority, that home rule regulations could not be applied extraterritorially. In City of Carbondale v. Van Natta, the c examination of the proceedings of the [Illinois Sixth Constitutional] convention shows that the

intention was not to confer extraterritorial sovereign or governmental powers directly on home rule units. The intendment shown is that whatever extraterritorial governmental powers home rule

Section 2-25-090(a)), enacted in 2008, or deceptive practice while conducting any trade or business in the city. Any conduct constituting

an unlawful practice under the [ICFA], as now or hereafter amended . . . relating to business
-25-090(a). As both Chicago and Marriott agree, the ICFA itself incorporates as part of its consumer protection provisions IPIPA. As relevant to this case, IPIPA requires data collectors such as Marriott to concerning Illinois residents] . . . from unauthorized access, acquisition, destruction, use,

modification, or disclosure, to notify Illinois residents on a timely basis of any breach of their

data system that may have compromised the integrity of the PI of Illinois residents, and to take further actions to ameliorate the breach. First Am. Compl. ¶¶ 93, 107. Thus, the City alleges that incorporated into the MCC, and the IPIPA, as incorporated into the ICFA. Specifically, Chicago

Id. at ¶ 54. As a consequence, the City has pleaded

database . . . to potential identify theft, financial fraud, tax return scams, and other potential ongoing

harm. At the very least, Chicago Victims will be forced to spend time and money in an attempt to protect themselves against the substantially increased risk Id. at ¶ 7. As part of the relief the City seeks, it asks this C monitoring of this data breach as well as for all precautions now necessary as a result of the

uct, per day for each offense. Id. at 28, ¶¶ C, D. The parties have not cited, nor has my research located, any explicit language in any legislation enacted by the Illinois General Assembly granting the City of Chicago authority to enforce MCC § 2-25-090(a) beyond the city limits, nor does the City claim that such authority exists. Rather, Chicago argues that the relief they seek in this case involves no extraterritorial within Chicago Unsurprisingly, Marriott strongly disagrees. -6,

11 (arguing that the conduct being regulated, data security practices).

Fortunately, by analogy, the Illinois Supreme Court has provided the analytical framework for determining whether the conduct the City alleges against Marriott falls within the scope of the MCC, as it incorporates the ICFA (and, through it, the IPIPA). In Avery v. State Farm Mut. Auto. Ins. Co., the court was asked to decide whether a nationwide class action could be brought on behalf of Illinois residents as well as residents of other states for violations of the ICFA. 835 N.E.2d 801, 849 (Ill. 2005). The defendant, State Farm Automobile Insurance Company, challenged the Illinois Circuit C ICFA] to policyholders across the country . . . because the Act, by its own terms does not apply to consumer transactions involving Id. The court began its analysis with the text of § 2 of

omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce are hereby declared Id.

distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State. [emphasis added]

The Plaintiffs in Avery , whether within or outside of Illinois. Id. at 850. Not so, the court concluded, holding instead that:

article, commodity, or thing of value. the scope of the [ICFA] to apply to consumer transactions that take place out-of- state.

Id. (internal citations omitted). ion 1(f) of the ICFA restricted its application to transactions that took place within

that trade or commerce that took place outside of Illinois, but which had an impact on Illinois residents, was within the reach of the ICFA. Id. The Illinois Supreme Court observed that section 1(f) of the ICFA had been interpreted inconsistently by both Illinois Federal Courts and the Illinois

Appellate Court, some decisions imposing a geographical limitation, while others rejected such a limit. 835 N.E.2d at 851 52. Left with this inconclusive interpretive history, the court observed:

It is not clear from the plain language of section 1(f) which, if any, of the many interpretations noted above accurately captures the meaning of that provision. Indeed, the wealth of competing interpretations of section 1(f) is a compelling ambiguity . . . Because the language of section 1(f) is ambiguous it is appropriate for us to consider other sources, including legislative

Id. at 852 (internal citations omitted).

Drawing from the statement of Senator Sours, the sponsor of the bill that added the private cause of action remedy included within the interstate concept, -standing rule of construction in Illinois

appears from the express provisions of the statute, nd the Consumer Fraud Act to apply to fraudulent transactions

Id. at 852 53 (internal citations omitted).

But that was not the end of the matter, because as the c identify the situs of a consumer transaction when, as plaintiffs in this case allege, the transaction Id. at 853. The Illinois Supreme Court looked to the analysis of the Court of Appeals of New York in its interpretation of the New York consumer fraud statute in Goshen v. Mutual Life Insurance Co., 774 N.E.2d 1190 (N.Y. 2002). In Goshen or promotional conduct is irrelevant if the deception itself that is, the advertisement or

promotional package did not result in a transaction in which the consumer was harmed. Id. at 1196. This led that court to conclude that the location of the deception, rather than the location of the origin of the misleading or fraudulent conduct, was the controlling factor in determining whether a consumer protection violation had occurred. Id. But the Illinois Supreme Court reasoned that the issue was more complex than simply identifying the place where the consumer was located at the time that he or she was deceived or mislead. Rather, the court observed:

In a misrepresentation case, there is no fraudulent transaction until the misrepresentation has been communicated. But the Goshen situs of a consumer transaction is a narrow one. The place of injury or deception is only one of the circumstances that make up a fraudulent transaction and focusing solely on that fact can create questionable results. If, for example, the bulk of the circumstances that make up a fraudulent transaction occur within Illinois, and the only thing that occurs out-of-state is the injury or deception, it seems to make little sense to say that the fraudulent transaction has occurred outside Illinois. Stated otherwise, we believe that there is a broader alternative to the position taken by the Goshen court, namely, that a fraudulent transaction may be said to take place within a state if the circumstances relating to the transaction occur primarily and substantially within that state. Avery, 835 N.E.2d at 853. Importantly, the Illinois Supreme Court added:

The General Assembly has stated that the Consumer Fraud Act shall be liberally construed to effect its purposes. Given this fact, we believe that the General Assembly intended the broader understanding of an in-state transaction noted

above. Accordingly, we hold that a plaintiff may pursue a private cause of action under the Consumer Fraud Act if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois. In adopting this holding, we recognize that there is no single formula or bright-line test for determining whether a transaction occurs within this state. Rather, each case must be decided on its own facts. Accordingly, the critical question in this case becomes whether the circumstances relating to plaintiffs occurred primarily and substantially in Illinois.

Id. at 853 54 (internal citations omitted). I am persuaded that the approach taken by the Illinois Supreme Court in Avery provides the proper framework for determining whether the alleged violations of the MCC occurred . 7

Avery suggested that deceptive conduct occurred, where the damage to plaintiff occurred, and whether plaintiff

communicated with the defendant or its agents in Illinois (here, Chicago). Rivera v. Google, Inc., 238 F. Supp. 3d 1088, 1101 (N.D. Ill. 2017) (citing Avery, 835 N.E.2d at 823 24). When we look at the FAC, we see that the City was quite surgical in its pleadings. First, the FAC defines the Chicago residents whose personal i reservation database. irst Am. Compl. ¶ 7 (emphasis added). Second, it alleges that Chicago

residents were misled physical, electronic and administrative safeguards to protect your Personal Data from loss, misuse and unauthorized access, disclosure, alteration and destruction, taking into account the nature of

7 Both Chicago and Marriott argue that the Avery test, in this context, dictates that the Chicago ordinance (as it incorporates the ICFA) must only relate to transactions that occur primarily and substantially in Illinois. However, because home rule units cannot apply their regulations outside of their geographic borders, the Avery analysis limits the application of the MCC to transactions that occurred primarily and substantially within Chicago. See City of Evanston v. Create, Inc., 421 N.E.2d 196, 203 (Ill. 1981).

Id. at ¶ 24. Third, it Chicago residents, who make reservations at from Chicago and stay and throughout the country Id. at ¶ 54 (emphasis added). At a minimum, the City adequately has alleged that some of its residents, while located within Chicago, made on-line reservations (and provided their PI in the process of doing so) to stay in a Marriott hotel located within Chicago. 8

And, it has alleged that some portion of those yet unidentified City residents had their PI

compromised by the alleged failure of Marriott to live up to its online representations that it took reasonable precautions to protect the security of consumers who registered online to stay in a Chicago Marriott property, subjecting them to actual or foreseeable future injuries caused by the data breach, the effects of which will be felt in Chicago. disputed transactions with [Marriott] . . . occurred primarily and substantially in [Chicago]. Avery, 835 N.E.2d at 854. coup de main entire lawsuit because it seeks to apply the MCC in an extraterritorial fashion goes too far.

8 The resolution of these facts matters. See Shaw v. Hyatt Intern. Corp., No. 05-C-5022, 2005 WL 3088438 (N.D. Ill. Nov. 15, 2005) (holding that the ICFA did not apply to the disputed transaction because it involved a London resident who booked a room in Russia, even though principal place of business was in Illinois). There are any number of possible iterations given the allegations of the FAC. Compare: Chicago resident booked a hotel while using the website in Chicago to stay at a Marriott within Chicago; Chicago resident booked a hotel while using the website in Chicago to stay at a Marriott outside of Chicago; and Chicago resident booked a hotel while using the website outside of Chicago to stay at a Marriot located outside of Chicago. It is not necessary at this phase of the case to do more than determine whether the FAC alleges that the circumstances surrounding some portion of Chicago residents had sufficient connection with Chicago such that they primarily and substantially occurred within the City. It does.

The FAC alleges four separate causes of action: Unfair practice failure to safeguard personal information (Count 1); Unlawful Practice failure to implement and maintain reasonable security measures (Count 2); Deceptive practice misrepresentations and material omissions (Count 3); and Unlawful Practice failure to give prompt notice of data breach (Count 4), all of which are alleged to violate MCC § 2-25-090(a). While discovery may reveal facts to show that some

to enforce the MCC, may be entitled to recover, or limiting the scope of any remedial order this court could impose on Marriott to redress any proven violations of the MCC, 9

it is premature to dismiss the entire suit. Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250 (4th Cir. 2009) (holding that all reasonable inferences at this stage must be made in favor of the plaintiff). Similarly, discovery may show that the number of identifiable Chicago residents who, while located in Chicago, registered online to stay in a Marriott property (in or outside Chicago) who were provably injured by the data breach is so small as not to justify some or all of the non-declaratory or injunctive relief that it seeks to recover. But those determinations are for another day, not on a motion to dismiss. Cosmetique, Inc. v. ValueClick, Inc., 753 F. Supp. 2d 716, 723 (N.D. Ill. 2010) there is other evidence to show that the disputed transaction occurred primarily or substantially in [Chicago] can be properly assessed at the summary judgment stage, s the Illinois

9 Facts developed during discovery may limit the scope of relief requested by Chicago, including, for example, the injunction. LG Electronics U.S.A., Inc. v. Whirlpool Corp., 809 F. Supp. 2d 857 primarily and substantially in Illinois, and therefore denied a nationwide injunction). I am unable to assume

that implementation of an injunction necessarily will have extraterritorial effect; factual development is needed.

-line test for determining

Avery, 835 N.E.2d at 854. What is necessary at this time is to develop those facts during discovery.

Conclusion to request an injunction and monitoring fund as relief for its own injuries. As applied here to the facts pled in -25- and does not violate the Illinois Constitution. Finally, if Chicago establishes liability for breach

of the ordinance, relief could be fashioned that would prevent the ordinance from having an unconstitutional extraterritorial effect.

ORDER

Accordingly, on this thirteenth day of December, by the United States District Court for the District of Maryland, hereby ORDERED that the IS DENIED. I will issue a scheduling order and set in a telephone conference to discuss further

pretrial proceedings.

/S/ Paul W. Grimm United States District Judge