

1 David B. Rosenbaum, 009819
2 Anne M. Chapman, 025965
3 Osborn Maledon, P.A.
4 2929 North Central Avenue, Suite 2100
5 Phoenix, Arizona 85012-2793
6 (602) 640-9000
7 achapman@omlaw.com
8 drosenbaum@omlaw.com

9 Eugene F. Assaf, DC Bar 449778 (*Pro Hac Vice*)
10 K. Winn Allen, DC Bar 1000590 (*Pro Hac Vice*)
11 Kirkland & Ellis, LLP
12 655 Fifteenth St. N.W.
13 Washington, D.C. 20005
14 (202) 879-5078
15 eugene.assaf@kirkland.com
16 winn.allen@kirkland.com

17 Douglas H. Meal, MA Bar 340971 (*Pro Hac Vice*)
18 Ropes & Gray, LLP
19 Prudential Tower, 800 Boylston Street
20 Boston, MA 02199-3600
21 (617) 951-7517
22 douglas.meal@ropesgray.com

23 Attorneys for Defendants

24 **IN THE UNITED STATES DISTRICT COURT**
25 **FOR THE DISTRICT OF ARIZONA**

26 Federal Trade Commission,

27 Plaintiff,

28 vs.

Wyndham Worldwide Corporation, et.
al.,

Defendants.

Case No. CV 12-1365-PHX-PGR

**DEFENDANTS' NOTICE OF
SUPPLEMENTAL AUTHORITY**

1 Defendants in the above-captioned matter hereby notify the Court of a
2 development that provides further support for defendants' motions to dismiss this case
3 as a matter of law. *See* Mot. to Dismiss by Def. Wyndham Hotels & Resorts LLC (Dkt.
4 # 32 Aug. 27, 2012); Mot. to Dismiss by Defs. Wyndham Worldwide Corp., *et al.* (Dkt.
5 # 33 Aug. 27, 2012).

6 On February 12, 2013, President Obama issued an Executive Order on
7 Improving Cybersecurity for Critical Infrastructure, as well as an accompanying
8 Presidential Policy Directive. *See* Exec. Order No. 13,636, 78 Fed. Reg. 11739 (Feb.
9 12, 2013) (hereinafter, "Cybersecurity EO") (attached as Exhibit A); Presidential Policy
10 Directive 21, Critical Infrastructure Security and Resilience (Feb. 12, 2013) (attached as
11 Exhibit B). As relevant here, the Executive Order requires the National Institute of
12 Standards and Technology ("NIST") to lead the creation of a baseline set of standards
13 for reducing cyber risks to critical infrastructure—what the Executive Order calls the
14 "Cybersecurity Framework." Cybersecurity EO § 7(a). The Cybersecurity Framework
15 will establish a "set of standards, methodologies, procedures, and processes" for
16 addressing cybersecurity threats, *id.*, and will include "guidance for measuring the
17 performance of an entity in implementing" those standards, *id.* § 7(b). The Framework
18 must also "provide a prioritized, flexible, repeatable, performance-based, and cost-
19 effective approach" that includes specific "information security measures and controls"
20 critical-infrastructure operators can implement to "identify, assess, and manage cyber
21 risk." *Id.* § 7(b). In developing the Cybersecurity Framework, the Director of NIST
22 must "engage in an open public review and comment process." *Id.* § 7(d). Compliance
23 with the Cybersecurity Framework is initially "voluntary," *id.* § 8(a), however federal
24 agencies are directed to develop "incentives" to promote compliance and to assess
25 whether "the agency has clear authority to establish requirements based on the
26 Cybersecurity Framework," *id.* § 10(a).

1 The method of regulation laid out in the Cybersecurity Executive Order starkly
2 contrasts with the approach the Federal Trade Commission has taken to regulating
3 cybersecurity under Section 5 of the FTC Act. The FTC has not issued any “standards,
4 methodologies, procedures, [or] processes” for complying with Section 5, *id.* § 7(a); it
5 has not established “guidance for measuring the performance of an entity in
6 implementing” data-security protections that might comply with the statute, *id.* § 7(b); it
7 has not identified specific “information security measures and controls” that a business
8 might adopt, *id.* § 7(b); and it has not “engage[d] in an open public review and
9 comment process,” *id.* § 7(d). To the contrary, the FTC has refused to issue *any* rules,
10 regulations, or guidelines explaining what data-security protections a company must
11 employ to comply with the Commission’s understanding of Section 5. *See* WHR Mot.
12 to Dismiss at 10-11. Instead, the FTC has claimed the right to enforce its view of data-
13 security policy through selective enforcement actions founded entirely on *ex post*
14 reasoning. *See, e.g.,* Br. of *Amici Curiae* Chamber of Commerce, et al., at 7-12.

15 The bottom-line point is simple. In the context of regulating critical
16 infrastructure, the Executive branch has determined that governing rules and standards
17 must be developed far in advance of any potential regulatory enforcement efforts and
18 through a full-fledged “public review and comment process.” *Id.* § 7(d). If that is true
19 in the context of critical infrastructure, then surely it is all the more true when the FTC
20 attempts to regulate businesses operating in other sectors of the economy. For these
21 reasons, and for those stated in defendants’ motions to dismiss, the FTC’s complaint
22 should be dismissed as a matter of law.

23 DATED this 27th day of February, 2013.
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

By /s/ Eugene F. Assaf

Eugene F. Assaf, P.C., 449778, *pro hac vice*
K. Winn Allen, 1000590, *pro hac vice*
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005

Douglas H. Meal, 340971, *pro hac vice*
Ropes & Gray, LLP
Prudential Tower, 800 Boylston Street
Boston, MA 02199-3600

David B. Rosenbaum
Anne M. Chapman
Osborn Maledon, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2794

Attorneys for Defendants

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

- **Kristin Krause Cohen;** kcohen@ftc.gov
- **John Andrew Krebs;** jkrebs@ftc.gov
- **Katherine E McCarron;** kmccarron@ftc.gov
- **Kevin H Moriarty;** kmoriarty@ftc.gov
- **Lisa Naomi Weintraub Schifferle;** lschifferle@ftc.gov
- **Andrea V. Arias;** aarias@ftc.gov

Attorneys for Plaintiff, Federal Trade Commission

/s/ Eugene F. Assaf _____