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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Federal Trade Commission,

Plaintiff,

v.

Wyndham Worldwide Corporation, a
Delaware corporation;

Wyndham Hotel Group, LLC, a
Delaware limited liability company;

Wyndham Hotels and Resorts, LLC, a
Delaware limited liability company;
and

Wyndham Hotel Management, Inc., a
Delaware Corporation,

Defendants.

Case No. 2:13-cv-01887-ES-SCM

Hon. Esther Salas

**PROPOSED BRIEF OF AMICI
CURIAE CHAMBER OF
COMMERCE OF THE UNITED
STATES OF AMERICA,
AMERICAN HOTEL &
LODGING ASSOCIATION, AND
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS IN
SUPPORT OF DEFENDANTS**

Return Date: May 19, 2014

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**PROPOSED BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA, AMERICAN HOTEL & LODGING
ASSOCIATION, AND NATIONAL FEDERATION OF INDEPENDENT
BUSINESS IN SUPPORT OF DEFENDANTS**

The Chamber of Commerce of the United States of America (the Chamber), the American Hotel & Lodging Association (AH&LA), and the National Federation of Independent Business (NFIB) submit this brief as *amici curiae* in support of defendant Wyndham Hotels & Resorts LLC (Wyndham)'s motion to certify order denying motion to dismiss for interlocutory appeal.

INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is a nonprofit corporation and the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the nation's business community.

The AH&LA is the only national association representing all sectors and stakeholders in the lodging industry, including individual hotel property members, hotel companies, student and faculty members, and industry suppliers. It has

played this role for over a century providing members with national advocacy on Capitol Hill, public relations services and education, research, and information.

The NFIB is the nation's leading small business association, representing approximately 350,000 members across the country. To fulfill its role as the voice for small business, the NFIB frequently files *amicus curiae* briefs in cases that will impact small businesses, such as this case.

The companies represented by the Chamber, AH&LA, and NFIB use electronic data, including personal data, to enhance business efficiency and to benefit consumers. For the modern company, personal and other types of digitized data are essential for a multitude of reasons, including administering employee benefits programs, processing payment and shipping information, and enabling customer loyalty programs, among many other uses. *Amici* all have a significant interest in further explaining the legal and policy implications of interlocutory review of the Court's order denying Wyndham's motion to dismiss.

ARGUMENT

Defendant Wyndham's motion explains why the Court's order denying its motion to dismiss involves controlling questions of law as to which there are substantial grounds for differences of opinion and where an immediate appeal will materially advance the ultimate termination of the litigation, demonstrating that the Court should certify the order for interlocutory appeal. *See* 28 U.S.C. § 1292(b).

I. There Are Substantial Grounds for Genuine Differences of Opinion.

This case presents issues of first impression that have produced extensive discussion and debate. Although not all cases of first impression warrant interlocutory review, this one does. The briefing on the motion to dismiss and the Court's opinion demonstrate that the question whether the Federal Trade Commission (FTC) has general authority to regulate data security and the related question whether it has provided adequate notice to regulated entities are complex, difficult issues that have not previously been resolved. *See, e.g.*, Op. (D.E. 181) at 6 (stating that the Court "wrestled" with the parties' arguments).

The Court's opinion also generated substantial media coverage, with members of the legal community discussing the implications for the FTC's authority. *See, e.g.*, Thomas O'Toole & Katie Johnson, *FTC's Unfairness Authority Upheld in Wyndham Data Security Litigation*, <http://www.bna.com/ftcs-unfairness-authority-n17179889558/> (April 14, 2014) (analyzing the FTC's enforcement approach in light of the decision); Christopher Cole, et al., *FTC Data Security Authority Remains Murky Despite Wyndham*, <http://www.law360.com/articles/525058/ftc-data-security-authority-remains-murky-despite-wyndham> (April 8, 2014) (noting that the FTC's role in regulating data security continues to evolve in the courts, before Congress, and through the recently-published cyber security framework).

It is not just Wyndham and *amici* that have identified questions about the limits of the FTC's authority and enforcement practices. *See* Wyndham Mot. 7-9. Legal commentators, among others, have voiced similar concerns. *See, e.g.,* Gerard Stegmaier & Wendell Bartnick, *Another Round In the Chamber: FTC Data Security Requirements and the Fair Notice Doctrine*, 17 J. Internet L. 1 (2013) (finding problems with the FTC Section 5 enforcement actions under fair notice doctrine); David Zetoon, *The 10 Year Anniversary of the FTC's Data Security Program: Has the Commission Finally Gotten Too Big for Its Breaches?*, 2011 Stan. Tech. L. Rev. 12 (2011), at ¶ 23 (finding it "highly doubtful" that FTC could bring an unfairness action based on failure to monitor data security practices).¹ At a minimum, there are grounds for genuine disagreement about the issues addressed in the Court's order denying Wyndham's motion to dismiss.

II. Early Resolution of These Issues Is Critical.

Whether the FTC's enforcement authority under Section 5 of the FTC Act, 15 U.S.C. § 45, extends to regulation of data security is an issue of central importance to businesses that face the prospect of being investigated by the Commission. That prospect that becomes likelier every day given the increase in cyber-based attacks against businesses many of which, experts agree, are likely to succeed notwithstanding significant efforts on the part of those businesses. *See,*

¹ <http://journals.law.stanford.edu/stanford-technology-law-review/online/10-year-anniversary-ftcs-data-security-program>.

e.g., Mandiant, M-Trends: Beyond the Breach (2014);² Verizon, 2014 Data Breach Investigations Report (2014).³ As Wyndham notes, the FTC has filed or settled over 50 data security enforcement actions, *see* Wyndham Mot. at 11, and around a dozen settlements under Section 5 have been finalized just since this suit was filed in 2012. *See* Federal Trade Commission, Bureau of Consumer Protection Business Center, Legal Resources, <http://www.business.ftc.gov/legal-resources/29/35> (last visited April 23, 2014).

Given these trends, an appellate decision resolving Wyndham's questions about the FTC's general authority to regulate data security—and the related question of the sufficiency of the Commission's guidance about what constitutes commercially reasonable security measures—would provide much needed clarity. An FTC investigation imposes substantial costs, including costs related to the production of documents and information responsive to the Commission's requests. Moreover, companies currently struggle to decipher coherent standards from the FTC's dozens of consent orders and previous pronouncements on data security, and to accommodate those dictates with other security regulations and risk management protocols. With the greater certainty that an appellate decision would

² <https://www.mandiant.com/blog/mtrends-2014-threat-report-revealed>

³ <http://www.verizonenterprise.com/DBIR/2014>

provide, businesses would be able to better allocate their scarce resources toward compliance with the complex regulatory regime governing data security.

Without interlocutory review, in contrast, businesses will have to wait months, if not years, for resolution of these fundamental legal issues. In this case, discovery is not set to close until September, with dispositive motions not due until November. *See* D.E. 148. Even if the Court were to decide the core legal issues on summary judgment, any appeal would follow much later. The likelihood of significant delay, and the potential for scattered district court decisions to reach conflicting results in the meantime, all put businesses in an untenable position. *See, e.g.*, Verified Compl. for Injunctive and Declaratory Relief, *LabMD v. FTC*, No. 14-cv-00810-WSD, D.E. 1 (N.D. Ga. filed Mar. 20, 2014) (challenging FTC authority to regulate data security under Section 5). A ruling that the FTC lacks authority under Section 5 would effectively terminate the litigation, which makes it all the more important to avoid unnecessarily burdening the judicial system and parties.

In sum, continued uncertainty about whether the FTC has the authority to bring Section 5 data security enforcement actions imposes significant costs on businesses that are subject to an FTC investigation or that expend resources trying to divine what practices the Commission considers to be “reasonable” and “appropriate.” Those costs can be mitigated or avoided entirely by an appellate

decision with broader applicability. Clarity on this important legal issue from an appellate court would also expedite the termination of the litigation and save the Court from dedicating resources to a case that the FTC may not have had the authority to bring in the first place. These questions should be resolved now.

CONCLUSION

For these reasons, and for those stated in Wyndham's motion, the motion should be granted.

Respectfully submitted,

Dated: April 24, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2014, I caused a copy of the foregoing document to be served by operation of the Court's electronic filing system on counsel of record in these proceedings.

By: /s/ Sean M. Marotta