
No. 14-3514

**In the United States Court of Appeals
for the Third Circuit**

FEDERAL TRADE COMMISSION

v.

WYNDHAM WORLDWIDE CORP., a Delaware corporation,
WYNDHAM HOTEL GROUP, LLC, a Delaware limited liability company,
WYNDHAM HOTELS & RESORTS, LLC, a Delaware limited liability company,
AND WYNDHAM HOTEL MANAGEMENT, INC., a Delaware corporation

WYNDHAM HOTELS & RESORTS, LLC,

Appellant

**On Appeal From the U.S. District Court
for the District of New Jersey (Salas, J.)
Civil Action No. 2:13-cv-01887-ES-JAD**

JOINT APPENDIX VOL. 2, pp. JA56-288

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10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE DISTRICT OF ARIZONA

Federal Trade Commission,)	
)	No. CV 12-1365-PHX-
Plaintiff,)	PGR
)	
v.)	FIRST AMENDED
)	COMPLAINT FOR
Wyndham Worldwide Corporation, a Delaware)	INJUNCTIVE AND
16 corporation;)	OTHER EQUITABLE
)	RELIEF
Wyndham Hotel Group, LLC, a Delaware)	
17 limited liability company;)	
)	
Wyndham Hotels and Resorts, LLC, a Delaware)	
19 limited liability company; and)	
)	
Wyndham Hotel Management, Inc., a)	
20 Delaware Corporation,)	
)	
Defendants.)	
)	

1 Plaintiff, the Federal Trade Commission (“FTC”), for its Complaint alleges:

2 1. The FTC brings this action under Section 13(b) of the Federal Trade
3 Commission Act (“FTC Act”), 15 U.S.C. § 53(b), to obtain permanent injunctive
4 relief and other equitable relief for Defendants’ acts or practices in violation of
5 Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), in connection with Defendants’
6 failure to maintain reasonable and appropriate data security for consumers’
7 sensitive personal information.

8 2. Defendants’ failure to maintain reasonable security allowed intruders
9 to obtain unauthorized access to the computer networks of Wyndham Hotels and
10 Resorts, LLC, and several hotels franchised and managed by Defendants on three
11 separate occasions in less than two years. Defendants’ security failures led to
12 fraudulent charges on consumers’ accounts, more than \$10.6 million in fraud loss,
13 and the export of hundreds of thousands of consumers’ payment card account
14 information to a domain registered in Russia. In all three security breaches,
15 hackers accessed sensitive consumer data by compromising Defendants’ Phoenix,
16 Arizona data center.

17 **JURISDICTION AND VENUE**

18 3. This Court has subject matter jurisdiction pursuant to 28 U.S.C.
19 §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a) and 53(b).

20 4. Venue is proper in this district under 28 U.S.C. § 1391(b), (c), and
21 15 U.S.C. § 53(b).

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PLAINTIFF

5. The FTC is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce.

6. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act and to secure such equitable relief as may be appropriate in each case. 15 U.S.C. § 53(b).

DEFENDANTS

7. Defendant Wyndham Worldwide Corporation (“Wyndham Worldwide”) is a Delaware corporation with its principal office or place of business at 22 Sylvan Way, Parsippany, New Jersey 07054. At all times material to this Complaint, Wyndham Worldwide has been in the hospitality business, franchising and managing hotels throughout the United States. Wyndham Worldwide transacts or has transacted business in this district and throughout the United States. At all relevant times, it has controlled the acts and practices of its subsidiaries described below and approved of or benefitted from such subsidiaries’ acts and practices at issue in this Complaint. See Exhibit A for an organizational chart depicting the entities named as Defendants in this Complaint.

8. Defendant Wyndham Hotel Group, LLC (“Hotel Group”) is a Delaware limited liability company with its principal office or place of business at 22 Sylvan Way, Parsippany, New Jersey 07054. Hotel Group operates a data

1 center in Phoenix, Arizona (the “Phoenix data center”) that it uses to store and
2 process payment card data, and the payment card data of some of its subsidiaries,
3 including Wyndham Hotels and Resorts, LLC. Hotel Group is a wholly-owned
4 subsidiary of Wyndham Worldwide, and through its subsidiaries it franchises and
5 manages approximately 7,000 hotels under twelve hotel brands, one of which is
6 the Wyndham brand. It transacts or has transacted business in this district and
7 throughout the United States. At all relevant times, Hotel Group has controlled
8 the acts and practices of its subsidiaries described below and approved of or
9 benefitted from such subsidiaries’ acts and practices at issue in this Complaint.

10 9. Defendant Wyndham Hotels and Resorts, LLC (“Hotels and
11 Resorts”) is a Delaware limited liability company with its principal office or place
12 of business at 22 Sylvan Way, Parsippany, New Jersey 07054. Hotels and Resorts
13 is a wholly-owned subsidiary of Hotel Group. Throughout the relevant time
14 period, Hotels and Resorts has licensed the Wyndham name to independent hotels
15 through franchise agreements, and provided various services to those hotels,
16 including information technology services. At all times material to this
17 Complaint, Hotels and Resorts has licensed the Wyndham name to approximately
18 seventy-five independently-owned hotels under franchise agreements. Hotels and
19 Resorts transacts or has transacted business in this district and throughout the
20 United States, including franchising hotels located in Arizona. At all relevant
21 times, Hotel Group and Wyndham Worldwide have performed various business
22 functions on behalf of Hotels and Resorts, or overseen such business functions,

1 including legal assistance, human resources, finance, and information technology
2 and security. Hotel Group and Wyndham Worldwide controlled the acts and
3 practices of Hotels and Resorts that are at issue in this Complaint.

4 10. Defendant Wyndham Hotel Management, Inc. (“Hotel
5 Management”) is a Delaware corporation with its principal office or place of
6 business at 22 Sylvan Way, Parsippany, New Jersey 07054. Hotel Management is
7 also a wholly-owned subsidiary of Hotel Group. Like Hotels and Resorts, Hotel
8 Management licenses the Wyndham name to independently-owned hotels, but
9 does so under management agreements in which it agrees to fully operate the hotel
10 on behalf of the owner. At all times material to this Complaint, Hotel
11 Management has licensed the Wyndham name to approximately fifteen
12 independently-owned hotels under management agreements. Hotel Management
13 transacts or has transacted business in this district and throughout the United
14 States, including managing at least one hotel in Arizona. At all relevant times,
15 Hotel Group and Wyndham Worldwide have performed various business
16 functions on Hotel Management’s behalf, or overseen such business functions,
17 including legal assistance and information technology and security. Hotel Group
18 and Wyndham Worldwide controlled the acts and practices of Hotel Management
19 that are at issue in this Complaint.

20 11. Defendants Wyndham Worldwide, Hotel Group, Hotels and Resorts,
21 and Hotel Management have operated as a common business enterprise while
22 engaging in the unfair and deceptive acts and practices alleged in this Complaint.

1 Defendants have conducted their business practices described below through an
2 interrelated network of companies that have common ownership, business
3 functions, employees, and office locations. Because these Defendants have
4 operated as a common enterprise, they are jointly and severally liable for the
5 unfair and deceptive acts and practices alleged below.

6 **COMMERCE**

7 12. At all times material to this Complaint, Defendants have maintained
8 a substantial course of trade in or affecting commerce, as “commerce” is defined
9 in Section 4 of the FTC Act, 15 U.S.C. § 44.

10 **DEFENDANTS’ BUSINESS ACTIVITIES**

11 **Defendants’ Business Structure**

12 13. Wyndham Worldwide is a hospitality business that, through its
13 subsidiaries, franchises and manages hotels and sells timeshares. It conducts its
14 business through three subsidiaries, including Hotel Group. At all times relevant
15 to this Complaint, Hotel Group’s wholly-owned subsidiaries, Hotels and Resorts
16 and Hotel Management, licensed the Wyndham brand name to approximately
17 ninety independently-owned hotels under franchise or management agreements
18 (collectively hereinafter “Wyndham-branded hotels”).

19 **Defendants’ Network Infrastructure**

20 14. Throughout the relevant time period, Wyndham Worldwide has been
21 responsible for creating information security policies for itself and its subsidiaries,
22 including Hotel Group and Hotels and Resorts, as well as providing oversight of

1 their information security programs. From at least 2008 until approximately June
2 2009, Hotel Group had responsibility for managing Hotels and Resorts’
3 information security program. In June 2009, Wyndham Worldwide took over
4 management and responsibility for Hotels and Resorts’ information security
5 program.

6 15. Under their franchise and management agreements, Hotels and
7 Resorts and Hotel Management require each Wyndham-branded hotel to purchase,
8 and configure to their specifications, a designated computer system, known as a
9 property management system, that handles reservations, checks guests in and out,
10 assigns rooms, manages room inventory, and handles payment card transactions.
11 These property management systems store personal information about consumers,
12 including names, addresses, email addresses, telephone numbers, payment card
13 account numbers, expiration dates, and security codes (hereinafter “personal
14 information”).

15 16. The property management systems for all Wyndham-branded hotels,
16 including those managed by Hotel Management, are part of Hotels and Resorts’
17 computer network, and are linked to its corporate network, much of which is
18 located in the Phoenix data center. Hotels and Resorts’ corporate network
19 includes its central reservation system, which coordinates reservations across the
20 Wyndham brand.

21 17. Each Wyndham-branded hotel’s property management system is
22 managed by Defendants. Only Defendants, and not the owners of the Wyndham-

1 branded hotels, have administrator access that allows Defendants to control the
2 property management systems at the hotels. Defendants set the rules, including all
3 password requirements, that allow the Wyndham-branded hotels' employees to
4 access their property management systems.

5 18. Defendants have even more direct control over the computer
6 networks of the Wyndham-branded hotels managed by Hotel Management. Hotel
7 Management controls the "operation" of those hotels pursuant to its management
8 agreements, including their information technology and security functions and the
9 hiring of employees to administer the hotels' computer networks.

10 19. The owners of the Wyndham-branded hotels pay Defendants fees to
11 support their property management systems and to connect them to Hotels and
12 Resorts' computer network. Defendants' technical support team is responsible for
13 addressing and resolving any technical issues that a Wyndham-branded hotel has
14 with its property management system. As explained further below, Defendants'
15 information security failures led to the compromise of many of the Wyndham-
16 branded-hotels' property management system servers, resulting in the exposure of
17 thousands of consumers' payment card accounts.

18 **DEFENDANTS' DECEPTIVE STATEMENTS**

19 20. Hotels and Resorts operates a website where consumers can make
20 reservations at any Wyndham-branded hotel. In addition, some Wyndham-
21 branded hotels operate their own individual websites, which describe the
22 individual hotel and its amenities. Customers making reservations from a

1 Wyndham-branded hotel’s individual website are directed back to Hotels and
2 Resorts’ website to make the reservation.

3 21. Since at least 2008, Defendants have disseminated, or caused to be
4 disseminated, privacy policies or statements on their website to their customers
5 and potential customers. These policies or statements include, but are not limited
6 to, the following statement regarding the privacy and confidentiality of personal
7 information, disseminated on the Hotels and Resorts’ website:

8 . . . We recognize the importance of protecting the privacy of
9 individual-specific (personally identifiable) information
10 collected about guests, callers to our central reservation
11 centers, visitors to our Web sites, and members participating
12 in our Loyalty Programs (collectively ‘Customers’). . . .

13 This policy applies to residents of the United States, hotels
14 of our Brands located in the United States, and Loyalty
15 Program activities in the United States only. . . .

16 We safeguard our Customers’ personally identifiable
17 information by using industry standard practices. Although
18 “guaranteed security” does not exist either on or off the
19 Internet, we make commercially reasonable efforts to make
20 our collection of such Information consistent with all
21 applicable laws and regulations. Currently, our Web sites
22 utilize a variety of different security measures designed to
protect personally identifiable information from
unauthorized access by users both inside and outside of our
company, including the use of 128-bit encryption based on a
Class 3 Digital Certificate issued by Verisign Inc. This
allows for utilization of Secure Sockets Layer, which is a
method for encrypting data. This protects confidential
information – such as credit card numbers, online forms, and
financial data – from loss, misuse, interception and hacking.
We take commercially reasonable efforts to create and
maintain “fire walls” and other appropriate safeguards to
ensure that to the extent we control the Information, the
Information is used only as authorized by us and consistent

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with this Policy, and that the Information is not improperly altered or destroyed.

22. There is a link to this privacy policy on each page of the Hotels and Resorts' website, including its reservations page.

23. Although this statement is disseminated on the Hotels and Resorts' website, it states that it is the privacy policy of Hotel Group.

DEFENDANTS' INADEQUATE DATA SECURITY PRACTICES

24. Since at least April 2008, Defendants failed to provide reasonable and appropriate security for the personal information collected and maintained by Hotels and Resorts, Hotel Management, and the Wyndham-branded hotels, by engaging in a number of practices that, taken together, unreasonably and unnecessarily exposed consumers' personal data to unauthorized access and theft. Among other things, Defendants:

- a. failed to use readily available security measures to limit access between and among the Wyndham-branded hotels' property management systems, the Hotels and Resorts' corporate network, and the Internet, such as by employing firewalls;
- b. allowed software at the Wyndham-branded hotels to be configured inappropriately, resulting in the storage of payment card information in clear readable text;
- c. failed to ensure the Wyndham-branded hotels implemented

1 adequate information security policies and procedures prior to
2 connecting their local computer networks to Hotels and
3 Resorts' computer network;

4 d. failed to remedy known security vulnerabilities on Wyndham-
5 branded hotels' servers that were connected to Hotels and
6 Resorts' computer network, thereby putting personal
7 information held by Defendants and the other Wyndham-
8 branded hotels at risk. For example, Defendants permitted
9 Wyndham-branded hotels to connect insecure servers to the
10 Hotels and Resorts' network, including servers using outdated
11 operating systems that could not receive security updates or
12 patches to address known security vulnerabilities;

13 e. allowed servers to connect to Hotels and Resorts' network,
14 despite the fact that well-known default user IDs and
15 passwords were enabled on the servers, which were easily
16 available to hackers through simple Internet searches;

17 f. failed to employ commonly-used methods to require user IDs
18 and passwords that are difficult for hackers to guess.

19 Defendants did not require the use of complex passwords for
20 access to the Wyndham-branded hotels' property
21 management systems and allowed the use of easily guessed
22 passwords. For example, to allow remote access to a hotel's

- 1 property management system, which was developed by
- 2 software developer Micros Systems, Inc., Defendants used
- 3 the phrase “micros” as both the user ID and the password;
- 4 g. failed to adequately inventory computers connected to the
- 5 Hotels and Resorts’ network so that Defendants could
- 6 appropriately manage the devices on its network;
- 7 h. failed to employ reasonable measures to detect and prevent
- 8 unauthorized access to Defendants’ computer network or to
- 9 conduct security investigations;
- 10 i. failed to follow proper incident response procedures,
- 11 including failing to monitor Hotels and Resorts’ computer
- 12 network for malware used in a previous intrusion; and
- 13 j. failed to adequately restrict third-party vendors’ access to
- 14 Hotels and Resorts’ network and the Wyndham-branded
- 15 hotels’ property management systems, such as by restricting
- 16 connections to specified IP addresses or granting temporary,
- 17 limited access, as necessary.

18 **INTRUSIONS INTO DEFENDANTS’ COMPUTER NETWORK**

19 25. As a result of the failures described above, between April 2008 and
20 January 2010, intruders were able to gain unauthorized access to Hotels and
21 Resorts’ computer network, including the Wyndham-branded hotels’ property
22 management systems, on three separate occasions. The intruders used similar

1 techniques on each occasion to access personal information stored on the
2 Wyndham-branded hotels' property management system servers, including
3 customers' payment card account numbers, expiration dates, and security codes.
4 After discovering each of the first two breaches, Defendants failed to take
5 appropriate steps in a reasonable time frame to prevent the further compromise of
6 the Hotels and Resorts' network.

7 **First Breach**

8 26. In April 2008, intruders first gained access to a Phoenix, Arizona
9 Wyndham-branded hotel's local computer network that was connected to the
10 Internet. The hotel's local network was also connected to Hotels and Resorts'
11 network through the hotel's property management system. Using this access, in
12 May 2008, the intruders attempted to compromise an administrator account on the
13 Hotels and Resorts' network by guessing multiple user IDs and passwords –
14 known as a brute force attack.

15 27. This brute force attack caused multiple user account lockouts over
16 several days, including one instance in which 212 user accounts were locked out,
17 before the intruders were ultimately successful. Account lockouts occur when a
18 user inputs an incorrect password multiple times, and are a well-known warning
19 sign that a computer network is being attacked. Defendants did not have an
20 adequate inventory of the Wyndham-branded hotels' computers connected to its
21 network, and, therefore, although they were able to determine that the account
22 lockouts were coming from two computers on Hotels and Resorts' network, they

1 were unable to physically locate those computers. As a result, Defendants did not
2 determine that the Hotels and Resorts’ network had been compromised until
3 almost four months later.

4 28. The intruders’ brute force attack led to the compromise of an
5 administrator account on the Hotels and Resorts’ network. Because Defendants
6 did not appropriately limit access between and among the Wyndham-branded
7 hotels’ property management systems, the Hotels and Resorts’ own corporate
8 network, and the Internet – such as through the use of firewalls – once the
9 intruders had access to the administrator account, they were able to gain unfettered
10 access to the property management system servers of a number of hotels.

11 29. Additionally, the Phoenix hotel’s property management system
12 server was using an operating system that its vendor had stopped supporting,
13 including providing security updates and patch distribution, more than three years
14 prior to the intrusion. Defendants were aware the hotel was using this unsupported
15 and insecure server, yet continued to allow it to connect to Hotels and Resorts’
16 computer network.

17 30. In this first breach, the intruders installed memory-scraping malware
18 on numerous Wyndham-branded hotels’ property management system servers,
19 thereby accessing payment card data associated with the authorization of payment
20 card transactions that was present temporarily on the hotels’ servers.

21 31. In addition, the intruders located files on some of the Wyndham-
22 branded hotels’ property management system servers that contained payment card

1 account information for large numbers of consumers, stored in clear readable text.
2 These files were created and stored in clear text because Defendants had allowed
3 the property management systems to be configured inappropriately to create these
4 files and store the payment card information that way.

5 32. As a result of Defendants' unreasonable data security practices,
6 intruders were able to gain unauthorized access to the Hotels and Resorts'
7 corporate network, and the property management system servers of forty-one
8 Wyndham-branded hotels – twelve managed by Hotel Management and twenty-
9 nine franchisees of Hotels and Resorts. This resulted in the compromise of more
10 than 500,000 payment card accounts, and the export of hundreds of thousands of
11 consumers' payment card account numbers to a domain registered in Russia.

12 **Second Breach**

13 33. In March 2009, approximately six months after Defendants
14 discovered the first breach, intruders were able again to gain unauthorized access
15 to the Hotels and Resorts' network, this time through a service provider's
16 administrator account in the Phoenix data center.

17 34. In May 2009, Defendants learned that several Wyndham-branded
18 hotels had received complaints from consumers about fraudulent charges made to
19 their payment card accounts after using those cards to pay for stays at Wyndham-
20 branded hotels. At that point, Defendants searched Hotels and Resorts' network
21 for the memory-scraping malware used in the previous attack, and found it on the
22 property management system servers of more than thirty Wyndham-branded

1 hotels. As a result of Defendants' failure to monitor Hotels and Resorts' network
2 for the malware used in the previous attack, hackers had unauthorized access to
3 the Hotels and Resorts' network for approximately two months.

4 35. In addition to again using memory-scraping malware to access
5 personal information, in this second breach the intruders reconfigured software at
6 the Wyndham-branded hotels to cause their property management systems to
7 create clear text files containing the payment card account numbers of guests using
8 their payment cards at the hotels.

9 36. Ultimately, the intruders exploited Defendants' data security
10 vulnerabilities to gain access to the Hotels and Resorts' network and the property
11 management system servers of thirty-nine Wyndham-branded hotels – nine of
12 which were managed by Hotel Management and thirty franchisees of Hotels and
13 Resorts. In this second incident, the intruders were able to access information for
14 more than 50,000 consumer payment card accounts and use that information to
15 make fraudulent charges on consumers' accounts.

16 **Third Breach**

17 37. In late 2009, intruders again compromised an administrator account
18 on Hotels and Resorts' network. Because Defendants had still not adequately
19 limited access between and among the Wyndham-branded hotels' property
20 management systems, Hotels and Resorts' corporate network, and the Internet –
21 such as through the use of firewalls – once the intruders had access to this
22 administrator account they were able again to access multiple Wyndham-branded

1 hotels' property management system servers. As in the previous attacks, the
2 intruders installed memory-scraping malware to access payment card account
3 information held at the Wyndham-branded hotels.

4 38. Again, Defendants did not detect this intrusion themselves, but
5 rather learned of the breach from a credit card issuer. The credit card issuer
6 contacted Defendants in January 2010, and indicated that the account numbers of
7 credit cards it had issued were used fraudulently shortly after its customers used
8 their credit cards to pay for stays at Wyndham-branded hotels.

9 39. As a result of Defendants' security failures, in this instance,
10 intruders compromised Hotels and Resorts' corporate network and the property
11 management system servers of twenty-eight Wyndham-branded hotels – eight
12 managed by Hotel Management and twenty franchisees of Hotels and Resorts. As
13 a result of this third incident, the intruders were able to access information for
14 approximately 69,000 consumer payment card accounts and again make fraudulent
15 purchases on those accounts.

16 **Total Impact of Breaches**

17 40. Defendants' failure to implement reasonable and appropriate
18 security measures exposed consumers' personal information to unauthorized
19 access, collection, and use. Such exposure of consumers' personal information
20 has caused and is likely to cause substantial consumer injury, including financial
21 injury, to consumers and businesses. For example, Defendants' failure to
22 implement reasonable and appropriate security measures resulted in the three data

1 breaches described above, the compromise of more than 619,000 consumer
2 payment card account numbers, the exportation of many of those account numbers
3 to a domain registered in Russia, fraudulent charges on many consumers'
4 accounts, and more than \$10.6 million in fraud loss. Consumers and businesses
5 suffered financial injury, including, but not limited to, unreimbursed fraudulent
6 charges, increased costs, and lost access to funds or credit. Consumers and
7 businesses also expended time and money resolving fraudulent charges and
8 mitigating subsequent harm.

9 **VIOLATIONS OF THE FTC ACT**

10 41. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or
11 deceptive acts or practices in or affecting commerce.”

12 42. Misrepresentations or deceptive omissions of material fact constitute
13 deceptive acts or practices prohibited by Section 5(a) of the FTC Act.

14 43. Acts or practices are unfair under Section 5 of the FTC Act if they
15 cause or are likely to cause substantial injury to consumers that consumers cannot
16 reasonably avoid themselves and that is not outweighed by countervailing benefits
17 to consumers or competition. 15 U.S.C. § 45(n).

18 **Count I**

19 **Deception**

20 44. In numerous instances through the means described in Paragraph 21,
21 in connection with the advertising, marketing, promotion, offering for sale, or sale
22 of hotel services, Defendants have represented, directly or indirectly, expressly or

1 by implication, that they had implemented reasonable and appropriate measures to
2 protect personal information against unauthorized access.

3 45. In truth and in fact, in numerous instances in which Defendants have
4 made the representations set forth in Paragraph 44 of this Complaint, Defendants
5 did not implement reasonable and appropriate measures to protect personal
6 information against unauthorized access.

7 46. Therefore, Defendants' representations as set forth in Paragraph 44
8 of this Complaint are false or misleading and constitute deceptive acts or practices
9 in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

10 **Count II**

11 **Unfairness**

12 47. In numerous instances Defendants have failed to employ reasonable
13 and appropriate measures to protect personal information against unauthorized
14 access.

15 48. Defendants' actions caused or are likely to cause substantial injury
16 to consumers that consumers cannot reasonably avoid themselves and that is not
17 outweighed by countervailing benefits to consumers or competition.

18 49. Therefore, Defendants' acts and practices as described in Paragraph
19 47 above constitute unfair acts or practices in violation of Section 5 of the FTC
20 Act, 15 U.S.C. §§ 45(a) and 45(n).

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CONSUMER INJURY

50. Consumers have suffered and will continue to suffer substantial injury as a result of Defendants’ violations of the FTC Act. In addition, Defendants have been unjustly enriched as a result of their unlawful acts or practices. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers, reap unjust enrichment, and harm the public interest.

THIS COURT’S POWER TO GRANT RELIEF

51. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC. The Court, in the exercise of its equitable jurisdiction, may award ancillary relief, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies, to prevent and remedy any violation of any provision of law enforced by the FTC.

PRAYER FOR RELIEF

Wherefore, Plaintiff FTC, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and the Court’s own equitable powers, requests that the Court:

A. Enter a permanent injunction to prevent future violations of the FTC Act by Defendants;

B. Award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants’ violations of the FTC Act, including but not limited to, rescission or reformation of contracts, restitution, the refund of monies

1 paid, and the disgorgement of ill-gotten monies; and

2 C. Award Plaintiff the costs of bringing this action, as well as such
3 other and additional relief as the Court may determine to be just and proper.

4

5

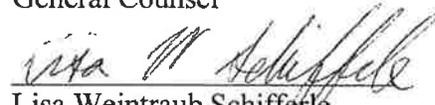
Respectfully submitted,

6

Willard K. Tom
General Counsel

7

Dated: August 9, 2012



8

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CERTIFICATE OF SERVICE

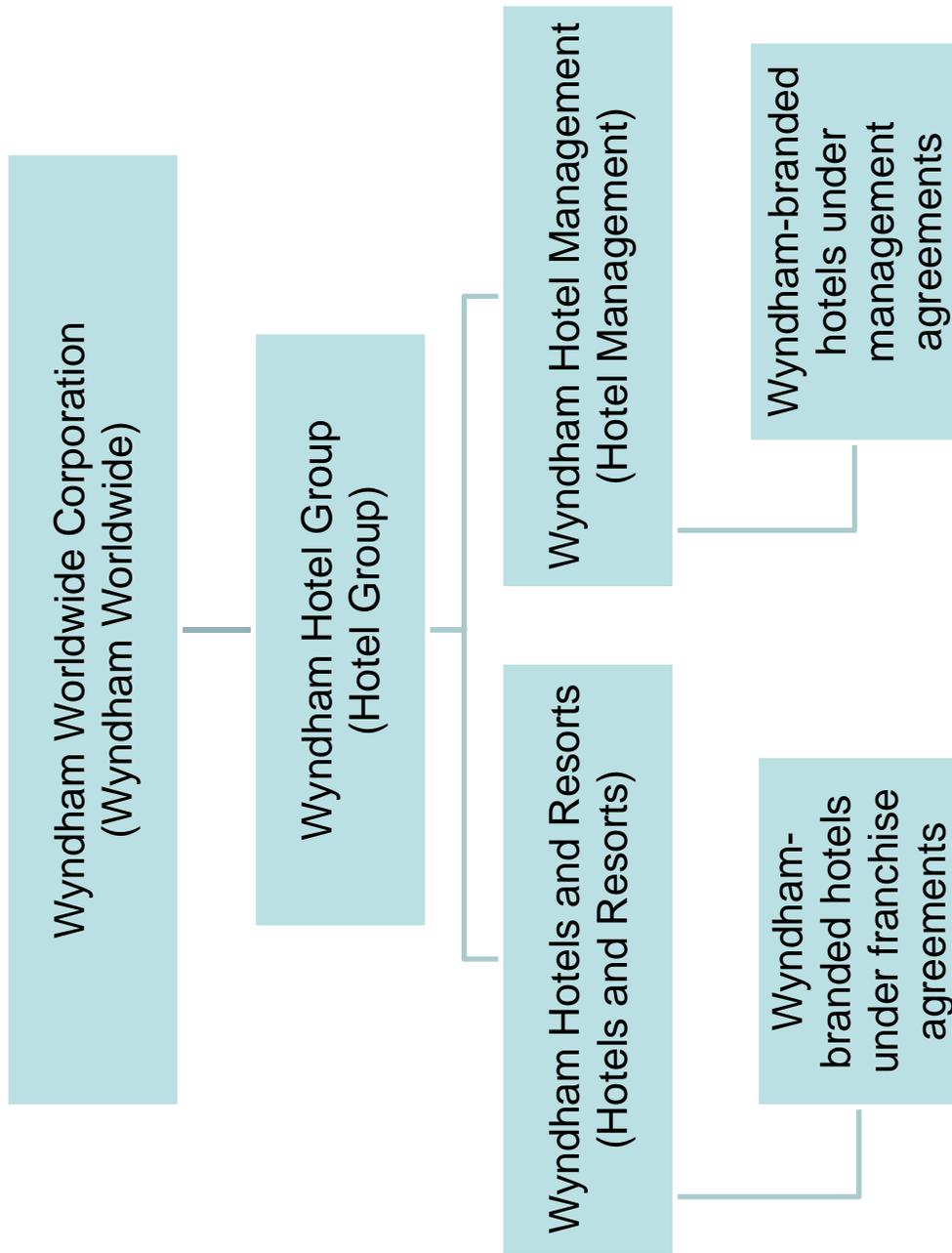
I hereby certify that on August 9, 2012, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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s/ Lisa W. Schifferle

EXHIBIT A

Defendants' Corporate Structure



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UNITED STATES DISTRICT COURT.
FOR THE DISTRICT OF NEW JERSEY
Civil 13-1887 ES

FEDERAL TRADE COMMISSION,

Plaintiff,

MOTIONS
TO DISMISS

v.

WYNDHAM WORLDWIDE
CORPORATION, ET AL,

DEFENDANTS.

NEWARK, NEW JERSEY
NOVEMBER 7, 2013

B E F O R E: HONORABLE ESTHER SALAS,
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

KEVIN HYLAND MORIARTY, ESQ.
KRISTIN KRAUSE COHEN, ESQ.
JONATHAN ELI ZIMMERMAN, ESQ.
FOR THE FEDERAL TRADE COMMISSION.

GIBBONS
BY: JUSTIN T. QUINN, ESQ.
AND
KIRKLAND & ELLIS
BY: EUGENE ASSAF, ESQ.
AND: K. WINN ALLEN, ESQ.
For the Defendants.

1
2 Pursuant to Section 753 Title 28 United
3 States Code, the following transcript is certified to
4 be an accurate record as taken stenographically in the
5 above-entitled proceedings.

S/LYNNE JOHNSON

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11 LYNNE JOHNSON, CSR, CM, CRR
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1 THE COURT: Good morning to everyone. Please
2 be seated.

3 We are on the record in the matter of Federal
4 Trade Commission versus Wyndham Worldwide Corporation
5 et al, civil 13-1887. Let me have appearances by
6 counsel.

7 MR. MORIARTY: Kevin Moriarty on behalf of
8 the Federal Trade Commission.

9 MR. ZIMMERMAN: Jonathan Zimmerman on behalf
10 of the Federal Trade Commission.

11 MS. COHEN: Kristin Cohen for the FTC.

12 MR. QUINN: Justin Quinn for the defendants.
13 Along with me at counsel table is Eugene Assaf, K.
14 Winn Allen and Douglas Meal. Also with me are
15 representatives from Wyndham, Marcus Banks and Korin
16 Neff.

17 Mr. Assaf will be arguing the authority
18 question. Mr. Allen will be answering any questions
19 with respect to the common enterprise and if your
20 Honor has any questions on the motion to stay, I will
21 be addressing those.

22 THE COURT: Perfect. Be seated.

23 Let me tell you the order we are going to go
24 today. We are going to start with whether Section 5,
25 unfair authority extends to data security and if so,

1 does it govern the security of payments, payment card
2 data. So what we are going we are going to deal first
3 as it was in the briefs. Count 2, the unfairness
4 claim.

5 Let's deal with the first issue, whether
6 again, as I said a moment ago, Section 5 unfairness
7 authority extends to data security, and issue two then
8 will be whether the FTC is required to provide fair
9 notice of what Section 5 requires.

10 And then issue three will be whether
11 unfairness is adequately pled by the plaintiffs.

12 We then will move to the second argument,
13 count 1, which is the deception claim, and we will
14 have argument on that claim. Then at some point we
15 will probably break. We will come back and we will
16 deal with the other Wyndham entities' motions to
17 dismiss and finally we will deal with the motion to
18 stay discovery. That is the order in which we will be
19 conducting argument today.

20 Let's start with, it is the first issue, I
21 would like to open with defendants.

22 Counsel, I know that you feel that Section 5,
23 the unfair authority, extends to data security. You
24 do not believe it does. I will hear from you now.

25 Let me apologize in advance to counsel. I

1 I think I could address some of the issues as
2 we go along. Obviously, if your Honor has questions I
3 could go to different parts.

4 What I tried to do is graphically represent
5 some of the issues in the brief, and condense those
6 down into a slide or two for each issue. If that is
7 okay with your Honor, may I approach the courtroom
8 deputy with copies of the deck.

9 THE COURT: Please. Approach Mr. Selecky, if
10 you have a copy for my law clerks as well as, I don't
11 know as well as for Ms. Johnson.

12 MR. ASSAF: Yes, your Honor.

13 May I approach?

14 THE COURT: Great.

15 MR. ASSAF: May it please the Court, this was
16 the overview I actually prepared in anticipation of
17 the Court's questions which I think actually tracks
18 some of the Court's questions. So I will jump right
19 to the issues, and as the Court once framed it, does
20 the FTC have a statutory authority under Section 5 to
21 regulate data security.

22 Before I get there, your Honor, I would like
23 to take a few minutes to level the table and put it in
24 context, this is the parties and the issue and then I
25 will get into the statutory analysis issue.

1 So the factual background. Obviously on one
2 side is the FTC, and I think it is very important to
3 start off here. This is not, not some anti government
4 plot. I have the greatest respect for the FTC, the
5 historical missions, the results for the consumers.
6 This is a fair minded discussion of whether, what they
7 do under their consumer protection actions for
8 consumers extends to data security.

9 So that is the FTC on one side.

10 On the other side is obviously Wyndham
11 hotels. And one of the things that we are going to
12 hear today, both in terms of the pleadings issues, and
13 the statutory issues and the fair notice issue, is one
14 of the key things here that I will keep coming back to
15 is that the allegation is that that these Wyndham
16 branded hotels, you have Wyndham in Parsippany, but
17 then there are Wyndham-branded hotels, they own a
18 whole series of franchises, Ramada, Howard Johnson,
19 Wyndham.

20 And what the FTC, the crux of their
21 allegation, is that cyber criminals use certain
22 techniques to access personal information on the
23 Wyndham branded hotels property management server. So
24 let's just step back how, I got into this, I said oh,
25 they are hacking into Wyndham.

1 Clearly, as you will see, they did hack into
2 Wyndham's computer servers, but the credit card
3 information we are talking about was actually stored
4 on the local hotels server, the franchisees, if you
5 will. So that is why we are going go to get into the
6 issue of how far the authority goes for the FTC to
7 regulate not only the company here in Parsippany, but
8 then franchisees who are storing credit card
9 information at their individually owned hotels all
10 over the country.

11 The third set of parties here is Amici. I
12 think there are a couple of points I would like to
13 emphasize at the outset here.

14 First of all, as the Court I am sure has
15 observed, it is unusual for the amicus to come in at
16 the District Court level. This is the first Article
17 III Court to weigh in on this issue and it has
18 obviously much interest. The two entities I would
19 like to call out here, your Honor, is the NFIB, small
20 business group. 350,000 members averaging \$500,000 in
21 revenue a year in sales. And their average number of
22 employees are ten.

23 And again, I would say it is significant that
24 they decided to weigh in at the District Court because
25 as we will see later in terms of fair notice issues,

1 and the FTC's argument on consent degrees decrease, a
2 large number of consent decrees in the data security
3 area are from small businesses.

4 As your Honor knows from your prior days on
5 the bench as a magistrate, discovery costs are
6 enormous, especially as you would imagine data
7 security cases. So these people I think, they don't
8 have a chance to contest this, a realistic chance to
9 object. They have to enter a consent decree, because
10 otherwise they will go out of business if they fight
11 the FTC.

12 The second group is the International
13 Franchising Association. 1300 franchisors, so if you
14 are driving down the highway, it is, everybody. Tim
15 Horton, Subway, whenever you see a franchise, most
16 likely they are a member of this organization. Why do
17 they have an interest, your Honor? Because that
18 pleading that I showed you initially, can they be held
19 for the Subway Sandwich Shop's protection of data
20 security in Peoria, so that is why they are in.

21 Okay. Factual background. There is just the
22 first slide, then we are going, we have one more and
23 we will get into more of the background. These cyber
24 attacks occurred in 2008. I think it is undisputed
25 that they were perpetrated by Russian cyber criminals.

1 THE COURT: Let me ask a question. It
2 happened in 2008. My understanding, at least, from
3 trying to track it in the complaint, in about April of
4 2008, who was in charge of the data security at that
5 time, 2008, April, 2008?

6 MR. ASSAF: Well, in terms of, a couple of
7 answers to the question. Wyndham obviously is
8 responsible for the data security at their corporate
9 center. But as made clear on our website, including
10 the very policy that the FTC refers to, the
11 franchisees are responsible for their own maintenance
12 of credit card information, which makes sense. You go
13 into a Ramada in South Bend, Indiana, they swipe your
14 card, they have your information. And yes, they have
15 to communicate with Wyndham in Parsippany, but the
16 crux of the allegation is that the South Bend, Indiana
17 Ramada had the credit card information. So your
18 Honor, clearly we are responsible for servers in
19 Parsippany. Clearly.

20 THE COURT: That is what I am -- all right.
21 You are admitting you are responsible for servers in
22 Parsippany, but with respect to maintaining and
23 keeping confidential this information you say it falls
24 on the independently owned franchisee.

25 MR. ASSAF: Yes, your Honor. And to your, I

1 think your next question is preempted, is that it did
2 start in 2008, and what happened is very sophisticated
3 malware was used to crack into our system. I am going
4 to show you in a second from down the hall, there is a
5 criminal indictment, there are actually two of them
6 here, which allege very similar facts which I will get
7 to, Russian cyber criminals put malware on the system,
8 in the back door like they did for us, and they came
9 back later and used the back doors to gain entry to
10 the system.

11 THE COURT: So in April, 2008, you would say
12 the information was being held and the responsibility
13 was being held by the independently owned franchisees,
14 right.

15 MR. ASSAF: Yes, your Honor.

16 THE COURT: Then at some point counsel,
17 though, I know, I told you I was going to interrupt
18 you. At some point, doesn't Wyndham Worldwide
19 Corporation takeover in terms of management of the
20 information?

21 MR. ASSAF: Yes.

22 THE COURT: Counsel, I appreciate Power
23 Point, and I am not in any way trying to give any one
24 a hard time today, but the end result is, I can assure
25 you I have read every brief. I have gone and looked

1 up every publicly available document even though you
2 did not provide me, which I ask in the future both
3 sides, if you cite to something, even if it is
4 publicly available, I would ask that each of you take
5 the time to at least provide me one courtesy copy of
6 the document, and in particular, I am speaking of the,
7 I believe, counsel, the way you pronounce it is
8 CISPA.

9 You indicated in your brief, it is passed on
10 4/18/2013. My understanding, my research, correct me
11 if I am wrong, I will get to that. You think it is
12 sitting in committee and not currently law. But we
13 will get to that. That wasn't provided, but I found
14 it late last night late. My point is I will have
15 questions for you.

16 I want to let you present what you are going
17 to present. But I want to get to some of the heart
18 and the meat of the questions that I have. So one of
19 the questions is, at some point, at least FTC is
20 saying that Worldwide Corporation took over some of
21 the management of this information. And I wanted to
22 hear you on that because you seem to be indicating
23 that it really, all the information was in the hands
24 during all of the breaches of these independently
25 owned Wyndham hotels, or Wyndham-branded hotels. I

1 would like you to speak to that.

2 MR. ASSAF: Sure. In terms of Wyndham's
3 response, they did undertake remedial measures. They
4 hired forensic computer people to come in and try to
5 figure out what was done, and in terms of
6 responsibility issue that you are raising, your Honor,
7 they notified the franchisees, they notified the card
8 brands. They tried to implement systems for Wyndham.

9 But in terms of taking over responsibility
10 for data security, they still did not take over, and I
11 think that is a big legal issue, it goes back to why
12 the franchisee association is here, is that
13 franchisors at the end of the day cannot, in their
14 view, and I am going to cite the Radisson case later
15 on, should not be responsible for the computer systems
16 of the franchisees. And how they maintain their data
17 security, especially, your Honor, when it is prominent
18 on our website that the franchisees maintain their own
19 data-security system.

20 THE COURT: Okay.

21 MR. ASSAF: We responded to the
22 investigation, notified the card brands, notify the
23 Secret Service, and bring on forensic accountants, or
24 forensic computer technicians. Of the FTC later on
25 opened up an investigation, a million documents,

1 several witness interviews, at a cost of \$5 million.
2 They then file suit.

3 Now, since filing suit there are two issues
4 that talk about the cyber security framework. There
5 is cyber security litigation that is pending in 2012,
6 you are right, never enacted and never signed. In
7 response to that, President Obama issues an executive
8 order asking for preliminary cybersecurity framework,
9 and then fast forward to October 28 of this year, the
10 federal government issues actually a preliminary
11 framework of cybersecurity measures that are
12 voluntary, to be sure, not the measure of law, an
13 executive order, but that we will get to later on that
14 we think provide important guideposts as to what
15 companies should and should not do going forward, and
16 so now at least those companies, arguably, will have
17 notice of what is required of them.

18 And I will just note here, your Honor, that
19 while those guidelines apply to banks, financial
20 institutions, nuclear power plants, we would still
21 comply with those guidelines as of today. So that is
22 part of the anomaly I would suggest is part of this
23 case, is that the federal government has now issued
24 proposed, not regulations but guidelines, and we are
25 in compliance with them.

1 THE COURT: But getting, let's talk about
2 whether the FTC, let's cut to the chase, whether the
3 FTC has this authority.

4 A lot of your arguments focus around Brown
5 and Williamson, and the problem I am having and
6 perhaps maybe you can tell me why this case you feel
7 is so on point because when I read it, I really think
8 it is distinguishable. And the reason I think it is
9 distinguishable is because we have a situation where,
10 as the Court said, since 1965 Congress has enacted six
11 separate statutes addressing the problem of tobacco
12 use and human health. We don't have that situation
13 here.

14 What we have here is we do have something
15 that is rapidly evolving, and I give you that, in
16 terms of the concerns that the government has as well
17 as the sophistication of these criminals and these
18 hackers.

19 So yes, we have a situation where it is
20 rapidly evolving, but we don't have Congress speaking
21 to removing any, or extinguishing any power that the
22 FTC has. And I read again CISPA, and there is no
23 mention of whether the FTC has the authority or not.
24 And quite frankly, where and how do you feel that this
25 case, this Brown and Williamson case is as instructive

1 as you say it is?

2 MR. ASSAF: Okay. Let me go to slide 23.

3 Your Honor, the first argument is the
4 argument about disclaiming authority. Let me address
5 your question as to the other statutory --

6 THE COURT: We will get to disclaiming. I
7 have questions.

8 MR. ASSAF: Let me address your issue on
9 statutory -- on cases. That is I start with what I
10 think you have been quoting, Brown and Williamson.
11 This is important, I will go through the statute. It
12 is a two-part answer.

13 First the law. At the time the statute is
14 enacted, it may have a range of plausible meanings.
15 Over time, however, subsequent acts can shape or focus
16 those meanings. This is particularly where the scope,
17 as here, I would argue, is fairly broad. And
18 subsequent statutes provide more specifically address
19 the topic.

20 So I would say to your question is there
21 actually have been subsequent, there are numerous
22 statutes since the age of data security. They are
23 cited in our brief. The Fair Credit Reporting Act,
24 Graham-Leach-Bliley Act, Children's On Line Protection
25 Act, to start off. Why is that important? That is

1 important because it, because Congress, when they
2 enacted that they said, for example, under Children's
3 on Line Privacy Protection Act that the FTC were to
4 issue certain regulations regarding data security. If
5 the FTC already had that power there would be no
6 reason for Congress to give them additional powers
7 there.

8 So it ties in to what, to why I say the
9 disclaimer issue is also important is that the FTC in
10 the early 2000s recognized they don't have authority
11 to regulate data security.

12 THE COURT: You know what? And I apologize.
13 Go back to that. I do have some questions regarding
14 the disclaimer here. Then we will go back to this
15 issue.

16 Quite frankly, I am looking for case law that
17 really supports your position that because the FTC has
18 sought additional data-security legislation. It
19 necessarily then lacks the authority under Section 5.
20 And we will get to that question. Let me let you go
21 back to this issue of whether they disclaim authority
22 in early 2000. Tell me why you think they did.

23 MR. ASSAF: Okay. I start on with the Brown
24 and Williamson statement. I point out obviously the
25 case is not only important because it is a Supreme

1 Court case, I think it is more important because Judge
2 O'Connor --

3 THE COURT: Let the record be clear.
4 Whenever the Supreme Court says anything, it is
5 incredibly important and I would of course defer to
6 our Supreme Court. However, when I believe the case
7 is distinguishable, I have to ask you why then the
8 Court needs to consider it when I think it is perhaps
9 clearly distinguishable. That being said, go ahead
10 and state what you, what are you saying.

11 MR. ASSAF: Justice O'Connor I think lays out
12 three possible ways in which an agency action would be
13 seen as outside their authority. The first is
14 disclaimer. The second is other statutes address it,
15 and what I think it is shorthand for is is that when
16 Congress acts in specific ways, it trumps a more
17 general way or gives meaning to it, and the third
18 issue would be especially an issue of rigorous public
19 debate, it is hard to believe that Congress would have
20 ceded this debate to an agency when the statute is
21 either silent or ambiguous.

22 Let me address the first on disclaimer. In
23 1998 Chairman Pitofsky at the FTC was testifying on,
24 this shows you how quickly things have developed, the
25 worldwide web. And so I think the FTC was struggling

1 as to what their authority was under the worldwide
2 web, both on the privacy side, and on the security
3 side.

4 And here, if you look at what Chairman
5 Pitofsky says, two things in his prepared remarks. He
6 is trying to ask about whether businesses will self
7 regulate or whether the FTC should be given authority
8 to regulate businesses. And his view is, as expressed
9 to Congress, that the FTC should get that authority
10 because it is unclear whether businesses will actually
11 self regulate, and he turns out obviously to be right.
12 Businesses aren't going to self regulate.

13 What he says is that the Commission believed
14 that unless the industry can demonstrate that it has
15 developed and implemented broad-based and effective
16 self regulatory promise by the end of the year,
17 additional governmental authority in this area would
18 be appropriate and necessary.

19 Footnote, important footnote: Currently the
20 Commission has limited authority to prevent abusive
21 practices in this area. The Act grants the Commission
22 authority to seek relief for violation of the Act's
23 prohibitions on unfair and deceptive practices
24 affecting commerce, an authority limited in this
25 context to ensuring that websites follow their stated

1 information practices.

2 So your Honor, I would argue the first time
3 the FTC grapples with it, they say are authorities are
4 limited here to if a company says something on their
5 website, they have to abide by it. They are not
6 talking here about the FTC determining what data-
7 security practices companies should adopt. So this is
8 the first step.

9 That same testimony, your Honor, the FTC
10 says, gee, this is geared more towards privacy than
11 security. And I would suggest that is actually not
12 correct. It was not limited to on line privacy. In
13 fact, if you look, this is for the record slide 19.

14 This is the conclusion in which he is asking
15 for legislative authority from Congress, and again,
16 the level said this, Justice O'Connor said you weren't
17 asked for authority, you already have it. He says
18 consumers are deeply concerned about the privacy and
19 security of their own, and their children's personal
20 information in the on line environment and are looking
21 for greater protection.

22 And he then says, the four basic information
23 practices required by the statute would be. So this
24 is proposed. Would be. And then four is security
25 integrity. Websites would be required to take

1 reasonable steps to protect the security integrity of
2 that information.

3 So at least the first step, your Honor, not
4 dispositive. So 1998, I would argue there is at least
5 a step towards acknowledging.

6 THE COURT: But in 2000, and again, the
7 Commission has argued, the SEC has argued that they
8 began, and there are a number of these consent
9 decrees, and they have said in their arguments that
10 they have brought more than 40 data-security cases, 19
11 of which allege unfair practices, and have routinely
12 reported a publicized data-security program.

13 The end result, counsel, that I would ask you
14 is this at some point in early 2000 they began
15 bringing these actions, quite frankly, you know, I
16 think Congress would presumably have notice of these
17 actions, since they have been occurring in over 40,
18 actually over 40 data-security cases, 19 of which,
19 again, alleged unfair practices.

20 Well, if there was a shift, I am not
21 necessarily saying there was a shift in position with
22 respect to whether they possessed the authority or
23 not, they began in 2000 certainly pursuing these
24 actions, and regulating and indeed enforcing when
25 necessary. So you say what to that?

1 MR. ASSAF: Great question. I totally agree
2 they started this roughly 2003, 2004. I have -- there
3 are cases cited in our brief, consent decrees cannot
4 form agency action interpretive guidance. It is how I
5 started off, your Honor.

6 When you go again against, this is one of the
7 names, Bonzai Auto Sales, that company is going to
8 agree to a consent decree no matter what. One, we
9 have great law that consent decrees are not litigated
10 cases and don't form interpretive guidance. There is
11 also the practical matter that there is no, in terms
12 of consent decrees, we never have the information of
13 investigations that don't end in consent decrees.
14 That would also arguably provide some guideposts as to
15 what is permitted and what is not permitted.

16 But more importantly, your Honor, this is
17 right on all fours with Brown and Williamson, when the
18 FDA starts to regulate tobacco, Congress obviously
19 knew that. Congress didn't take action then to
20 circumscribe that authority. There were lots of
21 complaints in Congress about it. But the proper
22 process is that in order to an Article III Judge
23 decides whether the agency has authority. So the fact
24 that the FTC, like the FDA, starts regulating
25 something, and Congress doesn't do anything in the

1 first instance, doesn't surprise me because it is an
2 exactly what happened in Brown and Williamson.
3 Congress didn't do anything. Instead, an Article III
4 Judge said, you know what, we get to look at that and
5 decide whether the agency is acting properly.

6 THE COURT: So your point about the consent
7 decree, though, wasn't TJ Maxx one of the entities
8 that entered into a consent decree with the FTC?

9 MR. ASSAF: Absolutely.

10 THE COURT: That is a pretty big company you
11 would argue, right?

12 MR. ASSAF: In term of that policy issue, let
13 me address that straight on. You have company
14 companies. TJ Maxx. BJ's, who have entered into
15 consent decrease and it is not going to come as any
16 surprise to your Honor, is that there is of course a
17 path of least resistance, even though some of the
18 consent decrees require a monitor for 20 years, that
19 at some point, as we see from the record, companies
20 large and small say you know what? It is just not
21 worth it to fight with the FTC.

22 THE COURT: All right. I was countering your
23 point about it being a mom-and-pop type of thing. We
24 are dealing with some pretty sophisticated companies
25 and they did enter into consent decrease. In

1 fairness, I think they would have also have resources
2 to litigate, if necessary.

3 But that being said, let's move on.

4 Continue, counsel.

5 MR. ASSAF: Back to the 21. Chairman
6 Pitofsky in 1998, and then in 2000 the Commission
7 publishes a position on the dissemination of certain
8 information. And it is clearly in the context of the
9 FCC Act and in the context of COPPA, the Child on Line
10 Privacy Protection Act. I quote from 21. The
11 Commission's authority over the collection and
12 dissemination of personal data collected on line from
13 Section 5 of the act, and from COPPA, Which governs
14 the collection of information from children under the
15 age of 13.

16 Importantly at the end, as a general matter,
17 however, the Commission lacks authority to require a
18 firm to adopt information, practice, policies or to
19 abide by the fair information practice principles on
20 their websites or portions of their websites not
21 directed to children.

22 I marry that, your Honor, that that is not
23 just Wyndham saying, oh, that must help us. I marry
24 that to the side panel to academic commentary on this
25 very proposition from Michael Scott and the

1 Administrative Law Review. In its 2000 report the
2 Commission indicated that while it had power under
3 Section 5 to pursue deceptive practices, such as the
4 website's failure to abide by its stated privacy
5 policy, it could not require companies to adopt
6 privacy policies in the first place.

7 And then 2001. Lee Peeler, who is the
8 associate director of advertising practices at the
9 FTC, in response to some issues with Amazon, and it is
10 also important to understand, as I talk about this
11 slide, the FDA was an issue over 60 years because of
12 tobacco. I think we could all recognize, though, that
13 obviously the digital age is moving much more quickly,
14 so the timeframe here is compressed, but I would say
15 in 2001, again, the FTC is going on record saying our
16 authority is about deceptive practices. Deceptive
17 practices. This is before any of the consent decrees
18 that you referenced earlier in your questions or that
19 are part of the record.

20 So I would say, this is the graphic on the
21 next page, that from 2000, from 1998 to 2001, there
22 are several statements, and then things clearly happen
23 rapidly, your Honor. There are a number of consent
24 decrees after that. But on the disclaimer point, I
25 submit that Wyndham has a very strong argument that

1 the FTC, at minimum, was conceding that their only
2 jurisdiction was over deception and whether your
3 website was deceptive in terms of what you are doing
4 for information policy.

5 Nobody from the FTC, prior to these consent
6 decrees, were talking about the fact, and this is
7 important, an important point, I have shown you actual
8 disclaimers, but I would actually turn it around as
9 well. Where is there any where from 1998 to 2001
10 where the FTC is telling Congress or even the
11 Executive Branch, that we have this authority, so
12 there is no need to do anything?

13 There is nowhere. So I have at least three
14 instances. I would submit the FTC actually doesn't
15 have anything where they go to Congress and in 2000
16 say we have this authority. There is nothing you need
17 to do.

18 THE COURT: Okay. Counsel, I am going to
19 shift gears. I want to hear from the FTC on this
20 issue. Counsel does point to three separate instances
21 where it appears at least that there is a question of
22 whether you have authority. And I would like to hear
23 your position only on that point. Then we will move
24 back to counsel's additional points with respect to
25 this issue.

1 MR. MORIARTY: Your Honor, Kevin Moriarty on
2 behalf the FTC.

3 As I understand it, you only want me to talk
4 about the disclaimer issue?

5 THE COURT: I want to hear what you say in
6 response to the issue that in 1998 there was
7 apparently at least statements on the record
8 indicating that you did not have the authority to do
9 what you are doing right now. And you would say what,
10 sir?

11 MR. MORIARTY: As a preliminary matter I
12 would say this case is very different than Brown and
13 Williamson. I would say you understated how unique
14 Brown and Williamson was. What the Supreme Court held
15 was that the FDA's assertion of authority would
16 require the FDA to actually illegalize tobacco
17 products. And so the conflict between the FDA's
18 position there and this 35 years of regulation was
19 unique, and not anything like the conflict we are
20 talking about here.

21 But just to limit it to the disclaimer, you
22 know, I think all those reports and testimony to
23 Congress, they really speak for themselves, and so
24 there is not much use in trying to reframe them or
25 argue about what they mean. They are all about, in

1 context, they are about this question that was coming
2 up in the late nineties and the early two thousands
3 which is that people were suddenly discovering that
4 companies on line were capable of collecting enormous
5 amounts of information about consumers, and people
6 were suddenly realizing this. They are saying what
7 are we go to go do about this?

8 And The FTC's position was, well, to the
9 extent that we can't articulate an injury as a result
10 of this collection, the companies are just collecting
11 this information, and consumers aren't injured, then
12 all we can do is prevent companies from lying or
13 deceiving consumers about what their collection
14 practices are. And so implicit in all of these is
15 look, if consumers are injured, then of course we have
16 jurisdiction because unfairness applies when consumers
17 suffer substantial injury.

18 So that is sort of, that is the ground work
19 of all these cases.

20 And you know, I can point out different spots
21 in each of these cases where, or each of these reports
22 or testimony where that is clear. You know, where we
23 are limited in our authority to deceptive and unfair
24 practices. But that is throughout these cases. And
25 essentially the question that is being answered in

1 these supposed disclaimers is okay, well, consumers
2 aren't injured, is there anything you can do about it?
3 And the answer is well, if they are not injured, no,
4 we can only stop companies from receiving it --

5 THE COURT: So you are saying it is a
6 consistent position.

7 MR. MORIARTY: It is consistent. The other
8 issue which again sort of gets into the weeds of Brown
9 and Williamson, which I think is hardly worthwhile. I
10 think Brown and Williamson is such an unusual case.

11 The other issue here is in Brown and
12 Williamson, what happened was the FDA denied it had
13 authority. Very clear disclaimer for 70 years. As a
14 result of that denial this regulatory regime built up.
15 But the earliest alleged disclaimer that they can
16 identify from the FTC is 1998 or 2001. These data-
17 security statutes that they are pointing to which
18 again don't conflict in any way with the FTC Act, in
19 the case of the FCRA, it was passed in the early
20 seventies, maybe 1970, so there is no way that
21 Congress was reacting to our disclaimer by passing
22 that law. So really the disclaimers I think are a
23 red herring.

24 THE COURT: Okay. Thank you, counsel.

25 MR. MORIARTY: Sure. Thank you.

1 MR. ASSAF: So addressing point one of the
2 disclaimer, again, I think the FTC is saying that
3 there is nothing -- there is no affirmative evidence,
4 I think their position is that it must have existed
5 all along. There is nothing in this record, your
6 Honor, which they point to saying we have unfair
7 jurisdiction and authority to regulate data security
8 under the unfairness prong.

9 I don't, again, if I am wrong I will be
10 corrected, but I think there is nothing in this
11 record. So that is step 1 of Brown and Williamson, or
12 at least one possible way that Brown and Williamson
13 would apply.

14 The second one is what you and I started to
15 talk about, the second prong. You don't have to prove
16 any one of the prongs, but they are all instructive,
17 to be sure.

18 And the second prong is whether there is
19 other legislation that fills out the void and puts me
20 meat on the bones as to what Congress meant. I
21 actually think these are three, not only pre statutes,
22 but three regulatory schemes that confirm that the FTC
23 did not have unfair authority to regulate data
24 security, and I am going to tell you why.

25 Let's take Bliley, 1999, right in the sweet

1 spot of the chronology. It mandates data-security
2 requirements for financial institutions and instructs
3 the FTC to establish standards for those financial
4 institutions to protect against unauthorized access or
5 use of customer records or information.

6 And what is so important about this, your
7 Honor, I hate to preview fair notice, but there is
8 some spillover, obviously. The FTC then issues
9 regulations saying what data-security practices should
10 apply under the statute.

11 Secondly, the Children's on Line Privacy
12 Protection Act, 1998. Same thing. Directs the FTC to
13 promulgate regulations requiring website operators to,
14 quote, establish and maintain reasonable procedures to
15 protect the confidentiality, security, and integrity
16 of personal information collected from children.

17 And your Honor, let me address one issue. If
18 the FTC is right on how broad Section 5 is of the FTC
19 Act, there is certainly not an exemption for children
20 under the FTC Act and whether it protects children's
21 data security. So why would Congress, in 1999, seek
22 then to create a regime for the FTC to not only have
23 authority to regulate data security but it actually
24 then tells them, which gets to our fair notice point
25 later on, and they do this, issue regulations

1 protecting that data security.

2 And then finally, the Fair Credit Reporting
3 Act, yes, although it was passed in the 1970's, to be
4 sure, it was amended again in the sweet spot of this
5 debate as we would describe it in 2003, that again,
6 you impose requirements for the collection, disclosure
7 and disposal of data collected by consumer reporting
8 agencies and require the FTC and other agencies to
9 develop rules for data handling in order to curb
10 identity theft.

11 And the FTC then issues regulations on this,
12 on data security.

13 So under the second prong or the second test
14 for Brown and Williamson of whether there is other
15 statutes out there that give guidance as to whether
16 Congress has already given them this authority, I
17 would argue there are at least three instances in
18 which Congress then, in the sweet spot of this
19 chronology, acts to give the FTC data security
20 authority, and does so, and also tells them to issue
21 regulations.

22 These cases are cited in our brief. I think,
23 I respectfully disagree that -- Brown and Williamson
24 is not only obviously authority, but it is, it also
25 provides an analytical framework that other courts

1 have used in terms of what an agency tries to do
2 something other than it is authorized to do. I don't
3 think it is that unusual, it is not a one-off case.
4 You have cases from the EPA, under the controlled
5 substances Act, the FCC has been challenged. All on
6 whether other statutes have made it clear that a broad
7 statute is actually more narrow than the agency has
8 said.

9 This is kind of a footnote to Brown and
10 Williamson, your Honor, then I will get to the third
11 point. I don't know where this comes up. I think it
12 is in the FTC's brief in this section so I will put it
13 here. The FTC I think also drops a footnote saying,
14 well, no matter what, we get deference to determine
15 our own jurisdiction, and they cite to the U.S.
16 Supreme Court case, City of Arlington, Texas vs. FTC
17 from this summer.

18 Well, your Honor, in Arlington, importantly,
19 Arlington cites Mead, U.S. versus Mead, and it is an
20 eight to one decision by Justice Souter. Here is what
21 Arlington says about Mead. Mead denied Chevron
22 reference to action by agency, with that rule-making
23 authority, that was not rule making. I said there is
24 spillover from the rule making and the authority. The
25 FTC by the way for the first time ever, we briefed

1 this in Arizona and here, there is one line in their
2 brief, we get deference to determine our own
3 jurisdiction.

4 That only applies, your Honor, if they in
5 fact have issued rules and engaged in rule making as
6 to their jurisdiction. So I just wanted to pick this
7 up, I didn't want to leave it there.

8 Now, I will get to the third point of Brown
9 and Williamson, and that is, I will try to tie it all
10 together, and address whether there is a limiting
11 principle here.

12 Okay. The third point, Justice O'Connor
13 says, there is disclaimer, there are other statutes.
14 Then she says we must be guided to a degree by common
15 sense as to the manner in which Congress is likely to
16 delegate a policy decision of such economic and
17 political magnitude to an administrative agency. We
18 are confident that Congress could not have intended to
19 delegate a decision of such economic and political
20 significance in so cryptic a fashion.

21 That may be, that is the explanation point
22 here. Because what we know from the record, and I am
23 sorry your Honor had to go find the bills. There is
24 charitably described a very healthy and rigorous
25 debate between Congress and its interest groups and

1 the Executive Branch as to data security and how it
2 should be done. That is going on right now. And so I
3 would say Justice O'Connor's words only confirm under
4 Brown and Williamson that there can be no argument
5 that Congress, having now dealt with cybersecurity
6 legislation and trying to figure out what it means,
7 has delegated that to the FTC, and in fact, your
8 Honor, I read the 2012 debates, and the 2013 debates,
9 there is no serious notion the FTC is going to run
10 data security for U.S. businesses.

11 The whole question is Homeland Security, and
12 what Homeland Security is going to do in connection
13 with the National Institute For Standards and
14 Technology. And you would expect that. They have all
15 the standards, and, why would Homeland Security be --

16 THE COURT: I also circled the section with
17 respect to common sense because the only problem I am
18 having is that if this is, if indeed Congress never
19 meant to give the authority to the FTC and they know
20 that, and it is clear, I have a hard time thinking
21 that based on the security breaches and based on what
22 we are talking about in this case, that Congress would
23 not have acted years ago, and I understand the Court
24 can't read into Congress's inaction or silence. But
25 is the answer to not regulate? Is the answer to not

1 allow them -- they are again protecting consumers.
2 And it just seems strange to me that if that was so
3 clear, that Congress never intended to give them the
4 authority, then we would not have seen some form of
5 regulation, and instead what we are seeing is things
6 are sitting right now and I understand this country is
7 where it is right now, economically and the crisis
8 that we all are faced with, various issues that face
9 this nation at the moment.

10 But the end result is to say that Congress
11 didn't intend to give them the authority and yet there
12 has been nothing done, and in fact, we have, as you
13 noted, there is, they refuse to they refused to act in
14 2012. So does that make, when we talk about common
15 sense, does that make any sense?

16 MR. ASSAF: An excellent question right at
17 the key point of obviously the third point of Justice
18 O'Connor's analysis, that it actually I think cuts the
19 other way in that while cybersecurity is clearly a
20 problem, your Honor, the notion that the FTC is
21 regulated through this litigated case against Wyndham
22 when there are hundreds of data security breaches a
23 year, and that there are no guidelines as the safe
24 harbors, I appreciate that is a significant problem.

25 But there are also resources that address it.

1 There is obviously the criminal aspects, to go after
2 cyber criminals. There are state Attorney Generals
3 who are very active in this area in terms of consumer
4 protection. They all have consumer bureaus that are
5 very active in this area.

6 Unfortunately, there is a debate about this,
7 too, but it is clearly out there. We know it from
8 Reilly in the Third Circuit and Hannifer, there is
9 equivalent of private Attorney Generals or private
10 plaintiffs that if there is real injury that satisfies
11 Article III injury, they also bring claims for data
12 security.

13 So I would actually argue this is the worst
14 of all worlds, because you have agencies, Homeland
15 Security, criminals, state Attorney Generals, private
16 parties, going after it. And here you have the FTC,
17 who has refused to issue any regulations or rules or
18 safe harbor provision as to what actually is required.

19 So your Honor, taking your premise that it is
20 a significant problem, if it is a significant problem,
21 I would argue then the FTC, or some agency of the
22 federal government, should articulate exactly what
23 companies should do for safe harbor provision, which
24 gets into fair notice, I know, but that is the, that
25 is to come -- that is, I think, the common sense

1 issue.

2 THE COURT: But what would you say to the
3 SEC's position, we issued guidelines, protecting
4 personal information and guides for businesses. We
5 also have issued consent decrees, we are trickling
6 into fair notice, but I think they really do overlap
7 in many ways. I mean, they haven't necessarily, they
8 would say, sat silently, have they?

9 MR. ASSAF: On two points, on the guidelines
10 which I think, they cite for the first time these
11 guidelines, I went and looked on the website, and they
12 are just that. I mean, we will go through them on the
13 Elmo, but they are the most vague and ambiguous
14 guidelines. You should take reasonable measures to
15 protect. They are a truism. And something that in
16 law school we would say wait a second, you can't hold
17 somebody liable for telling them, here are the
18 guidelines, you have to act reasonably and we later
19 determine what is reasonable.

20 I actually think the guidelines undercut
21 their position.

22 In terms of consent degree, we will get into
23 this, but the law is very clear the consent degree is
24 not agency enforcement action that provides action to
25 aggrieved parties. You saw this, for example, in the

1 FCC. The FCC consent decree, later on the parties
2 agree, they can't then be held liable because another
3 network entered into a consent decree that wasn't
4 litigated.

5 But your Honor I think is getting at a point
6 that I think bothers everybody, this is how I started
7 off, is that how -- the FTC has an important mission
8 here. Consumers are out there, and the FTC is trying
9 to protect consumers, to be sure. How do you
10 reconcile this?

11 I actually think, your Honor, that when you
12 look at it that way, as to the FTC's mission, what
13 they have done prior to this, and why I think it shows
14 that this case is outside that authority, is that they
15 -- under the unfairness and deceptive policy
16 provisions, they have gone after fraudsters, phishers,
17 schemers. Unscrupulous people. You just look at the
18 Bureau of Protection website.

19 I couldn't find a single situation in which a
20 third party who is the victim of a criminal attack,
21 and we know that, I think you could take judicial
22 notice of that given the indictment here. We have
23 Russian cyber criminals. They are not going to
24 dispute it.

25 You have a third party who then becomes the

1 focus of the FTC's consumer protection bureau. I
2 think the way you reconcile all these cases is, it
3 goes back to my limited experience with criminal law,
4 kind of a malum in se issue. Are you engaged, are you
5 as an actor engaged in a malum in se issue. I think
6 it has basis in the case law. All of the cases we
7 talk about, with the exception of this one, the data
8 security group of cases, they are limited to malum in
9 se things, where the actor is doing something they
10 know is just wrong.

11 You go back to the primary purpose of Section
12 5 is to lessen the harsh effects of caveat emptor or
13 the DC Circuit. They talk about what exactly the
14 primary categories are: withholding material
15 information; making unsubstantiated advertising
16 claims; using high pressure techniques; depriving
17 consumers of various post purchase remedies.

18 I have no quarrel, your Honor, that data
19 security is a very important issue. I suspect the
20 government, including the Homeland Security and
21 President Obama's White House are trying to do
22 something about it. My quarrel is that the FTC
23 actually isn't the agency that is supposed to be doing
24 it. They are supposed to be, and I would make the
25 argument as a policy matter that the resources of this

1 agency historically and brilliantly have been used to
2 protect consumers from scammers, thieves, and
3 deceivers.

4 And to actually now go into an area which
5 they have no real expertise, and I am going to get to
6 that, your Honor. One of the issues in this case,
7 your Honor, is hardware configurations, security
8 networks. I know we are putting the cart before the
9 horse, but we are accused of having unsecured hardware
10 configurations or security standards that are lax.

11 Well, your Honor, we can show on the Elmo, we
12 asked for discovery from the FTC as to what proper
13 hardware configurations are. Forget that they haven't
14 issued regulations for it. What they say is we object
15 to answering that because the term "hardware
16 configuration" is vague and ambiguous.

17 So your Honor, that is what I am saying. I
18 can assure you, if I asked Homeland Security or the
19 National Institute of Standards and Technology what
20 hardware configurations are required for a proper
21 network, I know now from President Obama's Executive
22 Order, I know exactly what is required.

23 But the FTC, with all due respect,
24 notwithstanding all the good they do for consumers,
25 has no expertise in this area. So that is why I say

1 it comes back to the common sense point. I agree with
2 you in the abstract. But let those agencies with the
3 sophisticated technological expertise actually publish
4 the guidelines.

5 I will get to that fair notice. So your
6 Honor, I finish up on this point saying Brown and
7 Williamson is not a one-off case, that Justice
8 O'Connor writing for the Court laid out three ways in
9 which an agency action can be challenged as beyond the
10 statute's authority to that agency. We have shown you
11 disclaimers and we have three or four of them, and
12 they have none at the relevant timeframe saying this
13 is our authority.

14 We have shown you subsequent statutes in the
15 timeframe, under Brown and Williamson, that show that
16 Congress knew how to give the FTC authority when they
17 wanted to for data security.

18 Then we come to this point which I think is
19 an important point, and that is, I would say it is not
20 consistent with common sense to think that Congress in
21 this environment, both good and bad, your Honor. I
22 will finish off with this. Congress couldn't do it.
23 I personally was disappointed in 2012 when they didn't
24 get the cybersecurity act, because I thought it would
25 have helped us here in this case. But they did not do

1 it.

2 But the political process worked. President
3 Obama issued an executive order. I am going to go
4 through chapter and verse as to what that executive
5 order requires certain groups to do. It is going to
6 become a standard that people can look at in the
7 future. That is how it should be done.

8 THE COURT: But, and I am going to allow
9 counsel to respond to the points made. But when we
10 look at the executive order again, and when we look at
11 CISPA, which again is pending legislation, there is
12 nothing in there, or is there, that says that the FTC
13 lacks authority?

14 MR. ASSAF: And we had a debate about this in
15 the briefs. I know your Honor is getting to that
16 point. There have been ten bills. Six of them had no
17 savings clauses as to cybersecurity, which support us.
18 They say but yeah, four of them had savings clauses.
19 And none of those ten get enacted.

20 But again, the fact that we are having a
21 debate that Congress six times doesn't put in a
22 savings clause. Four times does. How could it be
23 said that their statutory authority is clear at that
24 point? I actually think that point cuts in our
25 favor.

1 THE COURT: Okay. Thank you, counsel.

2 All right.

3 MR. ASSAF: Thank you, your Honor.

4 THE COURT: Now we will have counsel for the
5 plaintiff address the Court. We sort of addressed
6 disclaimer already. We have the issue of subsequent
7 statutes and finally rounding off with the issue of
8 common sense.

9 Counsel, I will hear you now.

10 MR. MORIARTY: Thank you, your Honor. So
11 first I want to talk about the Brown case. The FTC
12 Act is a consumer protection act. This FTC alleges
13 that Wyndham engaged in practices that put consumers
14 at risk, they deceived consumers as a result about
15 these practices, and as a result consumers suffered
16 substantial harm.

17 The substantial harm question is key here.
18 The statutes that Wyndham is talking about, COPPA,
19 GLB, the FCRA, they are all enactments by Congress
20 that provide the FTC with additional tools to protect
21 data security in certain circumstances. Specifically,
22 when it comes to children's on line privacy, financial
23 institutions treatment, and also information
24 collections, companies' collection of consumers credit
25 information in the context of the FCRA. What each of

1 these statutes does is say, either in the context of
2 the FCRA they have specific rules are in the statute
3 and in the context of COPPA and GLB, Congress stayed,
4 requested the FTC issue regulation. But in all those
5 cases what Congress did is say when someone violates
6 the rule, when someone violates the statute, you can
7 bring a case against them.

8 And so there is no injury requirement in
9 those cases, so they are dramatically different than
10 the FTC's authority under the FTC Act. Under the FTC
11 Act we are limited to cases where we can prove
12 substantial injury. We have alleged substantial injury
13 here.

14 In those cases if someone collecting
15 information about children on line, that is a
16 violation. If a financial institution fails to have a
17 written information security program that they update
18 every year in response to likely threats to their
19 information, that is a violation. Those are
20 violations of those acts. In this case we have to
21 prove substantial injury. So those cases are very
22 different.

23 Of course, it bears repeating that this is a
24 very different case than Brown and Williamson. In no
25 way do those statutes in any way conflict with the FTC

1 Act.

2 And the proof is in the pudding here. The
3 TFT isn't enforcing the FTC Act, the unfairness
4 portion of the FTC Act, against companies for their
5 data-security practices since 2005, and not a single
6 conflict has arisen. Wyndham has identified a lot of
7 the security laws, they appeal to this idea of common
8 sense. I think we have addressed that, why those laws
9 are different.

10 But you know, the key point of Brown and
11 Williamson is there is a conflict here. The FDA's
12 change in its position would have mooted those laws.
13 It would have directly conflicted with those laws and
14 as a result it was a Supreme Court's job to make both
15 of those laws make sense since they both existed.
16 That is why that happened that way. There is no
17 conflict.

18 Wyndham has not identified a conflict, for
19 the last almost decade we have enforced these cases,
20 there has been no conflict.

21 Brown and Williamson is a very special case.
22 I would point out the case law, Massachusetts versus
23 EPA, I don't think it appeared in the briefs,
24 essentially had exactly the same fact pattern here.
25 The EPA said it couldn't regulate I believe CO 2 as a

1 pollutant under the Clean Air Act because at the time
2 the Clean Air Act was passed Congress wasn't thinking
3 about CO 2 as a pollutant. Then in later years other
4 laws were passed, for example, against, required the
5 Department of Transportation to have capped off
6 standards for cars. The EPA was requested to start
7 regulating standards for CO2 and they said no, we
8 can't do it. Congress was not expecting it.

9 Second of all, there are other laws that
10 couldn't plate regulation of this issue.

11 Third, it is a dramatic change in sort of the
12 political and economic atmosphere for us to regulate
13 that. And the Supreme Court said no. Those laws
14 don't apply. Those don't conflict. Brown and
15 Williamson applies where there is a clear conflict
16 between the laws. That sort of addresses that issue.

17 I am just going to run through the points so
18 this might be disjointed. Please ask me questions.
19 As far as deference goes, the point of FTC versus
20 Arlington is there is a distinction between a
21 statutory interpretation and a jurisdictional
22 interpretation of a statute by an agency. Our
23 reference is whatever deference we should receive it
24 doesn't matter that Wyndham is framing this as a
25 jurisdictional question about the extent of the

1 authority or whether it was just a standard
2 application of the FTC Act. It was not fully briefed,
3 this deference issue.

4 I think is barely worth getting into it, and
5 the reason is this idea of deference only comes up
6 when the statute is not clear. In this context, we
7 have a statute that prohibits unfair acts or practices
8 in or affecting commerce.

9 THE COURT: You say clearly the statute is
10 clear.

11 MR. MORIARTY: It is clear. The idea that
12 the collection of payment information in exchange for
13 services, the collection, the transfer, the
14 maintenance of that payment information isn't a
15 practice in or affecting commerce? It defies belief.
16 It is squarely within the language of the statute. We
17 don't have to get into the deference issue at all.

18 So I will move on to the idea that there are
19 other statutes here and the stating of causes and the
20 lack of stating of causes. As they pointed out in the
21 reply brief, there is little point of trying to read
22 tea leaves of Congressional inaction.

23 In addition, I would say in all those
24 statutes, and in some of the statutes that they have
25 identified, in some of the instances they have

1 identified the FTC going to Congress and asking for
2 more authority, again this goes back to the COPPA and
3 GLB issue, if there are regulations that said if, you
4 have to take these steps or if there is a statutory
5 law that says you have to take these steps regarding
6 data security, we could enforce that law in the
7 absence of consumer injury. That is not what is
8 happening here.

9 THE COURT: The key is, in the absence of
10 injury, you would not be able to enforce. Right? And
11 so that --

12 MR. MORIARTY: Unfairness requires
13 substantial injury, correct.

14 THE COURT: Right. So the reason that we
15 have the FCRA and COPPA is because now Congress has
16 said if there is a violation, you now have the
17 authority to act.

18 MR. MORIARTY: Right.

19 THE COURT: That is why you believe those
20 statutes are distinguishable from this case, and in
21 this case, you clearly, you argue there is substantial
22 injury, and therefore, you always had the authority to
23 act.

24 MR. MORIARTY: That's right, your Honor. I
25 wouldn't, you know, I would also point out that the

1 fact is that under Brown and Williamson there is just,
2 there is core issues that are missing here. There is
3 no indication that those laws conflict with, there is
4 no indication that those laws abrogated or applied to
5 -- that there is some previous lack of authority in
6 the cases.

7 I guess the last point I will make is that, I
8 think the idea that the FTC lacks any sort of
9 expertise.

10 First of all, the factual questions are
11 completely inappropriate here. This is a motion to
12 dismiss. The response is to the interrogatories I
13 don't think should be relevant to the Court's
14 consideration. The idea we lack expertise is
15 contradicted expressly by these statutes that Congress
16 has passed that provide the FTC with authority to
17 issue regulations on data-security practices, to issue
18 regulations on privacy, that is, that's FCRA, GLB and
19 COPPA. I think this is a disconnect there.

20 I guess the one other point I would make is
21 they sort of belittled the guidelines that we passed,
22 and, the guidelines that we have issued, those, the
23 guidelines are for small businesses and they are
24 important guidelines for small businesses. A
25 sophisticated company like Wyndham, if acting

1 reasonably, would probably require more than just a
2 little booklet in order to know how they should be
3 setting up their network when they are connecting all
4 of these individual franchise hotels.

5 But even those guidelines, and I don't have
6 the particular guideline in front of me, based on the
7 allegations in our complaint, Wyndham wasn't even
8 complying with those guidelines that they say are very
9 rudimentary.

10 THE COURT: We are going to get into the
11 guidelines in terms of fair notice. I have a question
12 for you. In terms of the way it works with respect to
13 getting information and guidance from the FTC as to
14 whether, and I am a large company. Are there
15 mechanisms for these companies to sort of seek
16 advisory opinions from the FTC about the security
17 system they have in place?

18 I am just wondering, and I recognize this is
19 a motion to dismiss, but I was curious in reading the
20 papers last night that, you know, I am not familiar
21 with what a company can do to sort of get an advisory
22 opinion from the FTC as to whether their firewalls are
23 adequate, as to whether indeed their data is
24 centralized and protected. What is the process, just
25 for my own edification?

1 MR. MORIARTY: We are pretty squarely within
2 the fair notices category there. I think there are a
3 lot of answers to that question, the principal one
4 being that Wyndham in its privacy policy tells the
5 consumers that they are going to take commercially
6 reasonable steps to adequately protect their data. So
7 you know, it is an objective standard, reasonableness,
8 and for them to claim that it is now kind of a
9 meaningless standard, it sort of rings hollow.

10 But as far as advisory opinions, there are
11 not advisory opinions. But the way companies
12 determine what is reasonable and what is not
13 reasonable is the same way companies Act in any other
14 legal context. The entire foundation of the common
15 law negligence is requiring companies to Act
16 reasonably under the circumstances. For example, in
17 the context of data privacy they should evaluate the
18 size and complexity of their network, evaluate the
19 type of consumer data they are collecting and storing.
20 They should evaluate industry standards. There are
21 industry standards out there that are not associated
22 with the FTC. There are experts out there that
23 consult with companies routinely about the data
24 security.

25 THE COURT: I am sorry to interrupt you,

1 counsel.

2 Does the FTC sort of endorse any particular
3 industry standards that are out there? Are they
4 published? How is that information disseminated in
5 terms of what the industry standard should be?

6 MR. MORIARTY: Industry standards are well
7 known. There are industry standards that specifically
8 apply to the collection and transmission of credit
9 card data. The FTC does not endorse any standards,
10 particular standards. There is a Third Circuit case
11 called Vogel which talked about whether a
12 reasonableness standard should be pinned to industry
13 standards. The Third Circuit said no, it should
14 evaluate other reasonable things that companies in
15 that position should look at.

16 The other thing I wanted to mention about FTC
17 guidance is we have these books that we issue,
18 guidance books. Also the adjudications are very
19 valuable.

20 In this case in particular, I think it is
21 that at page 19 of our brief, we identify a good
22 number of the other, there is, at the time we wrote
23 the brief, there were 19 unfairness cases. I think
24 there is two more that are public. But we identified
25 the particular types of things that companies should

1 be looking for in order to evaluate whether their data
2 security is reasonable.

3 Now, we don't say here is how you should set
4 up your router. We don't say you should have, you
5 know, white lists and black lists for IP addresses.
6 We are not tech support. We do say to them,
7 companies, these are the types of things the FCC is
8 looking at, you should make sure your house is in
9 order on these things. The FTC provides guidance
10 through these opinions, through these consent decrees.

11 THE COURT: Thank you. I will let you
12 address any points you want to address after counsel
13 argues with respect to whether the FTC has provided
14 fair notice.

15 MR. MORIARTY: Thank you, your Honor.

16 THE COURT: Thank you. Mr. Assaf.

17 MR. ASSAF: May I have permission to make two
18 reply points?

19 THE COURT: Sure.

20 MR. ASSAF: First of all, with respect to the
21 FTC's point that Graham-Leach-Bliley, COPPA, that
22 these were all cases in which Congress enacted them in
23 order to avoid the FTC having to prove injury. That
24 was kind of how they reconcile these cases. First of
25 all, that is not in their brief. In fact, on page 12

1 they say something very different. I will get to the
2 injury point. Page 12 they said they were enacted in
3 order to give the agencies rule making, and/or civil
4 penalty authority.

5 Now, I suspect they are running from the rule
6 making authority, we are now paying into that. There
7 is nothing in this record to suggest that those
8 statutes were enacted simply to avoid the FTC or
9 another agency having to prove injury. And how do we
10 know that?

11 Because no statute can be enacted --

12 THE COURT: I don't know if that was
13 counsel's argument, necessarily. I think counsel was
14 saying that they, they cannot act unless there is
15 substantial injury, and that this was Congress's way
16 of saying if there are violations that necessarily are
17 without substantial injury, just a violation, then
18 they are -- they made it very clear to the FTC that
19 they are free to act from that point.

20 MR. ASSAF: That point is not on page 12 of
21 their brief. So I heard it differently. I heard
22 injury. Because obviously, as your Honor knows, that
23 Congress could enact a statute eliminating the injury
24 requirement for Article III purposes, that is Reilly,
25 they have to prove injury even if there is a

1 Congressional statute. A Congressional statute can't
2 allow them in this Court without proving some sort of
3 injury.

4 Secondly, your Honor, secondly, your Honor,
5 the issue, this gets into fair notice, we are going to
6 talk about advisory opinions. I think the answer to
7 that question is not only are there no advisory
8 opinions, but I want to put a point on this as we now
9 get into fair notice, is that the FTC said well,
10 companies should have experts, they should look at
11 industry standards. The FTC doesn't endorse any
12 industry standard, or tell you how to set up your
13 router.

14 It is a great lead-in to fair notice, because
15 now, if this litigation goes forward, you are going to
16 hear the FTC at this podium complaining about bringing
17 in an expert that says this router configuration is
18 what should have been done, and what should be done by
19 Wyndham going forward.

20 And so not only is there no advisory
21 opinion, but there is actually, up until today, the
22 FTC, even in their pamphlet, has never provided any
23 discussion of what actually is required. We are going
24 to get into that with fair notice. So let's talk
25 about that.

1 THE COURT: Again, counsel, the purpose of,
2 we are here on a motion to dismiss. And a lot of the
3 arguments that we are going to get into, and I just, I
4 am wondering whether these arguments aren't left for
5 trial, in the sense that determining whether one
6 security system is adequate and/or reasonable. Aren't
7 these issues that, quite frankly, are best left for
8 trial, and are they necessarily ones -- an issue that
9 the Court needs to resolve in a motion to dismiss?

10 MR. ASSAF: Let me address that, your Honor.
11 If there is a trial as to whether a company's security
12 measures were adequate or reasonable, that is a
13 separate question as to whether, today, or at the time
14 of the filing of the complaint, a company had notice
15 of what the FTC standards were. I actually just break
16 that --

17 THE COURT: But isn't that more for a summary
18 judgment? Isn't the argument that you are about to
19 make, and I am going to let you make them, but aren't
20 they best left for a dispositive motion? Once
21 discovery has been had? Because what if indeed there
22 is some evidence, and I am by no means saying there
23 will be, but let's say there is some evidence that
24 internally Wyndham knew that there were issues, that
25 they were aware of what some of the industry standards

1 that they were concerned about some of the stuff that
2 was coming out of the consent decrees, and that they
3 were aware that their present security system was
4 inadequate. Isn't that, in essence, isn't that
5 helpful to know, and doesn't that have to actually,
6 don't we have to let discovery play out before one can
7 stand at a dispositive stage and say we didn't have
8 adequate notice?

9 MR. ASSAF: I think that would turn fair
10 notice cases on their heads. There would never be a
11 fair notice case on the pleadings and they are all, as
12 I see them, all these fair notice cases are on the
13 pleadings, because otherwise you would have a company
14 have to go through discovery in order to raise the
15 fair notice question. The whole purpose of the fair
16 notice doctrine is that prior to being hailed into
17 court, and be subjected to an enforcement action, that
18 you had fair notice of what the prohibited activity
19 was.

20 THE COURT: But the cases you cite, weren't
21 all of them summary judgment motions?

22 MR. ASSAF: I will check that when I sit
23 down, your Honor.

24 THE COURT: They are. If they are not,
25 correct me. I could have sworn they were all

1 dispositive motions. They weren't brought necessarily
2 on an MTD stage.

3 MR. ASSAF: I will check that when I sit
4 down. I suspect now. Let me start off with the FCC
5 cases, these are not cases in which you need to
6 develop a factual record as to what exactly the
7 regulatory environment is, because you actually know
8 on the pleadings.

9 And so could there be some summary judgment
10 issues that the Court said I need more facts just for
11 a limited issue to complete the record? I think so.
12 But I don't think we are going to go through years of
13 discovery and determine anything else in terms of the
14 notice issue.

15 Because your question goes to two different
16 issues: What notice were we on versus what our
17 knowledge is. I suspect issue one as to what the
18 notice is, that is done on the pleadings. So let's go
19 through that.

20 FCC versus Fox. This is where we start off,
21 Supreme Court 2012, fundamental principle in our legal
22 system is that laws which regulate persons or entities
23 must give fair notice of conduct that is forbidden.
24 GE versus EPA. In the absence of notice, for example,
25 where the regulation is not sufficiently clear to warn

1 a party about what is expected of it, an agency may
2 not deprive a party of property by imposing civil or
3 criminal liability.

4 This, so this actually goes exactly to the
5 point that not -- here I argue there is no dispute as
6 to whether the regulation is sufficiently clear
7 because I am going to get to the point that they
8 haven't published any regulations. So this is
9 actually the most extreme case of fair notice.

10 Most of the fair notice cases say, are these
11 regulations sufficiently clear? Here, there is no
12 dispute on this record. They are not going to dispute
13 it, that there is no regulation. So that is what I
14 think, your Honor, in terms of the cases, most cases
15 come up to a court where there is actually a
16 regulation in issue.

17 So we start with the Third Circuit, Dravos
18 with an OSHRC regulation. The Third Circuit said the
19 agency must be able to state with ascertainably
20 certainty what protections a company must employ in
21 order to comply with the regulation. Here I would
22 argue there is no as certainly regulation because
23 there is no regulation. The FTC has not published any
24 rule or regulation.

25 We already know, I previewed this in the last

1 section, your Honor, that Graham-Leach-Bliley, the
2 Fair Credit Reporting Act, and COPPA, they have
3 authority to publish rules. But under Section 57 (a)
4 they also have the authority to prescribe rules and
5 general statements of policy, and they have not done
6 that for data security. There is no dispute about
7 that.

8 This is where again it is not just Wyndham.
9 I would suggest there is academic commentary saying
10 the nature, format and content of the agency's data
11 security related pronouncements raise equitable
12 considerations that create serious due process
13 concerns, what I call fair notice.

14 So what are the arguments?

15 Now, I understand, your Honor, I am going to
16 get to the agency's arguments, and I understand that
17 these are requests for admissions, but I think they
18 actually filed them in this Court. And again, there
19 is not any dispute here. The FTC has not published
20 public information about what security software should
21 be used by a company. Admitted.

22 And the FTC has not published any substantive
23 rules or regulations pursuant to their statutory
24 authority explaining what data security protections an
25 individual or entity must employ to be in compliance.

1 So I want to marry that with the Dravos quote from the
2 Third Circuit which said is an agency must explain
3 with ascertainable certainty what must be employed.

4 Here, they can never meet Dravos because they
5 have not published. What do they say? They say
6 reasonable notices --

7 THE COURT: All of this sounds of summary
8 judgment. You are asking me now to consider requests
9 for admissions, things that are outside our pleadings
10 here, counsel. We are here on MTD. That was one of
11 the things I struggled for the last week is many of
12 the arguments you are making to me sound like they are
13 going to be appropriately made at a later juncture.
14 But at an MTD hearing, I am having trouble
15 understanding how the Court should be considering a
16 request for admission at this point.

17 MR. ASSAF: So let me address that, your
18 Honor. Put the request for admission off to the side.
19 There is not going to be any dispute. The Court can
20 certainly take judicial notice, there are no rules,
21 regulations, or policy statements published by the
22 FTC.

23 You can open CFR, you can go to the agency
24 website. You can obviously take judicial notice of
25 that. And they are not going to dispute it, your

1 Honor. It has been dispositive in their briefing.
2 They said we haven't published rules and regulations.
3 I am sorry on to use the RFAs, but I don't really need
4 them. There is no dispute they haven't published
5 them. On the summary judgment point the record is
6 clear that there are no rules or regulations. What
7 does the FTC argue? Instead of rules and regulations
8 it should be reasonableness, reasonableness is the
9 touchstone.

10 THE COURT: What about the best practices?
11 Are you going to get me there? Because clearly the
12 best practices, and the Court read them yesterday and
13 counsel is saying when you look at the guide, that
14 they submit he failed to follow even the very basic
15 rules that were, or at least the very basic
16 information that was provided by the FTC to businesses
17 and small businesses in this particular informational
18 paragraph.

19 MR. ASSAF: I am definitely going to get
20 there. Let me preview it. First of all, I think I
21 said, reasonable practices, because even their
22 pamphlet just says reasonable practices. They don't
23 say best practices.

24 So, I am going to get you there. There are
25 three arguments the FTC says, or makes out. The first

1 is, rule making is not feasible here. That is their
2 first argument.

3 The second is we have published these consent
4 decrees and they should give you guidance. And the
5 third is you can look at private standards or read
6 what the industry or best practice -- reasonable
7 practice is. And I have responses to all three that I
8 think on a motion to dismiss are properly in front of
9 the Court.

10 THE COURT: Okay.

11 MR. ASSAF: So first I start with the FTC
12 brief on slide 46, that it would not be practicable
13 for the FTC to establish through rule-making the
14 highly particularized guidelines that we suggested
15 should be published.

16 Now, I would suggest, your Honor, again, you
17 can do it on a motion to dismiss. We know that
18 argument cannot be persuasive because the FTC has in
19 fact published particularized guidelines under
20 Graham-Leach-Bliley and under COPPA. And even again,
21 this is a matter of public record in the CFR, they
22 published very detailed guidelines in the Bureau of
23 Consumer Protection of what it means if a company hit
24 green. And so I would argue that if the FTC Bureau of
25 Consumer Protection can publish regulations on data

1 security for Graham-Leach-Bliley and COPPA, and they
2 can publish detailed regulations on what it means to
3 be green, they can at least publish some regulation
4 here. I don't think it is not feasible to publish
5 regulations.

6 In addition, as your Honor knows from doing
7 your own research on the Cybersecurity Act and the
8 Executive Order, and again the Court can take judicial
9 notice of the Executive Order by the president, that
10 is done, that is part of the record here, is that the
11 cybersecurity framework lays out in detail certain
12 protocols that they encourage companies to follow. So
13 this goes to the feasibility issue. If you have one
14 executive agency publishing guidelines, and I am sorry
15 they are so small but they are on the slide 51, very
16 interesting, your Honor, if you look at the bold on
17 the right, COBIT, BA, ISP, CCS, TEC.

18 These are all references to certain hardware
19 and software protocols. So when we talk about fair
20 notice, your Honor, if the FTC had done what the
21 Department of Commerce and the Department of Homeland
22 Security had done, and published certain guidelines,
23 then this would be a far different argument.

24 And so why am I putting this up here?
25 Because I think it completely cuts against the FTC's

1 position that it is not feasible to public guidelines
2 as to what you should be doing. Two other executive
3 agencies, the Department of Homeland Security and the
4 Department of Commerce, have done it.

5 Now, the consent decrees. We talked about
6 this in the first set of arguments, too, that the FTC
7 responded that there are consent decrees. I think
8 these, as I pointed out earlier, are only FTC
9 victories. They are clearly not binding on the FTC.
10 If I came into court and said that this consent decree
11 was binding on the FTC as precedent, I do not think
12 that that would fly under the law.

13 And they are still vague. And why do I say
14 that they are not legally binding? If you turn to the
15 next page, slide 53, is that court after court has
16 said the entering of a consent decree is not a
17 decision on the merits and does not therefore
18 adjudicate the legality of any action by the party
19 thereto, nor is a consent decree a controlling
20 precedent for later Commission action.

21 Kenwit, on the Federal Trade Commission,
22 courts and FTC have construed consent orders as
23 contracts rather than as binding judicial precedent.
24 The Federal Circuit, consent order does not establish
25 illegal conduct. And so forth. I don't think there

1 is any Court of Appeals cases suggesting that consent
2 decrees are binding or even persuasive, or even
3 binding on the agencies, yesterday alone other
4 parties.

5 And again, your Honor, this is just an idea
6 of consent decree. This is a matter of public record,
7 so I am cited on a motion to dismiss. These are the
8 types of consent decrees, they go through some of the
9 factual allegations, and they talk about, in large
10 part, of remedies, the 20-year monitoring is what the
11 company has to do going forward.

12 Then finally, your Honor, on the point we
13 started your question about private or industry
14 standards. So the FTC says private standards provide
15 fair notice. Or industry standards, or reasonable
16 standard. I could be corrected, but nowhere has the
17 agency ever said that in terms of rules, regulations,
18 or policy guidance.

19 They said we encourage you to undertake
20 reasonable effort, but they never said your reasonable
21 efforts are the touchstone and provide you safe
22 harbor. I still think that is ambiguous. But I don't
23 think they have issued rules or regulations saying we
24 are going to look for industry standards in order to
25 provide you a safe harbor, which goes back again to

1 Dravos, that a company has to have some notice of what
2 we can do to stay out of trouble.

3 The FTC, importantly, your Honor -- you asked
4 the question, can you get an advisory opinion? Have
5 you, the FTC, ever adopted industry standard?

6 Importantly, your Honor, they have the ability to do
7 that, and in fact, the SEC, again, a matter of public
8 record, they have adopted FASB, an accounting
9 standards board. Look to FASB. That is what the FTC
10 can look to as the private standard. The FTC can say
11 we will adopt the standards adopted by the Commerce
12 Department, by Homeland Security or by private
13 standard, but they have not done so.

14 So your Honor, that is where I think the cart
15 before the horse issue, that they have to tell me in
16 advance what my improper conduct is, and importantly,
17 consistent with Dravos in the Third Circuit, forget
18 about the ascertainable certainty. I don't think
19 there is any real debate there is no ascertainable
20 certainty here. But importantly, for the Third
21 Circuit purposes, what can I do as a company in order
22 to make sure I am in a safe harbor?

23 And even as of today, no company can get up
24 here, FTC can file against any of the hundreds of
25 companies who had a data breach by alleging you have

1 unreasonable security practices. We are in court, I
2 will make this argument. The FTC he will never ever
3 worry about a motion to dismiss under their view. All
4 they have to say is we alleged unreasonable security
5 practices. Let's go forward with discovery. That is
6 all they have to allege, no matter what the violation
7 is.

8 So your Honor, I have no way, as a defendant,
9 to know what I need to do to stay out of the FTC's
10 aim, or more importantly what I can do in front of an
11 Article III Judge to say, here re the regulations with
12 ascertainable certainty, and my client abided by those
13 regulations. Right now, I can't do either. And I
14 think that is inconsistent with the Third Circuit law.
15 Then we get to deception.

16 So I am happy to answer any questions, your
17 Honor, but that is the outline of my argument. Again,
18 I don't think there is going to be any dispute that
19 there are rules or regulations, there are none out
20 there.

21 Thank you, your Honor.

22 THE COURT: Okay. I will hear from counsel
23 for the FTC.

24 Do you concede there are no rules and
25 regulations that are currently available?

1 MR. MORIARTY: Regarding FTC Act liability,
2 no, there aren't for data security. There are for
3 GLB, which counsel pointed out. Graham-Leach-Bliley
4 regulations were issued by the SEC, which goes back to
5 the expertise.

6 I actually would like to touch on the
7 guidelines from GLB for just a second. Those are the
8 guidelines that if a company violates those guidelines
9 they can be held liable under the FTC Act without
10 injury.

11 The guidelines, if you look at them, require
12 companies, I mean there are several, I think there are
13 four different steps, but sort of the linchpin of the
14 guidelines is that companies must take steps that are
15 reasonably designed to protect consumer data. And
16 this idea that through the GLB guidelines the FTC has
17 created very elaborate technological regimes where
18 companies can know precisely how to protect their data
19 is inaccurate.

20 Just to step back for a second, I think the
21 basic premise of Wyndham's fair notice argument is
22 that they don't know how to comply with the
23 reasonableness standard when it comes to protecting
24 consumer information. The argument is problematic.
25 First Wyndham states in its privacy policy it is going

1 to take reasonable measures to protect consumer data,
2 so they invoke the same standard that they now say
3 they can't comply with because they don't know what it
4 means.

5 My second point is that this is a standard
6 that companies comply with all the time. I made this
7 point before in a variety of contexts, in common law
8 negligence, in competition law. And actually, in data
9 security, in private data-security actions, negligence
10 actions against companies, the Court, the parties,
11 they evaluate whether the company acted reasonably
12 with consumer data.

13 And in those cases, your Honor, the
14 defendants are susceptible to a lot more liability
15 than they are in FTC Act ways. We concede equitable
16 relief in those cases, plaintiff can get damages. I
17 guess my basic argument is they are proving too much
18 to say that they don't know how to comply with the
19 reasonableness standard because that is how a lot of
20 the law works.

21 THE COURT: Which is the standard? Is it
22 reasonableness or is it ascertainable certainty?

23 MR. MORIARTY: So I think their argument so
24 our standard is reasonableness. And they argue that
25 reasonableness does not provide parties with

1 ascertainable certainty.

2 As a side note, there is a Third Circuit case
3 called Secretary of Labor versus Beverly HealthCare-
4 Hillview, 541 F.3d, (2008).

5 THE COURT: 2008 case?

6 MR. MORIARTY: Yes, 2008 case, that states
7 that ascertainable certainty is not the standard. I
8 believe the conditions are that if agency hasn't
9 reversed itself, and if the interpretation is publicly
10 available, an ascertainable certainty is not the
11 standard. We certainly satisfy that.

12 THE COURT: I was going to ask counsel, I
13 actually was going to provide counsel with a copy of
14 that case this morning. And I wanted to hear from
15 both sides as to their opinion with respect to this
16 2008 case because in preparation for today's oral
17 argument I came across it, and neither side had noted
18 it in their briefs.

19 So you would say, though, that based on the
20 Third Circuit's case in 2008, the Court does not
21 necessarily have to apply the heightened standard.

22 MR. MORIARTY: I agree. But I dispute that
23 the reasonableness standard does not provide companies
24 with ascertainable certainty. And I think that is
25 squarely within Third Circuit precedent. I think the

1 idea that reasonableness does not provide fair notice
2 to companies has been foreclosed by the Vogel case.
3 In that case, the Third Circuit held that an agency
4 regulation predicated on enforcing a reasonableness
5 standard did provide fair notice to regulated
6 entities.

7 This case appears in our brief at page 20-30.
8 That is a 1980 case.

9 So the last point is --

10 THE COURT: Let me understand your position.
11 I am sorry, counsel, to make you go back.

12 Does this Court apply a reasonableness
13 standard, or is this Court bound to apply, based on
14 counsel's argument that the Dravos case, that the
15 Court then must implement a heightened standard for
16 enforcement? Or are you saying -- what exactly is the
17 FTC's position?

18 MR. MORIARTY: The FTC's interpretation,
19 well, as a preliminary matter the substantial injury,
20 unfairness complication of substantial injury requires
21 parties to balance benefits to consumers, it is
22 basically substantial injury to injuries versus
23 countervailing injuries. It is essentially a
24 cost-benefit analysis.

25 In the context of data security, since 2005

1 in the BJ's complaint, the SEC has expressly said as
2 applied to data security that unfair application
3 requires companies to act reasonably with consumer
4 data. Reasonable is just not word for the cost
5 benefit analysis that reasonable parties should
6 undertake.

7 So our argument is that ascertainable
8 certainty does not apply because we have been
9 consistent all this time. We have consistently said,
10 essentially since the codification in 1994, and
11 certainly since we brought our first unfair data
12 security practices case in 2005, that reasonableness,
13 the cost benefit analysis is the standard for data
14 security practices, so as a result, the ascertainable
15 certainty standard under Beverly Healthcare doesn't
16 apply.

17 But I would further argue that reasonableness
18 is an objective standard recognized under the law and
19 does provide ascertainable certainty to companies.

20 So a separate issue which we have gotten into
21 a lot is whether the FTC should fill out the precise
22 contours of reasonableness by issuing rules and
23 regulations, or whether to proceed by ad hoc
24 adjudication. And this is squarely within the
25 agency's informed discretion, this is the Chenery

1 case, and the NLRB vs. Bell Aerospace case
2 especially where, as here, it is doubtful whether any
3 generalized standard could be framed which would have
4 more than marginal utility.

5 In the first FCC versus Fox, a Supreme Court
6 case in 2009, the Supreme Court affirmed this approach
7 of the FCC evaluating an obscenity, it said it could
8 proceed on a case-by-case basis, and in fact this
9 arose in the Vogel case in 1980 where the subsidiary
10 argument of the defendants, after saying
11 reasonableness didn't provide notice, they said at
12 least they should have provided us with regulations or
13 guidance to tell us what reasonableness means, and
14 the Court said, this is just standard law at this
15 point, quote, is within the secretary's discretion
16 whether to proceed between ad hoc litigation and
17 regulation.

18 So I just thought I might address some of the
19 points that they raise. And in fact I forgot
20 previously to address the point that they made in the
21 Brown and Williamson section. I will make it short.

22 THE COURT: Sure. Counsel, I want to let
23 both sides know, make all the points you feel
24 necessary. I am not cutting any one off today.

25 MR. MORIARTY: The idea that FTC Act only

1 applies to parties that are engaged in fraud is just
2 inaccurate. It is not based on the statute.
3 Unfairness, the injury requirements, plainly don't
4 have any limitations.

5 So getting to this case specifically, or
6 getting into the fair notice issue. So BJ's is clear.
7 I can -- that is a 2005 case, applying the unfairness
8 case to data security. Respondent's failure to employ
9 reasonable appropriate security measures to protect
10 personal information caused or likely to cause
11 substantial injury to consumers that is not offset by
12 countervailing --

13 THE COURT: Slow down and start from the
14 beginning, counsel.

15 MR. MORIARTY: I don't have to read it. The
16 reasonableness standard satisfies the codification of
17 unfairness, which is at 15 USC 45 (a). That is
18 essentially what I was reading, is the statute.

19 I don't think it is of great value to cite
20 academic articles in this case. I know that some of
21 the authors of those articles are also practitioners.
22 I don't know if that affects the Court's valuation of
23 the value of their academic opinions. I am not saying
24 that they are wrong or denigrating them in any way.
25 But to say that they are, you know, dispassionate

1 observers is probably not accurate.

2 So one of the issues on rules that they raise
3 is why doesn't the FTC issue rules, and the answer is
4 that the FTC Act, unlike Graham-Leach-Bliley which
5 applies to only financial institutions, the FTC Act
6 applies to all companies engaged in commerce. In
7 order to create a rule that apply to everyone equally,
8 we might end up with a rule that is very onerous to
9 small businesses.

10 In fact, your Honor, it is a position that
11 the Chamber of Commerce frequently takes when it
12 objects to statutes, that Congress is attempting to
13 pass, as they say, look, Congress can't possibly
14 substitute its judgment for the dynamic reasonableness
15 assessment that small businesses take, nor can it
16 create a rule which equally applies to everyone in a
17 fair way.

18 So to the extent that the FTC tried to issue
19 rules take are like frankly the cybersecurity
20 guidelines, which are designed to protect critical
21 infrastructure, that would be incredibly onerous to
22 small businesses that aren't protecting dams, or the
23 electric grid. So a reasonableness standard is far
24 more fair to all companies that we regulate. And
25 again, it is something that businesses do all the

1 time.

2 So the last point that I want to make is with
3 these consent decrees, there are consent decrees and
4 then there are also complaints. And the idea that
5 they are not binding on this Court, we don't argue
6 that they are binding on this Court. It is a red
7 herring.

8 What we argued, the purpose of decrees is to
9 provide parties with notice about the application of
10 the FTC Act and about the types of things that the FTC
11 evaluates when determining whether a company is
12 engaged in reasonable practices with regards to
13 consumer data.

14 THE COURT: So you say, counsel is arguing
15 that they are not binding, and you never submitted
16 that they are binding. But what you are saying, the
17 real issue here is do these consent decrees provide
18 notice to businesses as to what you need to be doing,
19 and if you are not doing, there is danger.

20 And so you say that by -- counsel, I don't
21 know whether it was in, it is probably in the reply
22 brief, one of the things they say is all these consent
23 decrees are very -- they are a case that deals
24 directly with this particular company. And it is very
25 difficult for us to say, well, based on those facts

1 are we in danger? And that they don't provide, you
2 know, adequate warning or adequate notice as to what
3 they need to be doing. And you would say what to
4 that?

5 MR. MORIARTY: So the answer is that they do
6 provide a lot of information, but we are not
7 exclusively leaning on those adjudications, those
8 consent decrees and complaints as the only source of
9 fair notice. Nor would industry, I believe, accept it
10 if the FTC stated we are the sole arbiter of what is
11 reasonableness.

12 Reasonableness is an objective standard. It
13 is not the FTC's reasonableness and Wyndham's
14 reasonableness. Reasonableness is objective. There
15 are a lot of sources companies can look to. There is
16 no single answer. That is what happens all the time
17 in the law.

18 So if a company is trying to figure out, if
19 the grocery store is trying to avoid slip and fall
20 accidents, the common law that they might look at
21 won't be exactly their grocery store, you know,
22 circumstances won't be the same, the type of threats
23 to consumers might not be the same, but they can still
24 make reasonable judgments based on previous cases and
25 a variety of industry standards and just the general

1 circumstances of their particular instances. That is
2 just, that is just how the common law works.

3 THE COURT: Can we talk a little bit about
4 the best practices guidelines, and can you walk me
5 through, perhaps, where you said earlier, even if you
6 look at the very simplistic guidelines that counsel
7 says are available, that there were violations you
8 allege by Wyndham of the very basic rules?

9 MR. MORIARTY: So one of the key principles
10 of the guidelines is data inventory and data
11 management and data minimization. And the allegations
12 in the complaint are that Wyndham permitted companies,
13 or on the Wyndham network there were hotels with
14 unencrypted information, and because of the lack of
15 password policies this information wasn't segregated
16 from anyone else who might also be able to get on the
17 network. So that is kind of a basic flaw which we
18 have alleged in paragraph 24 of our complaint.

19 And again, there is the guidelines but there
20 is a lot of other stuff out there that would make a
21 lot of these vulnerabilities that we have identified,
22 they make them reasonably known to companies that are
23 trying to practice data security.

24 THE COURT: Let's look at them, one of them
25 electronic security, make it your business to

1 understand the vulnerabilities of the computer system
2 and follow the advice of experts in the field, and
3 identify the computers the servers were sent to the
4 personal information is stored. Identify all
5 connections to the computers where you store sensitive
6 information. These may include, and you go on to say,
7 internet, electronic cash registers, and so on.
8 Encrypted, sensitive information that you send to the
9 parties over public network.

10 So there seems to be at least some
11 information here, and you say that some of this
12 information wasn't publicized here.

13 MR. MORIARTY: That's right, your Honor. You
14 articulated it much better than I was.

15 Yeah, I point to paragraph 24, we alleged
16 failure, not of that guidance, but of the complaint,
17 we alleged a failure to segment the network, we
18 alleged a failure to encrypt data, we alleged a
19 failure to change default passwords available on the
20 internet, a failure to have password policies that
21 require strong passwords. These are all things that,
22 some of which might be mentioned expressly in the
23 guidance, but are all things known in the industry as
24 commonly known, and easily avoided vulnerabilities
25 that a company that is acting reasonably to protect

1 consumer data could avoid.

2 THE COURT: Anything else, counsel?

3 MR. MORIARTY: No. Thank you, your Honor.

4 THE COURT: Let me check with my reporter.

5 We are going to take a break. Ten minutes.

6 And then we will let counsel respond.

7 (Recess).

8 THE COURT: We are back on the record in FTC
9 versus Wyndham, civil action 13-1887.

10 We took a break, and we are now ready to hear
11 from counsel for Wyndham. During the break I provided
12 counsel for Wyndham a copy of 2008 case that was cited
13 by the FTC's counsel, Beverly Healthcare-Hillview.

14 MR. ASSAF: May it please the Court, I
15 appreciate the copy of the case. It was not cited in
16 our brief. I wish it had been. Actually, I think it
17 supports beyond any doubt our position in the case.
18 2008 case Beverly Healthcare talked about Dravos and
19 said Dravos doesn't apply when -- may I leave the
20 podium, your Honor -- the agency had given conflicting
21 public interpretation of the regulation. We are not
22 arguing conflict, or the regulation at issue. The
23 regulation is so vague that the ambiguity can only be
24 resolved by deferring to the agency's own
25 interpretation of the regulation, and the agency has

1 failed to provide a sufficient, publicly accessible
2 statement of that interpretation before the conduct in
3 question.

4 So a couple of points, your Honor. First of
5 all, in this case the Secretary of the agency, or in
6 the FTC case, the Commission, had actually published a
7 regulation. So there is a regulation at issue that I
8 would argue, I understand under Dravos, you then at
9 least have a regulation for context.

10 After that,, your Honor, two things happen:
11 One, the agency, or in this case, the Commission,
12 issued two directives, publicly available, on the
13 meaning of the regulation. Then what happened is that
14 the agency, or the Commission, had two litigated, not
15 consent decrees, two litigated cases explaining the
16 regulation and the interpretation of the regulation.

17 So on one side you have post Dravos a
18 situation where the agency issued a regulation. They
19 issue a directive saying what the regulation means.
20 They litigate cases under the regulation and the Third
21 Circuit unsurprisingly says Dravos doesn't apply in
22 that case.

23 Here, no regulation. And certainly no
24 interpretations of the regulation because there is no
25 regulation.

1 Counsel conceded when they stood up, your
2 Honor, the very first thing they conceded, there are
3 no rules or regulations here. And I haven't completed
4 a full analysis, your Honor, of your question about,
5 well, aren't these cases resolved on summary judgment?
6 My initial analysis is that, for example, Dravos, Fox,
7 GE, they are only not summary judgment.

8 THE COURT: They go right up to the Circuit.
9 Counsel, we are in a different position right now. We
10 are in a different position. They don't have a
11 regulation that you are obviously taking right up to
12 the Circuit. But in that instance, this is as you
13 all are saying, as you know, a unique situation for
14 this Court to be, and many of the arguments that you
15 are making, I believe, and I am going to consider
16 them, I haven't pre-judged this issue, but I think
17 many of these arguments, at least as to notice, maybe
18 not standing, what I am calling standing, the issue
19 of whether the FTC has authority. That obviously I
20 have to resolve at an MTD stage. I understand that.

21 But the issue of fair notice I think is an
22 issue that, at least when it is dampening your
23 argument, seems to at least require that some
24 discovery be done as to what notice you were on as to
25 what reasonable standards were, because there was a

1 policy statement which you said you were observing
2 industry standards.

3 We have to understand what you understood
4 those industry standards to be and whether indeed
5 there was an issue of notice. You say not, and I
6 understand you, that is what we are here for. But I
7 quite frankly think when you look at those cases, we
8 are in a different posture today than many of those
9 cases when they went directly to the Circuit for
10 guidance.

11 MR. ASSAF: Your Honor, this is such an
12 important point.

13 I would like to try to convince you
14 otherwise. I will start with the regulations which it
15 is exactly opposite. You are saying, well, we are
16 here because there is no direct appeal of the
17 regulation. There is no direct appeal of the
18 regulations because they have not published the
19 regulations.

20 THE COURT: I understand the point.

21 MR. ASSAF: So your question, by the way, and
22 I want to come back to the industry standard point,
23 but your question was, well, there is an argument here
24 that, well, we don't want to publish regulations
25 because it might be unfair for small businesses. They

1 made that argument.

2 Under administrative law, your Honor, it is
3 exactly the opposite. They don't get to stand up and
4 say, we get to determine how to enforce the law
5 without regulations based on our own decision-making
6 without regulations. If they have a concern with how
7 they impact small businesses, that is what
8 administrative law is all about. That they need to
9 publish the proposed regulation. Get comments and
10 testimony on the proposed regulations. I guarantee
11 you, like the cybersecurity act, that people will come
12 in saying the way you phrased this would impact
13 negatively on small business, and therefore, we
14 suggest that you do the opposite.

15 They would have lots of comments, lots of
16 testimony, and then we would have a regulation. But
17 they don't get, with all due respect, they don't get
18 to come up and say we are not doing a regulation
19 because we think it would be hard for us to
20 administer. That is the exact purpose of the
21 administrative law and the whole promulgation of
22 regulation process, is that they have to publish a
23 regulation, they have to give people notice as to what
24 the regulation means. Give us a chance to comment on
25 the regulation, and then there due process is met,

1 because they will have considered the small business
2 impact, et cetera.

3 THE COURT: So you are saying that there must
4 be the publication of a regulation.

5 MR. ASSAF: There must be.

6 THE COURT: And without the publication of a
7 regulation, there is no fair notice.

8 MR. ASSAF: There is no fair notice. I think
9 under Dravos and the Supreme Court cases and it
10 answers your question about why are we here? Because
11 could we only do this on summary judgment? The reason
12 we are here is because if they had a regulation, we
13 could have either, A, challenged that directly to the
14 Third Circuit --

15 THE COURT: Is there any case that says there
16 must be a regulation in order for there to be fair
17 notice?

18 MR. ASSAF: Well, I think there are cases in
19 our brief. I will get it on my reply once I get them
20 out. I think it is black letter law that an agency
21 with rule-making authority, which they have, they have
22 rule-making authority, Congress has given it to them,
23 that when they are going to take action, enforcement
24 actions, that they have to publish regulations in
25 order to give companies fair notice of what is

1 prohibited by their actions.

2 And so, your Honor, your point, or your
3 question as to, and I understand it, I was sitting
4 there saying why are we here, why aren't we at the
5 Third Circuit already?

6 And the reason is that if they had published
7 even a one-page regulation, and they don't want to do
8 it, they know we would take them to the Third Circuit
9 in a heartbeat saying this is arbitrary and
10 capricious, it doesn't give fair notice, et cetera,
11 and the Third Circuit under Dravos would say no
12 ascertainable certainty. Try again.

13 That is why the telling part of the argument
14 is, it might impact small businesses differently, we
15 don't want to publish the regulation. That is the
16 precise part of the law and why Article III courts are
17 so important, because you cannot allow an agency
18 simply to say we get to decide in our own halls when
19 they are going to enforce things and what we are going
20 to enforce. Otherwise, by definition there is no
21 notice.

22 I am sorry, I am animated on this one. Your
23 question on why we are here, it got me thinking at the
24 break, she is right. Why are we here? Why aren't we
25 in the Third Circuit.

1 THE COURT: You want to skip right to the
2 Third Circuit on me?

3 MR. ASSAF: Yes, wait. There is no
4 regulation. There is no rule. And I read this case,
5 and I said, exactly. This is, Judge Fisher is working
6 with an agency, with the statute, that had a
7 regulation that then had interpreted decisions under
8 the regulation that litigated it, and litigated cases,
9 not consent decrease, he says, you know what? The
10 regulation, you know, isn't subject to a Dravos
11 challenge.

12 If they had that regulation, we would be
13 having a wholly different argument in front of three
14 members of the U.S. Court of Appeals for the Third
15 Circuit. But here, your Honor, it is not only the
16 regulation is vague. There is no regulation, but
17 again, it is the unfairness, by definition you need
18 something.

19 THE COURT: And counsel, let me just say that
20 quite frankly, a lot of the arguments that you
21 forwarded in your brief and today on the record, these
22 are arguments that I think are going to be available
23 to you, not now, we are not talking about the
24 authority issue, I am speaking directly to the issue
25 of fair notice. These are arguments that, quite

1 frankly, the reason I said why are we doing this now
2 is because I think that once there is discovery, then
3 these arguments with respect to you not being on --
4 there not being fair notice, are going to come into
5 play, and the FTC is going to have a job to do with
6 saying that there is -- the notice is adequate, and
7 the notice is reasonable, and whose standard are we
8 utilizing.

9 All these seem to be arguments that are ripe
10 for dispositive motions and not necessarily at a
11 motion to dismiss.

12 But you disagree. And I would like to hear
13 why you disagree.

14 MR. ASSAF: Respectfully, I am happy to get
15 you additional law on this.

16 THE COURT: No, we are not. We have briefed
17 this, we are living with what we are arguing today.

18 MR. ASSAF: But the issue is not a party's
19 subjective understanding of what the regulatory
20 environment is.

21 THE COURT: It is an objective. We agree.

22 MR. ASSAF: I agree it is an objective. So
23 whether Wyndham thought X, Y or Z is irrelevant for
24 the fair notice argument on this motion to dismiss,
25 because it is an objective standard as to whether a

1 party would be put on notice, because if Bonzai Auto
2 Sales said I had no notice, they may have an argument
3 on summary judgment because of the compelling
4 equities, but the Fox cases, the OSHA cases, all go to
5 a challenge. In fact, they mentioned the CO 2 cases,
6 whether the greenhouse gas cases, whether EPA can
7 regulate greenhouse gas. DC Circuit just decided
8 that.

9 A whole Army of parties came in and said,
10 this is an issue of fair notice, and it is now, cert
11 has been granted by the Supreme Court.

12 But the Court never said, oh, let's look at
13 Motorola and determine whether they believe the
14 regulations were sufficiently clear as to the
15 prohibited conduct. It is what do the regulations, as
16 an objective matter, tell the community as to what is
17 prohibited? That is the standard. My client's
18 knowledge, other client's knowledge, amicus knowledge,
19 all are relevant as to whether fair notice is met.

20 That is why I keep coming back to the
21 principle, the bedrock principle of the administrative
22 law.

23 Your Honor, with all due respect, I hate to
24 predict things, but the Third Circuit would, if they
25 went up and said this is our regulatory scheme, we

1 published a pamphlet and we think you have to do what
2 is reasonable. With all due respect, your Honor,
3 under Dravos and under this 2008 Beverly case, I
4 think it sits up there for a nanosecond in front of a
5 panel.

6 They are saying go back and publish a
7 regulation. You are an agency with rule making
8 authority and come back to us with that. But as
9 opposed to my challenge of it, anybody could challenge
10 the regulation, and so I get to, I know district
11 courts are struggling, you have a lot of things. What
12 is the path here?

13 And I actually think the clearest path in
14 this case is, and it protects the policy issue that
15 you have been raising questions about, the clearest
16 path in this case, your Honor, is to have the FTC say
17 go back and issue regulations. You say you have a
18 pamphlet. You said you have consent decrees. Put it
19 all together and publish it and let people testify or
20 give comments about it, and then, then, what do you
21 have to worry about? You will never have another
22 argument like this on fair notice because you would
23 have published what is prohibited.

24 And so, your Honor, the clearest path is to
25 say, you know what? I agree with Judge Fisher.

1 Publish a regulation. Make sure it is not vague, and
2 then you could pursue data security, if you decide the
3 first issue that they have standing. Even if they
4 have standing, your Honor, you should make them
5 publish a regulation, and say, tell people what is
6 prohibited by the conduct, because it is an objective
7 standard.

8 And then, your Honor, I like it here, I like
9 appearing here, but I won't be bothering you. I would
10 go right up to the Third Circuit on that issue, if
11 there is an argument about it.

12 But as to me, I will be candid with the
13 Court, it can't apply to me for 2008 conduct, and it
14 can't apply to other companies prior to the regulation
15 for 2009, 2010 conduct. The whole purpose of fair
16 notice under the Supreme Court cases is that prior to
17 bringing enforcement action you have to give them a
18 piece of paper saying what is the prohibited activity,
19 or alternatively, how do you stay safe and stay out of
20 our aim?

21 So your Honor, on this issue, I would say, I
22 can, if I may continue to the guidelines. I know you
23 raised these as well.

24 THE COURT: Yes.

25 MR. ASSAF: May I approach the podium?

1 THE COURT: Certainly, counsel.

2 MR. ASSAF: I picked out the section I
3 thought the Court and the FTC would talk about. A
4 couple of points on passwords. Number one, no rules
5 or regulations. There is certainly a pamphlet out
6 there.

7 Number two, I think, and I could be
8 corrected, I think the first indication that there was
9 a pamphlet out there was in their opposition brief
10 here in New Jersey as opposed to Arizona.

11 Three, it is very unclear when this was
12 published and whether it was published at all before
13 the conduct in question. It could be. The FTC could
14 fill me in on it, whether it is pre 2008 or not, but
15 whatever that is, this type of document that says here
16 are some guidelines. It starts off actually saying,
17 here is a guide to this.

18 THE COURT: Counsel, let me just say, for the
19 record, you can put that up. Everything you said, it
20 is unclear when this was published. We don't know,
21 all of those smacks of issues of fact. All of that
22 says, at least not issues of fact, we have to explore
23 this in order for us to argue at a later stage
24 something that sounds dispositive in nature.

25 MR. ASSAF: As first blush, your Honor, but

1 not when it is an agency of the United States taking
2 agency action. They have the burden to show what they
3 are doing is permitted before a company has to engage
4 in discovery. They have the burden. In fact, when
5 they said, oh, I am thinking about it. Page 3 of the
6 guidelines might be implicated by paragraph 24 of the
7 complaint.

8 Your Honor, that is not in the complaint at
9 all. Okay. And so if she just shows the problems
10 with not having ascertainable guidelines. If they
11 want to adopt this, your Honor, they should do a
12 couple of things. If I may be so forward. Say our
13 guidelines, we are issuing a proposed regulation, we
14 are adopting our guidelines. We are adopting certain
15 private guidelines, like the SEC has done, and we are
16 doing X, Y and Z.

17 Could we have your comments or could we have
18 your testimony on that on how it impacts?

19 Then, your Honor, we are in a much different
20 situation.

21 But I don't think, under fair notice, that it
22 is my burden to come in at this stage and try to
23 cobble together what the state of affairs is for the
24 FTC's regulatory scheme. They are an agency of the
25 federal government. They have to come forward under

1 the statute, again, they have rule making authority,
2 publish a rule and tell me what is prohibited and what
3 is allowed.

4 And again, your Honor, their argument is
5 well, we can't get into too much detail. All right.
6 But let's not have that debate in front of an Article
7 III Judge. Let's have that debate with the actual
8 rules and regulations. In other words, we are all
9 shooting in the dark here because they don't want to
10 publish a regulation. Let's publish the regulation
11 and see what it actually looks like.

12 So your Honor, I would say the guidelines,
13 the pamphlet does not get them there, and we have
14 looked. I haven't found any case law supporting the
15 notion that an agency pamphlet constitutes rule making
16 under even Magnuson On Rule Making or other rule
17 making that Congress sets forth, I come back again to
18 rule making. Congress gave them rule-making
19 authority. So if they want to do something, they have
20 to publish the rules.

21 And this is not a summary judgment issue.
22 This is an issue for today. And so if you decide,
23 there are two ways on this issue.

24 THE COURT: Or reserve on fair notice.

25 MR. ASSAF: If you decide fair notice against

1 us, then the record is what it is. And nothing else
2 is going to be developed because they either haven't
3 published the regs or rules, the only thing they could
4 do, I submit, is come forward and say here is what we
5 think the regulatory scheme is, your Honor. But this
6 case is so far, so much more extreme than Beverly, I
7 think under Beverly, we win. And I wish I had cited
8 the case. I am kicking myself for not doing it.
9 Because there is a regulation there.

10 THE COURT: Well, the argument is there,
11 counsel. I appreciate it.

12 MR. ASSAF: Finally I wanted to pick up a
13 point. They mentioned the NLRB case. It is the NLRB
14 case from the Third Circuit, that does have a special
15 meaning under law. The NLRB general duty and good
16 faith negotiations are looked at as contract matters
17 as opposed to administrative law matters. So under
18 Third Circuit precedent, that is a bucket of cases
19 that is different than the normal administrative law
20 cases.

21 It doesn't concern agency action under the
22 APA.

23 And I have one more point, your Honor. Oh.
24 Industry standard. I want to be clear, is that I
25 think I said, and I hope I said that the irony of

1 today's situation is that the only agency, Homeland
2 Security, Commerce, to published ascertainable
3 guidelines as of today, I am feeling pretty good that
4 we couldn't -- they couldn't use those guidelines
5 against us, okay, because it is when they published.

6 So as of today, for fair notice purposes, I
7 would look at them and say I think I have a safe
8 harbor in those because I think I comply with them
9 today. So that is what I was trying to say. That is
10 again the whole purpose of fair notice is that I now
11 know I have something I could come into court and say,
12 as of 2013, I have these regulations. And I complied
13 with them. So you can't take any adverse action
14 against me.

15 Thank you, your Honor.

16 THE COURT: Any response? We are going to
17 move along. Any response from FTC with respect to any
18 of the issues?

19 MR. MORIARTY: Your Honor, I will keep it
20 short.

21 So I will reiterate, it is within a
22 agency's informed discretion to proceed by ad hoc
23 litigation for rule making. Counsel believes the FTC
24 should proceed by rule making. That point is clear,
25 they believe that we should, but that it is within

1 the agency's discretion to choose.

2 And the one other point I would make is this
3 idea, I think counsel was saying that for every
4 unfairness case that the FTC brings, there must first
5 be a rule. And that is a very dramatic argument. And
6 I don't think the argument was just on data-security
7 cases. I think it was all unfairness cases. I think
8 in order to be consistent that has to be their
9 argument. That is, I would say, I don't have an
10 estimate, I think that is 90 percent of the FTC's
11 unfairness cases including all of our competition
12 cases which essentially require a court to evaluate
13 the totality of the circumstances to determine whether
14 a company was engaging in an unfair trade practice or
15 an unfair collusion between horizontal entities. And
16 the same is true with consumer protection. We bring
17 cases all the time for unfairness that do not have a
18 predicate of a rule.

19 Thank you, your Honor.

20 THE COURT: Okay. Now we move to issue
21 three, whether unfairness is adequately pled by the
22 FTC. And Wyndham will open with argument with respect
23 to that.

24 I would state for the record, state a claim
25 for unfair practices under Section 5 of the FTC Act,

1 the FTC must plead, one, that an act or practice
2 caused or is likely to cause substantial injury to
3 consumers; two, the injury was not reasonably
4 avoidable by the consumers, 'and three, that the
5 injury was not outweighed by countervailing benefits
6 to consumers or competition.

7 And the issue now before the Court is whether
8 the FTC has adequately pled.

9 MR. ASSAF: I am spending a lot of time up
10 here, your Honor.

11 All right.

12 THE COURT: Understanding the Court at this
13 point is looking at the facts in the light most
14 favorable to the nonmoving parties, we are really
15 going to be looking at what the complaint is, in
16 particular I think paragraph 32 and paragraph 40 are
17 what the Court is at least considering, and I want to
18 hear comments, but the Court will allow counsel to
19 raise this issue of no substantial consumer injury.

20 MR. ASSAF: Thank you, your Honor. Starting
21 with the consumer -- the statute. The standard of
22 proof is that the practice causes or is likely to
23 cause substantial injury to consumers which is not
24 reasonably avoidable by consumers themselves and not
25 outweighed by the benefits.

1 So there are two issues here. One is the
2 pleading of whether the Wyndham alleged data-security
3 deficiencies caused the consumer harm. And I would
4 first say, your Honor, that as you know, the complaint
5 is very careful, it says \$10.6 million fraud loss.

6 Now, maybe I am just being overly sensitive.
7 But they don't say \$10.6 million in consumer fraud
8 loss, and I would argue that there is a reason for
9 that. The reason is that federal law protects credit
10 card users up to 50 -- in excess of \$50. So I
11 understand, though, well, you could have then \$50, and
12 that could add up.

13 Now, this is where I do think there are two
14 different standards for private parties as opposed to
15 government. I don't think the government can plead
16 around by careful omission that which they know to be
17 the truth. And if they are forced to amend, to amend,
18 your Honor, they need to amend because it is, they
19 conducted an investigation, by the record here, they
20 have all these consent decrees, and they dealt with
21 hard brands all the time. And they know in addition
22 to this that every major card brand exempts the
23 consumer from the \$50.

24 That is why I said it is different than a
25 private party trying to get past a motion to dismiss.

1 I would argue, especially as a federal agency, that
2 they have an obligation to plead those facts even if
3 they are inconvenient for them. And that is why I
4 think the \$10 million fraud loss, my interpretation of
5 that is that they think that the banks, the card
6 brands, Visa and Mastercard, may have lost that money,
7 and they also leave aside, by the way, whether they
8 were reimbursed by Wyndham.

9 But they already know all of this from the
10 investigation, your Honor.

11 So I would ask that on issue one, the
12 consumer fraud loss, that they have to plead precisely
13 that which they know, and they are not going to be
14 able to get around discovery. It is a different
15 obligation. You know from your former days --

16 THE COURT: The word "precisely" is
17 concerning me, counsel.

18 MR. ASSAF: They know they can't just ignore,
19 when they say \$10 million in fraud loss, there is a
20 reason I submit they don't say \$10 million in consumer
21 fraud loss, because if -- unless it is consumer fraud
22 loss, they don't meet the elements of the statute that
23 say substantial consumer injury. If it is J. P.
24 Morgan that has the \$10 million in loss, they have no
25 jurisdiction to bring the unfairness claim. So that

1 is, at the end of the day, whatever they know they
2 know, we will leave that aside. But they have to
3 plead consumer fraud loss, not just fraud loss in the
4 abstract.

5 THE COURT: So what is your argument with
6 respect to that? Because, are you saying that the
7 Court must require them to amend, based on what they
8 know now? That I have a requirement to make them
9 amend their complaint?

10 MR. ASSAF: No, I would hope they would amend
11 as to what they know now. I think they have a
12 requirement to plead \$10.6 million in consumer fraud
13 loss as opposed to the artful phrase, \$10 million
14 fraud loss. It is the whole point of, is it the
15 banks? The credit card companies? Or is it the
16 consumers?

17 And again, your Honor, this is a matter of
18 public record. Unlike a lot of data breach cases
19 where consumers have brought actions against the
20 company alleged to be involved in the breach, no
21 actions here. Notify the consumers, notify the state
22 attorney generals. That is why this becomes all the
23 more informed. Where are these consumers that
24 suffered the fraud losses? We are not hearing about
25 them.

1 So that would be point one in terms of the
2 pleadings, that they have to talk about exactly what
3 the fraud loss is.

4 The second point of the pleading, your Honor,
5 goes to causation. That is your paragraph 32, or what
6 you reference as paragraph 32.

7 Paragraph 32 states as a result of
8 defendant's unreasonable data-security practices,
9 intruders were able to gain unauthorized access to the
10 Hotels and Resorts corporate network, and the property
11 management system servers of 41 Wyndham-branded
12 hotels, twelve managed by hotel management and 29
13 franchisees of Hotels and Resorts. This resulted in
14 the compromise of more than 500,000 payment card
15 accounts and the export of hundreds of thousands of
16 consumers payment and account numbers to a domain
17 registered in Russia. I think there are two points on
18 causation here.

19 One is that they need to plead, and I do
20 suspect, I do argue a heightened standard, especially
21 after an investigation that they have undertaken, that
22 the alleged deficiencies caused the breach and caused
23 the harm. Because, your Honor, I think what, as I
24 read the complaint, they say there are these alleged
25 deficiencies, and all the card brands, or all the

1 consumers had their information taken from the
2 hotels.

3 There is, my view of the plaintiffs don't
4 say these alleged deficiencies were a cause of the
5 breach. And the reason I say that is I am going to
6 get back to the criminal complaints which again, in
7 this Court, the Russian cyber criminals, is kind of
8 the same playbook, they took sophisticated, they put
9 sophisticated malware on, put it in a back door, and
10 why I think this is so important for pleading purposes
11 is that I think the FTC needs to plead that there were
12 alleged deficiencies and those alleged, those specific
13 alleged deficiencies caused the briefest and the harm
14 to consumers.

15 There are my two arguments. Substantial
16 consumer harm needs to be explicitly pled; and two,
17 that they need to plead that these alleged
18 deficiencies caused the alleged harm.

19 THE COURT: Don't they plead that in the
20 complaint already, in terms of, we look at paragraph
21 24, and then they cite to all these points. Isn't
22 that pled? Aren't they saying that indeed by failing
23 to use readily available security measures to limit
24 access between and among the branded hotels property
25 management system, the hotels corporate network and

1 the internet, such as employee's firewalls, B, C, D,
2 E, F, through J. Maybe I am missing something.
3 Aren't they saying that it is because of these
4 failures that indeed, when we then turn to paragraph
5 32, they resulted in a compromise of more than 500,000
6 payment card accounts, and the export of hundreds of
7 thousands of consumers payments. What do you say is
8 missing?

9 MR. ASSAF: Your Honor, I apologize. Maybe I
10 am missing it. I haven't seen the causal link between
11 this precise -- and maybe it is, maybe it is, now that
12 we have read 24, maybe it is 24, the causal link, that
13 these caused the exact theft of the information. But
14 I guess I have always come at this, if they are
15 repleading on consumer harm, they may as well try to
16 replead the exact alleged deficiencies.

17 THE COURT: Okay. I see your argument.

18 MR. ASSAF: That is what I am trying to get
19 at. They say there are all these deficiencies. I
20 want them to tell me what deficiency it was that
21 caused the alleged --

22 THE COURT: They haven't done discovery.
23 They are going to say to me in a minute, Judge, we
24 need to, of course we will get to the motion to stay
25 in a couple, at this rate in a couple of hours, but

1 you know, my point is, I think the other side is going
2 to say, Judge, in order for, they are asking us to
3 plead with such specificity, and we don't really have
4 access right now to this critical information. We
5 need to get this critical information and to put that
6 on us is really unfair. I anticipate that will be an
7 argument.

8 MR. ASSAF: I think they will say that, too.
9 I think that would be reasonable, except that they had
10 an investigation, that was within their power, they
11 conducted it, they brought the complaint saying these
12 were the problems.

13 They can't have it both ways. They can't say
14 we know what our inadequate data security practices
15 are and we are going to file a complaint against you
16 alleging them and then say but we don't actually know
17 the exact cause of the breach. Because if it turns
18 out, your Honor, that they know that the same Russian
19 cyber criminals used a sophisticated malware to back
20 door, like they did in the indictment in their case, I
21 know I am using the word fairness a lot, but if they
22 know that, your Honor, they can't just go fishing for
23 discovery, and so I would say tell me what exactly you
24 have determined, since you brought a complaint, is the
25 problem and how that caused it. Because with all due

1 respect, your Honor, I think they have to replead
2 consumer injury no matter what.

3 THE COURT: Counsel, you say again that the
4 requirement that they plead with more specificity, you
5 say is because the Court should implement the higher
6 standard?

7 MR. ASSAF: Yes, your Honor.

8 THE COURT: Okay. Before you sit down,
9 counsel. There were some argument in your brief with
10 respect to this issue of whether the injury was not
11 reasonably avoidable by consumers. That is not
12 really, are we taking an issue with respect to that,
13 that element of the standard?

14 MR. ASSAF: I think that is going to get into
15 the deception issue so I will address that during
16 deception.

17 THE COURT: Okay.

18 MR. ASSAF: Thank you, your Honor.

19 THE COURT: Counsel. Mr. Moriarty.

20 MR. MORIARTY: Thank you, your Honor.

21 THE COURT: Do you need to go back and plead
22 with more specificity, sir?

23 MR. MORIARTY: Your Honor, I think actually
24 the complaint does more than we give it credit for. I
25 agree with your anticipated criticism which is that we

1 haven't conducted discovery yet. And I dispute, there
2 has been a lot of characterizations about the nature
3 of the investigation. I just don't think those are
4 particularly appropriate for consideration. We have
5 not conducted discovery on how they spent the money
6 that they claim to have spent during the
7 investigation and it is just not something that we
8 need to discuss, and it shouldn't affect where we are
9 right now.

10 I would say that, as a factual matter, if we
11 are going to get into the investigation, the FTC sent
12 Wyndham an access letter which they responded to in
13 part but there was never any formal discovery in this
14 case. When we issued formal discovery because we
15 needed more information, they moved to quash the
16 discovery, and then instead of pursuing that motion to
17 quash, they filed this case in Federal District Court.
18 We haven't had our opportunity for formal discovery
19 yet.

20 But I think that, I wasn't even on the case
21 during the entire time of the investigation, and the
22 parties can go back and forth a lot about who did what
23 during the investigation. I think it is all kind of
24 irrelevant.

25 So as far as causation goes, paragraph 24,

1 which identifies ten vulnerabilities on the Wyndham
2 network that were caused by the unreasonable Wyndham
3 data security practices, in paragraphs 25 through 39
4 which describe the three breaches, in almost every
5 instance the paragraph aligns to a particular
6 vulnerability.

7 For example, in paragraph 26, it addresses
8 password complexity, because the password were
9 susceptible to brute force attack. Paragraph 27, it
10 talks about 212 user lockouts which should have
11 alerted the IT people at Wyndham they were undergoing
12 an attack. If they had good detection for intrusion,
13 for potential intrusion, which is another
14 vulnerability we identified in paragraph 24, they
15 would have been able to respond to that.

16 Same with paragraph 28, refer to firewalls
17 and segmentation. Paragraph 29 refers to the fact
18 that there were vulnerable computers on their network
19 that weren't getting security patches. So to go
20 through, I could go through all of them. The main
21 point here is there is a direct link between the
22 vulnerabilities identified and the breaches.

23 The last point I would make so far as federal
24 law and credit card companies policies regarding zero
25 liability, it is a question of fact, not that these

1 policies exist, not that the law exists, but in order
2 for the law to work, someone has to detect that fraud,
3 whether it is the credit card company, or the
4 consumer, and the credit card company has to
5 acknowledge and agree that in fact that fraudulent
6 charge was a fraudulent charge. And not all credit
7 cards immediately accept a consumer's assertion that
8 there was a fraudulent charge on that card.

9 These are questions of fact. We have alleged
10 separately from where we identified \$10.6 million in
11 fraud charges, we separately allege in paragraph 24
12 unreimbursed fraud charges. We are not saying \$10.6
13 million in unreimbursed fraud charges, but we do
14 allege separately that there were unreimbursed fraud
15 charges, which is to say that consumers acting
16 reasonably under the circumstances were faced with
17 unreimbursed fraud charges.

18 In addition, your Honor --

19 THE COURT: Where do you allege that,
20 counsel?

21 MR. MORIARTY: That is paragraph 40. It is
22 just, at the end of the same sentence where we --

23 THE COURT: I thought you said paragraph 24.
24 Paragraph 40.

25 MR. MORIARTY: 40, line 5. As far as, we

1 identified 600,000, we said over 600,000 payment cards
2 were stolen, and those include debits cards and the
3 law, they didn't say anything about debit cards in
4 their presentation. In the law, and card brand
5 policies are different on debit cards and it is not
6 true that in all circumstances debit card companies
7 will provide for zero liability for fraud charges.

8 And then the last point I would make is that
9 this case is not exclusively about the unreimbursed
10 fraud charges. This case is about because there was
11 \$10.6 million in fraud charges, consumers faced other
12 injuries, including loss of access to credit, loss of
13 access to funds, when their bank accounts were
14 temporarily frozen or depleted, reasonable mitigation
15 costs, including paying for credit monitoring and the
16 time, trouble and aggravation spent undoing the fraud
17 and paying for injuries. These are what we allege in
18 the complaint.

19 THE COURT: Forgive me, counsel. In its
20 reply they said some of these lawsuits cannot be
21 viewed as injury necessarily. You say what?

22 MR. MORIARTY: As I understand it, I think
23 you are referring to the Reilly case?

24 THE COURT: Yes.

25 MR. MORIARTY: The Reilly case is a lot

1 different than this case. We alleged more and
2 different kinds of injury than the plaintiffs did in
3 Reilly.

4 Most significantly in Reilly there was no
5 misuse, they did not allege misuse. By contrast, the
6 FTC alleges misuse in this case, some of it being
7 reimbursed, but misuse nonetheless, which gives rise
8 to some of the unrelated injuries, including some
9 unreimbursed fraud charges, the time and trouble spent
10 undoing purchases and credit monitoring.

11 Second, the Reilly Court's holding that
12 mitigation expenses were not reasonable was based on
13 the fact that there was no misuse, potential misuse
14 was merely speculative. In this case misuse isn't
15 just nonspeculative, it actually happened. In Reilly
16 the Third Circuit says the present sense is actuality,
17 not hypothetical speculation. In this case the FTC's
18 complaint passes that test because it identified
19 actual misuse.

20 THE COURT: All right, counsel.

21 MR. MORIARTY: That is all I have unless I
22 you have other questions.

23 THE COURT: No, I will probably have
24 additional questions, depending on the response.

25 Counsel, again, we are looking at as pled.

1 When I look at paragraph 40, the language there is
2 right after the 10.6 million in fraud loss, it says,
3 consumers and businesses suffered financial injury
4 including, but not limited to, unreimbursed fraudulent
5 charges, increased costs, and the loss access to funds
6 or credit.

7 Consumers and businesses also expended time
8 and money resolving fraudulent charges and mitigating
9 subsequent harm. I know you argue that some of those,
10 lost time, lost access, may not necessarily constitute
11 an injury that they can rely on, and you think it is
12 one of monetary injury. Let me hear you a little on
13 that and your position with respect to paragraph 40,
14 the way it is pled.

15 MR. ASSAF: I am surprised because the first,
16 this is the first time they have walked back from the
17 \$10.6 million number. It has to be in the complaint,
18 10.6.

19 I stood up and said, your Honor, I am
20 skeptical of that. I have nothing except my lawyerly
21 instincts to tell me that is being creatively pled.
22 They walked back from that, and said of course the
23 \$10.6 million isn't all consumer losses. Then they
24 point to paragraph 40 and say there is \$10.6 million
25 in fraud loss and consumer and businesses suffered

1 financial injury. Consumers and businesses. It is
2 substantial consumer injury. It is not business
3 injury. It is substantial consumer injury.

4 So the \$10.6 million number we know that is
5 no longer the applicable number. And then what they
6 try to do is say, oh, it is consumers and businesses.
7 Exactly what I said when I came up here before is that
8 my suspicions tell me that that is the card brand and
9 not the consumers. So if they have --

10 THE COURT: But even if there was some
11 consumers, again we are at the pleading stage. Even
12 if there were some consumers that inevitably did not
13 get reimbursed, even, for say hundreds of dollars, all
14 right, I mean, you would say that is not substantial
15 injury?

16 MR. ASSAF: Yes. For the FTC to pursue an
17 enforcement action for substantial consumer injury, I
18 don't think it can be two people at \$50. I don't
19 think that that is the purpose of the Act. I don't
20 think that is the purpose of unfairness statement. I
21 don't think that is the exact -- remember, they are
22 bound by the statement on unfairness that says
23 substantial consumer injury. If they had two people
24 out of this \$10.6 million at \$50, that doesn't meet
25 the standard, your Honor.

1 THE COURT: Well, you cite in your brief at
2 page 9, in your reply, you talk about the FTC Chairman
3 Miller, and I just want to look at that section of
4 your brief for a second, because in just taking this
5 directly, in a 1982 letter to Senators Packwood and
6 Katzen, FTC Chairman Miller reiterated the
7 Commission's view on what constitutes a substantial
8 injury. As a Federal body, the Commission believes
9 the concerns should be with substantial injuries. Its
10 resources should not be used for trivial or
11 speculative harm. Substantial injury involves
12 economics or monetary harm and does not cover
13 subjective examples of harm, such as emotional
14 distress or offenses to taste or social belief.

15 And you cite to that.

16 Well, it does, I mean, I looked at that, and
17 I just, again, we are talking about monetary loss. It
18 may just be 50 or a hundred, but what if it was, as
19 they said, there were breaches of hundreds of
20 thousands of card holders' information? We don't know
21 because, again, discovery hasn't been had. But I
22 mean, if you put them cumulatively together, is there
23 not monetary loss and would then this cite in your
24 brief not really help me in terms of what substantial
25 injury is?

1 MR. ASSAF: No, your Honor. First of all I
2 think the cite on emotional harm and noneconomic harm
3 is consistent with Reilly. That part of the pleading
4 cannot be forward. But in terms of this issue, in
5 terms of if 600,000 numbers were accessed, and
6 consumers didn't actually lose money, it actually, it
7 is analogous to Reilly in some ways in that it says
8 their credit card statement, that is my take away from
9 Judge Aldisert's opinion in Reilly where he says your
10 credit card statements are the same now as they were
11 two months ago.

12 And so here, the fact that Russian cyber
13 criminals took 600,000 numbers, that can't be the
14 standard. It has to be substantial consumer injury
15 under the statute, and the statement on unfairness.
16 And we know that, we know that because that is what
17 the statement says, but also, your Honor, all these
18 other hacking incidents that I talked about, including
19 the criminal indictment down the hall, hundreds of
20 thousands, if not millions of credit card numbers were
21 taken. That can't be --

22 THE COURT: But there was no misuse in
23 Reilly, was there? There was no misuse in Reilly.

24 MR. ASSAF: I agree.

25 THE COURT: We have misuse here. Let's

1 assume arguably, I don't know what discovery is going
2 to bare out. But what if the credit -- doesn't the
3 credit card holder have to advise the credit card
4 company within 60 days of the unauthorized, I am just
5 wondering, is there a time limit that they have to
6 advise, I have fraudulent charges on my card?

7 MR. ASSAF: I think that is the case, your
8 Honor, but I also know that the -- we notify the
9 credit card holders and we notify the card brands, and
10 in some cases the card brands notified us saying we
11 think there is a problem here.

12 Your Honor, it is not -- the notion that a
13 couple of people who weren't reimbursed, who didn't
14 get reimbursement can form the basis of an action for
15 a substantial consumer injury, if there are a handful
16 of people who for some reason, whether it be
17 administrative or otherwise, can't get their \$50 back,
18 we started the discussion about the FTC's mission to
19 protect consumer hard, substantial consumer injuries.
20 We are now talking about the FTC now trying to plead
21 around the notion of how much consumers, they know
22 this --

23 THE COURT: But you are saying at a pleading
24 stage they have to plead with such specificity, I
25 don't think you can cite a case to me that says they

1 have to plead with the amount of specificity you are
2 currently advocating. The reality is we don't know.
3 Discovery has to play out. They have to see, was it
4 hundreds of people that weren't reimbursed, what is
5 the difference? Is it five people, is it a hundred?
6 Is it if it is hundreds of people that weren't
7 reimbursed and you cumulatively look at that number,
8 does that amount of substantial injury. Arguably,
9 based on what I am reading in a footnote that you
10 provided, that goes beyond emotional distress. That
11 goes beyond. That is monetary damage. And you can't
12 tell me that a hundred, or, you know, what is the
13 barometer, what is the gauge. How much is substantial
14 injury? Can you provide that to me in terms of a
15 monetary amount?

16 MR. ASSAF: Well, I could tell you it is not
17 \$100. But their pleading requirement under the
18 statute, your Honor, and under the statement on
19 fairness, they have to, in order to bring an
20 enforcement action, say, determine, prior to bringing
21 the action that there was substantial consumer injury.

22 So it is not, I know I am the moving party,
23 but I am just moving saying they haven't met their
24 statutory burden to show their substantial consumer
25 injury. In fact, I think it is worse because I think

1 you just heard counsel for the FTC say the \$10.6
2 million, that is not all consumers. That is business
3 and consumers. So your Honor, I have a statute that
4 says substantial consumer injury, they have to plead
5 it.

6 So you are asking me what is substantial
7 consumer injury? I am in the same position as I am on
8 the regulation. If I had a pleading that said it is X
9 hundreds of thousands of dollars we could then have a
10 debate.

11 But it is certainly not fair for a defendant
12 to say I don't have this information. They do. They
13 have a statutory requirement by Congress for
14 substantial consumer injury and they have now stood up
15 in front of a Judge and said the \$10.6 million, that
16 is not it. It is something less than that.

17 THE COURT: Okay.

18 MR. ASSAF: Now, the final issue, the
19 reasonably avoidable one that you raised with me, your
20 Honor, that actually is in this section. And the
21 reason why, that is also an element of substantial
22 consumer injury, whether it is reasonably avoidable.
23 Your question about, if consumers were informed, and
24 the card brands were informed, and there are a handful
25 of consumers who didn't then follow up, it goes

1 directly to reasonably avoidable injury.

2 THE COURT: Okay. But here is the question I
3 had on reasonably avoidable injury. And I want to
4 hear from both sides on this. When I read it, as I
5 looked at it, maybe I am wrong and counsel will tell
6 me if I am wrong, please do so.

7 When we look at that, the injury was not
8 reasonably avoidable, the way that one reserves a room
9 nowadays, you have to provide the hotel with a credit
10 card number, even if you want to pay cash. A hotel
11 requires that you give them, in order to reserve that
12 room, your credit card information. All right. I
13 think that is the way, we all can agree on that.
14 Right?

15 So how am I as a consumer going to avoid the
16 injury, that being that all my private information was
17 hacked and taken by criminals in Russia, if I have no
18 choice but to give you, the hotel, my credit card
19 information, or guess what, I don't get to reserve a
20 room in Arizona? So I am just wondering, we are
21 talking about the injury, that being the loss, and you
22 analyze it in saying, well, the credit card consumer
23 calls and notifies the company of fraudulent charges,
24 they are going to be exonerated from paying any of
25 those charges. But when I look at injury, that being

1 the injury as cited in 32, and in 40, that being the
2 information that was taken, unfortunately, as I -- I
3 can't reasonably avoid it because in order for me to
4 reserve a room, I need to provide this information.

5 So am I reading that wrong? I am looking at
6 the wrong injury? And if so, tell me.

7 MR. ASSAF: Yes, your Honor. With all due
8 respect, that approach, the question is not whether
9 using a credit card is reasonably avoidable. That is
10 not --

11 THE COURT: No, hacking, taking my private
12 information, whether that injury, taking my
13 information, I can't give you anything other than that
14 information in order to reserve the room.

15 MR. ASSAF: Then there are three separate
16 things. Giving your credit card to the hotel. Is
17 that reasonably avoidable? I suspect it is not, but I
18 think it is also not an element of this case.

19 I think then you get to whether the hacking
20 itself caused a substantial consumer injury.

21 Or then the third issue of whether there is
22 actual substantial consumer injury as defined by
23 economic loss.

24 Issue two is not covered by the statute.
25 There has to be, I mean, it is not only, I would

1 argue, this is the whole theme of actual injury.
2 Okay. It is more than just losing, you know, that
3 have your credit card out there and you have the time
4 and expense. That I think is taken care of by Reilly
5 and other cases. But it is actual substantial
6 consumer loss.

7 That is the injury that the FTC has to plead
8 in order to comply with the statute. So they have to
9 plead that there was actual substantial consumer
10 injury and that it was not reasonably avoidable. And
11 so that is all, I am just asking that they comply with
12 the statute and the statement on unfairness, but that
13 is the key here. It is not just to say there was
14 fraud loss and now we get to go forward.

15 Finally, your Honor, the debit point. Can we
16 put up slide 102?

17 I just want to hopefully get rid of this
18 issue. I know we briefed it. That the debit issue is
19 covered like the credit card issue under federal
20 regulation. And more importantly, your Honor, this
21 does go to a pleading issue. There is no allegation
22 in the complaint that pin numbers were taken. None at
23 all. There is no -- you know, when you go into, you
24 sometimes swipe your credit card or you do the debit,
25 you do the pin number. There is no allegation in the

1 complaint, so this is a total red herring, as is the
2 time and effort, the emotional distress issue. So
3 when we talk about pleading issues, I don't think they
4 meet substantial consumer injury as they conceded.
5 That is not accurate in the complaint. They can't
6 lump together businesses and consumers and meet
7 their --

8 THE COURT: When did they concede that?

9 MR. ASSAF: When they got up and said we
10 lumped together in paragraph 40 businesses and
11 consumers. That is not what the statute, they are not
12 there to protect substantial business injury --
13 substantial business injury is not part of their
14 mission.

15 THE COURT: Okay. Mr. Moriarty.

16 MR. ASSAF: Do you have any questions? I
17 would be happy to answer.

18 THE COURT: Not yet, no. Thank you, counsel
19 Mr. Moriarty, have you conceded that the 10.6 million
20 is not part of the loss figure in this case? Is that
21 what you did when you stood up?

22 MR. MORIARTY: No, the 10.6 million dollars
23 are the unreimbursed fraud charges. As a factual
24 matter, it is just one card brand. But I understand
25 we can't address that it. It is a predicate for the

1 loss which addresses the Reilly concern, which is that
2 there wasn't misuse in this case. Any other injuries
3 including monetary injuries flow from misuse.

4 In addition, there were unreimbursed fraud
5 charges to the extent it is consumer and business,
6 under the FTC Act, the FTC can protect small
7 businesses. So the allegation refers to small
8 businesses that often book rooms for their employees
9 with their credit cards that also suffered the same
10 loss of their payment card information as a result of
11 the breaches.

12 On the reasonable avoidable part, the point
13 that you made, consumers certainly would not have
14 known that Wyndham had unreasonable data security
15 practices in this case, especially because, as we
16 allege, we alleged they had unreasonable data-
17 security practices. We also allege that in their
18 privacy policy they deceive consumers by saying we do
19 have reasonable security data practices. That is one
20 way consumers couldn't possibly have avoided
21 providing a credit card to a company --

22 THE COURT: Can you walk me through -- I am
23 sorry to interrupt you, counsel. That is why I
24 apologized this morning. Can you walk me through the
25 injury that you say the Court is looking at and

1 whether that injury then is reasonably avoidable?

2 MR. MORIARTY: Sure, your Honor. The injury
3 we have alleged in paragraph 40 that is not reasonably
4 avoidable, all the injuries is not reasonably
5 avoidable, include unreimbursed fraud charges, the
6 loss of access to funds as a result of frozen or
7 depleted bank accounts, even if temporary, temporary
8 loss of access to credit, and the cost of reasonable
9 mitigation, and then we also allege injury in the form
10 of time, trouble and aggravation dealing with
11 unwinding this fraud, and with re-establishing
12 recurring payments after the credit cards have to be
13 changed for hundreds of thousands of consumers.

14 As far as that last point, the time trouble
15 and aggravation, I dispute the characterization as
16 emotional harm, or not covered by the FTC Act. In FTC
17 versus Niovi, which is a Ninth Circuit case, there was
18 a very similar set of circumstances, and the Court
19 found that even if consumers were fully reimbursed or
20 raised on their debit accounts as a result of unfair
21 data security practices by the defendant in that case,
22 even though they were reimbursed, the time, trouble
23 and aggravation of being reimbursed constituted a harm
24 under the FTC Act.

25 THE COURT: So your point as to whether it

1 was reasonably avoidable by the consumer, you would
2 say they couldn't because they were relying on a
3 statement and assurances by Wyndham that they were
4 taking reasonable -- what was your -- Let me not put
5 words in your mouth.

6 What is your point with respect to reasonably
7 avoiding?

8 MR. MORIARTY: The point on reasonable
9 avoidability we make in our brief is really just about
10 the injury, not about the choice to use Wyndham. I
11 did make that point just now. But the real point is
12 that consumers suffered substantial injury because
13 their payment card information was taken as a result
14 of Wyndham's unreasonable data-security practices.

15 And then because it was taken there were
16 \$10.6 million in fraud charges, some of which are were
17 unreimbursed, there was the time and trouble spent
18 unlining the fraud, re-establishing credit, recurring
19 payments, loss of access to funds, as well as
20 reasonable mitigation expenses. Perhaps we should
21 have briefed the debit card issue more.

22 My understanding is once you receive your
23 notice from your bank, you are considered on notice
24 of any fraudulent charges. So the 60 days that was
25 referred to in the statute starts then, and so again,

1 this is a factual issue. This is not an issue for a
2 motion to dismiss. But I can conceive of a situation
3 where someone has a \$4.00 charge that they don't
4 notice and 60 days passes from when they received that
5 charge, at that point the statute no longer provides
6 liability cap. So after that 60 days, if there is an
7 additional charge beyond the \$4.00, a thousand
8 dollars, \$500, anything, that is not reimbursed by
9 statute.

10 Thank you, your Honor. Do you have any other
11 questions?

12 THE COURT: No. Thank you, counsel.
13 Anything else?

14 MR. ASSAF: Your Honor, I understand we have
15 argued this point. But I think that the last
16 statement by the FTC illustrates why the pleading
17 requirements have to be met. A federal enforcement
18 agency doesn't get to stand up and say I can imagine
19 there are situations out there. You have to plead it.
20 You can't say, well, the law might be what it is, but
21 I can imagine this.

22 They have a pleading obligation, your Honor.
23 And they haven't published regulations, they haven't
24 published rules. I have argued that. Now we are at a
25 stance where they are saying I don't have to plead it

1 because I can imagine situations where it occurred.

2 With all due respect, I don't think that is
3 the standard for a federal enforcement action. I
4 think we have to have a standard where they have to
5 plead what they know and it has to be true and
6 accurate.

7 THE COURT: I don't think we need to get
8 into the injury is not outweighed by countervailing
9 benefits to consumers. If either side feels they want
10 to weigh in on that. Counsel.

11 MR. MORIARTY: No, thank you, your Honor.

12 THE COURT: Counsel.

13 MR. ASSAF: No, your Honor.

14 THE COURT: Okay. So now it is 1:16. We
15 have been arguing since ten o'clock this morning. I
16 would like to take a break, take a break until 2:00
17 o'clock.

18 We will come back, and deal with count 1, the
19 deception claim, and then we will move on to the
20 motion filed by the other Wyndham entities, and
21 finally the motion to stay.

22 Thank you, counsel. See everybody at two
23 o'clock.

24 (Luncheon recess.)

25

1 A F T E R N O O N S E S S I O N

2 THE COURT: All right. Back on the record in
3 the matter of FTC versus Wyndham Worldwide Corp.,
4 civil 13- 1887.

5 We are moving to count 1, deception claim, to
6 establish liability under Section 5 of the FTC Act the
7 FTC must establish there was a representation, the
8 representation was likely to mislead customers acting
9 reasonably under the circumstances, and the
10 representation was material.

11 Actually, I want to start with the FTC, and
12 ask that the FTC go through the complaint and tell me
13 where in the complaint you would argue you pled the
14 case for a deception claim.

15 MR. MORIARTY: Yes, your Honor. Your Honor,
16 as I understand it, defendant's main argument that we
17 hadn't pled deception was that the allegations in
18 paragraph 24 apply only to franchisees, and they argue
19 that the privacy policy applies only to the Wyndham
20 Hotel network. Is that the issue would you like me to
21 discuss?

22 THE COURT: Well, I sort of feel like in the
23 briefs we didn't really lay out the facts to support,
24 or disprove each of the prongs that I just went over.
25 And so what I am asking you to do is lay out your case

1 in terms of looking at the case -- looking at your
2 claims, rather, as it relates to count 1. And then
3 of course, the whole franchisor, franchisee, but I
4 felt I didn't really have a good handle on what facts
5 you were relying on to support your prongs of
6 deception.

7 MR. MORIARTY: Okay. So the first prong is
8 that Wyndham made a representation, and that is in
9 paragraph 21, it identifies the Wyndham Hotel Group
10 privacy policy. And in that the privacy policy
11 specifically at paragraph, line 13 of the complaint,
12 paragraph 21, on page 9. And then also it discusses
13 safeguarding, using industry standard practices, and
14 then paragraph 20 says we take commercially reasonable
15 efforts to create and maintain firewalls and other
16 appropriate safeguards.

17 Then it goes on to ensure that is the extent
18 we control the information, the information is used
19 only as authorized by us, and consistent with this
20 policy, and that the information is not improperly
21 altered or destroyed. So that is the statement that
22 we are pointing to.

23 THE COURT: Okay.

24 MR. MORIARTY: The statement is likely to
25 mislead because as we have alleged the practices were

1 not in fact commercially reasonable to create
2 appropriate safeguards to ensure that the information
3 is used as only authorized by us and consistent with
4 the policy.

5 THE COURT: Where is that in the complaint?

6 MR. MORIARTY: That is paragraph 24. That
7 just alleges the litany of vulnerabilities that appear
8 on the network because of the lack of reasonable data
9 security practices.

10 Lastly, your Honor, the materiality is, this
11 is not in the complaint because it is a case law
12 argument, but essentially materiality comes from the
13 fact that it is an expressed statement, and expressed
14 statements are presumed material under FTC law. I can
15 give you a case for that.

16 THE COURT: Please do.

17 MR. MORIARTY: Okay.

18 THE COURT: While you look for that case, let
19 me understand, you say that the representation --
20 strike that. One, there was a representation. You
21 say the representation can be found in paragraph 21,
22 specifically starting at line 13 of the complaint,
23 right?

24 MR. MORIARTY: Yes.

25 THE COURT: Then as to the second prong, the

1 representation was likely to mislead customers acting
2 reasonably under the circumstances. So you would say
3 that 24 supports that second prong that it was likely
4 to mislead because they weren't doing these -- they
5 were failing to -- failed to use readily available
6 security measures, and then again those ten
7 vulnerabilities that you lay out in paragraph 24.

8 MR. MORIARTY: Yes, your Honor.

9 THE COURT: And then as to materiality you
10 say that case law, and you are going to give me now a
11 cite.

12 MR. MORIARTY: There are a lot of cases that
13 support that. There is a District of New Jersey cite
14 called In Re National Credit Management Corporation,
15 LLC, 21 F. Supp. 2nd 424 at pinpoint 441, (District of
16 New Jersey 1998.)

17 It is also in the deception statement which
18 is the FTC's interpretation of the deception
19 authority. That is the policy statement on deception
20 that --

21 THE COURT: Where in your opposition can I
22 find -- can I find these cases?

23 MR. MORIARTY: No. I would say that it is
24 not in there because I didn't see that issue raised in
25 their brief. That we didn't state that it was

1 material. The FTC statement on policy is, or FTC
2 policy statement on deception is 103 FTC 110, pin cite
3 174, that is a 1984 statement.

4 THE COURT: All right. So the reason you
5 didn't address it is it wasn't raised by Wyndham, so
6 you did not address it, but you again -- give me the
7 cite for the case.

8 MR. MORIARTY: For the District of New Jersey
9 case is 21 F. Supp. 2d 424 at 441.

10 THE COURT: Anything else?

11 MR. MORIARTY: No, that covers the pleading.
12 I will address any additional issues they raise after
13 their argument.

14 THE COURT: Certainly. Let me hear from
15 Wyndham now.

16 MR. MORIARTY: Thank you.

17 MR. ASSAF: Good afternoon, your Honor.

18 So deception. The FTC, after hours of
19 argument, seems that we are coming down to this big
20 analytical fight. Their case is apparently all about
21 commercially reasonable efforts, and their view is
22 that in lieu of regulation and the new rules, rules
23 and policies, that all they have to do is show
24 commercially reasonable, both for unfairness and now
25 deception.

1 I, focusing on deception, your Honor, what we
2 say is that we safeguard our customers' personal
3 identical information by using industry standard
4 practice. Although guaranteed security is not a
5 given, on or off the internet, we make commercially
6 reasonable efforts to make our collection of personal
7 information consistent with applicable laws. Two
8 points on this. It is ours. Two, it is commercially
9 reasonable.

10 Here is what we have another analytical
11 divide between the FTC and Wyndham. I keep going back
12 to fair notice. We have the FTC, they haven't argued
13 it but your questions at least presuppose there is
14 some discussion about whether it is subjective or
15 objective.

16 Just for the record, your Honor, I don't
17 think they raised that in their brief. But let's
18 assume I think from your questions you were asking
19 whether it is subjective. We think it is objective.
20 Here, this is -- now, the FTC is saying, well, this is
21 objective. Fair notice, not so much. That could be
22 subjective. I think they are buying in to your
23 question.

24 THE COURT: I think they did say objective at
25 some point.

1 MR. ASSAF: That would be objective. Could I
2 take one minute, because you raised that issue, it
3 bothered me. We were looking at it at lunch. And
4 they didn't raise, the FTC didn't raise subjective or
5 that it is a fact issue, fair notice, in their brief.
6 And I didn't hear it, but I couldn't understand what
7 their position is, and we have looked at the cases, at
8 least over the last hour, we can't find any case, your
9 Honor. If you do, I appreciate you already giving me
10 Beverly, but if there is another Beverly instance I
11 would be happy to look at it.

12 We looked and can't find any case in which
13 fair notice is either a subjective issue as opposed to
14 an objective issue, or where courts say there is a
15 factual issue as to agency action and whether there is
16 fair notice.

17 So maybe I misunderstood the FTC and
18 misunderstood the tenor of the Court's question, but
19 it is clearly not raised in their brief, and it is
20 just bothering me because it seems to be a huge issue,
21 whether this is objective or subjective and we can't
22 find any case law saying that it is subjective and a
23 fact issue.

24 So in any event, to this issue, I think you
25 say commercially reasonable efforts, and as the FTC

1 said, when they are weighing agency action, their view
2 is, well, we want to consider small businesses and we
3 want to consider what businesses are looking at based
4 on their dynamic and how many employees they have. I
5 would say if anything, your Honor, that analysis helps
6 us, because commercially reasonable effort as
7 determined by whom?

8 I would say, as determined by Wyndham, not by
9 the FTC.

10 And so I don't think that this is part and
11 parcel of their deception case, and I would suggest
12 that there is nothing in this statement that is the
13 hallmark of deception. In fact, the FTC versus
14 Millennium Telecom here in the District of New Jersey,
15 the case cite from that case which I think is crucial,
16 the cardinal factor in determining whether an act or
17 practice is deceptive under Section 5 is the likely
18 effect that the promoter's handiwork will have on the
19 mind of the ordinary consumer.

20 So I go back to where I started this morning.
21 Again, the case law says promoter's handiwork. There
22 is some sort of deceptive activity. Here, your Honor,
23 there is no real allegation that there is some sort of
24 malevolent, deceptive activity by, or the handiwork of
25 Wyndham at play here. What the FTC is saying is that

1 we disagree with what security measures you put in.
2 And I would say, your Honor, just as a matter of
3 logic, it can't be that the failure to implement the
4 data security measures that they say should be
5 implemented is somehow this nefarious promoter's
6 handiwork under the case law.

7 But leave that aside, the explanation point
8 to that is it is in the very same policy statement
9 where we say, we do not control the use of this
10 information or access to the access to the information
11 by the franchisee or its associates.

12 And you remember, your Honor, even their
13 complaint says it is the Wyndham-branded hotels in
14 which the information was extracted from. And we say
15 very plainly that it is, we don't control the
16 franchisee information.

17 So I don't think they can have it both ways,
18 saying, well, the policy is deceptive because a
19 consumer reads it and is deceived by the policy. But
20 then the very next page of the policy tells the
21 consumer we don't control your information and the FTC
22 says, well, ignore that section. The consumer isn't
23 reading that portion of the section.

24 So I would say that the policy itself is not
25 deceptive on its face, and I think the best source

1 here is the international franchise association cases
2 that talk about the relationship between franchisor
3 and franchisee, including the Radisson case, from New
4 Jersey, which is slide 63. I call it the Radisson
5 case. The District of New Jersey, I think it is Judge
6 Thompson. Judge Thompson. There is no genuine
7 dispute that Radisson lacked both ownership interest
8 and control over the day-to-day operations of the
9 hotel. The right to conduct and carry out periodic
10 inspections to ensure consistency and quality of the
11 Radisson brand does not give rise to the power to
12 control the daily maintenance of the premises. Courts
13 that have addressed the issue of duty require
14 franchisors to exercise more than a right to control
15 uniformity of appearance, products and administration
16 in order to find a duty of care.

17 The International Franchising brief says it
18 much better than I could. I think it is pretty clear
19 from cases across the country that franchisors should
20 be held liable for franchisee problems

21 And again, stepping back why we are here.

22 THE COURT: You anticipated my next question
23 which is why --

24 MR. ASSAF: This is such a huge issue,
25 because this is what I call the bridge too far. This

1 is why we are here. That the FTC, you look at all
2 those --

3 THE COURT: My question is why now? The
4 question that I was going to ask, the one I have been
5 asking you all, throughout the course, I am not trying
6 to give counsel a hard time, I just really honestly
7 think a lot of the questions in terms of how the
8 franchisor and the franchisee deal with one another,
9 all of these sound like issues that are better left
10 for a later point in time, not at a motion to dismiss.

11 And I know that you fundamentally disagree
12 with me, and that is fair. That is why we are having
13 oral argument for us to flush out your position. But
14 I mean a lot of these arguments, you know, you even
15 say in your moving papers, counsel, page 27, and I
16 have questions which is that you say that the security
17 standard, defendants say the security standard is
18 adequate or reasonable is a question of law, page 27,
19 not of fact. And all allegations as to the same are
20 the properly disregarded on a motion to dismiss.
21 Where do you support the statement?

22 MR. ASSAF: This is a huge issue, your Honor,
23 it goes back to the fair notice and the pleadings
24 standards we have been talking about, and this is
25 Twombly. This is, it is for a private party Twombly

1 and for the government Twombly. The FTC can't just
2 make secure generalized allegations because that runs
3 afoul of Twombly.

4 So I know you and I have had a lively
5 exchange, it has been great, it has been a fun
6 argument, it is why you are a lawyer, this is a good
7 day, even though some of the questions haven't been
8 that good.

9 But again, this is really, really important
10 because Twombly, Twombly infects the government's
11 complaint for all the issues I talked about earlier,
12 that they can't just say, hey, we are making these
13 conclusory allegations that these are unreasonable
14 security efforts. It is the double whammy for me.
15 Okay, they don't publish it, I know, talk about fair
16 notice.

17 Then they say I don't even have to meet
18 Twombly for the pleading. All I have to say is it is
19 unreasonable, or commercially unreasonable. That is
20 what it is. So this is more of a Twombly, Iqbal
21 issue. I think if this were a private party I would
22 suspect that the Court would have really hard
23 questions about well, there has to be more --

24 THE COURT: Why is it Twombly? Step me
25 through it, just as I asked counsel, Mr. Moriarty, the

1 question, step me through, we are analyzing it from an
2 MTD point of view. Tell me why it is not adequate.
3 Tell me why it is not pled with particularity. What
4 are they missing?

5 If we look at what they are saying, counsel
6 says, Judge, we say the representation can be found on
7 page 21. Strike that. Paragraph 21, page 9 of my
8 complaint, starts at line 13. We say that obviously
9 it was, it was a representation that was likely to
10 mislead customers acting reasonably under the
11 circumstances, because they weren't doing that. What
12 they did, Judge, is they, and they say on paragraph
13 24, that I have ten separate vulnerabilities, that,
14 you know, obviously are misrepresentation, and that
15 it was material, they argue, there is case law to
16 support that it was material misrepresentation.

17 Tell me why now this is a Twombly issue, and
18 not an issue that I think we disagree on, an issue
19 better left for summary judgment at a dispositive
20 stage when discovery has been exchanged and we can now
21 look to what they are alleging the actual deficiencies
22 are in terms of the record. But I have at least ten
23 here saying there were deficiencies. Why is that
24 there is not enough when you look at it from an Iqbal
25 Twombly perspective?

1 MR. ASSAF: 21, they say these are the
2 policies. These are the policies. 24, they say, 24,
3 we decided to, or we failed to provide reasonable
4 security measures. And they identify a number of
5 allegations that were not reasonable.

6 Now, in term of Twombly, I didn't think they
7 were simply able to say these are things that they
8 didn't do.

9 It gets back to my whole causation point,
10 that they have to address with specificity that these
11 deceptive statements were in the mind of the
12 consumers, for example, on 24, that a reasonable
13 consumer would think that the available security
14 measure, that firewalls were being used. Okay. I
15 don't think they simply say, here is a litany of
16 problems and it is deceptive.

17 The deceptive element that they have to say a
18 reasonable consumer, having reviewed this policy,
19 would find deceptive. And I don't think that is in
20 here.

21 So under Twombly, they can't just say these
22 are a bunch of problems. These are deceptive, and we
23 have now cited our deception count. I think they have
24 to do more in terms of analyzing, like a securities
25 fraud case, these statements were made to the

1 investment public, that a reasonable investor relied
2 on these on October 2, and that by relying on these,
3 caused harm. And I don't think they do it under
4 Twombly.

5 So that is why in terms of the cases, too, I
6 come back to the notion that we would have to go
7 through discovery to have all of these questions
8 answered when the law is so clear that the franchisor-
9 franchisee relationship is what it is, and so if they
10 are going to now exceed what I think the clear law is
11 on franchisor-franchisee relationship, that is even a
12 higher burden under Twombly because now they have to
13 come forward saying in the normal franchisee-
14 franchisee relationship, we understand this is the law
15 controlled as an equal liability in terms of
16 appearance, et cetera.

17 Now under Twombly they have to do more. They
18 can't just say I am entitled to discovery because I am
19 making these allegations. We know this law is out
20 there and the franchisor-franchisee relationship.
21 Otherwise, they will always simply plead these are
22 unreasonable standards and the franchisor is liable
23 and thus we get discovery.

24 I put it the other way around, your Honor.
25 How would I ever get, under the discussions we have

1 had, how would I ever win on a motion for judgment on
2 the pleadings or a motion to dismiss? Because as I
3 said --

4 THE COURT: But even that case that you are
5 citing, wasn't that summary judgment?

6 MR. ASSAF: That was summary judgment, your
7 Honor. But if you look at all the cases in the IFA
8 brief, these are cases on summary judgment and motions
9 to dismiss, and I would say again here, they have to
10 come forward with some fact, some plus factor to show
11 that outside this. Otherwise, your Honor, in two
12 months, if I am here, and they say, you know what?
13 All the indicia of franchisor-franchisee relationship
14 after millions of dollars in discovery, you are right.
15 That is where it was.

16 That doesn't really benefit me. The whole
17 purpose of Twombly is to avoid excessive and costly
18 discovery by putting the pleading party's feet to the
19 fire before discovery begins.

20 THE COURT: You seem to be holding the agency
21 to a higher standard. A heightened pleading. And I
22 would like you to speak to that a little bit, because
23 you said earlier, it was in a different context but I
24 do, you know, speaking of wanting to get back to
25 things, we were discussing issue three and whether

1 unfairness was adequately pled by the FTC. You
2 started, you know, and I asked you whether this was
3 almost a heightened standard that I was holding you
4 to, and you somewhat said there is a difference
5 between the private party versus a federal agency.

6 Where can I find that in the law?

7 MR. ASSAF: Yes, there are two issues. I
8 think on this issue we are talking about, deception,
9 that clearly sounds in fraud and I would suggest that
10 since it sounds in fraud as cited on page 24 in our
11 brief, it should meet 9 (b) requirements. It is
12 deception or fraud, that is the whole purpose of Rule
13 9 (b). When you see the deception elements, FCC
14 versus Millennium Telecard, July 12, 2011, we have a
15 couple cases that support that position. Again we
16 cited in our brief. FTC versus Lights of America, FTC
17 v. Ivy Capital talking about when there is a
18 deception claims there is a heightened standard. Your
19 Honor, to be sure there is a case that disagrees with
20 this. Out of the Southern District of New York.

21 THE COURT: They cite to it, right?

22 MR. ASSAF: Right. They cite to it. But
23 here, one of my entire themes today has been I think
24 we are different because we are not schemers and we
25 are not deceivers. They need that under their

1 statute, especially deception.

2 So this isn't like phishing or check kiting
3 or ripping offer elderly people. So once you are now
4 in this new area, then I think it is especially
5 incumbent upon the FTC if you are going to bring a
6 deception claim to meet Twombly and to meet 9 (b). So
7 that is my argument there. It does us no good under
8 Twombly. In fact, Twombly says the opposite: At the
9 end of the case for summary judgment the defendant
10 will have spent millions of dollars only to be
11 vindicated on the position that they thought was at
12 the summary judgment stage.

13 THE COURT: Thank you, counsel.

14 MR. ASSAF: Thank you.

15 THE COURT: Any response?

16 MR. MORIARTY: Yes, your Honor.

17 THE COURT: You cite in your brief on page
18 26, you cite to a case the that held a claim of
19 deceptive practices, pursuant to Section 5, "is not a
20 claim of fraud as that term is commonly understood or
21 contemplated by rule 9 (b)."

22 MR. MORIARTY: That's right. Under the FTC
23 Act, in order to prove deception the case law states
24 the FTC does not have to prove intent. That is where
25 we are getting away from the FTC Act when counsel

1 suggests we have to somehow prove Wyndham is a bad guy
2 or a bad actor, or anything like that which we are not
3 alleging.

4 And in addition, it is also what makes a
5 difference in a securities fraud case where a company
6 has to lie, someone has to rely on that intentional
7 lie, and be injured by it. In this case we have, the
8 standard is simply that they made a statement that
9 deceived consumers, whether or not they intended to,
10 and as a result the relief that we can get is less.
11 We don't get remedies at law. We don't get punitive
12 damages.

13 Regardless, your Honor, if it did sound in
14 fraud, we would have to proceed with particularity,
15 which we have done here. It simply requires to us say
16 precisely what the elements of our claim are, which we
17 have done in paragraphs 21, 24 and the fact that we
18 allege a difference between express statement and
19 therefore materially consumers.

20 So the last point I want to talk about with
21 deception is this idea that franchise law is somehow
22 relevant. We argue that that is a red herring, it is
23 not relevant at all. We allege that Wyndham made
24 statements about how they treat their network and we
25 allege in paragraph 24 vulnerabilities by Wyndham on

1 the Wyndham network. The idea that these are
2 franchisees, that they have disclaimed what happens at
3 Wyndham hotels has nothing to do with the core of our
4 allegations which is that Wyndham engaged in
5 unreasonable data-security practices on the Wyndham
6 network.

7 THE COURT: Counsel, can you speak to the
8 issues raised with the subjective and objective
9 standard, as it relates to fair notice and that they
10 don't see any cases that say, you know, that speak to
11 whether it is a subjective or objective standard, and
12 I am interested -- I know we are going backwards, back
13 to fair notice, where I believe we focused a lot of
14 our argument here today. Can you speak to your
15 position, and if it is not in your briefs, and if so,
16 why not?

17 MR. MORIARTY: It is in our briefs and it
18 does relate to the deception issue because it is this
19 idea that if they say we are going to take
20 commercially reasonable practices, is it okay for them
21 to say we are going to take what we believe are our
22 commercially reasonable practices, they might not be
23 your commercially reasonable practices. The idea that
24 reasonable under the law is something that everyone
25 can have a different idea of. It doesn't mean

1 anything. Subjective standard is simply wrong.

2 Reasonableness is an objective standard.

3 When the FTC states for the purpose of
4 unfairness that reasonableness is what unfairness
5 means as it applies to data security, that is an
6 objective standard. So in a way, in a very real way,
7 the proof is the same on both sides. Unfairness
8 requires them to take reasonable steps to protect
9 consumer data, and as it happens in their statement,
10 in their privacy policy, they say they will take
11 commercially reasonable steps to protect consumer
12 data. It is the same evidence in the case.

13 THE COURT: And you say again reasonableness
14 is an objective standard.

15 MR. MORIARTY: That's correct, your Honor.
16 And I think, that appears in the Vogel case, they
17 talk about reasonableness as an objective standard. I
18 can pull it up.

19 THE COURT: Can you take a moment and pull it
20 up if you will?

21 MR. MORIARTY: Yes. I am not into the tech.
22 I can just read it. I am not going to use the Elmo.

23 So talking about an unconstitutionally based
24 challenge, this is at pin cite 1078. In order to
25 uphold the regulations in the face of such a

1 constitutional attack, the first test of the
2 regulation has been held to imply an objective
3 standard, the reasonably prudent person test.

4 Then it goes on to say whether a reasonable
5 person familiar with the conditions in the industry
6 would have instituted more elaborate precautions.

7 THE COURT: Okay. You answered my question.
8 Counsel. Thank you.

9 MR. MORIARTY: Any other questions?

10 THE COURT: Not yet. I might.

11 MR. ASSAF: It is such an important issue,
12 your Honor, I don't think that actually responds, at
13 least to the question that you and I were discussing,
14 is whether it is an objective standard as to what
15 Wyndham needs to meet to comply with their version of
16 an enforcement action. I think the question you and I
17 were discussing, which is critical to this, is whether
18 for fair notice challenge, there is a question of
19 whether there is an objective standard that
20 accompanied the challenge of the fair notice standard
21 or a subjective.

22 And we have been saying, and I think the case
23 law bears it out, I want to correct something, I
24 didn't mean to suggest that we can't find it one way
25 or the other. I think if we read the cases, every

1 case we read is an objective standard, that you look
2 at fair notice objectively as to what the agency does.

3 THE COURT: I may have posed the question
4 incorrectly. I apologize.

5 MR. ASSAF: I think the FTC, they don't argue
6 that it is a subjective standard. They don't argue
7 it is an issue of fact. That is what I thought you
8 were asking them. I don't think they kind of
9 confirmed that, it is a crucial issue obviously in
10 terms of the motion to dismiss, whether it can be
11 decided as a threshold matter, based on record
12 evidence of Code of Federal Regulation and publicly
13 available materials, or whether there is a subjective
14 standard, and I don't know, I think it is important
15 that the FTC at least, because there is a lot in the
16 record right now as to how it goes, but I think we are
17 all now on the same page, this it is an objective
18 standard, unless the FTC disagrees.

19 THE COURT: No, I believe. Let me let
20 counsel for the FTC clarify. I believe that you had
21 argued earlier that it was an objective standard. But
22 counsel, clarify for the record, now we are dealing
23 specifically with the fair notice issue that we
24 addressed in our earlier argument, that you do submit
25 it is an objective standard?

1 MR. MORIARTY: You know, I might not be fully
2 on the same page, but our argument is that
3 reasonableness is an objective standard, and we have
4 provided fair notice to entities engaged in data
5 security practices by stating they need to have
6 reasonable data-security practices.

7 THE COURT: Okay. And then the issue as to
8 whether there was an issue of fact was something that
9 I actually raised with counsel, and said, well, why
10 are we raising this now? Shouldn't we at least
11 exchange discovery to see what Wyndham may have known,
12 and counsel corrected me that it is not important what
13 Wyndham knows because it is not subjective, but it is
14 whether they had fair notice, and the only issue that
15 I would say back, having thought about it during lunch
16 as well, is that, well, there may be documents that
17 indicate that Wyndham was on notice of certain things,
18 either via consent decrees, or best practices. And if
19 there are memos, internal memos or concerns within
20 Wyndham, that is an issue that has to obviously play
21 out in discovery, but it would be relevant, I believe,
22 to the issue of notice, and whether they had notice as
23 to particular standards that they needed to have in
24 place.

25 That is I think what we were all, we were

1 sort of talking around each other.

2 But I believe counsel said that they never
3 heard you claim it was a subjective issue. You
4 didn't. And that they never at least saw in your
5 papers that you were saying these were issues of fact.
6 And I quite frankly raised that during the course of
7 oral argument today in fairness as to whether this was
8 something that obviously the parties needed to delve
9 into in discovery.

10 So the record I think is now clear as to how
11 this sort of all involved.

12 But counsel, you are looking at me kind of
13 puzzled. I want to make sure --

14 MR. MORIARTY: No, that is just my face.

15 THE COURT: Is there anything you can shed
16 light on in terms of any of these issues that relates
17 to fair notice and/or your deceptive claim?

18 MR. MORIARTY: No, your Honor. I do agree we
19 have alleged they have engaged in unreasonable data
20 security practices and discovery will tell us whether
21 they have. They spent a lot of time talking about
22 very sophisticated malware, there is nothing they
23 could have done to stop it. These are questions of
24 fact.

25 Some of the things we might find out, we have

1 alleged they didn't take steps to prevent intrusions
2 or that when they knew of intrusions they didn't take
3 steps to remedy where those intrusions were coming
4 from.

5 And these are questions of fact that we will
6 find out through further discovery, who knew what, how
7 did they find the information, what did they do in
8 response to the information, how long did it take,
9 these are factual questions.

10 THE COURT: Okay.

11 MR. MORIARTY: Thank you.

12 THE COURT: Counsel, go ahead. I have a
13 feeling you may want to respond.

14 MR. ASSAF: I don't want to date myself, your
15 Honor, but Cool Hand Luke and Paul Newman, stay down,
16 stay down. I sometimes feel like that, today. In
17 terms of staying down. I will try one more time.

18 This analytically, we are not, the discussion
19 you and I are having is different than what the
20 discussion you and the FTC is having. I am not
21 discussing what needs to be alleged in their complaint
22 for unreasonable data security and what has to be
23 proven. That is not what this discussion is about.

24 My discussion is a constitutional one, of due
25 process and fair notice, that a party who makes an

1 allegation that the agency is acting inconsistent with
2 due process and fair notice, that is not a factual
3 issue that requires discovery. And in fact, I haven't
4 seen any cases showing that it is. The subjective
5 intent of the party challenging the agency action as
6 inconsistent with due process is one of an objective
7 standard.

8 That is the discussion that is critical for
9 what I thought was issue two today, and what I have
10 been trying to get at, is no discovery is relevant or
11 necessary for that.

12 If General Electric had a file full of memos
13 stating that the EPA's position would be what it is,
14 and had a bunch of actual discussions about consent
15 decrees under the EPA's power and what they meant, it
16 wouldn't matter a hill of beans to GE's challenge
17 under due process. The only thing that matters is the
18 objective standard. So that is why the party
19 challenging it, what my subjective intent was and
20 whether I thought consent decrees were out there and
21 what they meant, irrelevant to a due process
22 constitutional challenge.

23 That is the thing I am trying to get at is, I
24 think, again, my view is that it would be erroneous
25 to, that is why I asked, I am trying to get to the

1 FTC's position, it is not in their brief. I think it
2 would be erroneous to assert that a party making a
3 constitutional challenge is their subjective intent as
4 to the challenge. That is the point I am trying to
5 get at.

6 I am sorry, your Honor, for belaboring it,
7 but it is such an important point.

8 Finally, on Vogel, I thought we put a pin in
9 it before, Vogel is a case they cite for
10 reasonableness. This is on the other side, this is if
11 discovery goes forward or the agency action. It is a
12 NLRB case under contract principle. The Third Circuit
13 as well as every other Court of Appeals is very clear,
14 the NLRB jurisprudence is factual based, and there
15 were things in the record besides the administrative
16 action.

17 You have a whole body of case law from NLRB
18 and what good cause means and what workers' rights
19 means, it is contract-based based on the collective
20 bargaining agreement, and other issues under the NLRB.
21 That Third Circuit case doesn't help them out.

22 Thank you for your indulgence, your Honor.

23 THE COURT: Thank you. Anything further from
24 the FTC?

25 MR. MORIARTY: I would point out, when you or

1 your clerk pulls it up, Vogel is an Occupational
2 Safety and Health case, it is under the general duty
3 clause.

4 THE COURT: Let's move to the second round of
5 the motions here. I believe we have addressed
6 everything. This pertains to WHR. We now look at the
7 other Wyndham entities' motion to dismiss. I will
8 hear counsel now for Wyndham.

9 MR. ALLEN: Thank you, your Honor. For the
10 record, Winn Allen on behalf of defendants.

11 I know you are probably glad to see a change
12 of scenery up here.

13 Your Honor, thank you again for oral argument
14 on this hearing. It is undisputed that the only
15 defendant in this case whose computer systems were
16 breached, whose computer systems were alleged to have
17 inadequate data security protection is Wyndham Hotels
18 and Resorts, LLC, which is one of the many subsidiary
19 companies of the Wyndham corporate family.

20 Nonetheless, as you know, the FTC, Wyndham
21 Hotels and Resorts direct parent company, Wyndham
22 Hotel Group, and the ultimate parent company, the
23 entire Wyndham corporate family, Wyndham Worldwide
24 Corporation.

25 As your Honor well knows, in the normal case,

1 we don't accept such imputed liability, in a typical
2 thirties there is a strong presumption against it.

3 What the FTC says here is that there is a
4 long line of cases invoking what they call common law
5 liability under Section 5 of the FTC Act. I submit to
6 your Honor there is a fundamental legal problem with
7 the FTC common enterprise allegations in this case,
8 that make it appropriate for resolution at the motion
9 to dismiss stage, I can anticipate one of the
10 questions your Honor might have is why now, why not at
11 summary judgment?

12 The main problem is if you look at all the
13 common enterprise cases we cite and the FTC cites,
14 there is a common thread that runs through them. I
15 will quote here just a few cites. Common enterprise
16 liability applies when, quote, a judgment absolving
17 one of them, that is the defendants, a judgment object
18 absolving one of the defendants of liability would
19 provide the other defendants with a clear mechanism
20 for awarding the terms of avoiding the terms of the
21 order. That is NHS Systems, cited in the brief, point
22 13, WL 1285424, National Urological Group also cited
23 in the brief, Delaware Watch case, also cited in the
24 briefs.

25 Your Honor, the FTC has not and cannot as a

1 matter of law allege that here. There are no
2 allegations in the complaint that Hotels and Resorts
3 has ever in the past resorted to the corporate forum
4 to try to avoid a final court order, or that it is
5 particularly plausible to think Hotels and Resorts
6 would do that in the future.

7 As a legal matter, your Honor, again, we are
8 operating at a little bit of an unknown area here
9 given this is the first data securities case, we are
10 unclear as to what the legal obligations of Section 5
11 are, if it does indeed apply to the data security.
12 What the FTC has said is the data-security obligations
13 they believe are in Section 5 attach to entities that
14 collect data.

15 One place we cited that was a document called
16 protecting consumer privacy in the area of rapid
17 change. We cited that in the brief. There is another
18 document that is cited in the brief, we didn't
19 directly cite it for this proposition that I would
20 call the Court's attention to, and that is the
21 document called Privacy on Line, Fair Information
22 Practices in the Electronic Marketplace, May, 2000
23 document, that is cited in Hotels and Resorts' motion
24 to dismiss. It is not cited in our motion to dismiss.

25 If you look at pages 33 and 34 of that

1 document, the FTC makes the same point, the legal
2 obligations imposed by Section 5 attach to entities
3 that collect data.

4 Here it is undisputed that as it pertains to
5 this case, the only entities that were collecting
6 consumer data were Hotels and Resorts, the main
7 defendant, Mr. Assaf was just up here on behalf of,
8 and the independently owned Wyndham hotels that aren't
9 parties here. Those legal obligations that the FTC
10 believes Section 5 to impose are going to stay
11 attached to Hotels and Resorts for as long as it is
12 collecting consumer data. You don't need Wyndham
13 Worldwide Corporation.

14 THE COURT: But I am confused. Maybe you can
15 address this.

16 One of the things that the FTC says is that
17 at some point, Wyndham Hotel Group was managing the
18 security, the info security program for hotels and
19 Resorts, that was anywhere between June, 2008 to June,
20 2009. There is an agency, again, as you know, looking
21 at the facts in the light most favorable to the
22 nonmoving party, there is that allegation that that
23 was being managed by WHG. At some point I think there
24 was a concession that WWC, and the FTC argued on page
25 10 of the complaint, basically pleads that Wyndham

1 Worldwide controlled the acts and practices of its
2 subsidiaries including Hotels and Resorts, WWC was
3 responsible for the data security of Hotels and
4 Resorts network during the third breach. So there are
5 allegations, and we are at, again, a motion to dismiss
6 phase in this case and not summary judgment. So with
7 those allegations, why would it be proper to let WWC
8 and WHG out?

9 MR. ALLEN: Absolutely. Paragraph 14 of the
10 complaint they do allege and I accept as true for my
11 argument when Wyndham Hotel Group had responsible for
12 data security at Hotels and Resorts for a period of
13 time and Wyndham Worldwide did, as a matter of law, I
14 submit, that that is not enough to bring them in the
15 case on a common enterprise theory. It goes back to
16 my distinction between entities that collect data and
17 entities that provide data security services.

18 Here it is undisputed in the complaint that
19 Hotels and Resorts, and the independently owned
20 Wyndham Hotels, were the entities that were collecting
21 the consumer data that is at issue here, and therefore
22 they are the entities that are subject to the ultimate
23 legal responsibilities that the FTC believes Section 5
24 to impose.

25 So frankly, whether Wyndham Worldwide

1 Corporation, whether Wyndham Hotel Group, whether a
2 third party entity that we contracted with was
3 providing data-security services to Hotels and Resorts
4 is irrelevant for purposes of Section 5 liability.
5 The Section 5 theory that the FTC has in this case
6 attaches to the entity that collects the data, and
7 here that is Hotels and Resorts.

8 I make one other point, your Honor, is that
9 the FTC couldn't make out a stand-alone case against
10 Wyndham Worldwide Corporation, the ultimate parent
11 company or Wyndham Hotel Group, the company that sits
12 between Wyndham Worldwide and Hotels and Resorts, that
13 is because the Section 5 of the FTC Act, your Honor,
14 is a consumer protection statute. It is directed at
15 consumers. It prevents deceptive and unfair acts
16 directed at consumers.

17 And here, your Honor, as pled in the
18 complaint, the entities interfacing with consumers
19 that are alleged to have made statements to the
20 consumers and acted unfairly to consumers were the
21 independently owned hotels that aren't parties here
22 and Wyndham Hotels Resorts. Your Honor, I have two
23 other quick points.

24 THE COURT: Before you move to your other
25 quick points, the Court has a case, Judge Linares, it

1 was issued on July 12 of 2011, and that is FTC
2 Millennium Telecards, and I am quoting from it.

3 "When determining whether a common enterprise
4 exists, courts look to a variety of factors, including
5 common controls, the sharing of office space and
6 officers, whether business is transacted through a
7 place of interrelated companies, unified advertising,
8 and evidence which reveals that no real distinction
9 existed between the corporate defendants."

10 And so I am guided by this case in terms of
11 when we talk about common enterprise, why it would be
12 appropriate at this stage, since there have been
13 allegations, and the FTC has basically gone through in
14 their complaint, where there is a sharing of office
15 space and so forth. Again I ask you, understanding
16 what Judge Linares held in 2011 and understanding that
17 common enterprise, and those are some factors that the
18 Court should look at, why again you think it is
19 appropriate to dismiss now?

20 MR. ALLEN: Three points, your Honor.

21 First, the factors that you point to are only
22 one element of the common enterprise analysis. The
23 other one is the one I just spent time talking about
24 to prove common enterprise liability you have to prove
25 that there is some reason to think that the entity

1 will be more subject to liability.

2 The second is if you look the at facts
3 alleged, one, Wyndham conducted business through a
4 maze of interrelated companies; two, common control;
5 three, shared office space; and four, pooled resources
6 and staff.

7 I submit to your Honor that those aren't
8 evidence of a common enterprise or ignoring the
9 corporate forum. They are routine facts of life for
10 modern corporate America. Pretty much any company in
11 the Fortune 500, they will keep themselves distinct
12 for liability purposes to have different entities
13 within their corporate family, but they will also
14 synergize by sharing functions and common employees.
15 That is why a number of cases we cited in a brief,
16 Spagnola, from the SDNY, Universal Health Services
17 from West Virginia, routinely say that those facts
18 that the FTC alleged aren't enough to disregard
19 corporate separateness, particularly when you have a
20 reason to think that at the end of the day the
21 defendant is going to be able to use the corporate
22 forum sham to avoid liability.

23 I mentioned Universal Health Services. I
24 encourage you to read that case. It is a case under
25 the False Claims Act. But the facts are very similar

1 and the Court there was applying federal common law,
2 the same kind of federal common law this court would
3 apply in trying to decide whether to set aside
4 corporate distinctions. There the government sued a
5 subsidiary and tried to amend its complaint to add a
6 parent company. The government made the same
7 arguments the FTC is making here: Common control,
8 shared office space, shared employees, parent provided
9 services to their subs. The Court rejected the
10 government's attempts to bring liability against the
11 subs for the two reasons I have explained to you. One
12 is the Court didn't see there is any reasonable
13 likelihood that the sub would try to avoid liability
14 at the end of the day; and two, the facts the
15 government relied on were simply routine facts of
16 doing business.

17 One last point before I sit down, your Honor,
18 is that if you look at the common enterprise cases and
19 there are a number of them cited in both briefs. I
20 submit to you they are materially different from this
21 case. I am generalizing here, of course, but most of
22 them involved closely held corporations; they were run
23 by a single individual or group of individuals. The
24 actual individuals who ran the companies were often
25 included as defendants in the very case. They often

1 used corporate forums to shift assets and revenues
2 back and forth and critically, in most of the cases
3 cited by us and the FTC, there was evidence of a
4 deliberate intent to use the corporate forum to do one
5 of two things: One, to avoid consumer complaints, you
6 know, some individual set up a company, it got a lot
7 of consumer complaints, let's just set up another
8 company and do the same thing; or two, to explicitly
9 avoid state and federal regulatory investigations.

10 In a lot of cases you would have the FTC or
11 state Attorney General file a complaint, they set up
12 another company and move the assets.

13 With that, unless you have questions, I will
14 sit down and save the rest for my rebuttal.

15 MR. MORIARTY: Your Honor, regarding common
16 enterprise, I am not sure if that case involving, I
17 guess it was a False Claims Act, I don't think it was
18 a common enterprise case. I don't know, though. I
19 could be wrong. I think common enterprise shows up, I
20 think it is a unique creatures of the FTC Act
21 jurisprudence.

22 As far as the common enterprise is concerned,
23 and whether this company is likely to shift
24 responsibility, whether we would be able to get the
25 same relief by just going after WHR because they have

1 a collection responsibility, I think those are sort of
2 besides the point. What we have alleged here are the
3 factors that are necessary to establish common
4 enterprise.

5 And then as far as the question of whether
6 they are likely to transfer authority, we have alleged
7 that in fact, responsibility for data security, which
8 we allege was unreasonable in the complaint, paragraph
9 24, was transferred during the time of the complaint,
10 from, I believe Wyndham Hotel Group had it initially
11 during the first --

12 THE COURT: That was my question for you. In
13 your brief you say June of 2008 to June, 2009, Wyndham
14 Hotel Group was in charge of managing it. But we
15 know, at least according to the complaint, that the
16 allegations are that our first breach happened in
17 April, 2008, right?

18 MR. MORIARTY: Yes.

19 THE COURT: I think the second breach, let me
20 refresh my recollection, I am sure you can tell me
21 right off the bat, the second breach then occurred on
22 March, 2009.

23 MR. MORIARTY: Correct.

24 THE COURT: So this all predates when Wyndham
25 Hotel Group, WHG, was managing the security programs.

1 MR. MORIARTY: I am sorry. I think those
2 were during Wyndham Group managing and then in June,
3 2009, Wyndham Worldwide took over. Throughout the
4 entire Wyndham Hotel network -- Hotels and Resorts
5 owns the Wyndham hotel network. They always own it.
6 That is our allegation. That is what we understand.

7 Wyndham Hotel Group is in charge from the
8 beginning of the relevant time in the complaint, they
9 are in charge of data security. They are in charge
10 from the beginning until June, 2009, during which the
11 first two breaches happen. Then it is transferred to
12 Wyndham Worldwide Corporation, June, 2009. I think
13 the last breach starts to happen some time in the
14 fall of 2009, and is discovered in 2010.

15 So We have alleged that responsibility for
16 these various things does transfer. So to the extent
17 that we are not going to look at the common enterprise
18 prongs, we are only going to look at the likelihood of
19 the FTC being able to get its injunctive relief
20 against just WHR, there are factors in the complaint
21 that suggest that this type of authority, or perhaps
22 even the ownership of the Wyndham Hotel network can
23 change.

24 More importantly, we alleged direct liability
25 against each of the Wyndham entities. So even setting

1 aside common enterprise, all the named defendants
2 belong in this case.

3 For Wyndham Hotel Group, the policy at issue
4 in this case says it is the policy of Wyndham Hotel
5 Group. The complaint also alleges, as I just
6 mentioned, paragraph 14 that Wyndham Hotel Group was
7 responsible for the data-security program. Wyndham
8 Worldwide is the parent corporation of, controls the
9 acts and practices of the subsidiaries, including the
10 named defendants in the case. Paragraph 14, the
11 complaint alleges that Wyndham Worldwide is
12 responsible for the data-security policies of its
13 subsidiaries which are what are at issue in this case.

14 Lastly, paragraph 14, we talk about transfer
15 of the authority, transfer responsibility for data-
16 security program in the Wyndham Hotel network to
17 Wyndham Worldwide, 2009.

18 Lastly, Wyndham Hotel management was
19 responsible for all operations that manage Wyndham
20 Hotels, including data security, including
21 responsibility for data security at several management
22 hotels that were breached.

23 The complaint alleges that Hotel Management
24 operated the websites of Wyndham Hotels, some of which
25 referred consumers to the main website where the

1 privacy policy was hosted.

2 So what we have in our complaint is
3 allegations of direct liability for unfair and
4 deceptive practices against each of the four Wyndham
5 entities in addition to a common enterprise liability
6 theory.

7 That is everything I had on that. Do you
8 have any questions?

9 THE COURT: No. Anything further, counsel.

10 MR. ALLEN: Briefly, your Honor.

11 With respect to the Universal Healthcare
12 decision, again, that Court was applying federal
13 common law, and courts applying common income
14 liability under Section 5.

15 On the direct liability issue I think it is
16 important to take them claim by claim. If you look at
17 deception claim, which is count 1, the FTC spent a lot
18 of time talking about with the deception claim
19 centered around the policy. The privacy policy
20 doesn't mention Wyndham Worldwide Corporation at all,
21 except to distinguish Wyndham Worldwide Corporation
22 from the entities that are actually making
23 representations in the privacy policy.

24 So I don't understand how Wyndham Worldwide
25 Corporation could be alleged to have made any

1 deceptive representations in this case at all.

2 Wyndham Hotel Management is not mentioned at
3 all. I really don't understand it with respect to
4 that.

5 On the unfairness claim again, briefly, all
6 of the key unfairness allegations, I would say one
7 more time, pertain to conduct at Wyndham-branded
8 hotels, or at Hotels and Resorts where breaches were,
9 where the computer networks were, and again, the
10 ultimate legal liability in Section 5 is imposed on
11 entities that collect data, not on entities that
12 provide management services.

13 THE COURT: Thank you, Mr. Allen. All right.
14 We are at the last motion. This is a motion to stay.
15 It is filed by Wyndham.

16 MR. QUINN: Good afternoon, your Honor.
17 Justin Quinn on behalf of the defendants.

18 I want to thank your Honor for having
19 argument on the motion to stay.

20 THE COURT: Because you know, Mr. Quinn, that
21 generally this would be something that I would ask my
22 Magistrate Judge to handle, and I quite frankly am
23 going to entertain it right now, but there is the
24 common practice of this Court, both as a Magistrate
25 Judge for four and a half years, as well as a District

1 Judge now, I rarely grant such a stay, and my position
2 has always been, in very rare instances will I grant a
3 stay, and I would like to hear from you now why you
4 believe the Court should grant the stay in light of
5 the journey that this case has taken, and quite
6 frankly, we have, you know, the original complaint was
7 filed on June 26 of 2012. There was an August 2nd
8 motion to change venue. There was an amended
9 complaint that was ultimately filed on August 9. And
10 a pending motion to dismiss that was filed on August
11 27.

12 And of course, I have done my best to bring
13 you all to court as soon as I could feasibly do that,
14 based on the Court's calendar. But a lot of time has
15 gone by.

16 I am just afraid to let more time go by
17 without moving the parties towards discovery here in
18 the actual exchange. So why should I stay the
19 discovery at this point pending my ruling in these
20 matters?

21 MR. QUINN: Well, I think there are three
22 fundamental and practical reasons that would justify a
23 stay.

24 Your Honor has the discretion to stay the
25 discovery in this case pending the motion to dismiss,

1 and the party making the application must demonstrate
2 good cause.

3 So in this case, good cause exists for three
4 reasons, the first of which the duration of the stay
5 is that we are requesting here is minimal. In this
6 case the parties briefed the issues, as your Honor
7 noted, the Court scheduled it, today we are here for
8 oral argument. So Wyndham anticipated that a decision
9 on the motions to dismiss will be rendered forthwith.

10 And I just want to state that the FTC can't
11 say that they are going to be prejudiced. Let me just
12 be clear. Wyndham has expended over \$5 million, and
13 turned over well over a million pages of documents.
14 By contrast, Wyndham has received 1,000 pages of what
15 is effectively publicly available documents that are
16 on the website.

17 Second, and fundamentally, your Honor, this
18 case presents several, or I should say a few threshold
19 issues which, if rendered in Wyndham's favor may
20 foreclose portions of this litigation, if not the
21 litigation in its entirety which would in turn absolve
22 the need for discovery, which under settled law in
23 this Circuit is the purpose of a motion to stay.

24 In other words, motions to stay pending
25 motions to dismiss are granted when the motions to

1 dismiss would either narrow discovery or absolve the
2 need for discovery. That is exactly the case here.

3 Finally, your Honor, I will be brief.

4 THE COURT: You don't have to be.

5 MR. QUINN: I understand.

6 Finally, your Honor, conducting the discovery
7 at this juncture would be an inefficient use of the
8 parties' resources. I am sure you are aware discovery
9 disputes would be spawned which would in turn burden
10 the Court. So it is for those three reasons, Judge,
11 that good cause exists and discovery should be held in
12 abeyance until the Court has determined its motion to
13 dismiss.

14 Thank you, Judge.

15 THE COURT: Thank you. I take it from
16 reading the opposition that the FTC is saying we
17 hadn't had discovery, that we in fact have not, the
18 defendant has not been cooperative with our request,
19 yet we have been turning over discovery to them, and
20 you cite to several interrogatories, I think a total
21 of 47 requests for admissions, and 33 doc requests,
22 that in total have been asked of you and that you have
23 been complying with, and that all you asked for is
24 reciprocity. Right?

25 And I do have a couple of questions for Mr.

1 Quinn with respect to some of the points raised in the
2 brief. But let me hear you now.

3 MR. ZIMMERMAN: I would agree with your
4 Honor, for the record. Jonathan Zimmerman on behalf
5 of the FTC.

6 I will address Mr. Quinn's response quickly.
7 Before I do, this case came to your Honor in a
8 somewhat unusual posture. As soon as we filed the
9 case in Arizona, we were ordered to begin discovery,
10 and the plaintiffs and defendants and plaintiffs
11 aggressively pursued discovery for nearly nine months
12 before the case was transferred here.

13 During that period, we responded at length to
14 numerous discovery requests which your Honor has
15 outlined. In return, we received minimal responses
16 from Wyndham. In fact --

17 THE COURT: What of this point that Mr. Quinn
18 makes, that you received thousands of pages --

19 MR. ZIMMERMAN: They continually point to the
20 \$5 million and thousands of pages. That came up in
21 their motion to quash the administrative subpoena
22 which was attached to our opposition brief, the
23 decision.

24 The Commission, and what I would say to that
25 is, number 1, we don't believe that those are in any

1 way full and adequate responses to our discovery
2 requests. And even if they were, Wyndham has not
3 made the simple effort of identifying how those
4 documents respond to our discovery requests. They
5 simply say we produced a bunch of stuff. That should
6 be enough.

7 THE COURT: So it is a document dump. You
8 say it is not particularly responsive.

9 MR. ZIMMERMAN: Essentially, as the
10 Commission found on the motion to quash, much of it
11 was irrelevant, a lot of it did not address things
12 that came up in the administrative subpoena. And in
13 no way now that we are in federal court do we believe
14 it is fully responsive to the pending discovery
15 requests.

16 THE COURT: What is the prejudice to you? I
17 am hearing there is no prejudice, that you have been
18 waiting this long, regrettably you have been waiting
19 longer than I personally would have wanted you to
20 wait, although the motions, as I see it, weren't
21 really technically ripe until June of this year, I am
22 being a little hard on myself. But you have been
23 waiting based on the change of venue motion and so
24 forth. What is the harm in waiting a few more weeks
25 until the Court has had an opportunity to rule on the

1 pending motion?

2 MR. ZIMMERMAN: Your Honor, as we outlined in
3 our pleadings, we believe there are three prejudices.
4 The first is what I outlined, it is simply inequitable
5 to allow defendants to take substantial discovery and
6 get away with just not responding in kind, and then
7 stay discovery.

8 Moreover, as your Honor stated earlier on,
9 delay itself can be highly prejudicial. Witnesses'
10 memories can fade, documents can be lost. At the time
11 we opposed this we were heavily involved in third-
12 party discovery. Stopping that process only to start
13 it over again is prejudicial.

14 THE COURT: Thank you, counsel.

15 MR. ZIMMERMAN: Thank you.

16 THE COURT: Anything?

17 MR. QUINN: May I respond?

18 THE COURT: Yes, please, of course.

19 Mr. Quinn, from what I read in the
20 plaintiff's opposition, they say discovery has only
21 been one way here. It has been their responding to
22 your requests on August 3rd for 17 logs, 20 doc
23 requests, then on 8/17, the defendants serve 15
24 requests for admission, and they go on to say that on
25 February 11, 2013, the defendants served an additional

1 request for documents and admissions, bringing the
2 total to 47 requests for admissions and 33 document
3 requests on a parallel track. The defendants also
4 commenced discovery on third parties. That is page 2
5 of the opposition.

6 It does somewhat seem, it concerns me, that
7 we have a situation where the FTC is responding to
8 your request, yet the plaintiff has served one set of
9 requests on you, on the defendants. It took
10 defendants five months to produce any responsive
11 documents, and to date have only produced documents
12 related to contracts with their franchised and managed
13 hotels, page 6 of their opposition.

14 There does seem to be an issue of equity here
15 and fairness, and I am not sure, quite frankly, that
16 we should, that the Court should condone that type of
17 one-way discovery, if that is what is going on.

18 MR. QUINN: That actually is more just
19 muddying of the water. So what the FTC has turned
20 over and what they failed to disclose is the majority
21 of the documents as you stated in our brief has been
22 discovery from the third parties.

23 Also, the majority of our requests for
24 admission for interrogatories have not been responded
25 to, which we I think attached to the back of our reply

1 brief, in that we asked for certain things and they
2 decided to claim a privilege, which they can, or claim
3 that it is completely irrelevant to the case at issue.

4 For example, I think we asked in one what
5 they consider to be reasonable data security
6 practices. And they claim that is irrelevant. So to
7 suggest that this has been one-sided, I think is not
8 entirely true. But I just want to point out, to say
9 something about the delay, I think your Honor had
10 questioned, well, you know what.

11 I am, for example, going to focus my argument
12 back. The idea in filing the motion to stay along
13 with the motion to dismiss would be to focus
14 discovery. And that is the purpose of the motion to
15 stay. That is why we are requesting that your Honor
16 hold discovery in abeyance, figure out what is in the
17 case after the motion to dismiss, if there is anything
18 and then the parties, to the extent you would, it
19 would be -- we would take it from there.

20 THE COURT: Mr. Quinn, I remember my
21 question. I asked on page 10 of the opposition, the
22 defendant's knowledge, plaintiff says, defendants
23 acknowledge that they have not challenged the FTC
24 authority to bring this claim. Motion to dismiss, ECF
25 number 32.

1 And it says, in parens, WHR does not dispute
2 that FTC can bring enforcement action against
3 companies that make deceptive statements to consumers.
4 And so I am curious that if there is not a challenge
5 with respect to count 1, why shouldn't we get moving
6 on count 1? At least the discovery as it relates to
7 the deception claim?

8 MR. QUINN: Because then it would just be
9 inefficient for the purposes of the Court and the
10 parties.

11 THE COURT: Chances are, right, that the
12 Court is going to issue, by the time Judge Dickson, I
13 am now paired with Judge Dickson, by the time Judge
14 Dickson sets this down for a Rule 16 conference, gets
15 the party to exchange some discovery, this Court will
16 have ruled. Or close thereafter.

17 So I am just wondering whether we are
18 delaying the inevitable as it relates to count 1.

19 MR. QUINN: I don't think we are, your Honor.
20 And again, this is the motions to dismiss present
21 threshold issues which the FTC concedes on page 10 of
22 its brief. We are asking simply that the Court hold
23 discovery in abeyance and let the motions play out as
24 they will, and then we will take it from there. I
25 mean, that is appropriate, and good cause is for that

1 reason, this will narrow discovery.

2 And one more point.

3 Your Honor, there is a challenge to count 1
4 that would also dismiss that count in its entirety.
5 So it won't be in the parties' best interest, or the
6 Court's best interest to bifurcate that.

7 THE COURT: Okay. Any response from the FTC?

8 MR. ZIMMERMAN: I don't want to delay in any
9 longer. I will respond quickly. Many of the
10 documents we produced thus far to Wyndham have been
11 public documents because their discovery sought public
12 statements of commissioners. Based on that, we
13 produced it.

14 Moreover, their argument that they would like
15 to focus discovery is a little late. They initially
16 filed these motions in Arizona back in August, and
17 they could have filed to stay discovery at that time.
18 They chose not to. They chose to aggressively pursue
19 discovery.

20 Finally, as to the discussion you had at the
21 end, I think there is some confusion. Wyndham has
22 claimed that good cause exists to stay the discovery
23 because they have challenged the FTC's allegedly novel
24 use of the unfairness here, and that should weigh in
25 the balance in their favor of staying it. Our point

1 is to count 1 is that yes, they have moved to dismiss
2 count 1, but they have not brought a challenge to the
3 alleged novel authority.

4 THE COURT: They haven't challenged the
5 authority to bring an action under count 1.

6 MR. ZIMMERMAN: Exactly. Thank you, your
7 Honor.

8 THE COURT: Thank you.

9 All right. Well, as the parties know, the
10 Court retains broad discretion in determining whether
11 or not it makes sense to proceed with discovery while
12 the motion to dismiss is pending. The question is not
13 whether Wyndham has demonstrated good cause, but
14 rather what is permitted in light of the Court's heavy
15 docket.

16 When I look at the arguments being forwarded
17 by the defendants today, I recognize that they say
18 there is good cause to stay at this point in time, it
19 is a novel issue, it is a matter of first impression
20 for the Court. But the end result is I do think that
21 is a need to move this case forward. There is a need
22 for the Court to exercise its discretion in moving
23 these matters forward.

24 Neither I nor my colleagues are in the
25 practice of staying discovery as a matter of course,

1 whenever a dispositive motion is pending, quite
2 frankly. In very rare circumstances the district
3 judges in this district, at least, stay discovery.
4 Having been a magistrate judge for over four and a
5 half years, and being paired with a number of our
6 district judges, I know that I can speak from
7 experience to say that it is rarely done in terms of a
8 stay of discovery pending dispositive motions. In
9 fact, the converse is true.

10 A stay pending a district judge's decision on
11 a dispositive motion is an exception and not the rule
12 in the District of New Jersey.

13 In light of the Court's heavy docket,
14 dispositive motions often remain pending for months,
15 and sometimes over a year. That is not going to
16 happen in this case at this point in time because the
17 parties have come in for oral argument at this point.

18 I am going to do my best to get an opinion
19 issued rather quickly as to the issues raised during
20 oral argument and in the briefs, and I will endeavor
21 to keep my promise and get an opinion out
22 expeditiously.

23 That being said, the Court is disinclined to
24 let the parties stand by idly while memories continue
25 to fade, and evidence becomes stale.

1 Moreover, experience has taught us, and me in
2 particular, that going forward with discovery
3 encourages amicable resolution of disputes which in
4 turn prevents the Court from being crushed by the
5 heavy weight of our docket.

6 In this particular matter, I don't
7 necessarily think that we are going to have a
8 resolution of this case any time soon. And in fact,
9 it will require the Court to resolve some rather
10 hefty, and I think intellectually challenging issues
11 that the Court will wrestle with, and do my best to
12 issue a thoughtful opinion in the near future.

13 But under the circumstances, considering, as
14 I said when I started questioning Mr. Quinn, this case
15 has been out there since as far back as June of last
16 year. We have had motion practice, which I can
17 respect, but the time has come. We are going to move
18 forward.

19 So I will ask Judge Dickson to bring the
20 parties in in the next few weeks for a Rule 16
21 conference, to set a schedule that the parties can
22 follow, and I anticipate there are going to be
23 discovery issues, and I recognize that the parties are
24 advocates, and they are doing their jobs, but I will
25 caution the parties to really only raise those issues

1 that are real issues in dispute with respect to
2 discovery.

3 And I am going to keep a watchful eye on
4 discovery in this case, and I hope to not have to
5 intervene with discovery. But I am not going to have
6 this case delayed based on any issues, and so if need
7 be, I will step in on discovery issues and make calls
8 if I have to make to make the calls. I prefer not to,
9 but I will leave to it Judge Dickson, and his able
10 hands to resolve any of those pending discovery
11 disputes that I am sure you all will start thinking
12 about from this moment forward.

13 Any other issues that we need to resolve at
14 this time?

15 The time is now 3:18. I will gladly deal
16 with any issues that may be pending. If not, I thank
17 you all for your advocacy, for the arguments that have
18 been forwarded here today, and I wish you all safe
19 travels.

20 (Adjourned at 3:20 p.m.)

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U.S. District Court
District of New Jersey [LIVE] (Newark)
CIVIL DOCKET FOR CASE #: 2:13-cv-01887-ES-JAD

Federal Trade Commission v. Wyndham Worldwide
 Corporation et al
 Assigned to: Judge Esther Salas
 Referred to: Magistrate Judge Joseph A. Dickson
 Case in other court: Third Circuit, 14-03514
 Arizona, 2:12-cv-01365
 Cause: 15:0045 Federal Trade Commission Act

Date Filed: 03/26/2013
 Jury Demand: None
 Nature of Suit: 890 Other Statutory
 Actions
 Jurisdiction: U.S. Government Plaintiff

Date Filed	#	Docket Text
06/26/2012	1	COMPLAINT, filed by Federal Trade Commission (submitted by Lisa Schifferle). (Attachments: # 1 Exhibit, # 2 Civil Cover Sheet)(REK) (Entered: 06/26/2012)
06/26/2012	2	SUMMONS Submitted by Federal Trade Commission (submitted by Lisa Schifferle). (Attachments: # 1 Summons, # 2 Summons, # 3 Summons)(REK) (Entered: 06/26/2012)
06/26/2012	3	This case has been assigned to the Honorable Steven P. Logan. All future pleadings or documents should bear the correct case number: CV 12-01365-PHX-SPL. Magistrate Election form attached. (Attachments: # 1 Magistrate Consent Form)(REK) (Entered: 06/26/2012)
06/26/2012	4	Summons Issued as to Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Attachments: # 1 Summons, # 2 Summons, # 3 Summons)(REK). *** IMPORTANT: When printing the summons, select "Document and stamps" or "Document and comments" for the seal to appear on the document. (Entered: 06/26/2012)
07/09/2012	5	WAIVER OF SERVICE Returned Executed by Federal Trade Commission. Wyndham Worldwide Corporation waiver sent on 6/26/2012. (Schifferle, Lisa) (Entered: 07/09/2012)
07/09/2012	6	*WAIVER OF SERVICE Returned Executed by Federal Trade Commission. Wyndham Hotel Group LLC waiver sent on 6/26/2012. (Schifferle, Lisa) *Modified to correct filer on 7/10/2012 (TLJ). (Entered: 07/09/2012)
07/09/2012	7	*WAIVER OF SERVICE Returned Executed by Federal Trade Commission. Wyndham Hotel Management Incorporated waiver sent on 6/26/2012. (Schifferle, Lisa) *Modified to correct filer on 7/10/2012 (TLJ). (Entered: 07/09/2012)
07/09/2012	8	*WAIVER OF SERVICE Returned Executed by Federal Trade Commission. Wyndham Hotels and Resorts LLC waiver sent on 6/26/2012. (Schifferle, Lisa) *Modified to correct filer on 7/10/2012 (TLJ). (Entered: 07/09/2012)

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07/10/2012	9	Agreement to Magistrate Judge Jurisdiction. Party agrees to Magistrate Judge Jurisdiction. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (MAP) (Entered: 07/11/2012)
07/13/2012	10	NOTICE of Appearance by Anne Michelle Chapman on behalf of Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Chapman, Anne) (Entered: 07/13/2012)
07/13/2012	11	Corporate Disclosure Statement by Wyndham Hotel Group LLC identifying Other Affiliate Wyndham Worldwide Corporation for Wyndham Hotel Group LLC.. (Chapman, Anne) (Entered: 07/13/2012)
07/13/2012	12	Corporate Disclosure Statement by Wyndham Hotel Management Incorporated identifying Corporate Parent Wyndham Hotel Group, LLC, Other Affiliate Wyndham Worldwide Corporation for Wyndham Hotel Management Incorporated.. (Chapman, Anne) (Entered: 07/13/2012)
07/13/2012	13	Corporate Disclosure Statement by Wyndham Hotels and Resorts LLC identifying Corporate Parent Wyndham Hotel Group LLC, Other Affiliate Wyndham Worldwide Corporation for Wyndham Hotels and Resorts LLC.. (Chapman, Anne) (Entered: 07/13/2012)
07/13/2012	14	Corporate Disclosure Statement by Wyndham Worldwide Corporation. (Chapman, Anne) (Entered: 07/13/2012)
07/13/2012	15	Party Elects Assignment of Case to District Judge Jurisdiction. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (MAP) (Entered: 07/16/2012)
07/16/2012	16	Minute Order: Pursuant to Local Rule 3.8(a), a request has been received for a random reassignment of this case to a District Judge FURTHER ORDERED Case reassigned by random draw to Judge Paul G. Rosenblatt. All further pleadings/papers should now list the following COMPLETE case number: CV 12-1365-PHX-PGR. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (MAP) (Entered: 07/16/2012)
07/18/2012	17	ORDER SETTING SCHEDULING CONFERENCE for 11/19/2012 at 11:00 AM before Senior Judge Paul G Rosenblatt. Signed by Senior Judge Paul G Rosenblatt on 7/18/12. (TLJ) (Entered: 07/18/2012)
07/20/2012	18	MOTION for Admission Pro Hac Vice as to attorney Eugene F Assaf on behalf of defendants Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, and Wyndham Worldwide Corporation. (BAS) (Entered: 07/23/2012)
07/20/2012	19	MOTION for Admission Pro Hac Vice as to attorney K Winn Allen on behalf of defendants Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, and Wyndham Worldwide Corporation. (BAS) (Entered: 07/23/2012)
07/20/2012	21	MOTION for Admission Pro Hac Vice as to attorney Douglas H Meal on behalf of defendants Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, and Wyndham Worldwide

		Corporation. (BAS) (Entered: 07/23/2012)
07/23/2012		PRO HAC VICE FEE PAID. \$ 50, receipt number PHX124297 as to Eugene F Assaf. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 07/23/2012)
07/23/2012		PRO HAC VICE FEE PAID. \$ 50, receipt number PHX124296 as to K Winn Allen. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 07/23/2012)
07/23/2012	20	ORDER pursuant to General Order 09-08 granting 18 Motion for Admission Pro Hac Vice; granting 19 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 07/23/2012)
07/23/2012		PRO HAC VICE FEE PAID. \$ 50, receipt number PHX124302 as to Douglas H Meal. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 07/23/2012)
07/23/2012	22	ORDER pursuant to General Order 09-08 granting 21 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 07/23/2012)
08/02/2012	23	MOTION to Change Venue/Transfer Case to the United States District Court for the District of New Jersey or, alternatively, the United States District Court for the District of Columbia by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Attachments: # 1 Affidavit of Kirsten Hotchkiss in Support of Defendants' Motion to Transfer Venue, # 2 Text of Proposed Order) (Assaf, Eugene) (Entered: 08/02/2012)
08/03/2012	24	NOTICE re Defendants' Notice of Service Re Discovery Requests by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation . (Rosenbaum, David) (Entered: 08/03/2012)
08/06/2012	25	NOTICE re Service Re: Third Party Discovery by Federal Trade Commission . (McCarron, Katherine) (Entered: 08/06/2012)
08/06/2012	26	NOTICE of Appearance by David B Rosenbaum on behalf of Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Rosenbaum, David) (Entered: 08/06/2012)
08/09/2012	27	NOTICE re of Service re: Third Party Discovery Requests by Federal Trade Commission . (Schifferle, Lisa) (Entered: 08/09/2012)
08/09/2012	28	*AMENDED COMPLAINT against All Defendants, filed by Federal Trade Commission. (Attachments: # 1 Exhibit)(Schifferle, Lisa) *Modified to reflect

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		document is not in compliance with LR Civ 7.1(c); attorney noticed on 8/14/2012 (TLJ). (Entered: 08/09/2012)
08/17/2012	29	NOTICE re Service of Defendants' First Set of Requests for Admission to The Federal Trade Commission by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation . (Rosenbaum, David) (Entered: 08/17/2012)
08/20/2012	30	RESPONSE in Opposition re 23 MOTION to Change Venue/Transfer Case to the United States District Court for the District of New Jersey or, alternatively, the United States District Court for the District of Columbia filed by Federal Trade Commission. (Attachments: # 1 Exhibit Declaration of Kevin Wilmer)(Cohen, Kristin) (Entered: 08/20/2012)
08/20/2012	31	*NOTICE of Appearance by Kristin Krause Cohen for Jonathan Eli Zimmerman and Andrea Vanina Arias on behalf of Federal Trade Commission. (Cohen, Kristin) *Modified to add counsel to docket text on 8/21/2012 (TLJ). (Entered: 08/20/2012)
08/27/2012	32	MOTION to Dismiss Case by Wyndham Hotels and Resorts LLC. (Attachments: # 1 Exhibit Exhibit 1)(Rosenbaum, David) (Entered: 08/27/2012)
08/27/2012	33	MOTION to Dismiss Case by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Worldwide Corporation. (Rosenbaum, David) (Entered: 08/27/2012)
08/30/2012	34	REPLY to Response to Motion re 23 MOTION to Change Venue/Transfer Case to the United States District Court for the District of New Jersey or, alternatively, the United States District Court for the District of Columbia <i>Defendants Reply in Support of Motion to Transfer</i> filed by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Rosenbaum, David) (Entered: 08/30/2012)
09/05/2012	35	NOTICE by Federal Trade Commission <i>Service of Responses and Objections to Discovery Requests</i> . (McCarron, Katherine) (Entered: 09/05/2012)
09/12/2012	36	*JOINT STIPULATION for Extension of Time to File Response/Reply as to 32 MOTION to Dismiss Case , 33 MOTION to Dismiss Case by Federal Trade Commission. (Attachments: # 1 Text of Proposed Order)(Moriarty, Kevin) *Modified to correct event type on 9/13/2012 (TLJ). (Entered: 09/12/2012)
09/13/2012	37	ORDER that the parties' Joint Stipulation for Extension of Time to File Responses and Replies to Defendants' Motions to Dismiss 36 is accepted and that the plaintiff shall file its responses to the motions to dismiss no later than 10/1/12, and the defendants shall file their replies to the motions to dismiss no later than 10/23/12. Signed by Senior Judge Paul G Rosenblatt on 9/13/12. (TLJ) (Entered: 09/13/2012)
09/13/2012	38	NOTICE re Service of Third Party Discovery by Federal Trade Commission . (McCarron, Katherine) (Entered: 09/13/2012)
09/19/2012	39	NOTICE re Service of Plaintiff's Responses and Objections to Defendants' First Set of Requests for Admission by Federal Trade Commission . (Schifferle, Lisa) (Entered: 09/19/2012)

09/19/2012	40	NOTICE re Notice of Service of Defendants Second Set of Requests for Admission to The Federal Trade Commission by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation . (Rosenbaum, David) (Entered: 09/19/2012)
09/20/2012	41	NOTICE re Service of Third Party Discovery Requests by Federal Trade Commission . (Schifferle, Lisa) (Entered: 09/20/2012)
09/20/2012	42	ORDER vacating Scheduling Conference set for 11/19/2012. Signed by Senior Judge Paul G Rosenblatt on 9/20/2012. (LMR) (Entered: 09/20/2012)
09/24/2012	43	NOTICE re Notice of Service of Defendants' Second Set of Requests for Production to The Federal Trade Commission by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation . (Rosenbaum, David) (Entered: 09/24/2012)
09/24/2012	44	STIPULATION <i>for Entry of Protective Order</i> by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Attachments: # 1 Text of Proposed Order Joint Stipulated Protective Order Concerning Confidentiality)(Rosenbaum, David) (Entered: 09/24/2012)
10/01/2012	45	RESPONSE in Opposition re 32 MOTION to Dismiss Case filed by Federal Trade Commission. (Moriarty, Kevin) (Entered: 10/01/2012)
10/01/2012	46	RESPONSE in Opposition re 33 MOTION to Dismiss Case filed by Federal Trade Commission. (Moriarty, Kevin) (Entered: 10/01/2012)
10/02/2012	47	JOINT STIPULATED PROTECTIVE ORDER CONCERNING CONFIDENTIALITY re Stipulation 44 (please see attached order for complete information). Signed by Senior Judge Paul G Rosenblatt on 10/2/12. (TLJ) (Entered: 10/02/2012)
10/05/2012	48	MOTION for Admission Pro Hac Vice as to attorney Shivaprasad Nagaraj by International Franchise Association. (Attachments: # 1 Exhibit Certificate of Good Standing)(Nagaraj, Shiva) (Entered: 10/05/2012)
10/05/2012	49	MOTION for Leave to File Brief Amicus Curiae of the International Franchise Association in Support of Defendant Wyndham Hotels & Resorts LLC's Motion to Dismiss by International Franchise Association. (Nagaraj, Shiva) (Entered: 10/05/2012)
10/05/2012	50	LODGED Proposed Brief Amicus Curiae of the International Franchise Association in Support of Defendant Wyndham Hotels & Resorts LLC's Motion to Dismiss re: 49 MOTION for Leave to File Brief Amicus Curiae of the International Franchise Association in Support of Defendant Wyndham Hotels & Resorts LLC's Motion to Dismiss . Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by International Franchise Association. (Nagaraj, Shiva) (Entered: 10/05/2012)
10/05/2012	51	Corporate Disclosure Statement by International Franchise Association. (Nagaraj, Shiva) (Entered: 10/05/2012)
10/05/2012	52	MOTION for Admission Pro Hac Vice as to attorney Jonathan Cedarbaum on

		behalf of International Franchise Association. (BAS) (Entered: 10/05/2012)
10/05/2012		PRO HAC VICE FEE PAID. \$ 50, receipt number PHX126799 as to Jonathan Cedarbaum. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 10/05/2012)
10/05/2012	53	MOTION for Admission Pro Hac Vice as to attorney Heather Zachary on behalf of International Franchise Association. (BAS) (Entered: 10/05/2012)
10/05/2012		PRO HAC VICE FEE PAID. \$ 50, receipt number PHX126798 as to Heather Zachary. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 10/05/2012)
10/05/2012	54	MOTION for Admission Pro Hac Vice as to attorney Steven P Lehotsky on behalf of International Franchise Association. (BAS) (Entered: 10/05/2012)
10/05/2012		PRO HAC VICE FEE PAID. \$ 50, receipt number PHX126796 as to Steven P Lehotsky. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 10/05/2012)
10/05/2012	55	ORDER pursuant to General Order 09-08 granting 52 Motion for Admission Pro Hac Vice; granting 53 Motion for Admission Pro Hac Vice; granting 54 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 10/05/2012)
10/05/2012	56	NOTICE of Appearance by David A Selden on behalf of Chamber of Commerce of the United States. (Selden, David) (Entered: 10/05/2012)
10/05/2012	57	MOTION for Leave to File BRIEF AMICI CURIAE by Chamber of Commerce of the United States. (Attachments: # 1 Text of Proposed Order)(Selden, David) (Entered: 10/05/2012)
10/05/2012	58	*LODGED Proposed BRIEF AMICI CURIAE re: 57 . Document to be filed by Clerk if Motion to Leave to File or Amend is granted. Filed by Chamber of Commerce of the United States. (Selden, David) *Modified correct document number on 10/9/2012 (TLJ). (Entered: 10/05/2012)
10/10/2012		PRO HAC VICE FEE PAID. \$ 50, receipt number PHX126877 as to Shiva Nagaraj. This is a TEXT ENTRY ONLY. There is no PDF document associated with this entry. (BAS) (Entered: 10/10/2012)
10/10/2012	59	ORDER pursuant to General Order 09-08 granting 48 Motion for Admission Pro Hac Vice. Per the Court's Administrative Policies and Procedures Manual, applicant has five (5) days in which to register as a user of the Electronic Filing System. Registration to be accomplished via the court's website at www.azd.uscourts.gov. (BAS)(This is a TEXT ENTRY ONLY. There is no.pdf document associated with this entry.) (Entered: 10/10/2012)
10/16/2012	60	RESPONSE to Motion re 57 MOTION for Leave to File BRIEF AMICI CURIAE , 49 MOTION for Leave to File Brief Amicus Curiae of the International Franchise Association in Support of Defendant Wyndham Hotels & Resorts LLC's Motion to Dismiss filed by Federal Trade Commission. (Zimmerman, Jonathan)

		(Entered: 10/16/2012)
10/17/2012	61	NOTICE re Service of Responses and Objections to Discovery Requests by Federal Trade Commission . (Zimmerman, Jonathan) (Entered: 10/17/2012)
10/22/2012	62	RESPONSE to Motion re 57 MOTION for Leave to File BRIEF AMICI CURIAE , 49 MOTION for Leave to File Brief Amicus Curiae of the International Franchise Association in Support of Defendant Wyndham Hotels & Resorts LLC's Motion to Dismiss <i>Defendants' Response to the Motions for Leave to File Amicus Curiae Briefs in Support of Defendants' Motions to Dismiss</i> filed by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Rosenbaum, David) (Entered: 10/22/2012)
10/23/2012	63	REPLY to Response to Motion re 32 MOTION to Dismiss Case <i>Reply in Support of Motion to Dismiss by Defendant Wyndham Hotels & Resorts LLC</i> filed by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Rosenbaum, David) (Entered: 10/23/2012)
10/23/2012	64	REPLY to Response to Motion re 33 MOTION to Dismiss Case <i>Reply in Support of Motion to Dismiss by Defendants Wyndham Worldwide Corp., Wyndham Hotel Group, LLC, & Wyndham Hotel Management, Inc.</i> filed by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation. (Rosenbaum, David) (Entered: 10/23/2012)
10/24/2012	65	NOTICE re Service of Plaintiff's Responses and Objections to Defendants' Second Set of Requests for Production by Federal Trade Commission . (Schifferle, Lisa) (Entered: 10/24/2012)
10/31/2012	66	NOTICE re Service of Plaintiff's First Set of Requests for Production of Documents by Federal Trade Commission . (Cohen, Kristin) (Entered: 10/31/2012)
11/02/2012	67	NOTICE by Federal Trade Commission of <i>Third Party Discovery</i> . (McCarron, Katherine) (Entered: 11/02/2012)
11/27/2012	68	NOTICE re of Supplemental Authority by Federal Trade Commission . (Attachments: # 1 Attachment A)(Zimmerman, Jonathan) (Entered: 11/27/2012)
11/28/2012	69	NOTICE re Defendants' Response to Plaintiff's Notice of Supplemental Authority by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation re 68 Notice (Other) . (Rosenbaum, David) (Entered: 11/28/2012)
01/02/2013	70	NOTICE re Service of Third Party Discovery Requests by Federal Trade Commission . (Schifferle, Lisa) (Entered: 01/02/2013)
01/10/2013	71	NOTICE re of Service by Federal Trade Commission of <i>Third Party Discovery</i> . (McCarron, Katherine) (Entered: 01/10/2013)
01/15/2013	72	NOTICE re Service of Third Party Discovery by Federal Trade Commission . (Schifferle, Lisa) (Entered: 01/15/2013)

01/29/2013	73	NOTICE re Service of Third Party Discovery by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation . (Allen, K) (Entered: 01/29/2013)
02/22/2013	74	NOTICE re Service of Third Party Discovery by Federal Trade Commission . (McCarron, Katherine) (Entered: 02/22/2013)
02/27/2013	75	NOTICE re Supplemental Authority by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, Wyndham Hotels and Resorts LLC, Wyndham Worldwide Corporation re 32 MOTION to Dismiss Case , 33 MOTION to Dismiss Case . (Attachments: # 1 Exhibit Cybersecurity Executive Order, # 2 Exhibit Presidential Policy Directive)(Assaf, Eugene) (Entered: 02/27/2013)
03/18/2013	76	NOTICE re Notice of Service of Plaintiff's Responses and Objections to Defendants' Third Set of Requests for Production and Admissions by Federal Trade Commission . (Cohen, Kristin) (Entered: 03/18/2013)
03/25/2013	77	ORDER granting 23 Motion to Change Venue. The Clerk of the Court is instructed to transfer this case to the District Court for the District of New Jersey. The following motions are denied without prejudice to refile in the transferee court: Motion to Dismiss Case by Wyndham Hotels and Resorts LLC (Doc. 32); Motion to Dismiss Case by Wyndham Hotel Group LLC, Wyndham Hotel Management Incorporated, and Wyndham Worldwide Corporation (Doc. 33); Motion for Leave to File Brief Amicus Curiae of the International Franchise Association (Doc. 49); Motion for Leave to File Brief Amici Curiae by Chamber of Commerce of the United States (Doc. 57). Signed by Senior Judge Paul G Rosenblatt on 3/25/13. (LAD) (Entered: 03/25/2013)
03/26/2013	78	Certified Copy of Transfer Order and docket received, Case transferred in from District of Arizona; Case Number 2:12-cv-01365. Original file certified copy of transfer order and docket sheet received. (Entered: 03/26/2013)
03/26/2013		Judge Esther Salas and Magistrate Judge Steven C. Mannion added. (jr) (Entered: 03/27/2013)
03/27/2013	79	NOTICE of Appearance by KEVIN HYLAND MORIARTY on behalf of FEDERAL TRADE COMMISSION (MORIARTY, KEVIN) (Entered: 03/27/2013)
03/27/2013	80	NOTICE by FEDERAL TRADE COMMISSION of <i>Designation Pursuant to L.Civ.R. 101.1(f)</i> (MORIARTY, KEVIN) (Entered: 03/27/2013)
03/27/2013	81	NOTICE of Appearance by LISA NAOMI WEINTRAUB SCHIFFERLE on behalf of FEDERAL TRADE COMMISSION (SCHIFFERLE, LISA) (Entered: 03/27/2013)
03/28/2013	82	NOTICE of Appearance by KRISTIN KRAUSE COHEN on behalf of FEDERAL TRADE COMMISSION (COHEN, KRISTIN) (Entered: 03/28/2013)
03/28/2013	83	NOTICE of Appearance by JOHN ANDREW KREBS on behalf of FEDERAL TRADE COMMISSION (KREBS, JOHN) (Entered: 03/28/2013)
04/15/2013	84	NOTICE of Appearance by JENNIFER A. HRADIL on behalf of WYNDHAM HOTEL GROUP LLC, WYNDHAM HOTELS AND RESORTS, LLC,

		WYNDHAM WORLDWIDE CORPORATION, Wyndham Hotel Management Incorporated (HRADIL, JENNIFER) (Entered: 04/15/2013)
04/15/2013	85	NOTICE of Appearance by JUSTIN TAYLOR QUINN on behalf of WYNDHAM HOTEL GROUP LLC, WYNDHAM HOTELS AND RESORTS, LLC, WYNDHAM WORLDWIDE CORPORATION, Wyndham Hotel Management Incorporated (QUINN, JUSTIN) (Entered: 04/15/2013)
04/18/2013	86	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. (Attachments: # 1 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 04/18/2013)
04/24/2013	87	Consent ORDER setting Briefing Schedule for Defts' Motions to Dismiss, etc. Signed by Judge Esther Salas on 4/22/13. (jd,) (Entered: 04/24/2013)
04/24/2013	88	NOTICE of Appearance by JONATHAN ELI ZIMMERMAN on behalf of FEDERAL TRADE COMMISSION (ZIMMERMAN, JONATHAN) (Entered: 04/24/2013)
04/25/2013	89	NOTICE of Appearance by KATHERINE ELIZABETH MCCARRON on behalf of FEDERAL TRADE COMMISSION (MCCARRON, KATHERINE) (Entered: 04/25/2013)
04/26/2013	90	NOTICE of Appearance by ANDREA VANINA ARIAS on behalf of FEDERAL TRADE COMMISSION (ARIAS, ANDREA) (Entered: 04/26/2013)
04/26/2013	91	MOTION to Dismiss by WYNDHAM HOTELS AND RESORTS, LLC. (Attachments: # 1 Brief, # 2 Declaration of Jennifer A. Hradil, Esq., # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Text of Proposed Order, # 7 Certificate of Service)(HRADIL, JENNIFER) (Entered: 04/26/2013)
04/26/2013	92	MOTION to Dismiss by WYNDHAM HOTEL GROUP LLC, WYNDHAM WORLDWIDE CORPORATION, Wyndham Hotel Management Incorporated. (Attachments: # 1 Brief, # 2 Text of Proposed Order, # 3 Certificate of Service) (HRADIL, JENNIFER) (Entered: 04/26/2013)
04/26/2013	93	MOTION to Stay <i>Discovery</i> by WYNDHAM HOTEL GROUP LLC, WYNDHAM HOTELS AND RESORTS, LLC, WYNDHAM WORLDWIDE CORPORATION, Wyndham Hotel Management Incorporated. (Attachments: # 1 Brief, # 2 Text of Proposed Order, # 3 Certificate of Service)(HRADIL, JENNIFER) (Entered: 04/26/2013)
04/29/2013		Set Deadlines as to 93 MOTION to Stay <i>Discovery</i> . Motion set for 5/20/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 04/29/2013)
04/29/2013		Set Deadlines as to 92 MOTION to Dismiss , 91 MOTION to Dismiss . Motion set for 6/17/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 04/29/2013)
05/03/2013	94	MOTION for Leave to File <i>Brief Amici Curiae</i> by TechFreedom, International Center for Law & Economics, Paul H. Rubin, Todd J. Zywicki, Justin (Gus) Hurwitz. (Attachments: # 1 Brief in Support of Motion for Leave to File Brief Amici Curiae, # 2 Declaration of Stephen M. Orlofsky, Esquire, # 3 Exhibit A to

		Orlofsky Declaration, # 4 Exhibit B to Orlofsky Declaration, # 5 Certificate of Service, # 6 Text of Proposed Order)(ORLOFSKY, STEPHEN) (Entered: 05/03/2013)
05/03/2013	95	MOTION for Leave to File <i>Brief Amici Curiae in Support of Defendants</i> by Chamber of Commerce of the United States. (Attachments: # 1 Memorandum in Support of Motion for Leave to File Brief Amici Curiae, # 2 Proposed Brief Amici Curiae, # 3 Proposed Order)(MAROTTA, SEAN) (Entered: 05/03/2013)
05/03/2013		Set Deadlines as to 94 MOTION for Leave to File <i>Brief Amici Curiae</i> . Motion set for 6/17/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 05/03/2013)
05/03/2013		Set Deadlines as to 95 MOTION for Leave to File <i>Brief Amici Curiae in Support of Defendants</i> . Motion set for 6/3/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 05/03/2013)
05/03/2013	96	MOTION for Leave to File (<i>Notice of Motion</i>) by International Franchise Association. (Attachments: # 1 (Motion for Leave to File Brief Amicus Curiae of the International Franchise Association in Support of Defendant Wyndham Hotels & Resorts' Motion to Dismiss), # 2 Brief (Brief Amicus Curiae of the International Franchise Association in Support of the Defendant Wyndham Hotels & Resorts' Motion to Dismiss), # 3 Text of Proposed Order [Proposed] Order, # 4 Certificate of Service)(WEINER, RACHEL) (Entered: 05/03/2013)
05/03/2013		Set Deadlines as to 96 MOTION for Leave to File (<i>Notice of Motion</i>). Motion set for 6/3/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 05/03/2013)
05/03/2013	97	MOTION for Leave to Appear Pro Hac Vice by International Franchise Association. (Attachments: # 1 (Application for Admission Pro Hac Vice), # 2 (Certification of Rachel L. Weiner in Support of Application for Admission Pro Hac Vice of Jonathan G. Cedarbaum), # 3 (Certification of Jonathan G. Cedarbaum in Support of Application for Admission Pro Hac Vice), # 4 (Certificate of Good Standing: District of Columbia Court of Appeals), # 5 ([Proposed] Order Granting Application for Admission Pro Hac Vice of Jonathan G. Cedarbaum), # 6 (Certificate of Service))(WEINER, RACHEL) (Entered: 05/03/2013)
05/03/2013	98	MOTION for Leave to Appear Pro Hac Vice by International Franchise Association. (Attachments: # 1 (Application for Admission Pro Hac Vice), # 2 (Certification of Rachel L. Weiner in Support of Application for Admission Pro Hac Vice of Heather M. Zachary), # 3 (Certification of Heather M. Zachary in Support of Application for Admission Pro Hac Vice), # 4 (Certificate of Good Standing: District of Columbia Court of Appeals), # 5 ([Proposed] Order Granting Application for Admission Pro Hac Vice of Heather M. Zachary), # 6 (Certificate of Service))(WEINER, RACHEL) (Entered: 05/03/2013)
05/03/2013	99	MOTION for Leave to Appear Pro Hac Vice by International Franchise Association. (Attachments: # 1 (Application for Admission Pro Hac Vice), # 2 (Certification of Rachel L. Weiner in Support of Application for Admission Pro

		Hac Vice of Daniel Aguilar), # 3 (Certification of Daniel Aguilar in Support of Application for Admission Pro Hac Vice), # 4 (Certificate of Good Standing: District of Columbia Court of Appeals), # 5 ([Proposed] Order Granting Application for Admission Pro Hac Vice of Daniel Aguilar), # 6 (Certificate of Service))(WEINER, RACHEL) (Entered: 05/03/2013)
05/06/2013		Set Deadlines as to 97 MOTION for Leave to Appear Pro Hac Vice , 99 MOTION for Leave to Appear Pro Hac Vice , 98 MOTION for Leave to Appear Pro Hac Vice . Motion set for 6/3/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 05/06/2013)
05/06/2013	100	NOTICE by MASTERCARD INTERNATIONAL INCORPORATED re 93 MOTION to Stay <i>Discovery /Non-Party MasterCard International Incorporated's Notice of Joinder in Defendants' Motion to Stay Discovery Pending Resolution of Defendants' Motions to Dismiss</i> (Attachments: # 1 Brief, # 2 Certificate of Service)(VEIT, JACQUELINE) (Entered: 05/06/2013)
05/06/2013	101	RESPONSE in Opposition filed by FEDERAL TRADE COMMISSION re 93 MOTION to Stay <i>Discovery</i> (Attachments: # 1 Exhibit A, # 2 Text of Proposed Order, # 3 Certificate of Service)(ZIMMERMAN, JONATHAN) (Entered: 05/06/2013)
05/10/2013	102	Letter from Kristin Krause Cohen to the Honorable Esther Salas, U.S.D.J.. (Attachments: # 1 Text of Proposed Order)(COHEN, KRISTIN) (Entered: 05/10/2013)
05/10/2013	103	Letter from Jennifer A. Hradil, Esq. enclosing pro hac vice application for Eugene F. Assaf, P.C., Esq. and K. Winn Allen, Esq. (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Declaration of Eugene F. Assaf, P.C., Esq., # 3 Declaration of K. Winn Allen, Esq., # 4 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 05/10/2013)
05/13/2013	104	MEMORANDUM in Support filed by MASTERCARD INTERNATIONAL INCORPORATED re 93 MOTION to Stay <i>Discovery</i> (VEIT, JACQUELINE) (Entered: 05/13/2013)
05/13/2013	105	REPLY BRIEF to Opposition to Motion filed by WYNDHAM HOTEL GROUP LLC, WYNDHAM HOTELS AND RESORTS, LLC, WYNDHAM WORLDWIDE CORPORATION, Wyndham Hotel Management Incorporated re 93 MOTION to Stay <i>Discovery</i> (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Certificate of Service)(HRADIL, JENNIFER) (Entered: 05/13/2013)
05/14/2013	106	ORDER granting pro hac vice admission as to Eugene F. Assaf and K. Winn Allen. Signed by Magistrate Judge Steven C. Mannion on 5/14/13. (jd,) (Entered: 05/14/2013)
05/15/2013	107	CONSENT ORDER modifying briefing schedule for defts' Motions to Dismiss. Signed by Judge Esther Salas on 5/14/13. (sr,) (Entered: 05/15/2013)
05/15/2013		ReSet Deadlines as to 92 MOTION to Dismiss , 91 MOTION to Dismiss . Motion

		set for 6/17/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (sr,) (Entered: 05/15/2013)
05/15/2013	108	Notice of Request by Pro Hac Vice Eugene F. Assaf, P.C., Esq. to receive Notices of Electronic Filings. (Pro Hac Vice fee \$ 150 receipt number 0312-5012459.) (HRADIL, JENNIFER) (Entered: 05/15/2013)
05/15/2013	109	Notice of Request by Pro Hac Vice K. Winn Allen, Esq. to receive Notices of Electronic Filings. (Pro Hac Vice fee \$ 150 receipt number 0312-5012475.) (HRADIL, JENNIFER) (Entered: 05/15/2013)
05/20/2013	110	RESPONSE in Opposition filed by FEDERAL TRADE COMMISSION re 91 MOTION to Dismiss (Attachments: # 1 Certificate of Service)(MCCARRON, KATHERINE) (Entered: 05/20/2013)
05/20/2013	111	RESPONSE in Opposition filed by FEDERAL TRADE COMMISSION re 92 MOTION to Dismiss (Attachments: # 1 Certificate of Service)(MCCARRON, KATHERINE) (Entered: 05/20/2013)
05/23/2013	112	Letter from Jennifer A. Hradil, Esq. enclosing pro hac vice application for Douglas H. Meal, Esq. (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Declaration of Douglas H. Meal, Esq., # 3 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 05/23/2013)
05/28/2013	113	MOTION for Leave to File <i>Amici Curiae Brief in Support of Plaintiff's Opposition to Defendants' Motions to Dismiss</i> by PUBLIC CITIZEN, INC., Chris Jay Hoofnagle. (Attachments: # 1 Brief in Support of Motion for Leave to File Amici Curiae Brief, # 2 Brief in Support of Plaintiff FTC's Opposition to Defendants' Motions to Dismiss, # 3 Text of Proposed Order, # 4 Certificate of Service) (PATTERSON, JEHAN) (Entered: 05/28/2013)
05/28/2013		Set Deadlines as to 113 MOTION for Leave to File <i>Amici Curiae Brief in Support of Plaintiff's Opposition to Defendants' Motions to Dismiss</i> . Motion set for 6/17/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 05/28/2013)
05/30/2013	114	ORDER granting pro hac vice admission as to Douglas H. Meal. Signed by Magistrate Judge Steven C. Mannion on 5/30/13. (jd,) (Entered: 05/30/2013)
06/10/2013	115	REPLY BRIEF to Opposition to Motion filed by WYNDHAM HOTELS AND RESORTS, LLC re 91 MOTION to Dismiss (Attachments: # 1 Certificate of Service)(HRADIL, JENNIFER) (Entered: 06/10/2013)
06/10/2013	116	REPLY BRIEF to Opposition to Motion filed by WYNDHAM HOTEL GROUP LLC, WYNDHAM WORLDWIDE CORPORATION, Wyndham Hotel Management Incorporated re 92 MOTION to Dismiss (Attachments: # 1 Certificate of Service)(HRADIL, JENNIFER) (Entered: 06/10/2013)
06/12/2013	117	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. (HRADIL, JENNIFER) (Entered: 06/12/2013)
06/13/2013	118	Notice of Request by Pro Hac Vice Douglas H. Meal, Esq. to receive Notices of Electronic Filings. (Pro Hac Vice fee \$ 150 receipt number 0312-5063854.) (HRADIL, JENNIFER) (Entered: 06/13/2013)

07/17/2013	119	ORDER granting 96 Motion for Leave to File Brief Amicus Curiae; the Court accepts the proposed amicus brief as formal submission. Signed by Judge Esther Salas on 7/16/13. (jd,) (Entered: 07/17/2013)
07/17/2013	120	ORDER granting 95 Motion for Leave to File Brief Amici Curiae; the Court hereby accepts the proposed amici curiae brief as amici's formal submission. Signed by Judge Esther Salas on 7/17/13. (jd,) (Entered: 07/17/2013)
07/17/2013	121	ORDER granting 94 Motion for Leave to File Brief Amici Curiae; the Court hereby accepts the proposed amici curiae brief as amici's formal brief. Signed by Judge Esther Salas on 7/16/13. (jd,) (Entered: 07/17/2013)
07/17/2013	122	ORDER granting 113 Motion for Leave to File Amici Curiae Brief; the Court hereby accepts the proposed amici curiae brief as amici's formal submission. Signed by Judge Esther Salas on 7/16/13. (jd,) (Entered: 07/17/2013)
07/30/2013	123	CERTIFICATION in Support filed by International Franchise Association re 97 MOTION for Leave to Appear Pro Hac Vice (<i>Supplemental Certification of Jonathan G. Cedarbaum in Support of Application for Admission Pro Hac Vice</i>) (Attachments: # 1 Exhibit : Cover Letter, # 2 Text of Proposed Order)(WEINER, RACHEL) (Entered: 07/30/2013)
07/30/2013	124	CERTIFICATION in Support filed by International Franchise Association re 98 MOTION for Leave to Appear Pro Hac Vice (<i>Supplemental Certification of Heather M. Zachary in Support of Application for Admission Pro Hac Vice</i>) (Attachments: # 1 Exhibit : Cover Letter, # 2 Text of Proposed Order)(WEINER, RACHEL) (Entered: 07/30/2013)
07/30/2013	125	CERTIFICATION in Support filed by International Franchise Association re 99 MOTION for Leave to Appear Pro Hac Vice (<i>Supplemental Certification of Daniel Aguilar in Support of Application for Admission Pro Hac Vice</i>) (Attachments: # 1 Exhibit : Cover Letter, # 2 Text of Proposed Order)(WEINER, RACHEL) (Entered: 07/30/2013)
08/06/2013	126	ORDER granting 99 Motion for Leave to Appear Pro Hac Vice as to Daniel Aguilar. Signed by Magistrate Judge Steven C. Mannion on 8/6/13. (jd,) (Entered: 08/06/2013)
08/06/2013	127	ORDER granting 97 Motion for Leave to Appear Pro Hac Vice as to Jonathan G. Cedarbaum. Signed by Magistrate Judge Steven C. Mannion on 8/6/13. (jd,) (Entered: 08/06/2013)
08/06/2013	128	ORDER granting 98 Motion for Leave to Appear Pro Hac Vice as to Heather M. Zachary. Signed by Magistrate Judge Steven C. Mannion on 8/6/13. (jd,) (Entered: 08/06/2013)
08/07/2013		Pro Hac Vice fee as to Daniel Aguilar, Jonathan G. Cedarbaum and Heather M. Zachary: \$ 450.00, receipt number NEW017713 (jd,) (Entered: 08/07/2013)
09/13/2013		Case Reassigned to Magistrate Judge Joseph A. Dickson. Magistrate Judge Steven C. Mannion no longer assigned to the case. (msd) (Entered: 09/13/2013)
09/23/2013		Set Hearings: Please be advised that Oral Argument for the pending motions to dismiss has been scheduled for 11/7/2013 at 10:00 AM in Newark - Courtroom 5A before Judge Esther Salas. Please mark your calendars accordingly. (ps,)

		(Entered: 09/23/2013)
09/26/2013	129	Letter from Federal Trade Commission. (COHEN, KRISTIN) (Entered: 09/26/2013)
09/30/2013	130	Letter from Jennifer A. Hradil, Esq. to the Hon. Joseph A. Dickson, U.S.M.J. re 129 Letter. (HRADIL, JENNIFER) (Entered: 09/30/2013)
10/08/2013	131	ORDER STAYING CASE. Plaintiff's counsel shall advise the Court, in writing, when they are able to continue litigating this matter. Signed by Magistrate Judge Joseph A. Dickson on 10/7/13. (jd,) (Entered: 10/08/2013)
10/17/2013	132	Letter from Plaintiff re 131 Order Staying Case. (ZIMMERMAN, JONATHAN) (Entered: 10/17/2013)
10/18/2013		Set Hearings: Please be advised that a Telephone Conference has been scheduled for 10/21/2013 at 4:00 PM before Judge Esther Salas. Plaintiff's counsel shall coordinate the conference call. (ps,) (Entered: 10/18/2013)
10/21/2013	133	Minute Entry for proceedings held before Judge Esther Salas: Telephone Conference held on 10/21/2013. Oral Argument for pending motions to dismiss is scheduled for 11/7/2013 at 10:00 AM before Judge Esther Salas. (ps,) (Entered: 10/22/2013)
11/07/2013	134	Minute Entry for proceedings held before Judge Esther Salas: Motion Hearing held on 11/7/2013. 91 MOTION to Dismiss filed by WYNDHAM HOTELS AND RESORTS, LLC, 92 MOTION to Dismiss filed by Wyndham Hotel Management Incorporated, WYNDHAM HOTEL GROUP LLC, WYNDHAM WORLDWIDE CORPORATION. Decision Reserved on Motions to Dismiss. 93 MOTION to Stay <i>Discovery</i> filed by Wyndham Hotel Management Incorporated, WYNDHAM HOTEL GROUP LLC, WYNDHAM HOTELS AND RESORTS, LLC, WYNDHAM WORLDWIDE CORPORATION. Ordered Motion to Stay <i>Discovery</i> denied. (Court Reporter Lynne Johnson.) (ps,) (Entered: 11/08/2013)
11/08/2013	135	TEXT ORDER: The parties are advised that an Initial Conference is set for 1/7/2014 02:30 PM in Newark - Courtroom 2D before Magistrate Judge Joseph A. Dickson.SO ORDERED by Magistrate Judge Joseph A. Dickson on 11/8/13. (nm,) (Entered: 11/08/2013)
11/12/2013	136	ORDER denying 93 Motion to Stay <i>Discovery</i> . Signed by Judge Esther Salas on 11/12/13. (jd,) (Entered: 11/12/2013)
11/12/2013	137	JUDGE ESTHER SALAS'S GENERAL PRETRIAL AND TRIAL PROCEDURES. (ps,) (Entered: 11/12/2013)
11/19/2013	138	MOTION for Leave to Appear Amicus Curiae by CHARLES LEE THOMASON. (Attachments: # 1 Text of Proposed Order, # 2 Brief, # 3 Declaration, # 4 Exhibit Exhibit 1 to Declaration, # 5 Exhibit Exhibit 2 to Declaration)(THOMASON, CHARLES) (Entered: 11/19/2013)
11/20/2013		Set Deadlines as to 138 MOTION for Leave to Appear Amicus Curiae . Motion set for 12/16/2013 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 11/20/2013)

12/02/2013	139	Transcript of Proceedings held on NOVEMBER 7, 2013, before Judge ESTHER SALAS,. Court Reporter/Transcriber Lynne Johnson (chjlaw@aol.com/609-896-1836).MOTIONS TO DISMISS. NOTICE REGARDING REDACTION OF TRANSCRIPTS: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this Transcript. Redaction Request due 12/23/2013. Redacted Transcript Deadline set for 1/2/2014. Release of Transcript Restriction set for 3/3/2014.(Main Document 139 replaced on 12/5/2013) (ek). (Entered: 12/02/2013)
12/02/2013	140	RESPONSE in Opposition filed by FEDERAL TRADE COMMISSION re 138 MOTION for Leave to Appear Amicus Curiae (Attachments: # 1 Certificate of Service, # 2 Text of Proposed Order)(ARIAS, ANDREA) (Entered: 12/02/2013)
12/03/2013	141	REPLY BRIEF to Opposition to Motion filed by CHARLES LEE THOMASON re 138 MOTION for Leave to Appear Amicus Curiae (THOMASON, CHARLES) (Entered: 12/04/2013)
12/13/2013	142	Letter from Jennifer A. Hradil, Esq. enclosing supplemental authority. (Attachments: # 1 Exhibit Number 1)(HRADIL, JENNIFER) (Entered: 12/13/2013)
12/18/2013	143	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. (Attachments: # 1 Joint Discovery Plan, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3)(HRADIL, JENNIFER) (Entered: 12/18/2013)
12/19/2013	144	Letter from Katherine E. McCarron, Esq. regarding Supplemental Authority re 142 Letter. (MCCARRON, KATHERINE) (Entered: 12/19/2013)
12/20/2013		Set Hearings: Telephone Conference scheduled for 12/23/2013 at 2:00 PM before Judge Esther Salas. Plaintiff's counsel shall coordinate the conference call. (ps,) (Entered: 12/20/2013)
12/23/2013	145	Letter from Jennifer A. Hradil, Esq. enclosing pro hac vice application of David T. Cohen, Esq. (Attachments: # 1 Declaration of David T. Cohen, Esq., # 2 Declaration of Jennifer A. Hradil, Esq., # 3 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 12/23/2013)
12/23/2013		Minute Entry for proceedings held before Judge Esther Salas: Telephone Conference held on 12/23/2013. (ps,) (Entered: 12/27/2013)
12/27/2013	146	ORDER that the parties shall submit a supplemental, joint letter-brief to the Court of no more than 10 pages (5 pages each) by January 21, 2014, as discussed during the December 23, 2013 conference; that, for administrative purposes, the two motions, (D.E. Nos. 91 & 92), will be held in abeyance pending the Court's review of the parties' supplemental letter-brief. Signed by Judge Esther Salas on 12/27/13. (jd,) (Entered: 12/27/2013)
01/02/2014	147	Consent ORDER granting pro hac vice admission as to David T. Cohen. Signed by Magistrate Judge Joseph A. Dickson on 1/2/14. (jd,) (Entered: 01/02/2014)
01/07/2014		Minute Entry for proceedings held before Magistrate Judge Joseph A. Dickson: Initial Pretrial Conference held on 1/7/2014. (nm,) (Entered: 01/07/2014)
01/07/2014	148	Pretrial SCHEDULING ORDER: Settlement Conference set for 4/28/2014 10:30 AM before Magistrate Judge Joseph A. Dickson. Fact Discovery due by

		9/8/2014.. Signed by Magistrate Judge Joseph A. Dickson on 1/7/14. (jd,) (Entered: 01/08/2014)
01/08/2014	149	Notice of Request by Pro Hac Vice David T. Cohen, Esq. to receive Notices of Electronic Filings. (Pro Hac Vice fee \$ 150 receipt number 0312-5441556.) (HRADIL, JENNIFER) (Entered: 01/08/2014)
01/16/2014	150	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. (HRADIL, JENNIFER) (Entered: 01/16/2014)
01/17/2014	151	Letter from Katherine E. McCarron, Esq., enclosing Supplemental Authority. (Attachments: # 1 Exhibit)(MCCARRON, KATHERINE) (Entered: 01/17/2014)
01/21/2014	152	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. re 146 Order,. (Attachments: # 1 Brief Joint Letter Brief containing supplemental authority)(HRADIL, JENNIFER) (Entered: 01/21/2014)
01/22/2014	153	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. requesting leave to file a five-page letter brief.. (HRADIL, JENNIFER) (Entered: 01/22/2014)
01/23/2014	154	ORDER that the Court accepts Plaintiff's recent submission of supplemental authority, (D.E. No. 151); that Defendants' request for leave to submit a five-page letter brief by January 29, 2014, (D.E. No. 153), is GRANTED, etc. Signed by Judge Esther Salas on 1/23/14. (jd,) (Entered: 01/23/2014)
01/27/2014	155	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. enclosing courtesy copies of supplemental authority re 152 Letter. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(HRADIL, JENNIFER) (Entered: 01/27/2014)
01/29/2014	156	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. responding to the FTC's notice of supplemental authority. re 151 Letter, 152 Letter. (Attachments: # 1 Exhibit A to J. Hradil Letter, # 2 Exhibit B to J. Hradil Letter, # 3 Exhibit C to J. Hradil Letter, # 4 Exhibit D to J. Hradil Letter) (HRADIL, JENNIFER) (Entered: 01/29/2014)
02/04/2014	157	NOTICE of Change of Address by JENNIFER A. HRADIL (HRADIL, JENNIFER) (Entered: 02/04/2014)
02/06/2014	158	Letter from Jennifer A. Hradil, Esq. to the Honorable Esther Salas, U.S.D.J. enclosing supplemental authorities. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (HRADIL, JENNIFER) (Entered: 02/06/2014)
02/07/2014	159	Letter from Kevin H. Moriarty. (Attachments: # 1 Text of Proposed Order) (MORIARTY, KEVIN) (Entered: 02/07/2014)
02/07/2014	160	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 159 Letter. (HRADIL, JENNIFER) (Entered: 02/07/2014)
02/10/2014	161	NOTICE of Appearance by ALLISON MICHELLE LEFRAK on behalf of FEDERAL TRADE COMMISSION (LEFRAK, ALLISON) (Entered: 02/10/2014)
02/10/2014	162	TEXT ORDER - On or before 2/14/14, Plaintiff shall electronically file a single

		letter, of no more than 7 pages, setting forth any and all current discovery disputes that the parties were unable to resolve through the meet and confer process. Defendants may file a response, of no more than 7 pages, on or before 2/21/14. No further briefing shall be submitted without leave of Court. An in-person status conference is scheduled for 3/21/14 at 2:00 p.m. in Newark, Courtroom 2D before Magistrate Judge Dickson. SO ORDERED by Joseph A. Dickson, U.S.M.J. (ps,) (Entered: 02/10/2014)
02/10/2014	163	AMENDED TEXT ORDER: The Text Order dated 2/10/14 is hereby amended to read as follows: On or before 2/14/14, Plaintiff and Defendants may each electronically file a single letter, of no more than 7 pages, setting forth their respective positions on any all current discovery disputes that the parties were unable to resolve through the meet and confer process. Plaintiff and Defendants may each file a response to the other's submission, of no more than 7 pages, on or before 2/21/14. No further briefing shall be submitted without leave of Court. An in-person status conference is scheduled for 3/21/14 at 2:00 p.m. in Newark, Courtroom 2D before Magistrate Judge Dickson. SO ORDERED by Magistrate Judge Joseph A. Dickson on 2/10/14. (nm,) (Entered: 02/11/2014)
02/12/2014	164	NOTICE of Appearance by JAMES ALAN TRILLING on behalf of FEDERAL TRADE COMMISSION (TRILLING, JAMES) (Entered: 02/12/2014)
02/14/2014	165	MOTION to Seal by FEDERAL TRADE COMMISSION. (Attachments: # 1 Brief in support of Motion to Seal, # 2 Declaration in support of Motion to Seal, # 3 Exhibit Redacted Letter re Discovery Disputes, # 4 Exhibit Declaration in Support of Letter re Discovery Disputes, # 5 Exhibit A, # 6 Exhibit B, # 7 Exhibit C, # 8 Exhibit D, # 9 Exhibit E, # 10 Exhibit F (confidential materials), # 11 Exhibit G, # 12 Exhibit H, # 13 Exhibit I (confidential materials), # 14 Exhibit J (confidential materials), # 15 Exhibit K (confidential materials), # 16 Exhibit L (confidential materials), # 17 Text of Proposed Order)(MORIARTY, KEVIN) (Entered: 02/14/2014)
02/14/2014	166	Letter from Federal Trade Commission re Discovery Disputes. (Attachments: # 1 Declaration in support of Letter re Discovery Issues, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F (confidential materials), # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I (confidential materials), # 11 Exhibit J (confidential materials), # 12 Exhibit K (confidential materials), # 13 Exhibit L (confidential materials))(MORIARTY, KEVIN) (Entered: 02/14/2014)
02/14/2014	167	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. regarding discovery disputes re 163 Order,,,. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F) (HRADIL, JENNIFER) (Entered: 02/14/2014)
02/16/2014		Set Deadlines as to 165 MOTION to Seal . Motion set for 3/17/2014 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 02/16/2014)
02/21/2014	168	Letter from Kevin H. Moriarty re 159 Letter. (MORIARTY, KEVIN) (Entered: 02/21/2014)
02/21/2014	169	MOTION to Seal by FEDERAL TRADE COMMISSION. (Attachments: # 1 Brief, # 2 Declaration of Kevin H. Moriarty, # 3 Exhibit Letter (redacted), # 4

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		Exhibit Declaration of Jonathan E. Zimmerman, # 5 Exhibit A (confidential materials), # 6 Exhibit B (confidential materials), # 7 Exhibit C, # 8 Exhibit D, # 9 Exhibit E, # 10 Exhibit F, # 11 Exhibit G, # 12 Exhibit H (confidential materials), # 13 Text of Proposed Order)(MORIARTY, KEVIN) (Entered: 02/21/2014)
02/21/2014	170	Letter from Jonathan E. Zimmerman re 167 Letter,. (Attachments: # 1 Declaration of Jonathan E. Zimmerman, # 2 Exhibit A (confidential materials), # 3 Exhibit B (confidential materials), # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H (confidential materials))(ZIMMERMAN, JONATHAN) (Entered: 02/21/2014)
02/21/2014	171	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 166 Letter,. (Attachments: # 1 Declaration Jennifer A. Hradil, Esq., # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F)(HRADIL, JENNIFER) (Entered: 02/21/2014)
02/23/2014		Set Deadlines as to 169 MOTION to Seal . Motion set for 3/17/2014 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 02/23/2014)
02/24/2014	172	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. (HRADIL, JENNIFER) (Entered: 02/24/2014)
02/25/2014	173	TEXT ORDER: Per the request of the parties, the in person settlement conference scheduled for 4/28/14 has been adjourned to 5/6/14 at 11:00 a.m. SO ORDERED by Magistrate Judge Joseph A. Dickson on 2/25/14. (nm,) (Entered: 02/25/2014)
02/28/2014	174	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. (Attachments: # 1 Declaration of Lynn A. Feldman, # 2 Exhibit A (Proposed Form of Stipulated Discovery Confidentiality Order))(HRADIL, JENNIFER) (Entered: 02/28/2014)
02/28/2014	175	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 165 MOTION to Seal . (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Proposed Findings of Fact and Conclusions of Law)(HRADIL, JENNIFER) (Entered: 02/28/2014)
03/03/2014	176	Stipulated Discovery Confidentiality Order. Signed by Magistrate Judge Joseph A. Dickson on 3/3/14. (jd,) (Entered: 03/03/2014)
03/07/2014	177	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 169 MOTION to Seal . (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Proposed Findings of Fact and Conclusions of Law)(HRADIL, JENNIFER) (Entered: 03/07/2014)
03/21/2014		Minute Entry for proceedings held before Magistrate Judge Joseph A. Dickson: Status Conference held on 3/21/2014. (CD #ECR.) (nm,) (Entered: 03/24/2014)
03/26/2014	178	Transcript of Proceedings held on March 21, 2014, before Judge JOSEPH A. DICKSON. Court Reporter/Transcriber KLJ Transcription Service/ Terry L. DeMarco (201-703-1670).STATUS CONFERENCE. NOTICE REGARDING REDACTION OF TRANSCRIPTS: The parties have seven (7) calendar days to file with the Court a Notice of Intent to Request Redaction of this Transcript. Redaction Request due 4/16/2014. Redacted Transcript Deadline set for 4/28/2014. Release of Transcript Restriction set for 6/24/2014. (ek) (Main

		Document 178 replaced on 4/2/2014) (ek). (Entered: 03/26/2014)
03/28/2014	179	ORDER granting 165 Motion to Seal. Signed by Magistrate Judge Joseph A. Dickson on 3/27/14. (jd,) (Entered: 03/28/2014)
04/04/2014	180	NOTICE by FEDERAL TRADE COMMISSION of <i>Ex Parte and In Camera Filing</i> (ZIMMERMAN, JONATHAN) (Entered: 04/04/2014)
04/07/2014	181	OPINION. Signed by Judge Esther Salas on 4/7/14. (jd,) (Entered: 04/07/2014)
04/07/2014	182	ORDER that the motion to dismiss by Defendant Wyndham Hotels & Resorts LLC, (D.E. No. 91), is DENIED. Signed by Judge Esther Salas on 4/7/14. (jd,) (Entered: 04/07/2014)
04/08/2014	183	Letter from Kristin Cohen, Esq.. (Attachments: # 1 Text of Proposed Order, # 2 Text of Proposed Order)(LEFRAK, ALLISON) (Entered: 04/08/2014)
04/09/2014	184	ORDER Regarding Discovery Issues. Signed by Magistrate Judge Joseph A. Dickson on 4/9/14. (jd,) (Entered: 04/09/2014)
04/11/2014	185	ORDER granting 169 Motion to Seal. Signed by Magistrate Judge Joseph A. Dickson on 4/11/14. (jd,) (Entered: 04/14/2014)
04/16/2014	186	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(HRADIL, JENNIFER) (Entered: 04/16/2014)
04/16/2014	187	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. (Attachments: # 1 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 04/16/2014)
04/17/2014	188	MOTION Certify Order Denying Motion to Dismiss For Interlocutory Appeal re 181 Opinion, 182 Order by WYNDHAM HOTELS AND RESORTS, LLC. (Attachments: # 1 Brief in Support of Wyndham Hotels and Resorts LLC's Motion to Certify Order Denying Motion to Dismiss For Interlocutory Appeal, # 2 Text of Proposed Order, # 3 Certificate of Service)(HRADIL, JENNIFER) (Entered: 04/17/2014)
04/17/2014	189	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. requesting leave to file a motion for partial summary judgment. (HRADIL, JENNIFER) (Entered: 04/17/2014)
04/20/2014		Set Deadlines as to 188 MOTION Certify Order Denying Motion to Dismiss For Interlocutory Appeal re 181 Opinion, 182 Order . Motion set for 5/19/2014 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 04/20/2014)
04/21/2014		Set Hearings: Please be advised that a Telephone Conference has been scheduled for 4/23/2014 at 2:00 PM before Judge Esther Salas. Defense counsel shall coordinate the conference call. (ps,) (Entered: 04/21/2014)
04/21/2014	190	MOTION for Leave to Appear Amicus Curiae and filed <i>brief supporting motion Dkt. #188</i> by CHARLES LEE THOMASON. (Attachments: # 1 Text of Proposed Order, # 2 Exhibit Proposed Amicus Brief Supporting a Section 1292(b) certification, # 3 Exhibit Exhibit to Brief - Legislative History of Section 1292(b)) (THOMASON, CHARLES) (Entered: 04/21/2014)

04/21/2014		Set Deadlines as to 190 MOTION for Leave to Appear Amicus Curiae <i>and filed brief supporting motion Dkt. #188</i> . Motion set for 5/19/2014 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 04/21/2014)
04/22/2014	191	ORDER that Wyndham Hotels and Resorts, LLC's time to file a responsive pleading is hereby extended until 14 days after the Court rules upon Wyndham Worldwide Corporation, Wyndham Hotel Group, LLC, and Wyndham Hotel Management, Inc.'s motion to dismiss. Signed by Magistrate Judge Joseph A. Dickson on 4/21/14. (jd,) (Entered: 04/22/2014)
04/23/2014	193	Minute Entry for proceedings held before Judge Esther Salas: Telephone Conference held on 4/23/2014. (ps,) (Entered: 04/25/2014)
04/24/2014	192	MOTION for Leave to File <i>Brief Amici Curiae in Support of Defendants</i> by Chamber of Commerce of the United States. (Attachments: # 1 Memorandum in Support of Motion for Leave to File Brief Amici Curiae, # 2 Proposed Brief Amici Curiae, # 3 Proposed Order)(MAROTTA, SEAN) (Entered: 04/24/2014)
04/25/2014		Set Deadlines as to 192 MOTION for Leave to File <i>Brief Amici Curiae in Support of Defendants</i> . Motion set for 5/19/2014 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 04/25/2014)
04/28/2014	194	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 189 Letter. (HRADIL, JENNIFER) (Entered: 04/28/2014)
04/30/2014	195	TEXT ORDER: The Court has scheduled an in-person settlement conference for 5/6/2014 at 11 am in Courtroom 2D- Newark. All parties with full settlement authority are required to attend the conference. Confidential position papers no longer than 5 pages may be faxed by 5/5/2014 to 973-645-4549. SO ORDERED by Magistrate Judge Joseph A. Dickson on 4/30/14. (nm,) (Entered: 04/30/2014)
05/05/2014	196	BRIEF in Opposition filed by FEDERAL TRADE COMMISSION re 188 MOTION Certify Order Denying Motion to Dismiss For Interlocutory Appeal re 181 Opinion, 182 Order (TRILLING, JAMES) (Entered: 05/05/2014)
05/06/2014		Minute Entry for proceedings held before Magistrate Judge Joseph A. Dickson: Settlement Conference held on 5/6/2014. (nm,) (Entered: 05/06/2014)
05/12/2014	197	REPLY BRIEF to Opposition to Motion filed by WYNDHAM HOTELS AND RESORTS, LLC re 188 MOTION Certify Order Denying Motion to Dismiss For Interlocutory Appeal re 181 Opinion, 182 Order (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Exhibit A, # 3 Exhibit B, # 4 Certificate of Service) (HRADIL, JENNIFER) (Entered: 05/12/2014)
05/13/2014	198	TEXT ORDER: The parties are advised that an in person settlement conference is scheduled for 6/25/14 at 2:30 p.m. SO ORDERED by Magistrate Judge Joseph A. Dickson on 5/13/14. (nm,) (Entered: 05/13/2014)
05/23/2014	199	ORDER regarding Discovery Issues. Signed by Magistrate Judge Joseph A. Dickson on 5/23/14. (jd,) (Entered: 05/23/2014)
06/12/2014	200	NOTICE by FEDERAL TRADE COMMISSION of <i>Withdrawal of Attorney</i>

		(ZIMMERMAN, JONATHAN) (Entered: 06/12/2014)
06/23/2014	201	OPINION. Signed by Judge Esther Salas on 6/23/14. (jd,) (Entered: 06/23/2014)
06/23/2014	202	ORDER that the motion to dismiss by Defendants Wyndham Worldwide Corporation, Wyndham Hotel Group, LLC, and Wyndham Hotel Management, Inc., (D.E. No. 92), is DENIED. Signed by Judge Esther Salas on 6/23/14. (jd,) (Entered: 06/23/2014)
06/23/2014	203	MEMORANDUM OPINION and ORDER that Defendant Wyndham Hotels and Resorts, LLC's motion, (D.E. No. 188), for an order certifying this Court's April 7, 2014 Order, (D.E. No. 182), for interlocutory review is hereby GRANTED, etc.; that Defendant Wyndham Hotels and Resorts, LLC shall file a Petition for Permission to Appeal with the United States Court of Appeals for the Third Circuit in accordance with Federal Rule of Appellate Procedure 5(a)(2); that the motions requesting leave for certain individuals or entities to file brief amici curiae in support of Defendant Wyndham Hotels and Resorts, LLCs motion for an order certifying this Court's April 7, 2014 Order, (D.E. Nos. 190 & 192), are DENIED. Signed by Judge Esther Salas on 6/23/14. (jd,) (Entered: 06/23/2014)
06/26/2014		Minute Entry for proceedings held before Magistrate Judge Joseph A. Dickson: Settlement Conference held on 6/25/2014. (nm,) (Entered: 06/26/2014)
06/27/2014	204	Letter from Jennifer A. Hradil to the Honorable Joseph A. Dickson, U.S.M.J. enclosing application seeking the pro hac vice admission of Jason M. Wilcox, Esq.. (Attachments: # 1 Declaration of Jennifer A. Hradil in support of Application for Pro Hac Vice Admission, # 2 Declaration of Jason M. Wilcox, Esq. in support of Application for Pro Hac Vice Admission, # 3 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 06/27/2014)
06/30/2014	205	ORDER that Charles L. Thomason's Motion for Leave to Appear as Amicus Curiae, (D.E. No. 138), is DENIED. Signed by Judge Esther Salas on 6/30/14. (jd,) (Entered: 06/30/2014)
07/02/2014	206	Consent ORDER granting Pro Hac Vice admission as to Jason M. Wilcox. Signed by Magistrate Judge Joseph A. Dickson on 7/2/14. (jd,) (Entered: 07/02/2014)
07/02/2014	207	Notice of Request by Pro Hac Vice Jason M. Wilcox to receive Notices of Electronic Filings. (HRADIL, JENNIFER) (Entered: 07/02/2014)
07/03/2014		CLERK'S QUALITY CONTROL MESSAGE - Please be advised that the Request for Electronic Notification of Pro Hac Vice Counsel submitted by J. Hradil on 7/2/14 cannot be processed until pro hac counsel's application fee has been paid. Please review the Electronic Notification for Pro Hac Vice instructions on our website. Counsel is advised to resubmit the Request for Electronic Notification of Pro Hac Vice Counsel once payment has been recorded. This message is for informational purposes only. (jd,) (Entered: 07/03/2014)
07/03/2014	208	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. requesting additional time for Defendants to file answer. (Attachments: # 1 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 07/03/2014)
07/03/2014	209	Notice of Request by Pro Hac Vice Jason M. Wilcox to receive Notices of Electronic Filings. (Pro Hac Vice fee \$ 150 receipt number 0312-5790076.)

		(HRADIL, JENNIFER) (Entered: 07/03/2014)
07/06/2014		Pro Hac Vice counsel, Jason M. Wilcox, has been added to receive Notices of Electronic Filing. Pursuant to L.Civ.R. 101.1, only local counsel are entitled to sign and file papers, enter appearances and receive payments on judgments, decrees or orders. (jd,) (Entered: 07/06/2014)
07/07/2014	210	ORDER that Wyndham's time to file a responsive pleading is hereby extended for a period of 10 days, through and including July 17, 2014. Signed by Magistrate Judge Joseph A. Dickson on 7/7/14. (jd,) (Entered: 07/07/2014)
07/07/2014		Answer Due Deadline Update - The document 210 Order submitted by WYNDHAM WORLDWIDE CORPORATION, WYNDHAM HOTELS AND RESORTS, LLC, WYNDHAM HOTEL GROUP LLC, Wyndham Hotel Management Incorporated has been GRANTED. The answer due date has been set for 7/17/14. (jd,) (Entered: 07/07/2014)
07/14/2014	211	Letter from Kevin H. Moriarty re 148 Scheduling Order. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Text of Proposed Order)(MORIARTY, KEVIN) (Entered: 07/14/2014)
07/17/2014	212	<i>Defendants'</i> ANSWER to Amended Complaint by WYNDHAM HOTEL GROUP LLC, WYNDHAM HOTELS AND RESORTS, LLC, WYNDHAM WORLDWIDE CORPORATION, Wyndham Hotel Management Incorporated. (HRADIL, JENNIFER) (Entered: 07/17/2014)
07/18/2014	213	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 211 Letter. (Attachments: # 1 Exhibit A)(HRADIL, JENNIFER) (Entered: 07/18/2014)
07/23/2014	214	Letter from Thomas Burger to Judge Dickson. (jd,) (Entered: 07/23/2014)
07/23/2014	215	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 214 Letter. (HRADIL, JENNIFER) (Entered: 07/23/2014)
07/24/2014	216	Letter ORDER instructing the Parties and Mr. Burger to go forward with the deposition as scheduled. Additionally however, the Parties are instructed to discuss with Mr. Burger, an appropriate form of relief in connection with his time off from work and other expenses. If this issue is not resolved to everyone's satisfaction, Mr. Burger shall be permitted to file a formal application, proceeding prose, to this Court. Signed by Magistrate Judge Joseph A. Dickson on 7/23/14. (jd,) (Entered: 07/24/2014)
07/29/2014	217	ORDER of USCA granting Petition for Leave of Appeal (ca3cjc) (Entered: 07/29/2014)
07/29/2014	218	NOTICE OF INTERLOCUTORY APPEAL by WYNDHAM HOTELS AND RESORTS, LLC. (Pursuant to 28 USC Section 1292(b)) Filing fee \$ 505, receipt number NEW20831. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (db,) Modified on 8/6/2014 (db). (Entered: 08/05/2014)
08/05/2014	219	Letter from Thomas Burger to Magistrate Judge Dickson. (sr,) (Entered: 08/05/2014)

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		08/07/2014)
08/07/2014	220	USCA Case Number 14-3514 for 218 Notice of Appeal (USCA), filed by WYNDHAM HOTELS AND RESORTS, LLC. USCA Case Manager Caitlyn (CJG) (Document Restricted - Court Only) (ca3cjh) (Entered: 08/07/2014)
08/07/2014	221	Letter from Kevin H. Moriarty re 211 Letter. (MORIARTY, KEVIN) (Entered: 08/07/2014)
08/07/2014	222	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 219 Letter. (HRADIL, JENNIFER) (Entered: 08/07/2014)
08/11/2014	223	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 221 Letter. (HRADIL, JENNIFER) (Entered: 08/11/2014)
08/13/2014	224	AMENDED SCHEDULING ORDER re: extensions of the discovery deadlines. Fact Discovery shall remain open through 12/3/2014; etc. Signed by Magistrate Judge Joseph A. Dickson on 8/13/14. (sr,) (Entered: 08/13/2014)
08/13/2014	227	LETTER ORDER regarding Mr. Burger's deposition. Signed by Magistrate Judge Joseph A. Dickson on 8/8/2014. (nr,) (Entered: 08/14/2014)
08/13/2014	228	LETTER ORDER: In person Status Conference set for 10/9/2014 10:30 AM before Magistrate Judge Joseph A. Dickson. Fact Discovery due by 12/3/2014. etc.. Signed by Magistrate Judge Joseph A. Dickson on 8/12/2014. (nr,) (Entered: 08/14/2014)
08/14/2014	225	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. seeking to compel discovery. (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E)(HRADIL, JENNIFER) (Entered: 08/14/2014)
08/14/2014	226	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. seeking a protective order. (Attachments: # 1 Declaration of Jennifer A. Hradil, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C)(HRADIL, JENNIFER) (Entered: 08/14/2014)
08/15/2014	229	Letter from Jennifer A. Hradil, Esq. to The Honorable Joseph A. Dickson, U.S.M.J. seeking admission pro hac vice of Kate E. Wooler.. (Attachments: # 1 Declaration of Jennifer A. Hradil, Esq., # 2 Declaration of Kate E. Wooler, Esq., # 3 Text of Proposed Order)(HRADIL, JENNIFER) (Entered: 08/15/2014)
08/15/2014	230	Letter from James A. Trilling to the Honorable Joseph A. Dickson re 225 Letter,. (Attachments: # 1 Declaration of James A. Trilling, # 2 Exhibit)(TRILLING, JAMES) (Entered: 08/15/2014)
08/18/2014	231	Letter from Jennifer A. Hradil, Esq. to The Honorable Joseph A. Dickson, U.S.M.J. requesting leave to file reply. re 230 Letter. (Attachments: # 1 Exhibit A - Proposed Reply)(HRADIL, JENNIFER) (Entered: 08/18/2014)
08/25/2014	232	CONSENT ORDER Granting Pro Hac Vice Admission as to KATE E. WOOLER, ESQ.. Signed by Magistrate Judge Joseph A. Dickson on 8/25/2014. (ld,) (Entered: 08/25/2014)
08/26/2014	233	Letter from Kevin H. Moriarty re 226 Letter. (Attachments: # 1 Declaration, # 2

		Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E) (MORIARTY, KEVIN) (Entered: 08/26/2014)
08/26/2014	234	MOTION to Seal by FEDERAL TRADE COMMISSION. (Attachments: # 1 Brief, # 2 Declaration, # 3 Exhibit Redacted Letter, # 4 Exhibit A, # 5 Exhibit B, # 6 Exhibit C, # 7 Exhibit D, # 8 Exhibit E, # 9 Text of Proposed Order) (MORIARTY, KEVIN) (Entered: 08/26/2014)
08/27/2014		Set Deadlines as to 234 MOTION to Seal . Motion set for 10/6/2014 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 08/27/2014)
08/28/2014	235	Notice of Request by Pro Hac Vice Kate E. Wooler, Esq. to receive Notices of Electronic Filings. (Pro Hac Vice fee \$ 150 receipt number 0312-5898012.) (HRADIL, JENNIFER) (Entered: 08/28/2014)
08/29/2014		Pro Hac Vice counsel, KATE E. WOOLER, has been added to receive Notices of Electronic Filing. Pursuant to L.Civ.R. 101.1, only local counsel are entitled to sign and file papers, enter appearances and receive payments on judgments, decrees or orders. (jd,) (Entered: 08/29/2014)
09/05/2014	236	Letter dated 8/18/14 from Thomas Burger to Judge Dickson w/copy of letter from Judge Dickson attached. (jd,) (Entered: 09/05/2014)
09/16/2014	237	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 233 Letter. (Attachments: # 1 Exhibit A)(HRADIL, JENNIFER) (Entered: 09/16/2014)
09/26/2014	238	MOTION to Seal by FEDERAL TRADE COMMISSION. (Attachments: # 1 Brief, # 2 Declaration, # 3 Exhibit Redacted Letter from Kevin Moriarty, # 4 Exhibit Exhibits 1-8, # 5 Text of Proposed Order)(MCCARRON, KATHERINE) (Entered: 09/26/2014)
09/26/2014	239	Letter from Kevin H. Moriarty. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8) (MCCARRON, KATHERINE) (Entered: 09/26/2014)
09/28/2014		Set Deadlines as to 238 MOTION to Seal . Motion set for 10/20/2014 before Judge Esther Salas. The motion will be decided on the papers. No appearances required unless notified by the court. (jd,) (Entered: 09/28/2014)
09/30/2014	240	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. re 236 Letter. (HRADIL, JENNIFER) (Entered: 09/30/2014)
10/01/2014	241	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. (HRADIL, JENNIFER) (Entered: 10/01/2014)
10/02/2014	242	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J.. (Attachments: # 1 Exhibit A)(HRADIL, JENNIFER) (Entered: 10/02/2014)
10/02/2014	243	Letter from Jennifer A. Hradil, Esq. to the Honorable Joseph A. Dickson, U.S.M.J. (Attachments: # 1 Proposed Agenda)(HRADIL, JENNIFER) (Entered: 10/02/2014)

CERTIFICATE OF SERVICE

I, Eugene F. Assaf, P.C., hereby certify that on October 6, 2014, I caused four (4) copies of the Joint Appendix, Volume 2, to be dispatched by Federal Express Overnight delivery to the Clerk of the Court for the United States Court of Appeals for the Third Circuit, and filed an electronic copy of the appendix via CM/ECF. I also caused a copy of the appendix to be served electronically on the following counsel for Appellee:

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October 6, 2014

/s/ Eugene F. Assaf

Eugene F. Assaf, P.C.

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