Jennifer A. Hradil, Esq.
Justin T. Quinn, Esq.
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102-5310
(973) 596-4500

Eugene F. Assaf, P.C., DC Bar 449778
Pro Hac Vice
K. Winn Allen, DC Bar 1000590
Pro Hac Vice
KIRKLAND & ELLIS LLP
655 Fifteenth St. N.W.
Washington, D.C. 20005
(202) 879-5078
(*admitted pro hac vice*)

Douglas H. Meal, MA Bar 340971
Pro Hac Vice
David T. Cohen, MA Bar 670153
Pro Hac Vice
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, MA 02199-3600
(617) 951-7517
(*admitted pro hac vice*)

Attorneys for Defendants

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

FEDERAL TRADE COMMISSION *Plaintiff*, v. WYNDHAM WORLDWIDE CORPORATION, et al., *Defendants*.	Civil Action No.: 2:13-cv-01887-ES-JAD **DEFENDANT'S MOTION TO CERTIFY ORDER DENYING MOTION TO DISMISS (ECF. NO. 182) FOR INTERLOCUTORY APPEAL** Return Date: May 19, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

THIS COURT SHOULD CERTIFY ITS ORDER DENYING WYNDHAM'S MOTION TO DISMISS FOR INTERLOCUTORY APPEAL. 2

A. The Order Resolved Pure Questions Of Law. 3

B. There Are Substantial Grounds For Difference Of Opinion Regarding The Issues Addressed In The Order and Accompanying Opinion. 6

C. Interlocutory Review Would Materially Advance The Ultimate Termination Of This Litigation. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Ahrenholz v. Bd. of Trs. of the Univ. of Ill.,
219 F.3d 674 (7th Cir. 2000) 4

Atl. & Gulf Stevedores, Inc. v. OSHRC,
534 F.2d 541 (3d Cir. 1976) 4

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012) 8

Coyne Beahm, Inc. v. FDA,
966 F. Supp. 1374 (M.D.N.C. 1997) 5

Cuttic v. Crozer-Chester Med. Ctr.,
806 F. Supp. 2d 796 (E.D. Pa. 2011) 7

Donahue v. R.I. Dep't of Mental Health,
632 F. Supp. 1456 (D.R.I. 1986) 5

Dravo Corp. v. OSHRC,
613 F.2d 1227 (3d Cir. 1980) 9

Gen. Elec. Co. v. EPA,
53 F.3d 1324 (D.C. Cir. 1995) 8

In re Enron Creditors Recovery Corp.,
2009 WL 3349471 (S.D.N.Y. Oct. 16, 2009) 7

In re LabMD,
2014 WL 253518 (F.T.C. Jan. 16, 2014) 10, 12

In re Oxford Health Plans, Inc.,
182 F.R.D. 51 (S.D.N.Y. 1998) 11, 12

In re Trace Int'l Holdings, Inc.,
2009 WL 3398515 (S.D.N.Y. Oct. 21, 2009) 7, 8

Katz v. Carte Blanche Corp.,
496 F.2d 747 (3d Cir. 1974) 3, 11, 13

Klinghoffer v. S.N.C. Achille Lauro,
921 F.2d 21 (2d Cir. 1990) 6

Knipe v. SmithKline Beecham,
583 F. Supp. 2d 553 (E.D. Pa. 2008) 7

McFarlin v. Conseco Servs., LLC,
381 F.3d 1251 (11th Cir. 2004) 4

Primavera Familienstifung v. Askin,
139 F. Supp. 2d 567 (S.D.N.Y. 2001) 12

Pub. Interest Research Grp. of N.J. v Hercules, Inc.,
830 F. Supp. 1549 (D.N.J. 1993) 11, 12

Toilet Goods Ass'n v. Gardner,
360 F.2d 677 (2d Cir. 1966) 5

United States v. John-Baptiste,
--- F.3d ---, 2014 WL 627685 (3d Cir. Feb. 19, 2014) 4

STATUTES

28 U.S.C. § 1292(b) 1, 2, 6, 13

OTHER AUTHORITIES

16 Charles A. Wright & Arthur Miller,
Federal Practice and Procedure § 3930 (2d ed. 1996) 11

Daniel J. Solove & Woodrow Hartzog,
The FTC & the New Common Law of Privacy, 114 Colum. L. Rev.
583 (2014) 10

House Comm. on Energy and Commerce, Subcomm. on Commerce,
Mfg. and Trade,
Hearing on "FTC Review and Outlook," 2013 WL 6237638
(Dec. 13, 2013) 9

Peter S. Frechette,
FTC v. LabMD: FTC Jurisdiction Over Information Privacy is "Plausible," But How Far Can It Go?, 62 Am. U. L. Rev 1401 (2013) 10

INTRODUCTION

This Court's order denying Wyndham Hotels and Resorts' motion to dismiss warrants interlocutory appellate review under 28 U.S.C. § 1292(b). The accompanying opinion addresses two hotly contested and critically important issues of law regarding federal administrative authority over a new and burgeoning field: (1) whether Congress has delegated to the Federal Trade Commission ("FTC") generalized statutory authority to regulate data-security practices; and (2) if so, whether the FTC has provided regulated entities adequate notice of what data-security practices are required. This Court recognized that these are "thorny legal issues that Congress and the courts will continue to grapple with for the foreseeable future." Op. (ECF No. 181) at 6. It also recognized how "important, conspicuous, and controversial data security is," *id.* at 15, particularly "in a digital age that is rapidly evolving," *id.* at 6.

Wyndham, the FTC, and the public at large all have a strong interest in prompt appellate resolution of the legal questions presented here. Indeed, the fact that twelve *amici*—representing hundreds of thousands of businesses of all sizes—participated in this litigation at the district-court level underscores the importance of the issues at stake and their far-reaching impact on the American economy. In light of the clear

significance of the statutory authority and fair notice issues—both of which involve pure questions of law on which there is a substantial basis for disagreement—immediate appellate review is warranted. Accordingly, Wyndham Hotels and Resorts ("Wyndham") respectfully moves this Court to certify its order denying Wyndham's motion to dismiss (ECF No. 182) for interlocutory appeal under 28 U.S.C. § 1292(b).

ARGUMENT

THIS COURT SHOULD CERTIFY ITS ORDER DENYING WYNDHAM'S MOTION TO DISMISS FOR INTERLOCUTORY APPEAL.

This Court has discretion to certify to the United States Court of Appeals for the Third Circuit an otherwise non-appealable order if (1) "such order involves a controlling question of law," as to which there is (2) "substantial ground for difference of opinion," and where (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). All three requirements are readily satisfied here.

Both the statutory authority and fair notice issues involve pure questions of law that can be resolved without further discovery or factual development. There is also "substantial ground for difference of opinion" on each issue, as evidenced by, *inter alia*, the numerous *amicus* briefs filed before this Court, the extensive discussion of these issues in the legal

academy and the press, and the raising of these same arguments in other cases. Immediate interlocutory review by the Third Circuit would also materially advance the termination of this litigation by providing definitive answers to core issues in the case and eliminating the potential for "wasted, protracted" litigation of questions that could be resolved at the motion-to-dismiss stage. *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974).

A. The Order Resolved Pure Questions Of Law.

This Court's order denying Wyndham's motion to dismiss turns on pure questions of law, namely, (1) whether Section 5 of the FTC Act grants the FTC general authority over corporate data security and (2) whether the FTC has provided adequate notice of what Section 5 requires with respect to corporate data security. As courts have explained with respect to § 1292(b)'s "question of law" requirement, "what the framers of § 1292(b) had in mind is more of an abstract legal issue or what might be called one of 'pure' law, matters the court of appeals 'can decide quickly and cleanly without having to study the record.'" *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1258 (11th Cir. 2004) (quoting *Ahrenholz v. Bd. of Trs. of the Univ. of Ill.*, 219 F.3d 674, 677 (7th Cir. 2000)). Textbook examples of "pure" legal questions suitable for certification include "the meaning of a

statutory or constitutional provision," or the interpretation of a "regulation[] or common law doctrine." *Arenholz*, 219 F.3d at 676; *see also, e.g.*, *United States v. John-Baptiste*, --- F.3d ---, 2014 WL 627685, at *6 (3d Cir. Feb. 19, 2014) (concluding that a fair notice challenge to a statute is a "question of law"); *Atl. & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 552 n.14 (3d Cir. 1976) (explaining that whether an agency "has the statutory authority" to pursue certain enforcement mechanisms is a "purely legal question").

The scope of the FTC's authority under the FTC Act and the adequacy of notice to regulated entities are precisely such "abstract" legal issues that involve only statutory and constitutional interpretation, and do not turn on any disputed facts. Thus, as this Court implicitly acknowledged in its opinion, neither discovery nor meaningful factual inquiry is necessary to determine whether Congress intended to grant the FTC authority over data security or whether the FTC must provide additional notice to regulated entities before pursuing enforcement actions. And other courts have recognized that these types of questions—those involving the scope of an agency's statutory authority or the requirements of the constitutional fair notice doctrine—are "pure" legal issues suitable for certification. *See*, *e.g.*, *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 679-80 (2d Cir. 1966)

(Friendly, J.) (deciding certified interlocutory appeal on the question of whether the FDA exceeded its statutory authority by regulating certain cosmetic products); *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374, 1400 (M.D.N.C. 1997) (certifying for interlocutory appeal the question of whether the FDA exceeded its statutory authority by regulating tobacco); *Donahue v. R.I. Dep't of Mental Health*, 632 F. Supp. 1456, 1473-74, 1480 n.14 (D.R.I. 1986) (certifying for interlocutory appeal the question of whether a statute provides defendants with fair notice of what the law requires and includes enough specificity to avoid arbitrary enforcement).

B. There Are Substantial Grounds For Difference Of Opinion Regarding The Issues Addressed In The Order and Accompanying Opinion.

Whether the FTC is authorized to regulate data security and whether the Commission has provided fair notice of what the law requires are issues as to which there are substantial grounds for difference of opinion. *See* 28 U.S.C. § 1292(b). This is highlighted not only by the fact that these issues are difficult ones of first impression, but also by the extensive attention the issues have received both in this case and in other fora.

As the Court is well aware, this case is the first to squarely present the questions of whether Section 5 of the FTC Act grants the FTC authority to regulate data security and, if so, whether the Commission has provided fair

notice to regulated entities as to what Section 5 requires. To be sure, a legal issue may not always be suitable for interlocutory appeal merely because it is—without more—one of first impression. But where questions are as nuanced and important as these, certification is appropriate. *See*, *e.g.*, *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990) (explaining that there is a substantial ground for difference of opinion when "the issues are difficult and of first impression"); *Knipe v. SmithKline Beecham*, 583 F. Supp. 2d 553, 599 (E.D. Pa. 2008) ("[S]ubstantial ground for difference of opinion" exists when the matter involves "one or more difficult and pivotal questions of law not settled by controlling authority."); *Cuttic v. Crozer-Chester Med. Ctr.*, 806 F. Supp. 2d 796, 804-05 (E.D. Pa. 2011) ("[S]ubstantial grounds for difference of opinion exist where there is genuine doubt *or* conflicting precedent as to the correct legal standard.") (emphasis added); *In re Trace Int'l Holdings, Inc.*, 2009 WL 3398515, at *3 (S.D.N.Y. Oct. 21, 2009) ("Courts have certified orders for interlocutory appeal when the issues they raise are difficult and novel."); *In re Enron Creditors Recovery Corp.*, 2009 WL 3349471, at *6 (S.D.N.Y. Oct. 16, 2009) ("When a controlling question of law presents an issue of first impression, permission to appeal is often granted.").

The parties to this case—along with four sets of *amici curiae* collectively representing think tanks, academics, and hundreds of thousands of businesses of all sizes—thoroughly briefed the statutory interpretation and fair notice issues during the spring of 2013, and the Court presided over a full day's worth of oral argument on them. Following argument, the Court then requested, and the parties submitted, substantial supplemental briefing to clarify their positions and provide the Court with additional authority. This extensive briefing and argument—along with the fulsome opinion issued by this Court—indicate that these questions are not *just* ones of first impression, but rather the type of "particularly difficult" issues of first impression that warrant interlocutory review. *In re Trace*, 2009 WL 3398515, at *3.

The legal questions at stake in this litigation have also been vigorously disputed elsewhere—in other courts, in Congress, in academia, and in other FTC enforcement proceedings—providing further evidence that there exists a substantial basis for disagreement. For instance, the Supreme Court and courts of appeals have written much on the appropriate standard for fair notice in advance of agency enforcement actions. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (rejecting agency attempts to impose liability for legal rules that "the agency

announces . . . for the first time in an enforcement proceeding"); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) ("If, by reviewing the regulations and public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards by which the agency expects parties to confirm, then the agency has fairly notified a petitioner of the agency's interpretation."); *Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1232-33 (3d Cir. 1980) (holding that existing law must "state with ascertainable certainty" the standards the agency expects parties to obey).

In this same vein, Congress itself has expressed concern over "the regulatory uncertainty businesses already feel" because the FTC has failed to provide "a coherent statement of policy on how the Commission plans to enforce Section 5." House Comm. on Energy and Commerce, Subcomm. on Commerce, Mfg. and Trade, Hearing on "FTC Review and Outlook," 2013 WL 6237638 (Dec. 13, 2013). Without such a "coherent statement," one member noted, "many businesses, large and small, are left to examining past decisions to see how they may fit into a certain set of facts." *Id.* Legal academics have also put forth numerous competing assessments of the FTC's data-security enforcement regime, universally noting the complex and unsettled nature of the relevant legal issues. *See, e.g.*, Daniel J. Solove

& Woodrow Hartzog, *The FTC & the New Common Law of Privacy*, 114 Colum. L. Rev. 583 (2014); Peter S. Frechette, *FTC v. LabMD: FTC Jurisdiction Over Information Privacy is "Plausible," But How Far Can It Go?*, 62 Am. U. L. Rev 1401 (2013). And finally, other targets of FTC data-security actions have also mounted the same challenges to the Commission's enforcement authority, *see, e.g.*, *In re LabMD*, 2014 WL 253518 (F.T.C. Jan. 16, 2014), revealing that Wyndham is far from the only regulated entity that strongly disagrees with the FTC's legal positions. Taken together, the disputes within this case and elsewhere all reveal that there is a substantial basis for disagreement over the legality of the FTC's enforcement actions, making interlocutory review of this Court's Order all the more appropriate.

C. Interlocutory Review Would Materially Advance The Ultimate Termination Of This Litigation.

Finally, appellate review of the issues for which Wyndham seeks § 1292(b) certification would "materially advance the ultimate termination of the litigation." As courts in this district have previously noted, a question meets this third requirement if its resolution by the court of appeals could result in the elimination of one or more central legal issues from the case and, as a result, "save time and expense" for the parties and the Court. *Pub. Interest Research Grp. of N.J. v Hercules, Inc.*, 830 F. Supp. 1549, 1557

(D.N.J. 1993); *accord Katz*, 496 F.2d at 755; *Hercules*, 830 F. Supp. at 1555. In particular, certification is appropriate if appellate review is likely to "advance the time for trial or shorten the time required for trial." *In re Oxford Health Plans, Inc.*, 182 F.R.D. 51, 53 (S.D.N.Y. 1998); *accord* 16 Charles A. Wright & Arthur Miller, *Federal Practice and Procedure* § 3930 (2d ed. 1996).

Resolution of either of the two issues presented for certification here would materially advance the instant litigation. The FTC's entire unfairness count would be disposed of if the Third Circuit reversed this Court's decision on *either* the question of whether Section 5 of the FTC Act grants the FTC general authority over corporate data security *or* the question of whether the FTC must provide additional notice of what is required by Section 5 with respect to corporate data security. If the FTC's unfairness claim were barred on either ground, the remainder of the litigation would be much less complex. In particular, discovery would proceed on a much more rapid schedule and would focus on the narrow issue of consumer deception. These potential efficiency gains counsel in favor of § 1292(b) certification. *See In re Oxford*, 182 F.R.D. at 53; *Hercules*, 830 F. Supp. at 1555.

Moreover, the efficiency benefits of an interlocutory appeal extend far beyond this case. As other district courts have noted, whether an appellate decision would have "precedential value for a large number of cases"—and may assist in the prompt and expeditious resolution of those cases—is also relevant to whether interlocutory review is appropriate. *Primavera Familienstifung v. Askin*, 139 F. Supp. 2d 567, 570 (S.D.N.Y. 2001). As discussed above, defendants in other FTC enforcement actions have raised similar arguments to those at issue here and are likely to continue doing so going forward. *See, e.g.*, *In re LabMD*, 2014 WL 253518. To date, the FTC has filed or settled over fifty data-security enforcement actions, with many more likely to come. The Court's opinion recognized that underlying the viability of each of those enforcement actions are the assumptions that (i) the Commission has authority to regulate data security and (ii) the Commission need not provide additional notice of what the law requires. *See* Op. at 2. An appellate decision on these issues would simplify any litigation arising out of all those pending and future enforcement efforts by providing either persuasive or binding precedent with respect to key, threshold legal questions about the FTC's ability to maintain a lawsuit over data security. In light of the sheer number of data-security enforcement actions that the FTC has brought and will bring, the issues in dispute here

are precisely the type of "serious" questions with far-reaching practical *and* legal consequences that § 1292(b) was designed to address. *See Katz*, 496 F.2d at 755.

CONCLUSION

For the foregoing reasons, Wyndham respectfully requests that this Court certify its April 7, 2014 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

April 17, 2014

Respectfully submitted,

By: /s/ *Jennifer A. Hradil*

Jennifer A. Hradil, Esq.
Justin T. Quinn, Esq.
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102-5310
(973) 596-4500

Eugene F. Assaf, P.C., DC Bar 449778
Pro Hac Vice
K. Winn Allen, DC Bar 1000590
Pro Hac Vice
KIRKLAND & ELLIS LLP
655 Fifteenth St. N.W.
Washington, D.C. 20005
(202) 879-5078

Douglas H. Meal, MA Bar 340971
Pro Hac Vice
David T. Cohen, MA Bar 670153
Pro Hac Vice
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, MA 02199-3600
(617) 951-7517

Attorneys for Defendants