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December 13, 2013

VIA ECF

Honorable Esther Salas, U.S.D.J.
United States District Court
District of New Jersey
50 Walnut Street
Newark, New Jersey 07102

**Re: *Federal Trade Commission v. Wyndham Worldwide Corporation, et al.*
Civil Action No.: 13-cv-1887 (ES) (JAD)**

Dear Judge Salas:

This firm, along with Kirkland & Ellis LLP and Ropes & Gray LLP, represents Wyndham Worldwide Corp., Wyndham Hotel Group, LLC, Wyndham Hotels and Resorts, LLC, and Wyndham Hotel Management, Inc. (collectively, “Defendants”) in the above-referenced action. Defendants respectfully write to draw the Court’s attention to a recent development that bears on the pending motions to dismiss.

On December 3, 2013, all four FTC Commissioners testified at a hearing of the House Subcommittee on Commerce, Manufacturing, and Trade. A full transcript of the hearing is attached hereto as Exhibit 1. During the December 3 hearing, Subcommittee Chair Lee Terry made statements bearing on Defendants’ motions to dismiss:

- “I’m concerned with various issues at the FTC, some recent and others longstanding, that not only may take the commission away from the scope in which Congress legislated but . . . also add to the regulatory uncertainty many businesses feel already. One clear example is the Commission’s use of Section 5 authority under the FTC Act.”
- “[A]bsent a coherent statement of policy on how the Commission plans to enforce Section 5, many business, large and small, are left to examining past decisions to see how they may fit into a certain set of facts.”

The FTC at 100: Where Do We Go From Here?: Hearing Before the H. Comm. on Energy and Commerce, Subcomm. on Commerce, Manufacturing, and Trade, 113th Cong. (2013), 2013 WL 6237638 at 3.

Similarly, as part of his own testimony later in that same hearing, FTC Commissioner Joshua Wright made certain statements bearing on Defendants’ motions to dismiss:

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- “The fundamental problem with the commission Section 5 enforcement [in] the unfair methods context, is caused by a combination of the agency’s administrative process advantages and the vague nature of the Section 5 authority governing unfair methods of competition. This combination gives the FTC the ability, in some cases, to [e]licit a settlement, even when the conduct [in] question may benefit consumers.”
- “This is because firms typically prefer to settle Section 5 claims rather than go through the lengthy and . . . costly administrative litigation in which they are shooting . . . at a moving target and may have the chips stacked against them.”
- “Formal guidelines would help the commission’s mission by focusing [its] unfair methods enforcement upon plainly anti-competitive conduct and provid[ing] businesses with important guidance about what conduct is lawful and what conduct is unlawful under Section 5.”

Id. at 17-18.

Defendants believe that these statements, along with the accompanying Exhibit, will assist the Court in rendering a decision on the pending motions to dismiss. We thank Your Honor for your consideration of this submission. Should the Court require further information, we are available at the Court’s convenience.

Respectfully,

s/ Jennifer A. Hradil
Jennifer A. Hradil

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