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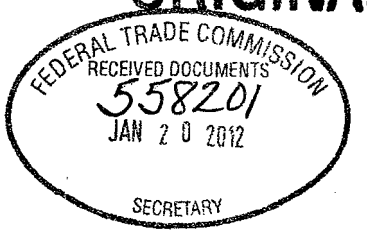

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

IN THE MATTER OF **WYNDHAM HOTELS & RESORTS, LLC**	)	**FILE NO: 1023142**

Petition of Wyndham Hotels & Resorts, LLC and Wyndham Worldwide Corporation to Quash or, Alternatively, Limit Civil Investigative Demand

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Dated: January 20, 2012

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INTRODUCTION

Wyndham Hotels and Resorts, LLC ("WHR") and its parent company, Wyndham Worldwide Corporation ("WWC" and, jointly with WHR, "Wyndham"), respectfully submit this Petition to Quash or, Alternatively, Limit the Civil Investigative Demand ("CID") issued by the Federal Trade Commission ("FTC" or "Commission") on December 8, 2011.[1]

The sequence of events that culminated in Wyndham's instant petition began nearly four years ago, when WHR became one of the thousands of American businesses, non-profits, and government agencies (the FBI and Department of Justice being the two latest examples) targeted by the scourge of criminal hackers bent on stealing cyber data. In WHR's case, the criminals targeted payment card data being handled by a group of independently owned hotels operating under the "Wyndham" brand pursuant to a franchise or management franchise agreement with WHR or one of its affiliates. While the hackers may have succeeded in obtaining a limited amount of payment card data from some of the hotels, no personal information other than payment card data was compromised. Moreover, because card brand rules protect cardholders from suffering any financial injury when their card is compromised, no consumer suffered any injury as a result of this particular hack. Nonetheless, in 2010 the FTC decided to launch an investigation into whether WHR's information security practices violated the federal consumer protection statute. WHR cooperated fully with that investigation over the next two years, without hearing a word from the FTC suggesting otherwise. However, notwithstanding WHR's spotless record of full cooperation with the investigation, in December 2011 the Commission suddenly decided to seek to use compulsory process to further its investigation and, to that end, served Wyndham with the CID.

The CID suffers from the same flaws recently recognized by a federal district judge with respect to another FTC CID:

> The court agrees with plaintiff that the CID appears on its face to be unconscionable, overburdensome and abusive. The CID is so broad that it indicates that no meaningful discretion was exercised by the FTC officials who prepared it. As plaintiff suggests, the CID appears to have the potential to cause plaintiff to suffer intolerable financial and manpower burdens and an inexcusable disruption of its normal business activities.

D.R. Horton, Inc. v. Jon Leibowitz, Chairman, No. 4:10-CV-547-A, 2010 WL 4630210, at *3 (N.D. Tex. Nov. 3, 2010). Indeed, for a number of reasons the FTC CID at issue here is significantly *more* problematic than the one that was excoriated in the *Horton* case. To begin with, here the CID was issued almost two years after the FTC initiated the investigation to which the CID relates. By that time WHR had already incurred out-of-pocket costs in excess of $5 million in cooperating fully and voluntarily with the voluminous discovery requests that the staff of the FTC ("Staff") had heaped on WHR in the course of the investigation. That cooperation

[1] The CID is attached at Exhibit 1. On December 19, 2011, Maneesha Mithal, Associate Director, Division of Privacy and Identity Protection, agreed to extend the time for filing this Petition to Quash to January 20, 2011. Accordingly, this Petition is timely filed.

included providing Staff with more than one million pages of documents in response to 29 separate document requests (including subparts) made by Staff; making five separate written submissions to Staff responding to 51 separate written questions (including subparts) that Staff had interposed; and making seven separate in-person presentations to Staff to provide additional information requested by Staff and to respond to additional questions raised by Staff.

Even more concerning, issuance of the CID occurred *after* the investigation had already reached a point where, according to Staff's own statements, the purpose of the investigation had already been accomplished. Specifically, the CID issued only *after* Staff told WHR that Staff believed its investigation had found reasonable ground to conclude that WHR had violated Section 5 of the Federal Trade Commission Act ("FTCA"); *after* Staff presented WHR with a proposed complaint setting forth the alleged Section 5 violation Staff believed it had uncovered; and *after* Staff demanded that WHR agree to a settlement of Staff's alleged Section 5 claim. In other words, by the time the CID issued, Staff had by its own admission already obtained everything it needed in order to move the matter beyond the investigatory phase.

Tellingly, the CID also issued *after*—indeed *just days after*—WHR submitted a white paper to the Director of the FTC's Bureau of Consumer Protection demonstrating the unlawfulness of the Staff settlement terms being objected to by WHR. Staff defended the timing of the CID by claiming that its investigation was for some reason not "complete," even though WHR had already responded fully to all Staff's voluminous, previously submitted discovery requests, and Staff had already concluded that corrective action should be taken by the FTC to address a supposed Section 5 violation by WHR. Thus, while ostensibly the CID is merely intended to enable Staff to obtain limited additional discovery that Staff thinks it still needs, even at this late juncture, to finish its longstanding investigation, WHR believes otherwise.

The CID itself proves this point. The CID does not merely target a few stray informational items that Staff may have somehow missed in its sixteen-month investigatory effort. Instead, as drafted, the CID would require WHR and WWC to respond to 89 further interrogatories, including sub-parts, and 38 further document requests (again including subparts). Moreover, almost every single discovery request in the CID has been drafted first to define the subject matter of the request as broadly as imaginable and then to demand a response containing a mind-numbing level of detail. Compliance with the CID would thus entail months of work and millions of dollars of expense.

Worse still, the CID is in large part duplicative of the discovery requests Staff previously made during the course of this investigation; takes no account whatever of the voluminous amount of information that WHR has already provided in response to those requests; and seeks to effectuate an eleventh-hour expansion of Staff's investigation beyond WHR's information security practices and into the information security practices of WHR's service providers and affiliates, even though to date Staff's investigation has revealed nothing whatever calling into question the information security practices of those other entities. Further, the CID is not based on a proper Commission investigational resolution; was not issued based on the required showing of need for invocation of compulsory process in an FTC investigation; fails to provide WHR and WWC with the statutorily specified notice of Staff's claim and legal theory; seeks information related to various issues that are beyond Staff's authority; and obviously was issued for an improper purpose—namely, to coerce WHR's acceptance of the unlawful settlement terms

being insisted on by Staff or, failing that, to obtain pre-litigation discovery from WHR in the guise of purporting to complete an investigation that, judged by any standard, should be considered to have been completed months ago.

Perhaps worst of all, the Staff investigation that is the subject of the CID has already established that the information security practices being investigated caused *no consumer injury* and any deficiency in those practices has already been *fully rectified*. Indeed, Staff's inability to prove consumer injury of the sort that normally is (or ought to be) the touchstone of an FTC enforcement action is so clear here that Staff does not even propose to assert an unfairness-based Section 5 claim. Instead, Staff's proposed complaint is limited to a deception-based Section 5 claim. But even that claim presents insignificant consumer protection concerns, for the claim is based solely on a privacy policy published on WHR's website that there is no reason to believe was ever even read, much less relied upon in making a purchasing decision, by any appreciable number of WHR customers (if, indeed, by any at all), and because the validity of Staff's deception claim depends entirely on Staff's tortured reading of just two sentences in that multi-paragraph policy—a reading that is elsewhere expressly negated by the policy itself. In other words, Staff is asking Wyndham to suffer the enormous additional discovery burden embodied in the CID in order to support a Staff investigation that, after nearly two years, has found, *at most*, a single, alleged Section 5 violation that indisputably was inadvertent if it happened at all (which it did not), and that in any event did not harm a single consumer.

In short, the CID is fundamentally flawed in essentially every imaginable respect and should be quashed in its entirety or, at the very least, significantly limited.

BACKGROUND[2]

WHR and the Wyndham-Branded Hotels

WHR's principal business is to provide a variety of services to a group of U.S.-based, independently owned hotels (the "Wyndham-branded hotels") that are licensed to use the "Wyndham" brand name. The Wyndham-branded hotels together constitute an upscale chain of hotels located in key business and vacation destinations. During the period in question, there were approximately ninety Wyndham-branded hotels worldwide, all of which were independently owned by third parties unaffiliated with WHR.[3] At that time, most of the Wyndham-branded hotels (the "franchised Wyndham-branded hotels") used the Wyndham brand name pursuant to franchise agreements with WHR, but about fifteen of them (the "managed Wyndham-branded hotels") were operated under the Wyndham brand name pursuant to a management agreement with WHR's sister company, Wyndham Hotel Management, Inc. ("WHM"), under which WHM managed the hotel on behalf of the hotel's owner.

[2] The accuracy of the factual statements made in the "Background" section of this petition is attested to in the Declaration of Douglas H. Meal (Exhibit 2 hereto) ("Meal Declaration"), at ¶ 3 .

[3] WHR has a minority economic interest in the Rio Mar hotel, which is one of the managed Wyndham-branded hotels. Also, WHR currently owns the Bonnet Creek hotel, which was not part of the Wyndham-branded hotel chain during the period in question.

The Intrusions

On three separate occasions during the period between June 2008 and January 2010, WHR and certain of the Wyndham-branded hotels suffered criminal intrusions into their computer networks (the "Intrusions"). During the course of the Intrusions, certain customer payment card data being handled by the intruded-upon hotels was placed at risk of compromise. Significantly, however, other than payment card data, no personal information of any consumer was placed at risk during the Intrusions. As a result, because payment card issuers protect their cardholders against suffering any financial injury by reason of their payment card data being compromised, the Intrusions did not cause, and could not have caused, any financial injury to any consumer.

Also, while the intruder(s) did gain access to WHR's network and the networks of certain of the Wyndham-branded hotels during the course of the Intrusions, at all times the information technology assets of WHR's affiliated entities such as WHM were physically distinct and logically separate from WHR's network and the networks of the Wyndham-branded hotels. Moreover, the forensic evidence shows no evidence of any of those affiliated entities being impacted by the Intrusions. Thus, there is no evidence that customer data located at any of WHR's affiliated entities was ever at risk of compromise in the Intrusions or that any of those affiliated entities ever suffered from information security deficiencies.

Subsequent to the occurrence of the Intrusions, substantial information security enhancements were put in place at WHR. In January 2011, an assessment of WHR's network security by an independent Qualified Security Assessor ("QSA") culminated in the QSA's issuance of a Report on Compliance that attested to the WHR network's full compliance with the Payment Card Industry Data Security Standard ("PCI DSS"). As for the intruded-upon Wyndham-branded hotels, each of them[4] executed a "Technology Addendum" to its franchise or management agreement pursuant to which WHR was given substantial direct responsibility for and over information security for the portion of the hotel's network that had been attacked in the Intrusions.[5] Pursuant to the Technology Addenda, substantial security enhancements were then also made to the intruded-upon Wyndham-branded hotels' networks.

Staff's Investigation

By means of an access letter dated April 8, 2010 (the "Access Letter"), a copy of which is attached hereto as Exhibit 3,the Commission advised WHR that Staff was conducting a non-public investigation into WHR's compliance with federal laws governing information security (the "WHR Investigation"). According to the Access Letter, the WHR Investigation was prompted by the Intrusions. The Access Letter stated that the WHR Investigation sought to

[4] Those Wyndham-branded hotels that were going to be leaving the system were not asked to execute the Technology Addendum and were not provided the services contemplated thereby. Also, several continuing Wyndham-branded hotels did not actually execute the Technology Addendum, but they all nonetheless did permit WHR to perform the services contemplated by the Technology Addendum.

[5] In regard to the managed Wyndham-branded hotels, because the Technology Addendum was structured as an amendment to the management agreement WHM had entered into with the owner of the hotel, WHM executed the Technology Addendum rather than WHR, and then as permitted by the Technology Addendum WHM arranged for WHR to perform the Technology Addendum on WHM's behalf.

determine whether WHR's information security practices complied with Section 5 of the Federal Trade Commission Act ("Section 5").

The WHR Investigation proceeded for the ensuing 16 months. Because the Intrusions affected the networks of WHR and certain of the Wyndham-branded hotels, the WHR Investigation focused on the adequacy of the information security measures that were in place at the time of the Intrusions to protect personal consumer information being handled by the WHR network and the hotels' networks. In that regard, while the WHR Investigation did reveal that the intruder(s) had gained access to the networks of both WHR and certain of the Wyndham-branded hotels during the course of the Intrusions, the WHR Investigation revealed that only payment card data had been placed at risk of theft during the Intrusions. Payment card issuers, pursuant to their contracts with their cardholders, fully protect their cardholders from suffering any financial injury by reason of their payment card data being stolen. Thus, the WHR Investigation found no evidence that any *consumer* had suffered any financial injury by reason of whatever access to personal consumer information had occurred during the Intrusions.

Because there is no evidence that the Intrusions extended beyond WHR's network and the networks of the intruded-upon Wyndham-branded hotels, the WHR Investigation did not address, or have any reason to address, whether at the time of the Intrusions adequate security measures were in place to protect whatever customer data was located at WHR's affiliates and WHR's service providers. Indeed, as noted above, the Access Letter itself expressly stated that *WHR* was the proposed respondent in the WHR Investigation, and that the subject matter of the WHR Investigation was limited to *WHR's* information security practices. *See* Exhibit 3 hereto, page 1. Moreover, WHR is not aware of the FTC's having ever taken action, subsequent to the delivery of the Access Letter, to authorize the WHR Investigation's being expanded to extend to the information security practices of any of WHR's affiliates and/or service providers, or to notify WHR or any of its affiliates of any such expansion.

WHR cooperated fully with the WHR Investigation. To begin with, WHR produced to Staff over one million pages of documents in response to the 29 separate document requests (including subparts) contained in the Access Letter and ensuing Staff communications. All but three of those requests targeted either certain specified documents or documents "sufficient to show" certain specified matters. Each such "targeted document request" accordingly required WHR to engage in a file-research project to try to locate the particular documents that would meet the request. These file-research projects were, in the aggregate, enormously labor intensive and time consuming. For example, more than five months of work were required just to complete WHR's effort to locate the documents called for by the targeted document requests included in the Access Letter. Upon completing that effort, WHR reported to Staff that, with the exception of just two requests as to which no documents could be located, WHR believed it had succeeded in locating documents that satisfied all the Access Letter's 29 targeted document requests. Similarly, WHR believes it succeeded in locating documents that met all the targeted document requests contained in Staff's ensuing communications. Significantly, Staff has never once suggested it disagrees with WHR's view as to the completeness of WHR's response to Staff's targeted document requests.

Staff's document requests also included three requests that sought "all documents" responsive to the matter in question. In substance, those three requests sought all documents

relative to the Intrusions and to WHR's and the Wyndham-branded hotels' information security at the time of the Intrusions. WHR proposed, without any objection by Staff, that its primary effort to locate documents responsive to the "all-document requests" would be to review the electronically stored information ("ESI") of the personnel who had the most direct responsibility for handling those matters and who, as a result, were most likely to have custody of documents relating to those matters. To that end, WHR reviewed the ESI of one individual who played a central role in WHR's information technology function during the period in question, and a second individual who played a central role in WHR's information security function during that period. All responsive, non-privileged documents located by means of that custodian-based ESI review (which amounted to more than one million pages in the aggregate) were in turn provided to Staff. Upon receiving that production, Staff did reserve the right to request at some later time that WHR expand its custodian-based ESI review to additional custodians. Staff never indicated, however, that it felt WHR's voluminous production in response to the all-document requests was somehow insufficient to meet Staff's investigatory objective in posing those requests.

In addition, WHR submitted to Staff five separate detailed written narratives responding to the 51 separate questions (including subparts) posed in the Access Letter and ensuing Staff communications. Owing to the number of and specificity called for by Staff's questions, preparation of WHR's narrative responses proved to be extremely burdensome, requiring extensive research and laborious drafting efforts. In the aggregate, including attachments, those responses total 72 pages, single spaced. WHR intended for each response to address fully and to provide all non-privileged information required by the particular Staff questions referenced by the response. Here, again, Staff has never suggested that any of WHR's responses failed to do that.

Further, the Chief Financial Officer and the head of Information Security for WHR, and/or WHR's inside and outside counsel, made seven separate in-person presentations to Staff in an effort to address various questions Staff had raised. Those presentations addressed a wide variety of Staff requests for additional information, ranging for example from further detail regarding the information security measures and policies that WHR had in place at the time of the breach to the technical details of the separation of WHR's network from the networks of WHR's affiliates to the structure and methodology of WHR's quality assurance program. Each such presentation was specifically requested by Staff, and each required substantial research into the matter being presented, extensive preparation on the part of the personnel making the presentation (usually including preparation of a supporting PowerPoint and/or document binder), and significant time expenditure associated with attending and traveling to and from the presentation itself. WHR sought for each presentation to fully address the matter on which Staff had requested the presentation and, when questions arose during the presentation, endeavored to answer those questions either in the course of the presentation itself or by means of a follow-up communication. Staff has never suggested that any of these presentations did not succeed in achieving, from Staff's perspective, the investigatory objective Staff had in requesting the presentation.

As can be well imagined, the burden that all these Staff requests placed on WHR was simply enormous. The above-described custodian-based ESI review by itself cost more than $2.8 million. *See* Declaration of Korin Neff, January 20, 2012 (Exhibit 4 hereto) ("Neff Declaration"), at ¶8. Through July of 2011, WHR's total out-of-pocket costs for outside counsel

and other consultants retained to assist WHR in dealing with the WHR Investigation exceeded $5 million. *Id*. Virtually all of these costs were expended in responding to the Staff discovery requests described above. And, of course, those costs give no account to the substantial amount of time expended by WHR's own personnel in doing the massive amount of research required to locate the documents and information sought by Staff's requests.

Staff's Proposed Complaint and Proposed Consent Order

During the course of the WHR Investigation, Staff advised WHR that Staff believed its investigation had adduced information sufficient to give the FTC reason to believe that WHR's information security practices were in violation of Section 5. On July 20, 2011, Staff provided WHR with a proposed complaint and a proposed consent order. Significantly, Staff's proposed complaint (the "Proposed Complaint," attached hereto as Exhibit 45) made no claim that WHR's information security practices were "unfair" under Section 5. Presumably, Staff recognized that, with payment card data having been the only personal information placed at risk of compromise in the Intrusions, Staff could not establish the substantial consumer injury necessary to sustain an *unfairness*-based Section 5 claim. Instead, the Proposed Complaint alleged only that WHR had committed a single *deception*-based violation of Section 5. Staff's theory, as set forth in the Proposed Complaint, was that two sentences contained in the privacy policy published on WHR's website since early 2008 (the "Privacy Policy") had expressly represented that reasonable security measures to protect customer information were in place at both WHR and the Wyndham-branded hotels. According to Staff's allegations, that representation was inaccurate because (as ostensibly shown by the occurrence of the Intrusions) neither WHR nor the Wyndham-branded hotels in fact had reasonable information security measures in place to protect customer information from criminal intrusion during the period in question.

The relief that Staff's proposed consent order (the most recent version of which ("Staff's Proposed Consent Order") is attached hereto as Exhibit 6) sought from WHR had three basic components:

1. a prohibition on WHR's making future misrepresentations of the sort alleged in the Proposed Complaint, as well as a variety of other future misrepresentations related to data privacy, confidentiality, security, and integrity (*see id*. at Part I);

2. a mandate that WHR (a) establish, implement, and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected by WHR from or about consumers and (b) arrange for an independent assessor to conduct biennial reviews designed to evaluate WHR's compliance with that program (collectively, the "Affirmative WHR Relief") (*see id*. at Parts II and IV.A - IV.D); and

3. a mandate that WHR (a) cause each Wyndham-branded hotel to establish, implement, and maintain its own comprehensive information security program, (b) assess, through WHR's Quality Assurance Program, each Wyndham-branded hotel's compliance with its program and take certain measures to address any instance of a Wyndham-branded hotel's non-compliance with such program, and (c) arrange for the independent assessor's reviews also to evaluate WHR's compliance with its monitoring and enforcement

responsibilities regarding the Wyndham-branded hotels' comprehensive information security programs (collectively, the "Affirmative Hotel Relief") (*see id*. at Parts III and IV.E).

The Proposed Complaint also alleges that WHM (the WHR affiliate that manages the managed Wyndham-branded hotels on behalf of the owners of those hotels), Wyndham Hotel Group ("WHG"), the parent company of WHR, and WWC, the parent company of WHG, are jointly liable for WHR's alleged deception-based violation of Section 5. Based on that allegation, Staff's Proposed Consent Order would impose substantial obligations (collectively, the "Affiliate Relief") on WHM, WHG, and WWC. As to WHM and WHG, Staff's Proposed Consent Order seeks much the same relief from them as it would obtain from WHR, by imposing on each entity the exact same prohibition regarding future misrepresentations and the exact same mandates regarding its own information security as it would impose on WHR. *See* Ex. 3, Parts I-II. As to WWC, Staff's Proposed Consent Order would impose on it the exact same prohibition regarding future misrepresentations that Staff's Proposed Consent Order would impose on WHR, and it would require WWC to guarantee WHR's, WHG's, and WHM's performance of their obligations under the order, but it would not impose on WWC any mandate regarding its own information security. *See id*. at Parts I, II & IX.

The Parties' Settlement Negotiations

WHR strongly believes that it did not violate Section 5 in connection with the Intrusions or otherwise. Accordingly, from the inception of this investigation WHR has viewed a settlement as unwarranted and has thought the appropriate resolution was for the WHR Investigation to be closed. WHR remains firmly of that view today.

Still, when Staff asked WHR whether WHR wanted to discuss settlement of Staff's Section 5 claim, WHR agreed to do so. To begin with, Staff said the settlement it had in mind would involve no monetary relief. And in regard to affirmative actions required of WHR under the consent order that would be part of the settlement, Staff said the predominant intent of the order it envisioned would be to require WHR to continue to provide the same information security that by that point WHR was already providing for its own network and for the networks of the Wyndham-branded hotels. WHR therefore understood the settlement concept to be offering WHR the possibility of a near-term, low-cost alternative to the years of expensive, time-consuming litigation that likely would be required to validate WHR's position that it had no Section 5 liability in connection with the Intrusions. As such, that concept merited consideration in WHR's view, notwithstanding WHR's belief that it did not violate Section 5. Accordingly, WHR agreed to work with Staff to see if this settlement concept could be turned into settlement documentation acceptable to both sides.

During the period from late July to mid-September of this year, Staff and WHR conducted substantial negotiations over Staff's proposed settlement terms. Those negotiations resulted in agreement in principle being reached on many important points. However, a number of points of disagreement remained, including three core WHR objections to Staff's Proposed Consent Order. Those three objections are the following:

- ***first***, WHR objected to a settlement being founded on a theory that WHR committed a

deception-based violation of Section 5;

- ***second***, WHR objected to those portions of the Affirmative Hotel Relief that would involve WHR's assuming direct responsibility for the Wyndham-branded hotel's information security in certain respects—*contrary to the fundamental business model that underpins franchising*; and
- ***third***, WHR objected to the Affiliate Relief (other than the portion of the Affiliate Relief that would oblige WWC and/or WHG to cause WHR to perform WHR's obligations under the order).

What made these features of Staff's proposed settlement documentation objectionable was that they each imposed a substantial business burden and/or a substantial business risk on WHR and/or its affiliates that went well beyond merely requiring WHR to continue to provide the very same information security WHR was at that point already providing for its own network and the Wyndham-branded hotels' networks. Moreover, these three aspects of Staff's proposed settlement documentation had no legal basis (given the facts of this particular matter) and were wholly unnecessary to address the concerns that had prompted the WHR Investigation (given that those concerns were fully addressed by provisions of the settlement documentation WHR *was* prepared to accept). WHR accordingly communicated to Staff that WHR could not accept a settlement that included these three aspects. Staff responded by indicating that management of the FTC's Bureau of Consumer Protection ("BCP Management") was insistent that a settlement would have to include all three aspects of Staff's proposed settlement documentation to which WHR had objected. WHR thereupon requested a meeting with BCP Management.

On November 21, 2011, in anticipation of such a meeting, WHR submitted to BCP Management a detailed white paper that demonstrated, in regard to each of WHR's three core issues, how each aspect of Staff's Proposed Consent Order being objected to by WHR

- lacked any lawful basis under Section 5 given the particular facts of WHR's case;
- would impose on WHR substantial business burdens and/or expose WHR to breach of contract claims from the Wyndham-branded hotels, third-party liability claims, and/or other unacceptable substantial business risks; and
- was, in light of the portion of Staff's proposed consent order that WHR *did not* object to, wholly unnecessary to achieve Staff's goal of protecting WHR's customers against future circumstances of the sort that prompted the WHR Investigation.

WHR's white paper is attached hereto as Exhibit 7. Shortly after WHR's submission of this white paper, BCP Management agreed to the meeting WHR had requested. The meeting occurred on December 15, 2011. At the meeting, WHR summarized the grounds for its three core objections to Staff's proposed settlement documentation, as detailed in WHR's white paper. Neither during the meeting nor at any other time has any representative of the FTC provided WHR with any rebuttal to the white paper's arguments that the settlement provisions being objected to by WHR are both unlawful and unnecessary. Nonetheless, as reflected in Exhibit 3 hereto, Staff's next (and last) draft of Staff's proposed settlement documentation continued to include all three components objected to by WHR. And, in the meantime, Staff served WHR and WWC with the CID.

The CID

The CID did not come as a complete surprise to WHR. In October 2011, shortly after WHR's settlement negotiations with Staff reached an impasse and WHR asked to meet with BCP Management, Staff had orally advised WHR that Staff believed it needed certain additional information in order to complete its investigation and, to that end, intended to ask the FTC to issue a civil investigative demand to WHR. Thereafter, in late October, Staff had orally requested that WHR provide a "certification" as to the completeness of the information and documents WHR had provided to Staff in response to the Access Letter and Staff's ensuing discovery requests. Staff explained this request by stating that WHR's provision of such a certification would enable Staff to limit the anticipated civil investigative demand to requesting only documents and information that had not been covered by Staff's prior discovery requests and WHR's responses to those requests, and that were necessary for the completion of the WHR Investigation. Staff and WHR thereupon negotiated and agreed upon an acceptable form of the requested certification, and WHR submitted the executed certification (a copy of which is attached hereto as Exhibit 8) to Staff on December 1, 2011.

The length and breadth of the CID did come as a surprise to WHR, however, particularly in view of the certification that had just days earlier been requested by Staff and provided by WHR. According to Staff's prior statements, the CID would be limited to seeking only whatever additional documents and information Staff legitimately felt were needed for the completion of the WHR Investigation, bearing in mind the enormous volume of documents and information WHR had provided to Staff during the first 16 months of the investigation. WHR seriously questioned, of course, why Staff would need *any* further discovery to complete the WHR Investigation, given where the investigation currently stood.[6] But even assuming the WHR Investigation were not entirely complete at this juncture, WHR felt it certainly must be nearly complete, given the enormous amount of documents and information already provided by WHR and the legal paucity of Staff's investigational findings based on its review of all that material. WHR accordingly anticipated that the CID at most would include a handful of additional questions and document requests, carefully drafted so as to avoid duplicating Staff's prior requests and so as to target precisely the particular pieces of additional information Staff was looking for, all to ensure that Wyndham would not incur significant burden in responding to those additional requests.

Unfortunately, the CID was not drafted in anything remotely resembling this fashion. To the contrary, it is a classic "kitchen-sink" discovery request that takes no account whatever of Staff's previous requests and WHR's previous responses to those requests, and makes no effort whatever to avoid unduly burdening Wyndham in responding to the CID. Including sub-parts,

[6] After all, Staff had previously advised WHR that, based on Staff's investigation to date, Staff had already determined that the evidence created reason to believe that WHR's information security practices violated Section 5 and Staff accordingly was prepared to recommend corrective action to the Commission in the form of a consent agreement. Indeed, Staff had already provided WHR with the consent agreement it was prepared to recommend to the Commission and a proposed complaint alleging violations of Section 5 on the part of WHR and certain of its affiliates. In WHR's view, any investigation that has reached a point at which Staff has made such a determination and is ready to make such a recommendation is by definition "complete," because once an investigation reaches that point Staff by definition has no need for any further information in order to conclude the investigatory phase of the case (see Operating Manual §1.3.4.4) and proceed with the next phase of the case.

the CID includes no fewer than *eighty-nine* further interrogatories and *thirty-eight* further document requests. The sheer volume of the discovery requests contained in the CID is exacerbated by the fact that the vast majority of the CID's requests duplicate, in significant part, one or more of the discovery requests previously made by Staff during the course of the WHR Investigation. Moreover, those of the CID's requests (or portions thereof) that do not duplicate Staff's prior requests instead seek, for the most part, information or documents that have nothing whatever to do with the subject matter of the WHR Investigation, such as documents and information relative to the information security practices of WHR's affiliates and service providers. Finally, almost every single discovery request in the CID has been drafted first to define the subject matter of the request as broadly as imaginable and then to demand a response containing a mind-numbing level of detail.

A case in point, by way of example only, is Interrogatory 12. As drafted, Interrogatory 12 purports to require Wyndham to describe in detail each and every aspect of any and all information security measures that Wyndham had in place at any time during the last four years, including the date on which each and every such aspect was implemented, each and every assessment, test, evaluation, monitoring action, or change that was made of or to any such aspect during such period, and the date of every such assessment, test, monitoring action, or change. No account is given in this interrogatory to the voluminous amount of information that Staff has already requested and received in regard to WHR's information security during the period in question. No effort is made in this interrogatory to zero in on any particular aspect of WHR's information security that Staff might have concerns about based on its investigation to date. Moreover, to the extent Interrogatory 12 seeks information not only relative to WHR's information security, but also relative to the information security measures that were in place at WWC, WHG, and WHM during the period in question, this interrogatory utterly ignores the fact that there is no reason whatever for the FTC to believe that any of these entities suffered from any information security deficiencies during the period in question. Worst of all, no attention is paid in this interrogatory to the obvious fact that any company's information security measures are routinely being assessed, tested, evaluated, monitored, and changed not just daily but minute-by-minute, such that the net effect of this interrogatory as drafted is to ask that Wyndham undertake the mind-boggling effort to create for Staff, somehow, a comprehensive daily history of every detail of every aspect of every feature of Wyndham's information security over a four-year period.

Nearly all of the CID's interrogatories and document requests suffer from the defective triad of (i) duplicating discovery requests Staff has previously made and WHR has already responded to, (ii) seeking documents or information that have nothing whatever to do with the WHR Investigation, and (iii) being drafted without any attention having been given to the generality of the request and the level of detail demanded by the request. *See, e.g.*, Interrogatories 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, and 21, and Document Requests 2-7 and 9-17 (all of which in substantial part duplicate discovery requests Staff has previously made and WHR has already fully responded to); Interrogatories 5, 6, 7, 8, 12, 13, 14, 16, 17, 18, 19, 20, and 21, and Document Requests 3, 6, 7, 8, 9, 10, 12, 13, and 16 (all of which, by addressing the information security practices of Wyndham's service providers and/or affiliates, seek information relative to matters that have not been part of the WHR Investigation

up to this point[7] and as to which Staff has no basis now to expand its investigation); and Interrogatories 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, and 21, and Document Requests 2-7 and 9-17 (all of which are drafted to cover an extremely broad subject matter and to demand a minute level of detail regarding that subject matter).

Because the CID's discovery requests were drafted in such an utterly defective fashion, compliance with the CID would impose a monumental burden on Wyndham. Specifically, based on the 16-month effort that WHR required in order to respond to the discovery requests Staff previously made of WHR in the course of the WHR Investigation, Wyndham estimates that it would need between one and two years to complete its response to the even more burdensome discovery requests contained in the CID, and even then the response would be incomplete in significant respects. Moreover, based on the costs WHR incurred in undertaking the effort WHR made to respond to Staff's previous discovery requests, WHR estimates that Wyndham would incur out-of-pocket costs of no less than $3.75 million were it required to respond to the CID as drafted.

Wyndham's Unsuccessful Effort to Resolve Its Objections to the CID

As noted above, Wyndham considers the CID to be objectionable in virtually every respect imaginable. To begin with, for a number of reasons the CID is legally invalid: it is not based on a proper Commission investigational resolution; it was not issued based on the required showing of need for invocation of compulsory process in an FTC investigation; it fails to provide WHR and WWC with the statutorily specified notice of Staff's claim and legal theory; it seeks information related to various issues that Staff has no authority to investigate; and—perhaps worst of all—it obviously was issued for an improper purpose, namely, to coerce WHR's acceptance of the unlawful settlement terms being insisted on by Staff or, failing that, to obtain pre-litigation discovery from Wyndham in the guise of purporting to complete an investigation that, judged by any standard, should have been deemed completed months ago. Moreover, the CID is both grossly overbroad (in that almost all of its requests either duplicate requests Staff has previously made and WHR has previously responded to or address matters that are utterly irrelevant to the WHR Investigation) and unduly burdensome (in that most of its requests are drafted so as to define the subject matter of the request as broadly as imaginable and then to demand a mind-numbing level of detail regarding that subject matter, all without any regard being given to the enormous amount of information WHR has already provided to Staff during

[7] During the meet-and-confer teleconference regarding the CID that took place between Staff and Wyndham, Staff took the position that the WHR Investigation had from its inception extended to WHR's affiliates and their information security practices. Staff was incorrect in advancing this position. The Access Letter was addressed solely to WHR and expressly stated in its very first sentence that Staff was conducting "a non-public investigation into Wyndham Hotels and Resorts, LLC's ('Wyndham') compliance with federal laws governing information security." The third sentence of the Access Letter then stated that "[w]e seek to determine whether *Wyndham's* information security practices comply with Section 5 of the Federal Trade Commission Act" (emphasis supplied). While the Access Letter later incoherently purported to redefine the term "Wyndham" to include Wyndham's affiliates and a number of other entities for purposes determining the scope of the Access Letter's discovery requests, that redefinition did not alter the Access Letter's earlier clear statement that the sole entity actually under investigation by Staff was WHR and the only information security practices being investigated were those of WHR. See Exhibit 3. Moreover, WHR is aware of no subsequent communication from the FTC to any WHR affiliate advising such affiliate that it too was a target of the WHR Investigation or any other investigation being conducted by the FTC.

the course of this investigation and the triviality of the supposed case that Staff has built against WHR by means of that investigation). Wyndham is therefore confident that the CID would be quashed in its entirety if the matter were to be litigated.

Nonetheless, consistent with its two-year history of cooperation with the WHR Investigation, Wyndham sought to negotiate modifications to the CID that would prevent it from unduly burdening Wyndham while at the same time still giving Staff plenty of ability to obtain from Wyndham any additional discovery that it might genuinely need to complete the WHR Investigation. Specifically, in the meet-and-confer conference relative to the CID that Wyndham and Staff conducted on January 6, 2012 pursuant to 16 C.F.R. § 2.7(d)(2),[8] Wyndham proposed that the CID be modified as follows:

- ***First***, with WHR's having already fully responded to no fewer than 51 interrogatories and 29 document requests during the course of the WHR Investigation, Wyndham proposed that the CID be limited to posing up to 10 more interrogatories and 10 more document requests—an approach that would still leave Staff with an aggregate total of 61 interrogatories and 39 document requests during the course of the WHR Investigation, as compared to the 25 interrogatory cap that applies to all federal cases under the Federal Rules of Civil Procedure.

- ***Second***, Wyndham proposed that the up-to-10 additional interrogatories and additional document requests that would be permitted under Wyndham's proposal be drafted by Staff so as to cure the three drafting defects that infect most of the CID's current discovery requests. Wyndham thus proposed that any additional interrogatories and any additional targeted document requests be drafted so as to:

    - avoid duplicating discovery requests Staff had previously made and WHR had already responded to;

    - exclude from their scope documents and information that have nothing whatever to do with the WHR Investigation, such as documents and information relative to the information security practices of WHR's affiliates and service providers; and

    - address the extreme breadth of most of the CID's current interrogatories and targeted document requests, and the extreme level of detail demanded by those interrogatories and targeted document requests, by instead seeking with precision particular documents and information that Staff has not previously requested, that reasonably relates to some specific concern that has arisen during the WHR Investigation, and that would reasonably be expected to be readily accessible to Wyndham.

- ***Third***, in regard to any "all documents requests" that Staff might include in the

[8] The statement required by § 2.7(d)(2) is attached hereto as Exhibit 9.

> revised CID, Wyndham proposed that Staff identify up to three additional custodians whose documents would be reviewed in order to locate documents responsive to any such requests.

See Letter of Douglas H. Meal to Kristin Krause Cohen, January 8, 2012, attached hereto as Exhibit 10 (memorializing proposal made by Wyndham during the meet-and-confer conference).[9]

Staff did not respond to Wyndham's January 6 proposal until January 12, 2012. *See* Letter of Kristin Krause Cohen to Douglas H. Meal and Lydia Parnes, January 12, 2012, attached hereto as Exhibit 11. Staff's response rejected virtually all of Wyndham's proposal, but invited further discussions in an effort to resolve Wyndham's objections to the CID. The next day, Wyndham responded by expressing a willingness to engage in further discussions of that sort, but noted that with Wyndham's deadline for filing a petition to quash the CID being now just a week away, Wyndham would be fully occupied during that week in preparing its petition, so further discussions relative to Wyndham's objections to the CID would have to occur after the petition was filed unless Staff were willing to extend that deadline so as to enable such discussions to occur immediately. Staff did not reply to Wyndham's communication, leaving Wyndham with no choice but to complete and file this petition.

ARGUMENT

Although the FTC has broad statutory authority under 15 U.S.C. § 45(a) to investigate practices that it determines may be deceptive or unfair when used in the course of trade, it is well established that FTC's subpoena power is not unfettered. Although Congress has provided the FTC with authority to conduct reasonable investigations through the use of CIDs, those CIDs are not self-enforcing, and federal courts stand as a safeguard against abusive CIDs. *See, e.g.*, *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) ("The federal courts stand guard, of course, against abuses of their subpoena-enforcement processes….") (citing *U.S. v. Powell*, 379 U.S. 48, 58 (1964) and *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 216 (1946)); *D.R. Horton, Inc. v. Jon Leibowitz, Chairman*, No. 4:10-CV-547-A, 2010 WL 4630210, at *2 (N.D. Tex. Nov. 3, 2010) ("As the government notes in its motion documents, the CID is not self-executing, and may only be enforced by a district court in an enforcement proceeding. . .").

[9] Wyndham's January 8 letter also noted that, while not addressed in the January 6 teleconference, Wyndham generally objects to the CID insofar as it defines "personal information" to include employee information; insofar as it requires a privilege log (at least one as detailed as set forth in the CID); insofar as it defines terms such as "document", "identify", and "relating to" to have something other than their standard English meanings; insofar as it purports to treat documents as being in Wyndham's possession, custody, and control that would not be treated as such under the Federal Rules of Civil Procedure; insofar as it purports to impose a search obligation on Wyndham beyond the search obligation that would be imposed under the Federal Rules of Civil Procedure; insofar as it imposes protocols for document and information production that are different from those protocols that have been followed by WHR thus far in the course of the investigation; insofar as it is addressed to Wyndham Worldwide Corporation rather than to WHR; insofar as it purports to allow only 30 days for compliance; and insofar as it treats the relevant time period as extending beyond May 2010. Wyndham accordingly stated that its proposal should be read to include a request that these aspects of the CID be redrafted as well.

The Supreme Court, in *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950), established the standard for determining whether a CID should be quashed or limited. Although the Court enforced the decree that was before it in that particular case, it recognized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.* at 652. Accordingly, the Court instructed that agency subpoenas or CIDs should not be enforced if they demand information that is: (a) not "within the authority of the agency," (b) "too indefinite," or (c) not "reasonably relevant" to the inquiry. *Id.* This standard has been consistently applied by the courts. *See, e.g., SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) (citing *Morton Salt*, 338 U.S. at 653) (confirming that "[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met"); *Arthur Young & Co.*, 584 F.2d at 1030-31 (noting that the subpoena request must "not [be] so overbroad as to reach into areas [that] are irrelevant or immaterial" and that specifications must not exceed the purpose of the relevant inquiry) (internal quotation marks and citation omitted).

In applying the *Morton Salt* standard, the costs and burdens imposed on the target of a CID also must be considered. *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (a party challenging a subpoena can do so by showing the compliance costs are overly burdensome or unreasonable); *Phoenix Bd. Of Realtors, Inc. v. Dep't of Justice*, 521 F. Supp. 828, 832 (D. Ariz. 1981) (the government should negotiate to narrow scope of a CID when compliance may be overly burdensome). Thus, administrative agencies may not use their subpoena powers to go on fishing expeditions. *FDIC v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997); *FTC v. Nat'l Claims Serv., Inc.*, No. S. 98-283, 1999 WL 819640, at * 1 (E.D. Cal. Feb. 9, 1999). *See also* S. Rep. No. 96-500 at 1105, 96th Congress 1st Session (1979) ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity.'"). "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *FTC v. Am. Tobacco Co.*, 264 U.S. 298, 306 (1924).

Upon applying the *Morton Salt* standard to the CID at issue here, there can be no doubt that the CID must be quashed. To begin with, for a variety of reasons the CID is invalid. *See* Part I below. In addition, the CID is wildly indefinite in numerous respects, is not reasonably relevant to the WHR Investigation in numerous other respects, is for the most part nothing more than a fishing expedition, and—perhaps worst of all—would impose an enormous burden on Wyndham that cannot possibly be justified when one considers the voluminous amount of information and documents that WHR has already provided to Staff, the paucity of the evidentiary record that the WHR Investigation has generated regarding possible Section 5 violations on the part of WHR, and the triviality of the one (and only) Section 5 violation that Staff believes (wrongly) the WHR Investigation has thus far uncovered. *See* Part II below.

I. THE CID IS INVALID

For a variety of reasons, the CID is invalid and, accordingly, must be quashed under *Morton Salt*. To begin with, the CID is not predicated on a Commission-adopted investigational resolution of the sort expressly required both by statute and by the FTC's own regulations. *See*

Part I.A below. Second, issuance of the CID was not predicated on the showing of need for compulsory process that is a necessary prerequisite for any use of compulsory process in an FTC investigation. *See* Part I.B below. Third, in issuing the CID the FTC did not meet its obligation, under its own regulations, to advise Wyndham in the CID itself of the purpose and scope of the investigation, the nature of the Wyndham conduct believed by Staff to have violated Section 5, and the legal theory supporting Staff's belief. *See* Part I.C below. Fourth, the sequence of events leading up to the issuance of the CID leaves no doubt that it was issued for an improper purpose, which in and of itself invalidates the CID. *See* Part I.D below. Finally, because Staff has no authority to expand the WHR Investigation into WHR's information security practices regarding employee (rather than consumer) data, or into the information security practices of WHR's affiliates or service providers, the CID is invalid insofar as it seeks information and documents relative to such security practices. For each, and all, of these reasons, the CID should be quashed.

A. The CID is Not Predicated on a Proper Investigational Resolution

The statutory and regulatory regime governing FTC CIDs expressly provides that a Commissioner may issue a CID *only* as part of an existing investigation with respect to which a resolution authorizing the use of compulsory process in *that* investigation has previously been adopted by the full Commission. The governing statute (Section 20(i) of the FTCA) reads as follows in relevant part:

> Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information . . . unless such subpoena or demand for information is signed by a Commissioner *acting pursuant to a Commission resolution*.

15 U.S.C. § 57b-1(i) (emphasis added). Part 2 of Subchapter A of the Commission's own regulations (the "Rules of Practice") expressly incorporate this statutory requirement by dictating that "[t]he Commission or any member thereof may, *pursuant to a Commission resolution*, issue a subpoena or civil investigative demand." 16 C.F.R. § 2.7 (emphasis added). In this regard, the Rules of Practice make clear not only that a CID is only valid if predicated on a Commission-adopted investigational resolution authorizing the use of compulsory process in the investigation in question, but also that a Commission-adopted investigational resolution is only valid if it is adopted as part of an existing FTC investigation of a particular matter, and even then its validity extends *only* to that particular investigation. "[T]he Commission may, *in any matter under investigation* adopt a resolution authorizing the use of any or all of the compulsory processes provided for by law." 16 C.F.R. § 2.4 (emphasis added). Here, then, the CID is invalid, and must be quashed, unless subsequent to the commencement of the WHR Investigation the full Commission adopted an investigational resolution approving the use of compulsory process in the WHR Investigation.

It is indisputable that the full Commission has never adopted any such resolution in regard to the WHR Investigation. This is made clear by the CID itself, which points to an FTC resolution dated January 3, 2008 as being the Commission-adopted resolution that ostensibly satisfies Section 20(i) of the FTCA and Sections 2.4 and 2.7 of the Rules of Practice in regard to the CID. *See* FTC Resolution No. P954807 (Jan. 3, 2008) (the "January 2008 Resolution"),

which is included in the CID (Exhibit 1 hereto) as an attachment. However, whatever FTC investigation may have been the subject of the January 2008 Resolution, that investigation certainly *was not* the WHR Investigation. The January 2008 Resolution nowhere even makes mention of the WHR Investigation, or of the Intrusions, or even of Wyndham. Nor could it have done so, for the first Intrusion did not even begin until June 2008, six months *after* the January 2008 Resolution was approved by the Commission. As of January 2008, then, there was nothing for the FTC to investigate in regard to WHR's information security practices. Indeed, the WHR Investigation was not commenced until 2010, as shown by the WHR Investigation's seven-digit identification number (1023142). Accordingly, the Commission's adoption of the January 2008 Resolution obviously had nothing to do with the WHR Investigation, and the investigation of WHR's information security practices referenced in the Access Letter (i.e., the WHR Investigation, which according to page 1 of the Access Letter was prompted by the Intrusions) obviously has to be a *different* investigation from the investigation referenced in the January 2008 Resolution. That being the case, the January 2008 resolution does not, and cannot, satisfy the statutory and regulatory requirement that the CID be predicated on a Commission-adopted investigational resolution approving the use of compulsory process in the WHR Investigation.

Wyndham anticipates that Staff will attempt to defend the absence of any resolution adopted by the Commission that references the WHR Investigation by arguing that Section 20(i) of the FTCA and Sections 2.4 and 2.7 of the Rules of Practice can be satisfied, in regard to any given CID, not only by a Commission-adopted resolution specifically addressing the particular investigation that is the subject of the CID, but also by a generic resolution by which the Commission purports to approve the use of compulsory process in Staff investigations of a certain general type, including Staff investigations that at the time of the resolution have not yet been commenced or even conceived of by Staff, but nonetheless are of the general type described in the resolution. In advancing such an argument, Staff will likely point to Section 3.3.6.7.4 of the FTC Operating Manual (the "Operating Manual"), in which the FTC takes the position that the "investigational resolution" requirement embedded in Section 20(i) and Sections 2.4 and 2.7 of the Rules of Practice can be satisfied not only by either a "special resolution" that specifically references the particular Staff investigation and company to which the CID in question relates or an "omnibus resolution" that authorizes an investigation having a particular industry focus rather than a particular company focus,[10] but also by what the Operating Manual defines as a "blanket resolution." Any argument by Staff that the January 2008 Resolution constitutes a "blanket resolution" within the meaning of Section 3.3.6.7.4.3 of the Operating Manual[11] and, as such, satisfies the investigational resolution requirement in regard to the CID, would be incorrect for two separate reasons.

First, neither Section 20(i) of the FTCA nor Sections 2.4 and 2.7 of the Rules of Practice can be read to permit the investigational resolution requirement (i.e., the requirement that any CID be predicated on an investigational resolution approved by the full Commission) to be

[10] An "omnibus resolution" is geared toward "an industrywide investigation" into certain "industry conduct or practices." Operating Manual, § 3.3.6.7.4.2. Nothing in the January 2008 Resolution describes the investigation authorized thereby as having an industry focus.

[11] As defined in the Operating Manual, when a "blanket resolution" is used to satisfy the investigational resolution requirement, "the investigation is ordinarily directed at certain types of practices rather than specific industries." Operating Manual, § 3.3.6.7.4.3.

satisfied by means of a resolution that does not even *mention* (much less authorize the use of compulsory process in) the particular investigation in which the CID was issued. To begin with, such a reading flies in the face of the unambiguous language of these provisions themselves, which language expressly states that the Commission can only adopt a resolution authorizing compulsory process "in [a] matter under investigation," 16 C.F.R. § 2.4—not "in [a] matter that may some day come under investigation." In addition, reading these provisions to be satisfiable by means of "blanket" investigational resolutions would utterly defeat the legislative purpose behind the investigational resolution requirement. Congress enacted Section 20(i) as part of the Federal Trade Commission Improvements Act of 1980. The Senate Report accompanying that bill makes clear that two key objectives of Section 20(i) were "to limit the practice of the Commission of giving a vague description of the general subject matter of the inquiry" and to ensure that the Commission "take[s] very seriously its obligation to demand information only where the information is not available through other means." *See* S. Rep. No. 96-500, at 1125, 27. Plainly, there is no way for the Commission to meet these congressional objectives by means of "blanket" investigational resolutions, because the Commission cannot possibly include in a blanket investigational resolution anything more than "a vague description of the general subject matter of the inquiry" and cannot in adopting a blanket resolution give even the slightest consideration (much less "take seriously") whether the information that any given respondent will be compelled to produce pursuant to the resolution "is not available through other means." To the contrary, the only way the Commission can meet the congressional objectives that underlie the investigational resolution requirement is if the Commission, when called upon to satisfy its statutory duty to ensure that any use of compulsory process in a Staff investigation must always be predicated on an investigational resolution adopted by the full Commission, discharges that duty by evaluating *the particular investigation in question*. In short, then, to the extent Staff were to oppose Wyndham's petition to quash by taking the position that the investigational resolution requirement embedded in Section 20(i) can be satisfied by means of a "blanket" investigational resolution, Staff would in effect be taking the position that the Commission is entitled to abdicate the very duty of overseeing Staff investigations that Congress intended to impose on the Commission by means of the investigational resolution requirement.

Second, even if the investigational resolution requirement could theoretically be satisfied in a given case by means of a "blanket" resolution, for several reasons the January 2008 Resolution does not come anywhere close to satisfying what even the FTC acknowledges would be required for a particular blanket resolution to pass muster under Section 20(i) of the FTCA and Sections 2.4 and 2.7 of the Rules of Practice:

- For one thing, even the FTC acknowledges in the Operating Manual that "[b]lanket resolutions have been approved by the Commission in a limited number of instances such as in connection with the issuance of 'second requests' under the Hart-Scott-Rodino Act," and that such resolutions ordinarily contemplate an investigation "directed at certain types of practices." Operating Manual, § 3.3.6.7.4.3. In that regard, the Operating Manual provides an example of what the FTC considers to be a proper blanket resolution; in that example, the resolution expressly limits the investigation in question to a particular category of practices involving the sale of merchandise by mail that violates not only Section 5 but also an entirely separate statute (namely, 39 U.S.C. § 3009) that prohibits the mailing of unordered merchandise in certain circumstances. *See* Operating Manual, Chapter 3, Illustration 11. In contrast, the January 2008 Resolution contains

nothing more than a *topical* limitation on the investigation with respect to which that resolution purports to authorize the use of compulsory process. *See* January 2008 Resolution (included in Exhibit 1 hereto) (authorizing use of compulsory process in an investigation to determine whether unnamed persons have committed deception- or unfairness-based Section 5 violations "related to consumer privacy and/or data security"). Moreover, that topical limitation really operates as no limitation at all, for in net effect the January 2008 Resolution purports to authorize the Bureau of Consumer Protection's Division of Privacy and Identity Protection to conduct a five-year investigation of any matter within its jurisdiction, during which investigation it can use compulsory process whenever it feels like doing so. As such, the January 2008 Resolution bears no resemblance at all to the sort of "blanket resolution" that the Operating Manual claims (wrongly) might permissibly be used as the predicate for issuance of a CID.

- The FTC also acknowledges in the Operating Manual that "[i]nvestigational resolutions must adequately set forth the nature and scope of the investigation." Operating Manual § 3.3.6.7.4.1. This requirement stems from the welter of judicial authority holding that a court may only look to the purpose and scope of an investigation as described in the investigational resolution to determine propriety of a CID predicated on that resolution. *See, e.g.*, *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) ("[T]he validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence" (citing *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980))); *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) ("The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution"). The January 2008 Resolution, however, says nothing at all about the nature and scope of the WHR Investigation (nor could it have, since the WHR Investigation was more than two years away from being commenced at the time the January 2008 Resolution was adopted). Accordingly, the January 2008 Resolution does not begin to satisfy the requirement (which even the FTC acknowledges) that an investigational resolution provide sufficient detail regarding the investigation in question to enable a court to determine the relevance to the investigation of the material being sought by the compulsory process in question.

- Finally, by its own express terms the January 2008 Resolution only purports to authorize the issuance of compulsory process in "this investigation" (*see* Exhibit 1 hereto)—i.e., in the investigation that is described in the January 2008 Resolution and that is identified by FTC File No. P954807. *See* Exhibit 1 hereto. Thus, even if the January 2008 Resolution were a sufficient predicate for the use of compulsory process in the investigation described and identified in the January 2008 Resolution, by its own terms the January 2008 Resolution does not purport to the authorize the use of compulsory process in any *other* investigation Staff might conduct. In that regard, the CID was issued not in the investigation described and identified in the January 2008 Resolution, but rather in *the WHR Investigation*—i.e., in the investigation that is described in the Access Letter as seeking to determine whether "Wyndham's [i.e., WHR's] information security practices comply with Section 5" and that is identified by FTC File No. 1023142. *See* Letter of Kristin Krause Cohen to Lydia Parnes and Douglas H. Meal, dated January 6, 2012, attached hereto as Exhibit 12 (describing the CID as having been issued "in our

investigation related to unauthorized access to the computer network of Wyndham Hotels and Resorts, LLC"). Since by Staff's own acknowledgment the CID was not issued in the investigation referenced and identified in the January 2008 Resolution, the very terms of the January 2008 Resolution preclude the January 2008 Resolution from serving as a valid predicate for the issuance of the CID. That being the case, and there being no Commission-approved investigational resolution of any kind with respect to *the WHR Investigation*, there is no valid predicate for the CID, whether or not the January 2008 Resolution might be thought to be a valid predicate for compulsory process that might be issued in the investigation referenced in that particular resolution.

In sum, for all the foregoing reasons, the January 2008 Resolution is entirely different from those investigational resolutions that have passed muster in the courts. For example, in *FTC v. O'Connell Assocs., Inc.* 828 F. Supp. 165, 167 & n.1 (E.D.N.Y. 1993), the 1990 investigational resolution on which the FTC's CIDs were predicated was an omnibus resolution (not a blanket one) authorizing an ongoing investigation into the consumer credit reporting industry, and the tip that the FTC received in 1992 that led to the issuance of the CIDs was generated as part of that *same* investigation. Here, in contrast, there is no suggestion that the CID was issued as part of what the January 2008 Resolution describes as a generic investigation into "consumer privacy and/or data security" violations being conducted by the Bureau of Consumer Protection's Division of Privacy and Identity Protection over a five-year period. To the contrary, it is undisputed that the CID was issued in an entirely different Staff investigation of one particular company's information security practices, and that the Commission has never approved an investigational resolution as to *that* investigation. Moreover, even if the CID had been issued in the investigation described in the January 2008 Resolution, permitting that resolution to serve as a valid predicate for the CID would mean that the Commission has the authority to grant the Bureau of Consumer Protection's Division of Privacy and Identity Protection what amounts to a blank check to utilize compulsory process whenever and wherever it so desires during a five-year period. This reading of Section 20(i) of the FTCA and Sections 2.4 and 2.7 of the Rules of Practice would fly in the face of the language of those provisions, ignore the FTC's own interpretation of that language, and eviscerate the investigational resolution requirement that Congress put in place precisely to protect against the Commission's compulsory process authority being used in the abusive fashion that occurred here.

B. The CID Was Not Issued Based on the Required Showing of Need for Compulsory Process to Be Used in the WHR Investigation

As noted above, Section 20(i) of the FTCA expressly prohibits any compulsory process from being issued in an FTC investigation unless (i) the full Commission has adopted an investigational resolution authorizing the use of compulsory process in the context of that particular investigation and (ii) a Commissioner has in turn approved the particular form of compulsory process that Staff is proposing to propound pursuant to that investigational resolution.[12] Congress included Section 20(i) in the Federal Trade Commission Improvements Act of 1980 for the precise purpose of "curtail[ing] the issuance by the Commission of overly

[12] "Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information . . . unless such subpoena or demand for information is signed by a Commissioner acting pursuant to a Commission resolution. The Commission shall not delegate the power conferred by this section to sign subpoenas or demands for information to any other person." 15 U.S.C. 57b-1(i).

broad subpoenas." *See* S. REP. NO. 96-500 at 1107. In that regard, Congress made clear that going forward, in a situation where a company had already provided substantial information during the course of an investigation, Congress expected the Commission (i) to seek additional information via compulsory process "only if the [C]ommission determines, after reviewing the initial submission, that more information is required" and (ii) to adhere to "its obligation to demand information [via compulsory process] only where the information is not available through other means." *Id.* at 1127. Moreover, in order to ensure that the Commission would achieve these congressional objectives, the Senate Report included the following express, and unambiguous, directive to the Commission in regard to the process to be followed by the Commission in satisfying the non-delegable obligations imposed on it under Section 20(i):

> [T]he Committee intends that the agency require staff memos to the Commission before a CID is issued to describe with specificity the information needed, the reasons why the information is relevant to the inquiry, and the cost and burden production will impose on target companies. The Committee also intends that the agency require Commission staff to explain why the information is not available through alternative (voluntary) means. The Committee intends that under this new procedure, the Commission will carefully review a subpoena before it is issued. In particular, the Commission should make appropriate use of staggered production schedules to minimize burden and inconvenience.

Id.

The Commission itself recognizes the responsibility it has, under Section 20(i) of the FTCA, to insist that Staff makes a proper showing of justification to the Commission at all steps along the path of compulsory process, from beginning the investigation, to obtaining a resolution that authorizes compulsory process, to acquiring permission to use a specific instance of compulsory process, such as any given CID. Specifically, pursuant to the Operating Manual:

- Staff requests for approval of full investigations are to be made by means of a transmittal memorandum addressed to either the Bureau Director or (where Staff intends for compulsory process to be used in the course of the investigation) the Commission. Operating Manual, § 3.3.5.1.2. The "memorandum requesting approval for full investigation should . . . explain the need for approval of the full investigation, including a discussion of" such factors as "[a] description of the practices and their impact on consumers," the "[e]xtent of consumer injury inflicted by the practices to be investigated," "[w]hat forms of relief are contemplated," and "justification for use of compulsory process." *Id.* § 3.3.5.1.4.
- Similarly, Staff requests for approval of an investigational resolution are to be submitted in the form of a memorandum addressed to the Commission, which "should include a general statement of the nature of the investigation in addition to the justification for the use of compulsory procedures" as well as "a cost summary." *Id.* § 3.3.6.7.3. As noted above, under Section 20(i) the Commission is obliged to find the use of compulsory process to be justified "only where the information is not available through other means." S. REP. NO. 96-500, at 1127. Consistent with that statutory obligation, under the

Operating Manual the only legitimate reasons for requesting authority to use compulsory process that are identified in the Operating Manual are "to avoid delay, to obtain testimony under oath, to obtain evidence from persons who will not or who [S]taff believe will not provide complete information voluntarily, or to prevent destruction or withholding of evidence and preserve the Commission's legal remedies against any such destruction or withholding." Operating Manual, § 3.3.6.7.2.

- Finally, when Staff requests that the Commission issue a CID pursuant to an investigational resolution previously adopted by the full Commission, Staff is required to submit the proposed CID to the responsible Commissioner for approval, along with a "justification memorandum" that "should describe with specificity . . . the information needed, the reasons why the information is relevant to the inquiry, and the cost and burden production will impose on target companies." *Id*. § 3.3.6.7.5.4.

Unfortunately, notwithstanding the Commission's clear legal duty to approve a Staff request for the issuance of compulsory process in a particular investigation only where the request has been justified by Staff in the manner set forth in the Senate Report and the Operating Manual, here it is beyond dispute that the CID issued without any such justification having been provided by Staff or required either by the Commission when it authorized compulsory process to be used in the WHR Investigation or by the responsible Commissioner when the CID itself was issued:[13]

- To begin with, Staff's memorandum seeking authorization to institute the WHR Investigation could not have described, and the Commission's and/or the Bureau Director's approval of the WHR Investigation's could not have been based on, any alleged "consumer injury inflicted by the practices to be investigated." *See id.* § 3.3.5.1.4. As noted above, payment card issuers protect their cardholders from suffering any financial injury by reason of their payment card data being compromised, and payment card data was the only personal information placed at risk of compromise during the Intrusions. *See* page 4 above. That being the case, no substantial consumer injury resulted from the Intrusions, and any claim by Staff or finding by the Bureau Director or the Commission to the contrary would have been clearly wrong.
- Further, Staff's memorandum seeking issuance of the CID could not have accurately described, and the Commissioner's issuance of the CID could not have been based on an accurate understanding of, "the reasons why the information is relevant to the inquiry, and the cost and burden production will impose on target companies." *See id*. § 3.3.6.7.5.4. Indeed, there is simply no way any Commissioner would ever have issued

[13] Obviously, the clearest way to assess the propriety of Staff's effort to justify using compulsory process in the course of the WHR Investigation would be by examining the required memoranda by which Staff (i) sought authority to institute the WHR Investigation; (ii) asked that the Commission adopt the investigational resolution on which the CID ostensibly is predicated (i.e., the January 2008 Resolution); and (iii) asked that the Commission issue the CID. Accordingly, by means of a letter dated January 13, 2012, Wyndham asked Staff for copies of the required memoranda (among other documents). See Exhibit 13 hereto. By letter dated January 17, 2012, Staff refused to provide the requested memoranda to Wyndham, claiming it had no obligation to do so and that Wyndham had not explained its reason for seeking the memoranda. See Exhibit 11 hereto. Wyndham accordingly sent Staff a letter dated January 19, 2012 explaining the obvious relevance of the documents Wyndham had requested. See Exhibit 15 hereto. Staff never responded to that letter prior to the deadline for filing Wyndham's petition to quash the CID.

the CID had he or she appreciated the rampant overbreadth of the CID in making inquiries into the information security practices of WHR's affiliates and service providers, the pervasive duplicativeness of the CID's repeated requests for information and documents that WHR has already provided in its response to the Access Letter and subsequent Staff requests, and the multi-million-dollar financial burden compliance with the CID would place upon Wyndham, on top of the millions of dollars of out-of-pocket costs Wyndham has already incurred in voluntarily cooperating with the WHR Investigation. *See* pages 5-6 above.

- Finally, and most important, any Staff memorandum seeking authorization to use compulsory process in the course of the WHR Investigation, whether submitted in seeking authorization to institute the investigation or adoption of an investigational resolution or issuance of the CID, could not possibly have presented the statutorily required justification for the use of compulsory process. As described above, WHR made exhaustive efforts over sixteen months to comply fully and voluntarily with the numerous discovery requests contained in the Access Letter and in Staff's subsequent communications. Staff has never once suggested that those efforts were in any way inadequate to meet Staff's investigatory objectives. *See* page 6 above. Moreover, Staff never once made any effort to obtain voluntarily from Wyndham any of the information and documents requested by the CID. *See* page 22 above. Given these indisputable facts, no Staff memorandum could have possibly satisfied the Commission's statutory obligation to "require Commission staff to explain why the information [sought by a CID] is not available through alternative (voluntary) means." S. REP. NO. 96-500, at 1127. Certainly nothing has occurred in the course of the WHR Investigation to support any claim by Staff, or any finding by the Commissioner who issued the CID, that issuance of the CID was, in the words of the Operating Manual, necessary so as "to avoid delay, to obtain testimony under oath, to obtain evidence from persons who will not or who [S]taff believe will not provide complete information voluntarily, or to prevent destruction or withholding of evidence and preserve the Commission's legal remedies against any such destruction or withholding." Operating Manual § 3.3.6.7.2.

In sum, there is nothing in the record to justify a finding by the Commission, in deciding Wyndham's instant petition to quash the CID, that issuance of the CID was predicated on a proper showing by the Staff, or a valid finding by the Commissioner who issued the CID, that the statutory and regulatory requirements for use of compulsory process in the WHR Investigation in general, and for issuance of the CID in particular, were satisfied here. With Staff and the Commission both having failed to follow the Commission's own internal procedures in authorizing the use of compulsory process in the WHR Investigation and in issuing the CID, the CID is defective and may not be enforced. *See SEC v. Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980) ("[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that . . . all administrative prerequisites have been met" (citing *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950))); *accord SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir. 1970).

C. The CID Does Not Inform WHR and WWC of the Purpose and Scope of the WHR Investigation or of the Nature of the Conduct Constituting Their Alleged Section 5 Violation or of How Section 5 Allegedly Applies to Their Conduct

As noted above, one of the key congressional objectives in enacting the Federal Trade Commission Improvements Act of 1980 was to "limit the practice of the Commission of giving [targets of compulsory process] a vague description of the general subject matter of the inquiry." *See* S. REP. NO. 96-500, at 1125. In place of that practice, Congress intended that upon passage of the statute "[a] civil investigative demand would have to . . . state the nature of the conduct of the alleged violation under investigation and the law applicable thereto." *Id*. at 1105. The Senate Report explained that the reason for imposing this obligation on the Commission in connection with issuing a CID was not only to accord basic fairness to the recipient of a CID, but also to ensure that every CID "provides a standard by which relevance may be determined" both by the recipient and by a reviewing court in evaluating the propriety of the CID. *Id*. at 1125. As aptly stated by Congressman Coughlin during the House of Representatives debate on the bill:

> We need to protect American business from overbroad investigative subpoenas demanding the production of great quantities of information and documents with no requirement that these demands be relevant to some suspected violation. . . . The Commission's powers of visitation and subpoena are awesome powers that require reasonable safeguards against abuse. The Senate will soon mark up a bill which would curb this subpoena power by requiring that the Commission specify the conduct they are investigating and why the Commission believes that the conduct violates the law. This would force the Commission to draft narrower and more reasonable subpoenas, and also establish criteria for judicial review of these subpoenas.

125 CONG. REC. 32,458 (1979). Senator Heflin echoed this view on the Senate side:

> Too often, the Commission has not seen fit to state clearly what conduct it is investigating—leaving the recipients of its subpoena with no basis on which to question the relevance of anything that might be asked for. When the Committee [sic] states, as it has done on occasion, that its purpose in investigating a company is to see whether that company may have been engaged in acts or practice violating section 5 of the FTC Act, and combines that all-inclusive statement of purpose with broad subpoena specifications, what it will get in response approaches the entire contents of that company's files. This is bad for the respondent and, I think, bad for the Commission as well. For this reason, the real heart of section 12 of the bill is a simple requirement applying to the proposed civil investigative demands, as follows: '(2) Each such demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable thereto.' That requirement, allowing some means of challenging the relevance of what the Commission asks for, would become section 20(c)(2) of the act as amended. . . . If the FTC staff has to define what it is after before it starts, rather than asking for everything, then fighting in court to get it, and later sorting out what it really wants, it is likely to make more actual progress in its investigations. . . . [T]he FTC has had a tendency to waste its own time and money, as well as that of subpoena respondents, by failing to bring its subpoena demands under control.

126 CONG. REC. 2394-96 (1980).

As enacted, the statute included a provision containing virtually the exact wording of the proposed provision described by Senator Heflin during the Senate floor debate of the bill:

> Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

15 U.S.C. § 57b-1(c)(2). The Rules of Practice take this statutory mandate one step further, stating that "[a]ny person under investigation compelled or requested to furnish information or documentary evidence shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation." 16 C.F.R. § 2.6. Here, then, the CID must be found invalid, and accordingly must be quashed, unless it somewhere advises Wyndham of (i) the purpose and scope of the WHR Investigation; (ii) the nature of the conduct by Wyndham constituting the alleged violation that is under investigation in the WHR Investigation; and (iii) the provision of law applicable to such violation.

The CID does *none* of these three things. Rather, the entirety of the CID's effort to meet the Commission's notice obligations under Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice consisted of the following three words that were included in Section 3 of the CID, entitled "Subject of Investigation":

> "See attached resolution"

See Exhibit 1 hereto, at page 1. The "attached resolution" referenced in Section 3 of the CID is the January 2008 Resolution. Regardless of whether the January 2008 Resolution constitutes a proper investigational resolution under Section 20(i) of the FTCA and Sections 2.4 and 2.7 of the Rules of Practice (and Wyndham strongly believes, for the reasons stated in Part I.A above, that it does not), that resolution in no way, shape, or form meets the entirely separate notice requirements of Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice. To begin with, the January 2008 Resolution does not even mention the WHR Investigation, much less advise Wyndham of the purpose and scope of that investigation. Further, the January 2008 Resolution does not even mention Wyndham, much less advise Wyndham of the nature of the conduct by Wyndham constituting the alleged violation that is under investigation in the WHR Investigation. Finally, while the January 2008 Resolution does reference Section 5 of the FTCA, it nowhere describes how that provision of law is allegedly applicable to any conduct on the part of Wyndham. In short, the January 2008 Resolution provides both Wyndham and a reviewing court with literally *nothing* to go on in trying to assess the relevancy to the WHR Investigation of the CID's interrogatories and document requests. That being the case, the CID fails utterly to meet the Commission's notice obligations under Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice.

The inadequacy of the January 2008 Resolution for purposes of satisfying the Commission's notice obligations under Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice becomes evident when one contrasts the January 2008 Resolution with the omnibus resolution at issue in the *Carter* case. As the court indicated in *Carter*, where a CID

seeks to satisfy Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice by cross-referencing an investigational resolution adopted by the Commission, the investigational resolution has to at least provide a "basis for determining the relevancy of the information demanded." *See FTC v. Carter*, 636 F.2d at 787-88. The investigational resolution at issue in *Carter* did just that, first by actually referencing the investigation in which the CID in question had been issued (something the January 2008 Resolution did not do and could not have done, given that the CID was not in fact issued in the investigation authorized by the January 2008 Resolution), and then "by identifying the specific conduct under investigation." *Id.* at 787-88. Moreover, rather than including just a broad topical reference to the conduct under investigation, as is the case in the January 2008 Resolution, the investigational resolution relied upon in *Carter* specified particular conduct in detail, namely "the advertising, promotion, offering for sale, sale, or distribution of cigarettes." *Id.* at 788. Crucially, the *Carter* court pointed out that the resolution had been adopted (in addition to under Section 5 of the FTCA) under "Section 8(b) of the Cigarette Labelling and Advertising Act," a far more topically-focused statute than Section 5, so much so that the reference to the statute was "self-expressive of several purposes of this investigation." *Id*. Otherwise, the Court noted that "Section 5's prohibition of unfair and deceptive practices . . . standing broadly alone would not serve very specific notice of purpose" such that it needed to be "defined by its relationship to section 8(b)" as well as linked "to the subject matter of the investigation." *Id.*

In sum, what we have here is a case where, in the words of Senator Heflin, "the Commission has not seen fit to state clearly what conduct it is investigating—leaving the recipients of its [CID] with no basis on which to question the relevance of anything that might be asked for." 126 CONG. REC. 2394 (1980). Congress took action more than thirty years ago to prohibit the Commission from behaving in this abusive fashion. Wyndham is unaware of any judicial decision in the ensuing 30-plus years approving of an FTC CID where the CID purported to satisfy the Commission's notice obligations under Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice by cross-referencing an investigational resolution that (i) nowhere even mentions (much less advises the recipient of the purpose and scope of) the investigation in which the CID was issued; (ii) nowhere even identifies the target of the investigation (much less advises the recipient of the nature of the target's conduct constituting the alleged violation that is under investigation); and (iii) nowhere describes how the provision of law cited in the resolution is allegedly applicable to any conduct on the part of the target. Wyndham therefore is confident that any reviewing court would quash the CID on this ground alone, if for some reason the Commission does not do so itself in response to Wyndham's instant petition.

D. The CID Was Issued for the Improper Purpose of Either Coercing WHR's Acceptance of Unlawful Settlement Terms or Engaging in Premature Litigation Discovery (or Both)

A CID should be issued, if at all, only in order to investigate whether the law has been violated. *See, e.g.*, Operating Manual, § 3.3.6.7.5.3. Thus, courts will quash agency demands for information that were "issued for an improper purpose, such as to harass [the recipient] or to put pressure on him to settle . . . or for any other purpose reflecting on the good faith of the particular investigation." *United Sates v. Powell*, 379 U.S. 48, 58 (1964); *see also FTC v. Bisaro*, 2010 WL 3260042, at *5 (D.D.C. July 13, 2010). Here, as detailed below, the record leaves no doubt

that the CID was issued either for the improper purpose of coercing WHR and its affiliates' acceptance of the unlawful settlement terms being insisted on by Staff, or for the improper purpose of enabling Staff to engage in litigation-related discovery in the guise of "completing" an investigation that by Staff's own admission had already accomplished its investigational objectives—or for both improper purposes. For this separate and independent reason, the CID is invalid and must be quashed.

As detailed earlier in this petition (*see* pages 11-12 above), the CID (i) pervasively duplicates Staff's prior requests for documents and information made during the course of the WHR Investigation; (ii) is patently overbroad in without authority seeking to expand the WHR Investigation at the eleventh hour to WHR's employees, affiliates, and service providers; (iii) is wholly unnecessary given that the WHR Investigation has by Staff's own admission already achieved its investigatory objective; and (iv) is unjustifiably burdensome when one takes into account the vast amount of information WHR has already provided to Staff at huge expense during the sixteen-month course of the WHR Investigation, the enormous costs Wyndham would incur in trying to comply with the CID, and the trivial nature of the Section 5 violation that Staff believes it found after sixteen months of investigating WHR's information security practices. Given these facts, it ought to be obvious to the Commission, and if not it certainly would be obvious to a reviewing court, that the CID in no way represents a good faith attempt by Staff to request of WHR merely whatever minimal additional discovery Staff might at this juncture legitimately believe it needs to complete the WHR Investigation. To the contrary, the Commission should find, and if it does not a reviewing court would find, that the only plausible explanation for the CID's enormous breadth is that it was drafted and served for the improper purpose of coercing WHR and its affiliates into accepting the Staff settlement terms being objected to by WHR—settlement terms that, as demonstrated in the white paper delivered by WHR to Staff on November 21, 2011 (Exhibit 7 hereto), Staff has no lawful basis for seeking to impose on WHR and its affiliates.

In evaluating Staff's true purpose in requesting issuance of the CID, the Commission should (and a reviewing court surely would) note that the CID was served only days after WHR delivered its white paper demonstrating the unlawfulness of the settlement terms being demanded by Staff and objected to by WHR. Moreover, the Commission should (and a reviewing court surely would) find it telling that Staff flatly refused Wyndham's request for a copy of the memorandum Staff was required to prepare for and submit to the responsible Commissioner in requesting issuance of the CID (*see* note 13 above), even though such memorandum is directly relevant to any evaluation by the Commission or a reviewing court of the propriety of Staff's purpose in seeking issuance of the CID. Perhaps more telling still is the fact that even now, two months after the white paper was delivered, Staff has provided WHR with no rebuttal of any sort to the arguments WHR advanced in the white paper as to the unlawfulness of the settlement terms being demanded by Staff. Indeed, to this day Staff's only response to the legal arguments in WHR's white paper has been to seek and obtain issuance of the CID. The message being conveyed by Staff by means of that response could not have been clearer: "Settle on our unlawful terms Wyndham—or else we will crush you with our discovery requests." As Judge Posner said in a recent decision granting an injunction to prevent one party's "threat to turn the screws" using costly discovery, "the pressure on [defendant] to settle on terms advantageous to its opponent will mount up if [opposing] counsel's ambitious program of discovery is allowed to continue." *Thorogood v. Sears, Roebuck and Co.*, 624 F.3d 842, 850

(7th Cir. 2010), *vacated and remanded on other grounds*, 131 S. Ct. 3060 (2011). Here then, just as Judge Posner did in *Thorogood*, the Commission should block the "ambitious program of discovery" reflected in Staff's CID and thereby put an end to Staff's blatant attempt to "turn the [settlement] screws" on Wyndham by seeking and obtaining issuance of the CID.

What makes Wyndham's improper-purpose argument for quashing the CID even more compelling is the powerful record evidence that Staff sought issuance of the CID not only for the improper purpose of coercing Wyndham to accept an unlawful settlement, but also (in the event Wyndham did not accept Staff's unlawful settlement terms) for the additional improper purpose of enabling Staff to obtain litigation-related discovery from Wyndham without in so doing being subject to the rules and limitations that are supposed to govern such discovery. As described earlier in this petition (*see* pages 7-8 above), by the time the CID was issued, Staff had already advised WHR that Staff believed, based on the results of the WHR Investigation, that WHR's information security practices violated Section 5. Moreover, based on that belief, Staff was prepared to recommend corrective action to the Commission in the form of a consent agreement. Indeed, Staff had already provided WHR with the consent agreement it was prepared to recommend to the Commission and a proposed complaint alleging a violation of Section 5 on the part of WHR and certain of its affiliates. Any investigation that has reached a point at which Staff believes it has found a Section 5 violation and is ready to recommend corrective action to the Commission is by definition "complete," because once an investigation reaches that point Staff by definition has no need for any further information in order to conclude the investigatory phase of the case (*see* Operating Manual § 1.3.4.4) and proceed with the next phase of the case. Given that by the time the CID was issued Staff plainly had no need for further discovery from WHR in order to complete the investigatory phase of the case and move forward with the corrective action phase, the second obvious explanation for Staff's having sought and obtained issuance of the CID is that, in the event Wyndham resisted Staff's coercive settlement demands, Staff hoped to use the CID to obtain discovery to be used by Staff in litigating against Wyndham once the Proposed Complaint was filed. But discovery of *that* sort is supposed to be sought and obtained by Staff not in the guise of completing an already-completed investigation, but rather under and subject to the Commission's rules for adjudicative proceedings, as authorized by an Administrative Law Judge. For this additional reason, then, the Commission should find (and if it does not a reviewing court would find) that the CID was sought and obtained by Staff for an improper purpose and as a consequence must be quashed.

The law is clear that Staff may not abuse the judicial process by seeking and obtaining issuance of a CID for "illicit purposes." *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981). Because Staff did precisely that here, the Commission should quash the CID.

E. Because Staff Has No Authority to Investigate Employee Injuries or the Information Security Practices of WHR's Affiliates and Service Providers, the CID Is Invalid Insofar As It Seeks Information and Documents Relative to Those Matters

The permissible scope of a CID is no broader than the permissible scope of the Staff investigation in which the CID is issued. The permissible scope of a Staff investigation depends,

in turn, on (i) how the scope of the investigation was defined by the Commission or the Bureau Director upon approving either the institution of or an expansion of the investigation and (ii) whether the scope of the investigation, as approved by the Commission or the Bureau Director, exceeds the Commission's investigatory jurisdiction as provided by Congress under the FTCA. Here, the scope of the CID exceeds the permissible scope of the WHR Investigation in two significant respects. First, insofar as the CID seeks discovery regarding WHR and its affiliates' handling of data of their employees[14] and discovery relative to the information security practices of WHR's affiliates and service providers,[15] the CID exceeds the bounds of the WHR Investigation as defined by the Commission and/or the Bureau Director. *See* Part I.E.1 below. Second, whether or not by seeking such information the CID exceeds the bounds of the WHR Investigation as defined by the Commission and/or the Bureau Director, the CID certainly exceeds the bounds of the FTC's investigatory jurisdiction as conferred by Congress insofar as it seeks information regarding WHR and its affiliates' handling of data of their employees. *See* Part I.E.2 below. The CID is therefore invalid, and must be quashed, both insofar as it seeks information and/or documents relative to how WHR and its affiliates handle employee data and also insofar as it seeks information relative to the information security practices of WHR's affiliates and service providers.

1. Staff Has Not Been Authorized to Investigate Employee Injuries or the Information Security Practices of WHR's Affiliates and Service Providers

As discussed in Part I.C above, under Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice, Wyndham, the Commission, and a reviewing court are all supposed to be able to look at the CID itself in order to determine how the scope of the WHR Investigation was defined by the Commission and/or the Bureau Director upon approving either the institution or an expansion of the WHR Investigation. Unfortunately, as shown in Part I.C above, here the CID fails to comply with Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice, in that it fails to provide any description of the scope of the WHR Investigation (a circumstance that in and of itself requires the CID to be quashed). Here, then, thanks to the CID's violation of Section 20(c)(2) of the FTCA and Section 2.6 of the Rules of Practice, neither Wyndham nor the Commission nor a reviewing court can determine the authorized scope of the WHR Investigation, and hence the permissible scope of the CID, by reference to the CID itself.

That being the case, the next best place to look in order to determine how the scope of the WHR Investigation was defined by the Commission and/or the Bureau Director upon approving either the institution or an expansion of the WHR Investigation would be to review any

[14] The CID seeks such information by defining "personal information"—a term that is incorporated extensively into the document requests and interrogatories—to include information about the *employees* of WHR and its affiliates: "For the purpose of this definition, an individual consumer shall include an 'employee,' and 'employee' shall mean an agent, servant, salesperson, associate, independent contractor, or other person directly or indirectly under your control." See Exhibit 1 hereto, Definition T.

[15] Many of the CID's interrogatories and document requests address in whole or in part the information security practices of Wyndham's service providers (see Exhibit 1 hereto, Interrogatory 14 and Document Request 8) or affiliates (see Exhibit 1 hereto, Interrogatories 5, 6, 7, 8, 12, 13, 14, 16, 17, 18, 19, 20, and 21, and Document Requests 3, 6, 7, 8, 9, 10, 12, 13, and 16).

documents by which Staff requested, and the Commission and/or the Bureau Director then granted, Staff the authority first to institute and later to expand the WHR Investigation. Thus, during the course of preparing its instant petition to quash, Wyndham asked Staff to provide Wyndham with these very documents. *See* Exhibit 13 hereto. Staff refused to do so, however, even after Wyndham detailed its reasons for requesting those documents. *See* Exhibits 14 and 15 hereto. Thus, while Wyndham is confident that a reviewing court would order Staff to produce those documents to Wyndham in the event the Commission were ever to seek judicial enforcement of the CID, at least for now the documents by which Staff requested that it be given authority, and the Commission and/or the Bureau Director granted Staff authority, first to institute and later to expand the WHR Investigation are not available to assist in determining how the scope of the WHR Investigation was defined by the Commission and/or the Bureau Director.

With Staff having failed to include any description of the scope of the WHR Investigation in the CID and having refused to provide the internal Commission documents that would operate to define the authorized scope of the WHR Investigation, Wyndham is aware of one and only one document that both is currently available for review and purports to describe the authorized scope of the WHR Investigation: the Access Letter. According to the very first sentence of the Access Letter, Staff was "conducting a non-public investigation into *Wyndham Hotels and Resorts, LLC's* [defined by the Access Letter as "Wyndham"] compliance with federal laws governing information security." Exhibit 3 hereto at page 1 (emphasis added). The Access Letter explained in its next sentence that the concern giving rise to the investigation was that "sensitive personal information (including credit card information) of *Wyndham's customers* was obtained from Wyndham's computer networks by unauthorized individuals." *Id*. (emphasis added). Thus, according to the Access Letter's third sentence, Staff was seeking "to determine whether *Wyndham's* [i.e., WHR's] *information security practices* comply with Section 5 of the Federal Trade Commission Act." *Id*. (emphasis added).

In other words, according to Staff's own description of the WHR Investigation as set forth in the first three sentences of the Access Letter, the investigation Staff had been authorized to conduct involved *WHR's* information security practices and *WHR's* compliance with Section 5 —not the information security practices or the compliance with Section 5 of WHR's affiliates or WHR's service providers. Moreover, per the Access Letter the focal point of the investigation was WHR's alleged failure to protect personal information of WHR's *customers*—not an alleged failure by WHR to protect personal information of WHR's *employees*. Further, at no point since its receipt of the Access Letter has WHR received any documentation from Staff advising WHR that the WHR Investigation had been expanded, beyond the scope set forth in the Access Letter, to extend to the protection of employee data by WHR or its affiliates or to the information security practices of WHR's affiliates and/or service providers. Nor has WWC or any other WHR affiliate ever received any documentation from the Commission as required by Section 3.3.6.1 of the Operating Manual notifying such entity that it had become a proposed respondent in the WHR Investigation.

In short, the documentary record that is available for review as to how the scope of the WHR Investigation has been defined by the Commission and/or the Bureau Director compels the conclusion that Staff has *never* been authorized by either the Commission or the Bureau Director to investigate the protection of employee data by WHR and its affiliates or to investigate the

information security practices of WHR's affiliates and/or service providers. The conclusion that the authorized scope of the WHR Investigation *does not* extend to such matters in turn compels the conclusion that the permissible scope of the CID *cannot* extend to such matters. Accordingly, the CID is necessarily invalid, and must be quashed, insofar as it seeks information and/or documents relative to how WHR and its affiliates handle employee data and also insofar as it seeks information relative to the information security practices of WHR's affiliates and service providers.

2. The FTC In Any Event Has No Jurisdiction to Investigate Employee Injuries

To establish an unfairness-based Section 5 violation, the FTC must show that the respondent's conduct "causes or is likely to cause substantial injury to *consumers* which is not reasonably avoidable by *consumers* themselves and not outweighed by countervailing benefits to *consumers* or to competition." 15 U.S.C. § 45(n) (emphasis added). Likewise, conduct is deceptive under Section 5 only if "first, there is a representation, omission, or practice that, second, is likely to mislead *consumers* acting reasonably under the circumstances, and third, the representation, omission, or practice is material." *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009) (emphasis added) (quotations omitted). By definition, then, the FTC's investigatory jurisdiction extends only to acts or practices that affect people in their capacity as "consumers."

To be a "consumer" under the FTCA, a person must be a purchaser or user of goods or services. The common meaning of the term imposes this requirement. *See* BLACK'S LAW DICTIONARY (9th ed. 2009) (consumer is "[a] person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal rather than business purposes"); Webster's II New College Dictionary (3d ed. 2005) (consumer is a "person who acquires goods or services : Buyer").[16] Likewise, the FTC has advocated this limitation on the definition of "consumer" in federal court. Brief of FTC in *FTC v. IFC Credit Corp.*, 2007 WL 5193297 (N.D. Ill. filed July 25, 2007) ("consumer," as used in the FTC Act, means a "*purchaser or user of goods or services*") (emphasis added). Employees serve their employers rather than purchase or use their employers' goods or services, and thus are not "consumers" of their employers' goods or services under the statute.

While some recent FTC data security consent decrees have defined "consumers" to include "employees" "[f]or the purpose of" the decree (*see*, *e.g.*, *In re Ceridian Corp.*, No. C-4325, 2011 WL 2487159, at *3 (F.T.C. June 8, 2011) (consent order)), these decrees do not support the proposition that employees are "consumers" for purposes of the FTCA. First, as the FTC itself has admitted in federal court, consent decrees affect the legal rights *only* of the parties who sign them. Brief of FTC in *POM Wonderful LLC v. FTC*, No. 10-1539, at 11-12 (D.D.C. filed Nov. 16, 2010). They do not serve as precedent or otherwise define rights under Section 5; to the contrary, they often impose requirements that are "more restrictive" than those imposed by the FTCA. *Id*. Because the proper purpose of a CID is to determine whether Section 5 has been

[16] "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning." *Pioneer Investment Srvs. Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993) (internal quotation omitted). Section 5 does not define the term "consumer."

violated, Section 5, not consent orders, defines the CID's proper scope. Second, to the extent these consent orders could somehow inform an interpretation of Section 5—which they could not—they in fact show that employees are *not* consumers within the meaning of the FTCA. By defining "consumers" to include "employees" "*for the purpose of*" a consent order, they, like the definition of "personal information" contained in the CID (*see* note 9 above), effectively concede that for *other* purposes—i.e., under the standard meaning that applies under Section 5—employees are *not* consumers. Otherwise, there would be no need to artificially add "employees" to the definition.

Because employees are not "consumers" for purposes of the FTCA, the FTC has no investigatory jurisdiction with regard to acts or practices that affect persons in their capacities as employees. Given the FTC's lack of any basis to assert investigatory jurisdiction over conduct respecting employees, the CID's pervasive effort to obtain information and/or documents relative to how WHR and its affiliates handle employee data (*see* note 9 above) would be invalid even if the Commission and/or the Bureau Director had purported to authorize the WHR Investigation to extend to such matters (which, as discussed in Part I.E.1 above, evidently did not occur). For this reason as well, then, Staff's attempt to use the CID to investigate to how WHR and its affiliates handle employee data (which would seem to be a rather transparent, and feeble, effort by Staff to circumvent Staff's clear inability to show any substantial *consumer* injury as a result of the Intrusions, *see* page 3 above) is invalid. The CID must therefore be quashed to the extent it seeks information and/or documents relative to how WHR and its affiliates handle employee data.[17]

II. THE CID MUST BE QUASHED BECAUSE IT IS OVERBROAD, UNDULY BURDENSOME, AND TOO INDEFINITE

Even if the CID were a valid exercise of FTC authority (which, as shown in Part I above, it is not), and the CID nonetheless must be quashed because it is overbroad, unduly burdensome, and too indefinite. First, the CID is overbroad throughout because request after request seeks information and/or documents not reasonably relevant to the WHR Investigation and thus constitutes a fishing expedition by Staff regarding activities and entities that Staff has no reason to believe violated Section 5. *See* Part II.A below. Second, the CID should be quashed in its entirety, or at a minimum should be drastically limited, on the basis that compliance with the CID as drafted would impose a burden on Wyndham that is both hugely costly and utterly disproportionate in scope to the trivial nature of the Section 5 violation that Staff believes it has found in this case, particularly when one takes into account the enormous amount of information and documents WHR has already voluntarily provided in the course of the WHR Investigation and the enormous expense WHR has incurred in so doing. *See* Part II.B below. Third, virtually all of the requests contained in the CID are too indefinite to constitute valid demands. *See* Part

[17] By a letter dated January 12, 2012, see Exhibit 11 hereto, Staff stated that it would "recommend to our Associate Director that the CID be modified to include in the definition of personal information only customer information." No such modified CID was ever served by Staff prior to the deadline for filing Wyndham's petition to quash, however, nor did the Associate Director agree to modify the CID. Thus, Wyndham was left with no choice but to include in this petition its objections to the CID's effort to obtain information and/or documents relative to how WHR and its affiliates handle employee data.

II.C below.[18]

A. The CID Is Pervasively Overbroad Because Request After Request Seeks Information Not Reasonably Related to the WHR Investigation

An agency subpoena or CID will not be enforced if it demands information that is not "reasonably relevant" to the inquiry. *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citing relevance as one of three bases for quashing CID). In this case, every single one of the 89 interrogatories and 38 document requests contained in the CID seeks information or documents that are well beyond the scope of the WHR Investigation and/or are not reasonably designed to discover whether WHR violated Section 5. Most notably, many of the requests seek information or documents regarding information security practices of WHR's corporate affiliates WWC, WHM, and WHG[19] despite the fact that Staff has not pointed (and cannot point) to a shred of evidence indicating that any of these entities violated Section 5 or that any of their networks suffered from information security deficiencies. In fact, Staff's sole argument in defense of the requests addressed to the information security practices of WHR's affiliates is that WWC and WHG are relevant because they provided information technology and security services to WHR and WHM is relevant because it provided information security services to the managed Wyndham-branded hotels. *See* Exhibit 11 at 2 (Staff letter noting that WHR's affiliates are relevant because information security services were provided to WHR by WHG and later by WWC, and to the managed Wyndham-branded hotels by WHM, but failing to state any reason why information or documents related to the separate information security programs of these entities themselves, and unrelated to information security at WHR or the Wyndham-branded hotels, are relevant to the WHR Investigation). Wyndham has never contested the relevance of documents or information in the possession of WHR's affiliates to the extent such documents or information relate to information security at WHR or the Wyndham-branded hotels. Indeed, WHR has already produced over one million pages of documents from custodians employed by WWC and WHG related to information security at WHR. WHR does contest, however, the relevance to the WHR Investigation of documents or information that has nothing to do with information security at WHR or the Wyndham-branded hotels and instead relates only to information security at WWC, WHG, or WHM. Staff has offered no rationale for the CID's demand for documents and information of *that* sort. *See* Exhibit 11. Accordingly, the portions of the CID that seek discovery regarding information security practices at WWC, WHG, and WHM that do not involve WHR's or the Wyndham-branded hotels' information security should be stricken.

The CID is overly broad in several material respects beyond the requests that target WHR's affiliates. For example, the CID seeks documents generated during, and information relative to, the period from January 1, 2008 to present, *see* Exhibit 1, Instruction C, despite the fact that WHR had fully remediated the security incidents experienced at the Wyndham-branded hotels by May of 2010. Staff has no reason to believe that documents generated during, or information relative to, the period between May of 2010 and December of 2011 would be

[18] Wyndham hereby incorporates each of the objections stated in Exhibit 16 into this Petition.

[19] See Exhibit x hereto, Interrogatories 5, 6, 7, 8, 12, 13, 14, 16, 17, 18, 19, 20, and 21, and Document Requests 3, 6, 7, 8, 9, 10, 12, 13, and 16.

reasonably likely to shed light on WHR's information security practices at the time of the Intrusions (the first of which began in June 2008 and the last of which ended in January 2010). This Instruction therefore should be modified. The CID also, without any basis, defines "personal information" to include information other than the type that was allegedly placed at risk of compromise during the Intrusions and/or information that is beyond the FTC's statutory jurisdiction (such as "employees"' information). *See* Exhibit 1, Definition T. This definition thus likewise should be modified. Various other requests in the CID seek information that could not possibly relate to whether WHR's information security practices violated Section 5, such as for example: the dates on which the Wyndham-franchised and managed hotels entered into franchise and management agreements with WHR (Interrogatory 1), the identity of the members of the Board of Directors of WHR and each of its affiliates and the length of time he or she has served in such a role (Interrogatory 22), and the process that WHR's quality assurance program uses to assess the Wyndham-branded hotels' compliance with their contractual obligations (Document Request 14). All of these overbroad requests should be stricken.

With respect to those of the CID's requests that at least facially relate to WHR's information security practices, the CID for the most part appears to be an attempt by Staff to conduct a fishing expedition into every imaginable aspect of those practices, rather than a targeted inquiry into whatever particular aspect of those practices is of concern to Staff based on the sixteen months of investigatory work Staff has already done in this case. For example, as drafted Interrogatory 12 purports to require WHR to describe in detail each and every aspect of any and all information security measures that WHR had in place at any time during the last four years, including the date on which each and every such aspect was implemented, each and every assessment, test, evaluation, monitoring action, or change that was made of or to any such aspect during such period, and the date of every such assessment, test, monitoring action, or change. No effort is made in this interrogatory to zero in on any particular aspect of WHR's information security that Staff might have concerns about based on its investigation to date. Similarly, Interrogatory 14 and Document Request 6 and 8 seek information and documents regarding any and all "Service Providers" who were allowed access to personal information relating to WHR's customers and any and all steps taken by WHR to secure this access, even though the forensic reports produced to Staff regarding the Intrusions do not indicate that any of the Intrusions involved any personal information held by any Service Provider or any failure on the part of WHR to adequately screen or manage a Service Provider. Again, no effort is made in this request to zero in on the activities of whatever particular Service Providers are of concern to Staff based on the results of the WHR Investigation, even though Staff's defense of these

requests makes clear that Staff has two particular entities in mind.[20]

Discovery requests such as Interrogatories 12 and 14 and Document Requests 6 and 8 are precisely the type of inappropriate exertions of agency power that the Federal Trade Commission Improvements Act of 1980 sought to prohibit. *See* S. REP. NO. 96-500 (1979) at 1105 ("The FTC's broad investigatory powers have been retained but modified to prevent fishing expeditions undertaken merely to satisfy its 'official curiosity. . . .'"); *see also* Statement of Congressman Shumway, 125 CONG. REC. 32,456 (1979) (noting need to "eliminate" the "propensity for the FTC to engage in 'fishing expeditions'"); Statement of Congressman Coughlin, 125 CONG. REC. 32,458 (1979) (stating that goal of bill was to "curb this subpoena power by requiring that the Commission specify the conduct they are investigating and why the Commission believes that the conduct violates the law."). These requests accordingly should be stricken, along with all the other requests in the CID that suffer from the same defect of having been drafted without any effort being made to zero in on a particular activity with respect to which Staff has a genuine concern, based on its investigation to date, of having involved a Section 5 violation.[21]

The inappropriate and unnecessary overbreadth of the CID's requests is underscored by the fact that WHR has already expended significant time, and incurred out-of-pocket costs in excess of $ 5 million in drafting written responses to 51 separate questions posed by Staff, preparing oral presentations addressing an additional 29 Staff questions, and locating and producing over 1,010,000 pages of documents in response to 29 separate Staff document requests. *See* Neff Declaration, Exhibit 4, at¶ 8; Meal Declaration, Exhibit 2, at ¶¶ 5-6 and Exhibit A. Thanks to those extensive efforts on WHR's part, Staff now has in its possession, for example, over 60 detailed forensic reports regarding the nature and suspected causes of the Intrusions. With that sort of information already in hand, Staff has no reason or need to be fishing about blindly for any and all information and documents that might be out there related to

[20] According to Staff, the CID's broad requests addressing the activities of any and all WHR Service Providers are appropriate because "one of the breaches occurred due to the compromise of a third-party administrative account" and because "the first two breaches involved the intruder accessing files on the Wyndham-branded hotels' networks . . . [that] were created as a result of the hotels' property management systems and/or payment processing applications being left in 'debugging' mode at the time they were installed on the hotels' networks by a service provider." See Exhibit 11 hereto, at 2. To begin with, since neither of the entities referenced by Staff in defending these particular requests was actually a WHR Service Provider as defined in the CID (because neither entity was permitted access to personal information, and because the second entity did not even provide services to WHR or its affiliates, see Exhibit 1 hereto, Definition V), the entire premise of Staff's argument is factually incorrect. But even were that not the case, the circumstances described by Staff would hardly begin to justify a wholesale investigation of the activities of each and every one of WHR's Service Providers. Rather than creating the basis for a fishing expedition of that sort, those circumstances would at most justify a further, targeted Staff inquiry into the activities of the two particular entities that were involved in the circumstances that created the concerns identified by Staff. Thus, far from justifying the CID's requests addressing the activities of WHR's Service Providers, Staff's defense of these requests actually only serves to underscore the fundamental flaws in the CID: Staff's failure to draft the CID's requests in a targeted fashion, and Staff's insistence on instead drafting request after request as broadly as possible in an effort to satisfy Staff's curiosity about every imaginable aspect of WHR's information security practices, without giving the slightest regard to whether Staff actually has any reason to believe that the practices being inquired about involved a Section 5 violation.

[21] The "fishing expedition" category of the CID's requests includes Interrogatories 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, and 15, and Document Requests 2, 3, 4, 5, 6, 7, 8, 9, and 10, all of which were drafted without the slightest effort being made to zero in on any particular aspect of WHR's information security practices that Staff might have some reason to believe to have been involved in a violation of Section 5.

each and every one of WHR's information security practices, including those practices with respect to which there is no reason for Staff to have any concern at all about their having created a risk to consumer data. Instead, what Staff should be doing at this juncture is crafting targeted requests that are drafted to seek with precision whatever limited additional information Staff truly requires at this late date to complete whatever remains of its longstanding investigation. Because the vast majority of the CID's discovery requests were not drafted in this targeted fashion, the CID should be quashed in its entirety or, at a minimum, the non-targeted requests should be stricken. *See D.R. Horton, Inc. v. Leibowitz*, No. 4:10-CV-547-A, 2010 WL 4630210, at *3 (N.D. Tex. Nov. 3, 2010) (noting plaintiff would have strong argument that FTC was "overreaching" when it issued a "CID [that] is so broad that it indicates that no meaningful discretion was exercised by the FTC officials who prepared it").

B. The CID Is Unduly Burdensome

The burden that would be imposed on Wyndham were it required to respond to the requests contained in the CID exactly as they are drafted would be heavy indeed when viewed in isolation, and would be downright absurd when considered in light of the substantial out-of-pocket costs already incurred by WHR in cooperating with the WHR Investigation and the trivial nature of the issues Staff has raised regarding WHR's information security practices after having investigated those practices for a full sixteen months. For this reason as well, the CID should be quashed. *See, e.g.*, *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (a party challenging a subpoena can do so by showing the compliance costs are overly burdensome or unreasonable); *Phoenix Bd. of Realtors, Inc. v. Dep't of Justice*, 521 F. Supp. 828, 832 (D. Ariz. 1981) (the government should negotiate to narrow scope of a CID when compliance may be overly burdensome).

When subparts are counted, the CID's interrogatories contain over 89 distinct questions. When added to the 51 Staff questions WHR has already responded to in writing and the 29 Staff questions WHR has responded to by means of oral presentations, the CID increases the number of questions Staff wants answered as part of the WHR Investigation to a stunning figure of 169—nearly *seven times* more than the 25 interrogatories allowed by both the Federal Rules of Civil Procedure and the Commission's own Rules of Practice for Adjudicative Proceedings. *See* Fed. R. Civ. P. 33(a)(l), 16 C.F.R. § 3.35(a). Moreover, as discussed above, many of the CID's Interrogatories were drafted to cover an extremely broad subject matter and to demand a minute level of detail regarding that subject matter, such that in the case of each of them a substantial fact development and drafting effort would have to be undertaken by inside and outside counsel and Wyndham employees even to begin to provide the requested information.[22] For example, Interrogatory 12 seeks, among other things, for each of WWC, WHG, WHR, and WHM, a recitation of every information security test, evaluation, practice, and procedure in existence over a four year time frame, regardless of how informal or trivial the test, evaluation, practice, or procedure. None of these entities keep logs showing each and every step they take with respect to information security—nor could they, since they have numerous employees whose each and every act in their day is geared toward information security. To respond fully to this interrogatory, then, Wyndham would have to review the electronic files of all of these employees

[22] See Interrogatories 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, and 21, all of which were drafted in this fashion.

and chronicle every activity each of them undertook during the course of over 1,000 days of work. Based on the sheer number of the CID's interrogatories, and the fact that many of those interrogatories would require an extensive fact development and drafting effort, Wyndham estimates that at least six months of work, and significant out-of-pocket costs would be required to prepare a meaningful response to the CID's interrogatories, and ev en then the response would be far from complete. See Neff Declaration, Exhibit 4, at ¶ 12**.** This expenditure (as well as Wyndham's expenditures to respond to the CID's document requests, discussed below,) would of course be *on top of* the $ 5 million and sixteen months of work that Wyndham has already spent responding to the discovery requests contained in the Access Letter and ensuing Staff communications. *See* Neff Declaration, Exhibit 4, at ¶ 8.[23]

With respect to the CID's document requests, responding to the "all-document requests" included in the CID (Requests 2, 7, 9, l0, 11, 12, 13, 15, 16, and 17) would require a review of the ESI of at least three Wyndham employees, which review would be likely to take about 10 weeks and cost approximately $1 million. *See* Neff Declaration, Exhibit 4, at ¶ 11.[24] As for the CID's "sufficient to describe requests" (namely, Requests 3, 4, 5, 6, and 14), trying to locate documents "sufficient to describe" the matters addressed in those requests with the breadth, and down to the level of detail, called for by these requests would be hugely burdensome. As reflected in Wyndham's objections to the CID, each of the CID's "sufficient to describe requests" seeks records that are not maintained in the normal course of business in the manner contemplated by the request. *See* Exhibit 16 hereto, Objections to Document Requests 3, 4, 6, and 7. Thus substantial fact investigation would have to be undertaken as to each such request in order to respond to that request. *Id*. Wyndham estimates that at least six months of work, would be required to prepare a meaningful response to the CID's "sufficient-to-describe" document requests, and even then the response would be far from complete. Adding these numbers to Wyndham's above-described projections for the time and expense that would be required to respond to the other aspects of the CID brings Wyndham's total projection for the time and expense of responding to the CID to at least six months of work[25] and an out-of-pocket cost of at

[23] As described in Exhibits 10 and 16,Wyndham also objects to a number of definitions and instructions that it believes impermissibly increase its burden of production. Specifically, Wyndham objects to the CID insofar as it defines terms such as "document", "identify", and "relating to" to have something other than their standard English meanings; insofar as it purports to treat documents as being in Wyndham's possession, custody, and control that would not be treated as such under the Federal Rules of Civil Procedure; insofar as it purports to impose a search obligation on Wyndham beyond the search obligation that would be imposed under the Federal Rules of Civil Procedure; insofar as it imposes protocols for document and information collection and production that are different from those protocols that have been followed by Wyndham thus far in the course of the investigation; insofar as it is addressed to Wyndham Worldwide Corporation rather than to Wyndham; and insofar as it purports to allow only 30 days for compliance.

[24] To the extent, as Staff has argued should be the case, the ESI of more than three Wyndham employees were reviewed in order to respond to the CID's all-document requests, the cost of responding to those requests would increase substantially above $1 million. See Neff Declaration, Exhibit 4, at ¶ 11 **.**

[25] Given the six-month period that Wyndham would require to complete a meaningful (but incomplete) response to the CID, the CID is both unduly burdensome and violative of Section 2.7(b)(1) of the Rules of Practice in purporting to require that Wyndham's complete response to the CID be provided within 30 days of service of the CID. See Exhibit 1 hereto, at 1 (purporting to allow just 30 days for the materials requested by the CID to be provided by Wyndham to Staff); 16 C.F.R. 2.7(b)(1) (providing that civil investigative demands for the production of documentary material shall "provide a reasonable period of time within which the material so demanded may be assembled and made available"). That instruction should therefore be stricken from the CID

least $2.75 million.[26] *See* Neff Declaration, Exhibit 4, ¶ 12.

Asking Wyndham to invest that amount of time and money in responding to the CID would be utterly indefensible when one considers that this expenditure would be made on top of the 16 months and $5 million WHR has already spent cooperating with the WHR Investigation, and that Staff's supposed case against WHR based on the WHR Investigation involves just a single alleged Section 5 violation that is marginal at best on the merits and in any event caused no consumer injury. Moreover, there is no reason to think that Wyndham's compliance with the CID would improve the flimsy case Staff believes it has made. For example, WHR has already produced over one million pages of electronic documents[27] to Staff from two custodians who were at the heart of dealing with WHR's information security in general and its investigation and remediation of the Intrusions in particular. To date, however, Staff has not once in the course of the WHR Investigation cited to any one of those electronic documents as a basis for arguing that WHR violated Section 5. If the first round of ESI review bore no investigational fruit whatever, why is Wyndham being asked to respond to the CID's all-document requests by going through a second round of ESI review involving a group of less relevant custodians?

Similarly, Wyndham is at a loss to see how the CID's "sufficient-to-describe" document requests or its interrogatories might be expected to buttress the FTC's claim were Wyndham to respond to those discovery requests. The Proposed Complaint contains a single deception-based Section 5 claim, and the key issue in determining the strength of that claim is the interpretation of and the degree of customer reliance on the privacy policy that is the focal point of the claim. Yet none of the CID's interrogatories and "sufficient-to-describe" document requests seek to learn further information about this privacy policy or any customer reliance thereon. Nor is there any likelihood that Wyndham's response to the CID's interrogatories and "sufficient-to-describe" document requests would enable Staff to discover other allegedly deceptive statements by WHR to its customers, given that Staff spent sixteen months trying to do just that but came up with nothing even after WHR fully responded to Staff's question in the Access Letter on the issue of what statements were made to customers regarding the security of their personal information. See Exhibit 3 hereto, Question 13. Staff also has no likelihood of being able to use Wyndham's responses to the CID's sufficient-to-describe document requests and interrogatories to succeed in building at this point an unfairness-based Section 5 claim against WHR of the sort that it was unable to build during the first sixteen months of its investigation, because no matter

[26] The burden imposed by the CID is even greater when one considers its demands with respect to privilege. First, the CID requires that Wyndham do the impossible and its claims to privilege with respect to each and every document it intends to withhold as privileged now, before it has had the opportunity to fully investigate the existence of documents responsive to the CID. Exhibit 1, Instruction D. Second, the CID requires that detailed information be provided regarding each document withheld on grounds of privilege. Exhibit 1, Instruction D. Such information can only be logged manually, and the volume of privileged documents is excepted to be high in this case due to the extensive involvement of counsel in the events under investigation by the FTC. Third, the CID requires Wyndham to seach not just its files but the files of outside counsel, see Exhibit 1, Instruction I. These files are highly likely to be responsive given the breadth of the CID but will almost exclusively be privileged and thus subject to logging requirements. Wyndham objects to both of these instructions and does not waive any rights to withhold documents as privileged.

[27] The phrase "electronic documents" refers to documents produced from custodial files with full electronically stored information under the Bates prefix WHR-FTC2, as opposed to the documents produced under the Bates label WHR-FTC1, which are paper or other documents produced to respond to specific Staff requests.

what evidence Staff might adduce through the CID of security vulnerabilities at WHR or the Wyndham-branded hotels, Staff still would have no way of demonstrating the substantial consumer injury that would be the linchpin of any such claim. In short, the huge cost Wyndham would incur in responding to the CID is completely disproportionate to any investigatory value the CID could possibly have to the WHR Investigation.

The CID is also unduly burdensome in that it repeats, in whole or in part, numerous discovery requests to which WHR has already responded during the course of the WHR Investigation. Specifically, Wyndham's review of the Access Letter and the additional Staff questions answered by WHR during the course of the WHR Investigation reveals that WHR has already been asked, in whole or in part, at least 42 of the CID's 89 interrogatories and at least 25 of the CID's 38s document requests. *See* Meal Declaration, Exhibit 2, at ¶¶ 8-9 and Exhibits C and D. In some cases, the CID even restates the prior question almost verbatim. Compare Access Letter (Exhibit 13 hereto), Question 6 (a)-(d), with CID (Exhibit1 hereto), Interrogatory 4 (a)-(d); and compare Access Letter (Exhibit 3 hereto), Question 13, with CID (Exhibit1 hereto), Interrogatory 21 and Document Request 15.[28] Staff purports to defend its failure to draft the CID so as to be non-duplicative of Staff's prior discovery requests by inviting *Wyndham* to undertake the effort first to re-review all Staff's prior discovery requests and then to re-write the CID to eliminate its many duplicative aspects. *See* CID (Exhibit1 hereto), at Instruction K; Exhibit 11 hereto at 3 (Staff letter suggesting that Wyndham "can comply with the CID by referencing its previous submissions" when Wyndham responds to the CID's duplicative requests). This approach to curing Staff's failure to draft the CID by taking due care not to unduly burden Wyndham would require *Wyndham* to expend the significant time and effort that would be required to fix Staff's drafting error. Forcing a CID recipient to go to such lengths would fly in the face of the legislative scheme that governs the issuance of FTC CIDs. *See* Statement of Senator Heflin, 125 CONG. REC. 2394-96 (1980) (criticizing FTC for forcing company to spend $200,000 merely to evaluate burden of complying with subpoena and noting that Federal Trade Commission Improvements Act of 1980 was intended to restrict such behavior). Thus, instead, of making Wyndham bear the burden of correcting Staff's drafting deficiencies, the appropriate cure for Staff's failure to lift a finger to craft the CID's requests so that they seek only new information is for each and every discovery request in the CID to be stricken in its entirety to the extent it in whole or in part duplicates one of Staff's prior requests in the course of the WHR Investigation.[29]

C. The CID Is Too Indefinite in Numerous Respects

"Indefiniteness" is one of the recognized bases for quashing a CID. *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citing indefiniteness as one of three bases for quashing CID); *see SEC v. Blackfoot Bituminous, Inc*., 622 F.2d 512, 514 (10th Cir. 1980) (citing *Morton Salt*, 338

[28] Despite this, Staff has obstinately refused to acknowledge the repetitiveness of the CID's requests. See Exhibit 11 hereto at 2-3 (Staff letter stating that "we do not believe the CID contains any requests that were previously answered by Wyndham in response to the access letter").

[29] Under this approach, Interrogatories 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, and 21, and Document Requests 2-7 and 9-17 (all of which in substantial part duplicate discovery requests Staff has previously made and WHR has already fully responded to) , see Meal Declaration (Exhibit 2 hereto), at ¶¶ 10-11 and Exhibits C-D would be stricken in their entirety.

U.S.) (confirming that "[t]o obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met"). A CID is deemed "too indefinite" when it fails to "describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified." 11 C.F.R. 2.7(b)(1); Operating Manual, § 3.3.6.7.5.3(1). Here, as described below, many of the CID's requests were drafted without any attention having been given to the generality of the request, the level of detail demanded by the request, or the lack of clarity of the request. Because those requests therefore were not drafted so as to permit the requested material to be "fairly identified" by Wyndham, each of those requests should be stricken.

To begin with, many of the requests in the CID manage to seek information or documents both at a very high level of generality and, at the same time, at an extreme level of detail. For example, Interrogatory 3 seeks information as to "how the Wyndham-branded hotels' networks are connected to any Company network(s)"—a broad question, particularly given that "connected" is not defined to be limited to be via computer or internet. The request appears to encompass both a listing of databases and systems on the computer networks of the Wyndham entities that can be accessed from the Wyndham-branded hotels and the specific technology used to make these connections. The Interrogatory then asks for a number of pieces of information, several of which go beyond the question of how the networks are connected to inquiring about security of information in certain databases and systems: "whether and how the Wyndham-branded hotels may access the central reservation system(s) or guest loyalty database(s)," "the personal information contained in each", "any access controls in place to limit access to the central reservation system or guest loyalty database." Interrogatory 3, therefore, asks Wyndham to narrate for Staff any and all knowledge it has regarding connections between any Wyndham entity and the Wyndham-branded hotels, without focusing on any specific system or database or other means of connection relevant to this case. A request like that does not come close to describing the information or documents being requested with "with such definiteness and certainty as to permit such material to be fairly identified." Interrogatory 3 therefore must be stricken as being "too indefinite," as must Interrogatories 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, and 21, and Document Requests 2-7 and 9-17, all of which suffer from this same sort of indefiniteness as to exactly what information or documents the request in question is asking to be provided.[30]

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the accompanying Exhibits, Wyndham respectfully requests that the Commission quash or, alternatively, limit the CID as set forth above.

[30] The CID is also "too indefinite" by reason of the lack of definiteness and clarity created by the CID's use of definitions that vary the standard English meaning of terms like "document", "identify", and "relating to" to have something other than their standard English meanings. See CID (Exhibit 1 hereto), Definitions J, O, and U. These definitions therefore should likewise be stricken.

Dated: January 20, 2012

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CERTIFICATE OF SERVICE

I hereby certify that, on January 20, 2012, I caused the original, twelve (12) copies, and a compact disc of Wyndham Worldwide Corporation and Wyndham Hotels & Resorts, LLC's Petition to Quash or, Alternatively, Limit Civil Investigative Demand with attached exhibits to be hand delivered to the Secretary of the Federal Trade Commission at the following address:

Federal Trade Commission
600 Pennsylvania Ave., NW
Room H-159
Washington, D.C. 20580

David T. Cohen