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

Federal Trade Commission, Plaintiff, v. Wyndham Worldwide Corporation, et al., Defendants.	Case No. 2:13-CV-01887-ES-JAD **PLAINTIFF'S OPPOSITION TO DEFENDANT HOTELS AND RESORTS' MOTION TO CERTIFY ORDER DENYING MOTION TO DISMISS (ECF NO. 182) FOR INTERLOCUTORY APPEAL**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

INTRODUCTION

Plaintiff Federal Trade Commission ("FTC" or "the Commission") opposes Defendant Wyndham Hotels and Resorts' ("Hotel and Resorts") motion to certify for interlocutory appeal the Court's order denying its motion to dismiss. Hotels and Resorts' disagreement with the Court's well-grounded decision fails to overcome the strong presumption against the piecemeal litigation resulting from an interlocutory appeal. Hotels and Resorts cannot meet its statutory burden to show both that there are substantial grounds for a difference of opinion on the issues it seeks to appeal and that an interlocutory appeal would materially advance the termination of this litigation. Therefore, the Court should deny Hotels and Resorts' motion.[1]

LEGAL STANDARD

A court may certify an order for interlocutory appeal under 28 U.S.C. §1292(b) only if: (1) the order involves a "controlling question of law;" (2) there is "substantial ground for difference of opinion" with respect to that question; and (3) immediate appeal may "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974). The party moving for an interlocutory appeal bears the burden of demonstrating that all three of these statutory prerequisites are met. *N.V.E., Inc. v. Palmeroni*, No. 06-5455, 2012 WL 2020242, at *4 (D.N.J. June 5, 2012). Because interlocutory appeals are strongly disfavored, a court still has discretion to deny certification even when the movant meets its statutory burden. *Bachowski v. Usery*, 545 F.2d 363, 368 (3d Cir. 1976); *N.V.E., Inc.*, 2012 WL 2020242, at *4; *Schnelling v. KPMG LLP*, No. 05-CV3756, 2006 WL

[1] An individual, Charles Thomason, and an *amici* group, including the U.S. Chamber of Commerce, American Hotel and Lodging Association, and National Federation of Independent Business, have both moved for leave to file briefs *amici curiae* supporting Hotels and Resorts' motion for certification of an interlocutory appeal. ECF Nos. 190 & 192. Both proposed *amici* briefs make substantially the same arguments that Hotels and Resorts makes in its motion. The FTC opposes the arguments in those briefs for the reasons explained below.

1540815, at *2 (D.N.J. May 31, 2006). "Section 1292(b) was not designed to circumvent the general rule against piecemeal litigation." *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 282 (E.D. Pa. 1983). Certification "is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." *Milbert v. Bison Labs.*, 260 F.2d 431, 433 (3d Cir. 1958).

ARGUMENT

I. HOTELS AND RESORTS HAS NOT SATISFIED THE STATUTORY REQUIREMENTS FOR CERIFICATION OF AN INTERLOCUTORY APPEAL.

Hotels and Resorts seeks interlocutory review regarding two legal questions: (1) whether the unfairness prong of Section 5 of the FTC Act, 15 U.S.C. § 45, applies to data security practices, and (2) whether the FTC has provided "adequate notice of what data-security practices are required." Hotels and Resorts' Memo. in Support of Mot. to Certify Order Denying Motion to Dismiss (No. 182) for Interlocutory Appeal ("Hotels and Resorts' Memo."), at 1 (ECF No. 188-1). The Court applied well-settled precedent in denying Hotels and Resorts' motion to dismiss, and thus there are not substantial grounds for a difference of opinion on the legal questions Hotels and Resorts seeks to appeal. Moreover, an interlocutory appeal will not materially advance the ultimate termination of the litigation because it will not simplify trial or discovery in any significant way and likely will cause delay.

A. There Are Not Substantial Grounds for a Difference of Opinion on the Issues Hotels and Resorts Seeks to Appeal.

The Court's reliance on long-standing precedent demonstrates that an interlocutory appeal is not appropriate. Hotels and Resorts may be correct that a federal court has not previously ruled on the *specific* questions Hotels and Resorts seeks to appeal. However,

numerous other federal courts have applied Section 5 of the FTC Act to a host of acts and practices that are not enumerated therein. *See, e.g.*, Opinion Denying Hotels and Resorts' Motion to Dismiss ("Op.") (ECF No. 181), at 19 (citations omitted). The Court's opinion makes clear that, in light of this precedent, there is no room for – let alone "substantial grounds" for – a difference of opinion on the issues Hotels and Resorts has raised.

To demonstrate that there are substantial grounds for a difference of opinion on the issues it seeks to appeal, Hotels and Resorts must show genuine doubt as to whether the Court applied the correct legal standard. *Kapossy v. McGraw-Hill, Inc.*, 942 F. Supp. 996, 1001 (D.N.J. 1996). Disagreement with the result that the court reached when it applied the law is not sufficient. *Id.*; *Interfaith Cmty. Org. Inc. v. PPG Indus., Inc.*, 702 F. Supp. 2d 295, 319 (D.N.J. 2010). And "'disagreement with the Court's logic, without . . . contrary authority, does not create a legally sufficient difference of opinion.'" *Children First Found., Inc. v. Legreide*, No. 04-2137, 2005 WL 3088334, at *8 (D.N.J. Nov. 17, 2005) (quoting *Burns v. Lavender Hill Herb Farm*, No. 01-7019, 2005 WL 545288, at *2 (E.D. Pa. Mar. 2, 2005)).

Hotels and Resorts cannot meet its burden here because the Court relied upon the proper legal authorities. The Court rejected Hotels and Resorts' "demands" that the Court enter "unchartered territory" by carving out a "data-security exception to the FTC's authority" and requiring "that the FTC publish regulations before filing an unfairness claim in federal court" because the very precedents Hotels and Resorts cited simply do not support such findings. Op. at 6. The Court's well-grounded opinion directly addresses the precedents upon which Hotels and Resorts based its legal arguments and explains why those cases and other precedent compelled the Court to deny Hotels and Resorts' motion. Thus, an interlocutory appeal is not appropriate. *See, e.g., Grieco v. New Jersey Dep't of Educ.*, No. 06-cv-4077, 2008 WL 170041, at *4 (D.N.J.

Jan. 16, 2008) (denying motion for certification of interlocutory appeal where court's opinion was "clear as to its reasoning and cite[d] to both Third Circuit and Supreme Court case law in support of its conclusion").

The Court rejected Hotels and Resorts' argument that Section 5 of the FTC Act's unfairness prong exempts data-security practices from enforcement because the Court was "guided by precedent that compel[led]" it to do so. Op. at 15 (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972); *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 967 (D.C. Cir. 1985)). In particular, the Court determined that Hotels and Resorts' legal argument in support of exempting data security from Section 5 of the FTC Act "ignore[d] the critical premise of" the precedent upon which Hotels and Resorts principally relied and "fail[ed] to explain how the FTC's unfairness authority would lead to a result that is incompatible with more recent legislation and thus would 'plainly *contradict* congressional policy.'" Op. at 10-11 (quoting & distinguishing *FDA v. Brown & Williamson Tobacco Corp.*, 520 U.S. 120, 139 (2000)) (emphasis in original). In so doing, the Court concluded that data-security legislation that post-dates Section 5 of the FTC Act "seems to complement—*not preclude*—the FTC's authority." Op. at 11 (emphasis in original).

Additionally, the Court determined that "Hotels and Resorts' [fair notice] arguments boil down to one proposition: the FTC cannot bring an enforcement action under Section 5's unfairness prong without first formally publishing rules and regulations." Op. at 20. The Court rejected this proposition because accepting it "would necessarily require the Court to side-step long-standing precedent . . . that suggests precisely the opposite." *Id.* at 21. *See also id.* at 18-19 (citing, *inter alia*, *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *PBW Stock Exch., Inc. v. SEC*, 485 F.2d 718, 732 (3d. Cir 1973)). As the Court explained, "Circuit Courts of Appeal have

affirmed FTC unfairness actions in a variety of contexts *without* preexisting rules or regulations specifically addressing the conduct-at-issue." Op. at 19 (citing *FTC v. Neovi*, 604 F.3d 1150, 1153, 1155-59 (9th Cir. 2010); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1191, 1193-95 (10th Cir. 2009)) (emphasis in original). Further basing its decision upon additional long-standing precedent, the Court concluded that "the contour of an unfairness claim in the data-security context, like any other, is necessarily 'flexible' such that the FTC can apply Section 5 'to the facts of the particular case arising out of unprecedented situations.'" Op. at 23 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384-85 (1965)).

Because Hotels and Resorts cannot show that the Court applied the wrong legal standards, it cites nonparty attention to the case as its primary evidence that there are substantial grounds for a difference of opinion on the legal issues it seeks to appeal. Hotels and Resorts' Memo. at 7-9. But the amount of nonparty interest in the case does not assist Hotels and Resorts in meeting its statutory burden. The Court received and considered extensive *amicus* briefs from nonparties, including those that supported Hotels and Resorts' legal positions. Only after fully considering the parties' and numerous *amici's* briefs, and the parties' full day of oral argument and supplemental briefs, did the Court determine that "binding and persuasive precedent" compelled the Court to reject Hotels and Resorts' motion to dismiss. Op. at 7. Nonparty interest does not call into doubt the substantial body of precedent upon which the Court relied.

B. An Interlocutory Appeal Would Not Materially Advance the Ultimate Termination of this Case.

Certifying legal questions for an interlocutory appeal may materially advance the ultimate termination of the litigation if the appellate court's resolution of the questions could eliminate the need for trial or eliminate complex issues or issues that make discovery more difficult and more expensive. *New Jersey Reg'l Council of Carpenters v. D.R. Horton, Inc.*, No.

08-1731, 2011 WL 1322204, at *5 (D.N.J. Mar. 31, 2011); *Harter v. GAF Corp.*, 150 F.R.D. 502, 518 (D.N.J. 1993). Here, an interlocutory appeal would not achieve those goals.

Hotels and Resorts concedes that an interlocutory appeal will not eliminate the need for trial. The issues Hotels and Resorts asks the Court to certify are controlling questions of law only with respect to Count II of the FTC's Complaint, which alleges that Defendants' failure to employ reasonable and appropriate data-security practices was an unfair act or practice under Section 5 of the FTC Act. Compl. (ECF No. 28), ¶¶ 24, 47-49. Regardless of the outcome of an interlocutory appeal, the parties will still need to try Count I of the Complaint, which alleges that Defendants violated Section 5 of the FTC by deceptively claiming that they employed reasonable data-security practices. *Id.*at ¶¶ 21, 44-46.

Not only would an interlocutory appeal fail to eliminate the need for trial, it would not eliminate significant facts or issues from the litigation either. Even assuming arguendo that Hotels and Resorts ultimately prevailed on an interlocutory appeal, the parties would still need to litigate the issue of whether Defendants maintained reasonable data-security practices. The significant overlap in facts and issues that form the core of both counts of the FTC's Complaint makes an interlocutory appeal inappropriate. *See, e.g.*, *New Jersey Reg'l Council of Carpenters*, 2011 WL 1322204, at *5 ("mere conjecture that certification would substantially reduce time and expense" is insufficient ground for seeking an interlocutory appeal) (internal quotation marks and citation omitted); *Koger, Inc. v. Klco*, No. 08-4175, 2010 WL 4553522, at *2 (D.N.J. Nov. 3, 2010) (denying motion to certify interlocutory appeal because same alleged misconduct would remain at issue regardless of result of interlocutory appeal); *Kapossy*, 942 F. Supp. at 1004 (denying motion to certify interlocutory appeal where its resolution would not significantly reduce length of trial); *In re Magic Marker Securities Litig.*, 472 F. Supp. 436, 439 (E.D. Pa.

1979) (denying motion to certify interlocutory appeal "given the significant overlap between" claims).

Moreover, there is no merit to Hotels and Resorts' assertion that an interlocutory appeal will cause discovery to proceed more rapidly. Not only is there substantial overlap between the discovery needed for both counts, but discovery has already begun. Under the current scheduling order, fact discovery closes on September 8, 2014, and expert discovery closes on December 19, 2014. *See* Pretrial Scheduling Order at 1, 3 (ECF No. 148). Thus, even if resolution of an interlocutory appeal could narrow any issues for discovery, it is highly unlikely that such a resolution would come in time to shorten the discovery schedule.

Instead of materially advancing the termination of this case, an interlocutory appeal would likely delay its resolution. Resolution of an interlocutory appeal will take an indeterminate amount of time. The uncertain duration of an interlocutory appeal could lead to delay of trial of this case regardless of whether this Court or the Third Circuit stayed discovery while the interlocutory appeal was pending.[2] In light of Hotels and Resorts' failure to demonstrate that an interlocutory appeal would simplify discovery or trial, potential delay of trial weighs heavily against certification. *See, e.g.*, *Children First Found.*, No. 04-2137, 2005 WL 3088334, at *10. The fact that the FTC seeks a permanent injunction to prevent additional consumer harm further heightens the need to avoid such delay.

[2] Hotels and Resorts' motion does not address whether Defendants would seek a stay of discovery pending Third Circuit consideration of this matter. The FTC would oppose any such request. Not only would a stay of discovery contravene 28 U.S.C. § 1292(b) by delaying the ultimate termination of this litigation, it also would be inconsistent with the Court's previous order denying Defendants' motion to stay discovery while Defendants' motions to dismiss were pending. *See* ECF No. 136.

CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court deny Hotels and Resorts' motion to certify an interlocutory appeal.

Dated: May 5, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014, I caused a copy of the foregoing Plaintiff's Opposition to Defendant Hotels and Resorts' Motion to Certify Order Denying Motion to Dismiss (ECF No. 182) for Interlocutory Appeal to be served upon counsel of record by operation of the Court's electronic filing system and upon the following counsel by electronic mail:

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