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20 **IN THE UNITED STATES DISTRICT COURT**  
21 **FOR THE DISTRICT OF ARIZONA**

22 Federal Trade Commission,

23 Plaintiff,

24 v.

25 Wyndham Worldwide Corporation, a  
26 Delaware corporation, *et al.*,

27 Defendants.

Case No. 2:12-cv-01365-PHX-PGR

**PLAINTIFF'S RESPONSE  
TO THE MOTIONS FOR  
LEAVE TO FILE AMICUS  
CURIAE BRIEFS IN SUPPORT  
OF DEFENDANT'S MOTION  
TO DISMISS BY THE  
INTERNATIONAL  
FRANCHISE ASSOCIATION,  
CHAMBER OF COMMERCE  
OF THE UNITED STATES,  
RETAIL LITIGATION  
CENTER, AND THE  
AMERICAN HOTEL AND  
LODGING ASSOCIATION**

1 **INTRODUCTION**

2 Plaintiff, the Federal Trade Commission (“FTC”), takes no position on the  
3 currently pending motions for leave to file amicus curiae briefs in support of Defendant  
4 Wyndham Hotels and Resorts’ (“Defendant”) motion to dismiss. Because the proposed  
5 amici did not lodge their briefs until after Plaintiff had responded to Defendant’s motion  
6 to dismiss, however, Plaintiff respectfully requests that the Court grant it the ability to  
7 respond to the amici briefs should the Court grant the motions for leave to file. As  
8 explained below, the opposing party’s ability to answer amici briefs filed out of time is  
9 specifically contemplated by Federal Rule of Appellate Procedure 29(e), which provides  
10 guidance to district courts in amicus curiae practice.

11 **PROCEDURAL HISTORY**

12 Following an investigation, the FTC filed the complaint in the instant action on  
13 June 26, 2012. The FTC subsequently amended that complaint on August 9, 2012.  
14 Defendants, who had already moved to transfer venue, moved to dismiss this matter on  
15 August 27, 2012. On September 12, 2012, the parties filed a joint stipulation setting a  
16 briefing schedule for the remaining motion to dismiss briefing and the Court entered an  
17 order setting the stipulated schedule. Consistent with the stipulation, on October 1, 2012,  
18 the FTC filed oppositions to both Defendant Wyndham Hotels and Resorts’  
19 motion to dismiss, and to the separate motion to dismiss filed by Defendants Wyndham  
20 Worldwide Corporation, Wyndham Hotel Group, LLC, and Wyndham Hotel  
21 Management. Four days later, on October 5, 2012, without notifying the FTC of their  
22 intention to do so, the proposed amici moved for leave to file two briefs in support of  
23 Defendant Wyndham Hotels and Resorts’ motion to dismiss.

24 **ARGUMENT**

25 If the Court grants the amici’s motions for leave to file, the FTC respectfully  
26 requests the opportunity to respond to the briefs. Although there are no federal or local  
27 rules governing the filing of amici briefs in this Court, district courts often look to the  
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1 Federal Rules of Appellate Procedure for guidance in these matters. *See Sierra Club v.*  
2 *Fed. Emergency Mgmt. Agency*, No. H-07-0608, 2007 WL 3472851, at \*1 (S.D. Tex.  
3 Nov. 14, 2007) (“District courts commonly seek guidance from Federal Rule of Appellate  
4 Procedure 29, which establishes standards for filing an *amicus* brief in the United States  
5 Courts of Appeal.”); *Correll v. United States*, No. C07-460RSL, 2007 WL 4209424, at  
6 \*2 n.2 (W.D. Wash. Nov. 26, 2007); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131,  
7 136-37 (D.D.C. 2008). Under the Federal Rules of Appellate Procedure, proposed amici  
8 must file “no later than 7 days after the principal brief of the party being supported is  
9 filed.” Fed. R. App. P. 29(e). In the instant matter, the proposed amici waited more than  
10 five weeks to lodge their briefs in support of Defendant’s motion. Thus, the amici did not  
11 lodge their briefs until after the FTC had filed its oppositions to Defendants’ motions to  
12 dismiss, thereby depriving the FTC of the opportunity to address their pleadings during  
13 the course of the briefing on the motions to dismiss.

14 Federal Rule of Appellate Procedure 29(e) contemplates that an opposing party  
15 will be given an opportunity to respond to a late filed amicus brief, stating: “[a] court  
16 may grant leave for later filing, specifying the time within which an opposing party may  
17 answer.” *Id.* Accordingly, should the Court grant the motions for leave to file, the FTC  
18 respectfully requests that the Court grant the FTC fourteen (14) days from the time of that  
19 order in which to file responsive pleadings. *See e.g., Eby-Brown Co. LLC v. Wis. Dep’t*  
20 *of Agric.*, 00-C-0718-C, 2001 WL 1913622, at \*1 (W.D. Wis. Oct. 24, 2001) (“Rather  
21 than strike the amicus brief, I will give plaintiff an opportunity to respond to it.”).

## 22 CONCLUSION

23 The FTC does not take a position on the currently pending motions for leave to  
24 file amicus curiae briefs in support of Defendant’s motion to dismiss. For the reasons set  
25 forth above, however, should the Court grant the proposed amici leave to file the lodged  
26 briefs, the FTC respectfully requests that the Court grant it fourteen (14) days from the  
27 time of the granting of leave within which to file responses.

1 Dated this 16th day of October, 2012.

2 s/ Jonathan Eli Zimmerman

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 16, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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