PUBLIC[1]

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
RagingWire Data Centers, Inc.	)	Docket No. 9386
a corporation,	)	
Respondent.	)	

ORDER ON COMPLAINT COUNSEL'S MOTION TO COMPEL

I.

On January 27, 2020, Federal Trade Commission ("FTC" or "Commission") Complaint Counsel filed a Motion to Compel Respondent's Responses to Complaint Counsel's First Set of Interrogatories and Requests for Production of Documents ("Motion"). Respondent RagingWire Data Centers, Inc. ("RagingWire") filed an opposition to the Motion on February 3, 2020 ("Opposition"). Having fully considered the Motion and the Opposition, and as further explained below, the Motion is GRANTED in part and DENIED in part.[2]

---

[1] The Motion was heavily redacted. Complaint Counsel asserts that its broad redactions reflect the fact that Respondent designated every page of its discovery responses, including its general objections, as "Confidential" under the Protective Order. On this asserted basis, Complaint Counsel designated as confidential such general statements as its assertion that Respondent is withholding responsive documents primarily on the basis of relevance objections. The standard Protective Order provides that "[a] designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of [the] Order." 16 C.F.R. § 3.31 Appendix A, ¶ 5. The Protective Order does not give parties or non-parties the unfettered ability or option to designate every document produced as "confidential." Commission Rule 3.45(e) provides that when a party includes "specific information" that is subject to confidentiality protections pursuant to a protective order, references to confidential material must be supported by record citations to relevant evidentiary materials and associated confidentiality rulings to confirm that confidential treatment is warranted for such material. 16 C.F.R. § 3.45(e). Parties are permitted to make references to, or general statements derived from, the content of information that has been designated as confidential, so long as such statements do not actually reveal contents of the underlying confidential information. The parties are directed to review their designations and comply with these directives going forward.

[2] Complaint Counsel also sought expedited briefing. FTC Rule 3.38(a) imposes a 5-day, expedited response time on motions to compel. 16 C.F.R. § 3.38(a). Complaint Counsel's request to further expedite Respondent's response to January 31, 2020 is DENIED.

II.

The Complaint alleges that "from at least January 2017 until at least October 2018," on its website and in its marketing materials, Respondent made false and deceptive representations that it was a participant in the European Union ("EU")-United States ("U.S.") Privacy Shield Framework ("Privacy Shield") and/or the U.S.-EU Safe Harbor Framework ("Safe Harbor"). Complaint ¶¶ 4, 20-21, 38-39. As alleged in the Complaint, the Safe Harbor Framework was a lawful mechanism under EU law for transferring data from the EU to the U.S.; was in effect from 2000-2016; and was replaced by the Privacy Shield Framework in 2016. Complaint ¶ 8. As further alleged in the Complaint, the EU has since enacted a new data protection regime, the General Data Protection Regulation ("GDPR"), which took effect as of May 25, 2018, and which contains similar provisions on data transfers. Complaint ¶ 6.

Complaint Counsel states that it served its First Set of Interrogatories and its First Set of Requests for Production ("RFPs") on December 10, 2019, and that Respondent is withholding, primarily on the basis of relevance objections, information and documents (1) otherwise responsive to Interrogatories 5-6 and RFPs 1-4 and 6-8 relating to Safe Harbor and GDPR; and (2) from prior to June 2016 in response to Interrogatory 5 and RFP 6.

As explained in greater detail below, Respondent objects to searching for and providing information regarding Safe Harbor and GDPR primarily on grounds of relevance. Respondent also objects to the scope of Interrogatory 5 and RFP 6 that ask for information "regardless of date," on grounds that they are unduly burdensome.

Complaint Counsel seeks an order requiring Respondent to (1) produce information and documents responsive to Interrogatories 5-6 in Complaint Counsel's First Set of Interrogatories and RFPs 1-4 and 6-8 in Complaint's Counsel's First Set of Requests for Production that relate to the Safe Harbor Framework or to the GDPR; and (2) respond to Interrogatory 5 and RFP 6 for the requested time period prior to June 2016. Furthermore, Complaint Counsel requests that Respondent be ordered to provide responsive documents on a rolling basis, and complete its document production by or before February 10, 2020.

III.

Pursuant to Rule 3.31(c)(1) of the Commission's Rules of Practice, unless otherwise limited by order of the Administrative Law Judge, parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c)(1). Pursuant to Rule 3.37(a) of the Commission's Rules of Practice, a party may serve on another party a request to produce documents which are within the scope of § 3.31(c)(1) and in the possession, custody, or control of the party upon whom the request is served. 16 C.F.R. § 3.37(a).

On a motion to compel, "[u]nless the Administrative Law Judge determines that the objection is justified, the Administrative Law Judge shall order that an initial disclosure or an answer to any requests for admissions, documents, depositions, or interrogatories be served or disclosure otherwise be made." 16 C.F.R. § 3.38(a). Discovery shall be limited if the Administrative Law Judge determines that: (i) The discovery sought from a party or third party is

unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) The burden and expense of the proposed discovery on a party or third party outweigh its likely benefit. 16 C.F.R. § 3.31(c)(2). In addition, the Administrative Law Judge may deny discovery or make any other order that justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. 16 C.F.R. § 3.31(d).

In summary, the issues raised by the Motion are (A) the relevance of documents relating to Safe Harbor and to GDPR; and (B) the discovery timeframe for Interrogatory 5 and RFP 6; and (C) the timeliness of Respondent's production.

A.

Safe Harbor Framework

The Complaint alleges that "[f]rom January 2017 until October 2018," Respondent disseminated representations concerning RagingWire's compliance with Privacy Shield "in its online privacy policy." Complaint ¶ 20. In addition, the Complaint alleges that Respondent disseminated sales materials, such as a marketing slide in a "Sales Tour Deck," which represented in 2018 that Respondent participated in the Safe Harbor Framework, when in fact, Respondent no longer participated in Safe Harbor or Privacy Shield as of January 2018. Complaint ¶ 21. Complaint Counsel and Respondent both state that the Privacy Shield Framework replaced the Safe Harbor Framework in 2016.

Complaint Counsel asserts that to prove the Complaint's deception allegations, Complaint Counsel must show that Respondent's representations about participating in the Privacy Shield Framework and/or the Safe Harbor Framework were material in that they relate to information that is important to consumers and likely to affect their choice of or conduct regarding a product. Complaint Counsel further asserts that because Privacy Shield replaced Safe Harbor as a lawful mechanism for transferring personal data from the EU, discovery indicating that customers cared about Safe Harbor is likely to lead to admissible evidence that they also care about the framework that replaced Safe Harbor, Privacy Shield. Complaint Counsel argues that Respondent has suggested that its 2017 decision to participate in Privacy Shield was largely a continuation of its earlier decision to participate in Safe Harbor, and, thus, discovery on why Respondent decided to participate in Safe Harbor, and continued to participate in that framework, is likely to lead to admissible evidence on Respondent's understanding of the importance of its Privacy Shield certification to its customers, and its defense that Privacy Shield and Safe Harbor do not apply to its business.

Respondent argues that the focus of this matter is RagingWire's alleged misstatement concerning Privacy Shield compliance in 2017 and 2018 and because the Safe Harbor and Privacy Shield are separate programs, adopted years apart, information related to the Safe Harbor Framework is not relevant to the claims in this case. Respondent's arguments with respect to the date range for Interrogatory 5 and RFP 6 are addressed in the following subsection.

One of the allegations of the Complaint specifically references RagingWire's representation in 2018 about its participation in the Safe Harbor Framework. Complaint ¶ 21; *see also* Complaint ¶ 38. Furthermore, according to the Declaration of Robin L. Wetherill ("Wetherill Declaration"), attorney for the FTC and Complaint Counsel, on numerous occasions, Respondent's counsel asserted that the company participated in the Privacy Shield Framework primarily as a continuation of its longstanding practice of participating in Privacy Shield's predecessor, Safe Harbor. (Wetherill Declaration ¶ 18). This averment is consistent with the representation made by Respondent's counsel at the Initial Prehearing Conference in this matter that RagingWire became Safe Harbor certified in 2005 and that after Safe Harbor was essentially replaced by Privacy Shield, RagingWire moved over to Privacy Shield. (Initial Prehearing Conference, Dec. 5, 2019, Roush, Tr. 41-42).

Discovery on why Respondent decided to participate in Safe Harbor, and continued to participate in that framework, is likely to lead to admissible evidence on Respondent's understanding of the importance of its Privacy Shield certification to its customers, and its defense that Privacy Shield and Safe Harbor do not apply to its business operations. Furthermore, discovery indicating the customers cared about Safe Harbor is likely to lead to admissible evidence that customers also care about the framework that replaced Safe Harbor, Privacy Shield. In this respect, the Motion is GRANTED. Except as modified by date in Section B below, Respondent shall produce information and documents responsive to Interrogatories 5-6 in Complaint Counsel's First Set of Interrogatories and RFPs 1-4 and 6-8 in Complaint Counsel's First Set of Requests for Production that relate to the U.S.-EU Safe Harbor Framework.

General Data Protection Regulation

Complaint Counsel also seeks to compel Respondent to produce information and documents otherwise responsive to Interrogatories 5-6 and RFPs 1-4 and 6-8 relating to GDPR. Complaint Counsel asserts that discovery related to GDPR is relevant to the materiality of Respondent's misrepresentations because Privacy Shield is a tool for complying with GDPR. Complaint Counsel posits that evidence tending to show that Respondent's customers care about GDPR compliance would make it more likely that they would consider information about the accuracy of Respondent's Privacy Shield representations to be important.

Respondent asserts that the Complaint does not allege that RagingWire had any obligations under GDPR, that it failed to meet any such obligations, or that it engaged in deceptive conduct with respect to GDPR. Respondent argues that to require RagingWire to search for and produce documents referencing GDPR unrelated to Privacy Shield would add to the burden of production and is not likely to yield documents relevant to the alleged wrongdoing – RagingWire's statement in its privacy policy that it complied with Privacy Shield. Furthermore, Respondent states that because it is producing documents responsive to Complaint Counsel's requests that reference Privacy Shield, any of those documents also referencing GDPR will be produced, and Complaint Counsel will have the benefit of those documents.

As alleged in the Complaint, the EU's GDPR took effect as of May 25, 2018. Complaint ¶ 6. Thus, GDPR did not go into effect until two years after RagingWire began participating in Privacy Shield and more than a year after the alleged misrepresentation about Privacy Shield

began. Because the alleged deception revolves around Privacy Shield, references to GDPR unrelated to Privacy Shield are not reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent. In this respect, the Motion is DENIED. Respondent is not compelled to produce information and documents responsive to Interrogatories 5-6 in Complaint Counsel's First Set of Interrogatories or RFPs 1-4 and 6-8 in Complaint Counsel's First Set of Requests for Production that relate to the General Data Protection Regulation.

B.

With the exception of Interrogatory 5 and RFP 6, Complaint Counsel's First Set of Interrogatories and Requests for Production seek information and documents from June 2016 to the present.[3] Interrogatory 5 asks Respondent to identify each employee or former employee, regardless of date, who had any role relating to RagingWire's decision to participate or continue to participate in Safe Harbor or Privacy Shield and to describe in detail their role. RFP 6 asks Respondent to produce all documents, regardless of date, relating to RagingWire's decision to participate or continue to participate in Safe Harbor or Privacy Shield.

Complaint Counsel argues that discovery about why Respondent decided to participate in Safe Harbor and Privacy Shield is relevant to the question of Respondent's understanding of the importance of its certifications to its customers and its defense that Safe Harbor and Privacy Shield do not apply to its business operations.

Respondent asserts that because the requests are not limited as to time, identifying and providing Safe Harbor information and documents in response to Interrogatory 5 and RFP 6 would be quite burdensome for RagingWire. Respondent further asserts that Safe Harbor went into effect in 2000, nearly two decades before the alleged misrepresentation concerning Privacy Shield, and that locating and producing responsive information would impose significant burdens on RagingWire that would be out of proportion to the needs of this matter. In addition, Respondent asserts, even if such documents could be located, the passage of time further diminishes the likelihood that such information, if any, would shed light on the materiality of representations concerning Privacy Shield.

Discovery about why Respondent decided to participate in Safe Harbor and Privacy Shield may be relevant to the question of Respondent's understanding of the importance of its certifications to its customers and its defense that Safe Harbor and Privacy Shield do not apply to its business operations. However, the request for production of documents "regardless of time," and "regardless of origin or location" is unduly burdensome when weighed against the relevance.

In response to Interrogatory 5, Respondent has provided the names, titles, dates of

---

[3] Respondent states that in its responses, Respondent objected to production of information for the period of time after the end of the alleged deception, but has since agreed to extend the relevant time period to the date the Complaint was filed. Complaint Counsel's requests instruct: "[u]nless otherwise specified, the time period . . . shall be from June 2016 to the present." Complaint Counsel's motion does not raise any distinction between "the present" and the date the Complaint was filed (November 7, 2019). Unless Complaint Counsel can show that documents prepared after the date the Complaint was filed are relevant, Respondent may limit the end date of the relevant time period to the date the Complaint was filed.

employment, and responsibilities of six individuals. It not clear why this response is not sufficient. To the extent it has not fully complied with Interrogatory 5, Respondent shall supplement its response to Interrogatory 5 to provide responsive information from 2005 to the date of the Complaint. In addition, Respondent shall search for and produce documents responsive to RFP 6 from 2005 to the date of the Complaint, but need do so only from the files of each individual named in response to Interrogatory 5.

C.

Complaint Counsel requests that Respondent be ordered to provide responsive documents on a rolling basis, and complete its document production by or before February 10, 2020. Respondent states that it served its objections and written responses on January 23, 2020; produced 100 documents, including complete production in response to RFP 5, 7, and 10; and is diligently working to provide the remaining documents Complaint Counsel has requested on a rolling basis. Respondent further states that before it could respond to Complaint Counsel's First Set of Requests for Production, Complaint Counsel served a Second Set of Requests for Production on January 2, 2020, and that Respondent's responses to this discovery are due on February 3, 2020.

Respondent asserts that, to avoid duplication of effort and expense, it seeks to identify documents responsive to either set during a single review process. Respondent argues that Complaint Counsel's request for immediate production of all responsive documents is unrealistic and unfair given that staff had the advantage of a lengthy pre-Complaint investigation.

Under the circumstances presented here, production on a rolling basis is acceptable and a February 10, 2020 deadline is unrealistic. The parties shall confer, as they have done thus far, to establish reasonable deadlines for production of documents, including those that are subject to this Order.

IV.

For all of the above reasons, Complaint Counsel's Motion is GRANTED in part and DENIED in part.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: February 7, 2020