

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Washington, D.C.



ORIGINAL

COMMISSIONERS: Joseph Simons, Chairman
Rohit Chopra
Noah Phillips
Rebecca Slaughter
Christine Wilson

In the Matter of:

RagingWire Data Centers, Inc.,

a corporation.

DOCKET NO. 9386

**RAGINGWIRE DATA CENTERS, LLC'S
MOTION TO DISMISS ADMINISTRATIVE COMPLAINT
AND
REQUEST FOR STAY AND REFERRAL**

Corey W. Roush
C. Fairley Spillman
Diana E. Schaffner
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K. Street, N.W.
Washington, DC 20006
(202) 887-4000

Counsel for Respondent

Pursuant to Rule 3.22 of the Commission’s Rules of Practice for Adjudicative Proceedings (16 CFR § 3.22), Respondent RagingWire Data Centers, Inc. seeks dismissal of this matter for failure to state a claim for violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45. RagingWire further requests that the Commission stay further proceedings in this matter pending decision on the motion to dismiss. In addition, RagingWire asks that the Commission exercise its discretion to refer this motion to the Administrative Law Judge for decision.

I. BACKGROUND

The Complaint asserts that RagingWire engaged in a deceptive practice in violation of Section 5(a). *See* Complaint [“Compl.”] ¶ 46. Although four separate “counts” are alleged, each count arises out of the same underlying alleged misrepresentation—that RagingWire’s website contained a statement that RagingWire was compliant with the EU-U.S. Privacy Shield Framework during a period in which RagingWire’s Privacy Shield certification had lapsed. *Id.* at ¶ 20. The Complaint acknowledges that RagingWire’s Privacy Shield certification has been restored. *Id.* at ¶ 24. Therefore, the Complaint on its face makes clear that there is no on-going issue.

In the investigation in this matter, RagingWire explained the unfortunate circumstances giving rise to the lapse in its Privacy Shield certification. RagingWire also explained that it is in the business of providing physical spaces to house servers owned and operated by its customers, and that RagingWire is not itself in the data business and does not have access to data on its customers’ servers. The Complaint acknowledges the nature of RagingWire’s business, but fails to come to terms with its implications. *Id.* at ¶ 2. Regardless of whether RagingWire incorrectly indicated that it was compliant with the Privacy Shield Framework, any such representation was

not and could not have been material to RagingWire's customers, and the Complaint fails to allege otherwise.

II. THE COMPLAINT FAILS TO STATE A SECTION 5 VIOLATION AND SHOULD BE DISMISSED

In evaluating motions to dismiss administrative complaints, the Commission uses the standards a reviewing court would apply in assessing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *In re LabMD, Inc.*, 2014 FTC LEXIS 2 *5; 2014-1 Trade Cas. (CCH) P78,784; *see also S.C. State Bd. of Dentistry*, 138 F.T.C. 230, 232-33 (2004); *Union Oil Co.*, 138 F.T.C. 1, 16 (2004). Under Rule 12(b)(6), dismissal is required when the complaint fails to plead an element of the cause of action. *See, e.g., Harris v. D.C. Water & Sewer Auth.*, 791 F.3d 65, 69, 416 U.S. App. D.C. 242 (D.C. Cir. 2015) (stating that a complaint must allege sufficient facts of each element of claim to survive motion to dismiss); *Gomez v. Quicken Loans, Inc.* 629 Fed. Appx. 799, 802 (9th Cir. 2015) (finding that the plaintiff failed to allege the first element of his claim and upholding the district court's order granting defendant's 12(b) (6) motion). In assessing the adequacy of a complaint, the question is "whether the [Complaint] contains sufficient factual matter . . . to state a claim to relief that is plausible on its face." *LabMD.*, 2014 FTC LEXIS at *6, *citing Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1326 (11th Cir. 2010) (citation omitted). Under these standards, the Complaint fails to plead a Section 5(a) deception violation and, therefore, must be dismissed.

There are three elements "that undergird all [Section 5(a)] deception cases": (1) a representation, omission or practice that is likely to mislead the consumer; (2) the Commission must examine the practice from the perspective of a reasonable consumer; and (3) the representation, omission or practice must be a "material" one. FTC Policy Statement on Deception, *appended to Cliffdale Associates*, 103 FTC 110, 174 (1984); *see also In re Jerk, LLC*,

2015 FTC LEXIS 64, *40 (March 13, 2015) (“A false or misleading representation will violate Section 5 only if it is also ‘material,’ that is, if it is likely to affect a consumer’s conduct with respect to the product or service.”) (internal quotation omitted).

The Complaint against RagingWire does not allege the required element of materiality. It does not even contain the words “material” or “materiality,” nor does it allege any facts that could support a finding of materiality.

Materiality would exist in this case only if the alleged misrepresentation were a material factor in customers’ decisions to utilize RagingWire’s services. *See American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff’d*, 695 F.2d 681 (3d Cir. 1982) (“A misleading claim or omission in advertising will violate Section 5 . . . , only if the omitted information would be a material factor in the consumer’s decision to purchase the product.”). The Complaint does not allege that Privacy Shield compliance is important to Raging Wire customers or that the Privacy Shield certification impacted any customer’s purchasing decision.

Furthermore, as acknowledged in the Complaint, Privacy Shield is “a mechanism to comply with data protection requirements when *transferring personal data* from the European Union . . . to the United States.”¹ Compl. ¶ 5. The Complaint does not allege that RagingWire has any locations in Europe or that RagingWire accesses, let alone transfers, any data, personal or otherwise.

The Complaint alleges that “RagingWire customers that collect or process personal information from the EEA and want to transfer that data to RagingWire in the U.S. can comply with GDPR and/or their own Privacy Shield obligations if RagingWire participates in Privacy Shield.” *Id.* at ¶ 16. However, the Complaint does not allege that there are, in fact, customers

¹ Privacy Shield, “Welcome to The Privacy Shield,” <https://www.privacyshield.gov/welcome> (last accessed Nov. 16, 2019).

that want to or do transfer protected data to RagingWire or use RagingWire to transfer data into (or out of) the United States. In light of the nature of RagingWire's business, there is no reason to believe that such customers exist. As the Complaint acknowledges, RagingWire simply provides physical locations to house servers. *Id.* at ¶ 2. RagingWire customers care about the physical security of its locations (e.g., perimeter fences, locked doors, crash barriers), the resilience and redundancy of its electrical and other support systems (e.g., the power will stay on even if there is a power outage), and the physical location of its data centers (e.g., how close is the data center to the client's operations center). Even taking all allegations in the Complaint as true and construing them in the light most favorable to Complaint Counsel,² nothing in the Complaint provides a plausible basis for concluding that a misrepresentation concerning Privacy Shield compliance would be material to RagingWire's customers.

Because the Complaint fails to allege a material misrepresentation, it fails to state a Section 5(a) deception violation and must be dismissed.

III. PROCEEDINGS SHOULD BE STAYED PENDING DECISION ON THE MOTION TO DISMISS

Particularly in light of the serious deficiency with the Complaint, the Commission should stay further proceedings in this matter pending resolution of the motion to dismiss. As the Complaint acknowledges, the lapse in Privacy Shield certification has ended. *Id.* at ¶ 24. There is no reason, alleged in the Complaint or otherwise, to anticipate future non-compliance, particularly in light of the unusual personnel issues that lead to the lapse in certification. Respondent has acted in good faith in all of its practices, including in the initial posting of the Privacy Shield statement. *See Id.* at ¶ 17-18. Respondent took affirmative steps to comply with

² See *LabMD*, 2014 FTC LEXIS at *6, citing *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010).

Privacy Shield and took down the statement once it learned of the issue. *Id.* at ¶ 23. There is no pressing need for expedition in this matter, and a stay will avoid wasting the resources of the Commission, the FTC, and RagingWire.

IV. REQUEST TO REFER MOTION TO ADMINISTRATIVE LAW JUDGE

Rule 3.22 recognizes the Commission's discretion to refer a motion to dismiss to the Administrative Law Judge. RagingWire respectfully requests that the Commission do so here given that the same five Commissioners who voted to file the Complaint would be reviewing this motion making a dispassionate ruling based on the law (as opposed to their discretionary judgment on whether to bring the case) difficult.

WHEREFORE, Respondent requests that the Complaint be dismissed in its entirety with prejudice, or alternatively without prejudice. Respondent further requests that the Commission stay proceedings in this matter pending a decision on the motion to dismiss and refer the motion to the ALJ for decision.

Dated: December 2, 2019

Respectfully submitted,

/s/ Corey W. Roush _____

Corey W. Roush
C. Fairley Spillman
Diana E. Schaffner
AKIN GUMP STRAUSS HAUER & FELD LLP
2001 K. Street, N.W.
Washington, DC 20006
(202) 887-4000

Counsel for Respondent

CERTIFICATE OF SERVICE

I certify that on December 2, 2019, a copy of the foregoing Motion to Dismiss and Request for Stay and Referral of Respondent RagingWire Data Centers, Inc. was electronically filed using the Commission's Electronic Filing System and was sent by that system and by certified mail to the following:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I certify that that a copy of the foregoing has been served upon all parties to this cause by electronic mail as follows:

Linda Kopp
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
lkopp@ftc.gov

Robin Wetherill
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
rwetherill@ftc.gov

Dated: December 2, 2019

By: /s/ Corey W. Roush

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Washington, D.C.**

COMMISSIONERS: **Joseph Simons, Chairman
Rohit Chopra
Noah Phillips
Rebecca Slaughter
Christine Wilson**

In the Matter of:

**RagingWire Data Centers, Inc.,

a corporation.**

DOCKET NO. 9386

[PROPOSED] ORDER DISMISSING COMPLAINT

This matter comes before the Commission on Respondent’s Motion to Dismiss Complaint.

Having considered the motion, it is hereby

ORDERED, that the Motion to Dismiss Complaint is granted and that the complaint be dismissed.

By the Commission.

ISSUED: _____

Donald S. Clark, Secretary
Federal Trade Commission 600
Pennsylvania Avenue, N.W.
Washington, D.C. 20580

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
Washington, D.C.**

COMMISSIONERS: **Joseph Simons, Chairman
Rohit Chopra
Noah Phillips
Rebecca Slaughter
Christine Wilson**

In the Matter of:

**RagingWire Data Centers, Inc.,

a corporation.**

DOCKET NO. 9386

**[PROPOSED] ORDER STAYING PROCEEDINGS AND REFERRING MOTION TO
ADMINISTRATIVE LAW JUDGE**

This matter comes before the Commission on Respondent's Request for Stay and Referral.

Having considered the request, it is hereby

ORDERED, that the Request for Stay and Referral is granted and that further proceedings in this matter are stayed, pending a decision by the Administrative Law Judge to whom Respondent's Motion to Dismiss is referred.

By the Commission.

ISSUED: _____

Donald S. Clark, Secretary
Federal Trade Commission 600
Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Notice of Electronic Service

I hereby certify that on December 02, 2019, I filed an electronic copy of the foregoing RAGINGWIRE DATA CENTERS, LLC'S MOTION TO DISMISS ADMINISTRATIVE COMPLAINT AND REQUEST FOR STAY AND REFERRAL, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on December 02, 2019, I served via E-Service an electronic copy of the foregoing RAGINGWIRE DATA CENTERS, LLC'S MOTION TO DISMISS ADMINISTRATIVE COMPLAINT AND REQUEST FOR STAY AND REFERRAL, upon:

Linda Kopp
Federal Trade Commission
lkopp@ftc.gov
Complaint

Robin Wetherill
Federal Trade Commission
rwetherill@ftc.gov
Complaint

Corey Roush
Partner
Akin Gump Strauss Hauer & Feld LLP
croush@akingump.com
Respondent

C. Fairley Spillman
Partner
Akin Gump Strauss Hauer & Feld LLP
fspillman@akingump.com
Respondent

Diana Schaffner
Akin Gump Strauss Hauer & Feld LLP
dschaffner@akingump.com
Respondent

Corey Roush
Attorney