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

In the Matter of	)	
	)	***PUBLIC***
	)	
RagingWire Data Centers, Inc., a corporation;	)	**DOCKET NO. 9386**
	)	

COMPLAINT COUNSEL'S MOTION FOR RECONSIDERATION

Complaint Counsel respectfully request that the Court reconsider its Order on Complaint Counsel's Motion to Compel, dated February 7, 2020 ("Order"), with respect to its ruling that Respondent RagingWire Data Centers, Inc. does not have to produce responsive documents related to the European Union's General Data Protection Regulation, 2016 OJ L. 119, 04.05.2016 ("GDPR") in response to Requests 1-4 in Complaint Counsel's First Set of Document Requests (collectively, "GDPR Discovery Requests").[1] Reconsideration is warranted because there is a material difference in fact that was not presented to the Court that may have reasonably altered the result, and reconsideration will prevent a clear error or manifest injustice.

STANDARD

Motions for reconsideration are not designed to give litigants a second bite of the apple, but may be granted upon a showing of:

> a material difference in fact or law from that presented to the Administrative Law Judge before such decision, that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision; (b) the emergence of new material facts or a change of law occurring after the time of such

[1] Complaint Counsel's Motion to Compel Respondent RagingWire Data Centers, Inc.'s Responses to Complaint Counsel's First Set of Interrogatories and Requests for Production ("Motion to Compel") identified additional interrogatories and requests for production that were in dispute because Respondent was also refusing to produce information and documents related to the U.S.-EU Safe Harbor Framework. However, Document Requests 1-4 are the only specifications that remain in dispute with respect to GDPR.

> decision; or (c) a manifest showing of a failure to consider material facts presented to the Administrative Law Judge before such decision.
>
> [S]uch motions should be granted only sparingly. Courts have granted motions to reconsider where it appears the court mistakenly overlooked facts or precedent which, had they been considered, might reasonably have altered the result, or where reconsideration is necessary to remedy a clear error or to prevent manifest injustice.

In re McWane, Dkt. No. 9352 (F.T.C. Jul. 12, 2012), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2012/07/120711aljorderrespmoreconsid.pdf.

ARGUMENT

On January 27, 2020, Complaint Counsel moved to compel, in part, more complete responses to the GDPR Discovery Requests because Respondent refused to produce otherwise responsive documents related to GDPR. In opposition, Respondent made three arguments against producing responsive materials related to GDPR, two of which were addressed in Complaint Counsel's initial motion.

First, Respondent argued that it should not have to provide information and documents about GDPR because its alleged misrepresentations concerned Privacy Shield, not GDPR. But, as addressed in Complaint Counsel's Motion at 5-6, Privacy Shield is a tool for complying with GDPR. More specifically, any company that collects personal information from a resident of the European Union and wants to store that personal data on servers located in a U.S.-based secure data center can comply with its GDPR compliance obligations (which generally forbid moving personal data out of the European Union unless certain conditions are met) if it uses a colocation service provider that is a Privacy Shield participant. Thus, when a RagingWire customer or potential customer expresses an interest in complying with GDPR, it means that that customer is particularly likely to find RagingWire's alleged misrepresentations that it participated in, and complied with, Privacy Shield—when it did not—to be material to its decision to purchase

RagingWire's services or its conduct with respect to those services.[2] *See 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).

Second, Respondent argued that it was unnecessary to search specifically for documents that reference GDPR because it would produce documents that reference Privacy Shield so that Complaint Counsel would have the benefit of those documents to the extent they also reference GDPR. Opposition at 6. But, as addressed in Complaint Counsel's Motion at 6, customers who expressed an interest in GDPR compliance may have reviewed Respondent's privacy policy and considered the Privacy Shield mispresentations contained therein to be important – even without any further discussions about Privacy Shield with Respondent. *See* Motion at 6 (citing RagingWire customer declaration averring that it reviews a potential service provider's privacy policy as part of its GDPR compliance efforts). Therefore, not only were the GDPR-related documents directly relevant to the issue of materiality, but they were also likely to lead to admissible evidence by identifying the very customers that may have relied upon Respondent's misrepresentations.

These two arguments were well-briefed, and Complaint Counsel does not seek to re-litigate them here. However, Respondent raised a final argument in its opposition that was new: "In addition, GDPR did not go into effect until two years after RagingWire began participating in

[2] Contracting with a vendor that is a Privacy Shield participant is one way to comply with GDPR, but companies could still work with vendors that are not Privacy Shield participants provided they take certain additional steps, such as entering into model contract clauses. *See* Motion, Wetherill Decl., Ex. F, ¶ 5 (RagingWire customer declaration) ("For partners implicated by GDPR, one of the many things we check for is to see if the partner is Privacy Shield certified. If a company is not Privacy Shield certified, we pursue other methods to ensure GDPR compliance, such as model contract clauses. The accuracy of a company's representations about being a Privacy Shield participant is a big deal to [the company].").

Privacy Shield and more than a year after the alleged deception began." Opposition at 7. This argument appears to have carried weight with the Court as it was specifically cited in its holding:

> 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.

Order at 4-5 ("Order").

However, there was a material difference in fact that was omitted from Respondent's argument and not presented to the Court: while GDPR's effective date was May 2018, GDPR was *enacted in April 2016*. Thus, notwithstanding Respondent's suggestion to the contrary, there was no significant gap in time between GDPR and Privacy Shield: Privacy Shield was adopted a mere two months after GDPR was enacted, in July 2016.[3] Indeed, Privacy Shield was "specifically designed with GDPR in mind." *See* FAQs-General, *Privacy Shield Framework*, *available at* https://www.privacyshield.gov/article?id=General-FAQs (noting that Privacy Shield addresses GDPR's substantive and procedural requirements); *see also* GDPR, Art. 45, *available at* https://eur-lex.europa.eu/legalcontent/EN/TXT/?qid=1552662547490&uri=CELEX%3A32016R0679 (providing for Privacy Shield as an acceptable method of transfer of EU subjects' personal information to countries outside of the EU).

GDPR did not become effective for two years after it was enacted in order to give companies the time necessary to bring their privacy practices into full compliance with the sweeping changes required under GDPR. *See* GDPR, Art. 171, *available at* https://eur-

[3] Respondent's argument was also misleading because while the alleged misrepresentations *began* over a year before GDPR went into effect, those misrepresentations *persisted* for months after GDPR's effective date of May 2018, or until at least October 2018 or later. Compl. ¶¶ 20-21, 38.

lex.europa.eu/legalcontent/EN/TXT/?qid=1552662547490&uri=CELEX%3A32016R0679. This means that GDPR—and firms' efforts to become GDPR-compliant, such as by contracting with vendors that were Privacy Shield participants—was very much relevant for the two years prior to its 2018 effective date. For example, one RagingWire customer has averred that it began working towards GDPR compliance in 2017, and that a vendor's Privacy Shield certification gives the company "more peace of mind when considering whether or not to partner with that company." *See* Motion, Wetherill Decl. Ex. F, ¶¶ 4, 6.

The April 2016 date of GDPR's enactment—and how that information undercuts Respondent's time-gap argument against relevance—is a new fact that was not presented to the Court in the parties' briefs. Given the "low bar for demonstrating relevance in discovery," *Johnson v. CoreCivic, Inc.*, No. 18-CV-1051-STA-TMP, 2019 WL 5089086, at *3 (W.D. Tenn. Oct. 10, 2019), Complaint Counsel requests that the Court reconsider its ruling to determine whether this new information alters its ruling.

Complaint Counsel was aware of the date of GDPR's enactment when it filed its Motion, but exercised reasonable diligence in not briefing the issue. Under the FTC's Rules of Practice, Complaint Counsel was not afforded the opportunity to reply to Respondent's opposition. Moreover, the strict word count limits for discovery motions under the FTC's Rules of Practice and this Court's December 5, 2019 Scheduling Order appropriately discourage briefing side issues or otherwise extraneous facts.

Here, Complaint Counsel had no reason to highlight the date of GDPR's enactment. Respondent did not raise any timing issues with respect to GDPR and its relevance during meet and confer discussions, *see* Kopp Decl. 4. Nor did Complaint Counsel have reason to anticipate Respondent's argument (and the need to preemptively address it in its Motion) because

Respondent's counsel would almost certainly have also been aware of the date of GDPR's enactment and how companies used the two years between GDPR's April 2016 enactment and its May 2018 effective date to work towards compliance. Not only did Respondent have access to the customer declaration describing the customer's GDPR compliance efforts in 2017, *see* Kopp Decl. ¶ 3, but Respondent's own law firm began publicly recommending in *December 2015* that companies should begin changing their business practices "now" in order to comply with GDPR rather than waiting until just before GDPR's effective date. *See* Akin Gump Straus Hauer & Feld LLP, *Cybersecurity, Privacy & Data Protection Alert: The EU General Data Protection Regulation*, (Dec. 21, 2015), *available at* https://www.akingump.com/en/news-insights/the-eu-general-data-protection-regulation.html.

Reconsidering the Court's ruling would help avoid a clear error or manifest injustice. Respondent directed its alleged misrepresentations to a specific, targeted group—those customers or potential customers whose business model includes collecting personal information from residents in the European Union (that would then be stored on servers located in one of RagingWire's U.S.-based locations)—and those misrepresentations must be analyzed from the perspective of that audience. *See* Deception Statement, 103 F.T.C. at 178-79. Because it is very difficult to ascertain a company's relevant data collection practices from the outside, discovery about companies expressing an explicit interest in complying with GDPR is critical for identifying Respondent's targeted audience and discovering additional evidence of materiality.

Searching for documents or email communications that specifically reference Privacy Shield is simply not good enough. For example, RagingWire customers that included questions about GDPR compliance in their Requests for Proposal or among their due diligence questions may have reviewed Respondent's privacy policy and relied upon the Privacy Shield

misrepresentations contained therein, *see* Motion, Wetherill Decl., Ex. F at ¶ 4 (RagingWire customer declaration that he reviews privacy policies as part of his vendor vetting process relevant to GDPR compliance), or may have received oral confirmation of Respondent's purported Privacy Shield certification from their sales representative, rather than in writing.

Notably, because producing this discovery only includes adding two search terms to Respondent's document search ("General Data Protection Regulation" or "GDPR"), this discovery is only potentially burdensome to the extent that customers were frequently asking about GDPR compliance—a fact that would significantly undermine Respondent's arguments that its misrepresentations about Privacy Shield were immaterial to its customers. Indeed, during meet and confer discussions for this Motion, Respondent's counsel admitted that his client did not want to turn over these GDPR-related documents because it disagreed with Complaint Counsel's theory of the case and therefore did not want to produce evidence that may support that theory. Kopp Decl. ¶ 5. Because this discovery goes to the heart of the main disputed issue in this case, materiality, Respondent should not be allowed to argue that its alleged misrepresentations are immaterial while denying Complaint Counsel the discovery needed to probe the veracity of that claim.

CONCLUSION

For the above reasons, Complaint Counsel respectfully requests this Court to reconsider its Order, and compel Respondent to provide responsive information about GDPR in response to the GDPR Discovery Requests.

Complaint Counsel also respectfully requests a hearing on its Motion.

Date: February 11, 2020

Respectfully Submitted,

/s/ Linda Kopp

Linda Holleran Kopp
Robin L. Wetherill
Division of Privacy and Identity Protection
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mailstop CC-8402
Washington, DC 20580
Telephone: (202) 326-2267 (Kopp)
Facsimile: (202) 326-3393
Electronic mail: lkopp@ftc.gov (Kopp)

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2020, I caused the foregoing document to be filed electronically through the Office of the Secretary's FTC E-filing system, which will send notification of such filing to:

April S. Tabor, Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm.
H-113 Washington, DC 20580

I also certify that I caused a copy of the foregoing document to be transmitted via electronic mail to:

The Honorable D. Michael
Chappell Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm.
H-110 Washington, DC 20580

I further certify that I caused a copy of the foregoing document to be served via electronic mail to:

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
croush@akingump.com
fspillman@akingump.com
dschaffner@akingump.com

Counsel for Respondent RagingWire Data Centers, Inc.

February 11, 2020

By: */s/* Robin Wetherill
Robin Wetherill
Federal Trade Commission
Bureau of Consumer Protection

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

In the Matter of	)	
	)	***PUBLIC***
RagingWire Data Centers, Inc.,	)	
	)	**DOCKET NO. 9386**
a corporation,	)	
	)	
Respondent.	)	
	)	

[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL'S MOTION FOR RECONSIDERATION

Upon consideration of Complaint Counsel's Motion for Reconsideration:

IT IS HEREBY ORDERED that Complaint Counsel's Motion is GRANTED. Respondent shall produce documents responsive to Requests for Production 1-4 of Complaint Counsel's First Set of Requests for Production that relate to the European General Data Protection Regulation.

ORDERED:

_____
D. Michael Chappell
Chief Administrative Law Judge

Date:

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

In the Matter of	)	
	)	
RagingWire Data Centers, Inc., a corporation;	)	**DOCKET NO. 9386**
	)	
	)	

SEPARATE MEET AND CONFER STATEMENT

Consistent with this Court's Scheduling Order, Complaint Counsel met and conferred by telephone on February 11, 2020 with counsel for Respondent RagingWire Data Centers, Inc. ("RagingWire") in a good faith effort to resolve the discovery disputes that are the subject of Complaint Counsel's Motion to Reconsideration. Counsel were unable to resolve their dispute about the matter that is the subject of the Motion.

Dated: February 11, 2020

Respectfully submitted,

/s/ *Robin L. Wetherill*
Robin L. Wetherill
Division of Privacy and Identity Protection
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Mailstop CC-8402
Washington, DC 20580
Telephone: (202) 326-2220
Facsimile: (202) 326-3393
Electronic mail: rwetherill@ftc.gov

Complaint Counsel

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

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

DECLARATION OF LINDA HOLLERAN KOPP

1. I have personal knowledge of the facts set forth in this declaration, and if called as a witness, I could and would testify competently under oath to such facts. This declaration is submitted in support of Complaint Counsel's Motion for Reconsideration.

2. I am an attorney at the Federal Trade Commission and Complaint Counsel in this proceeding.

3. The customer declaration, dated Dec. 20, 2019, that was attached as Exhibit F to Robin Wetherill's Declaration in support of Complaint Counsel's Motion to Compel Respondent RagingWire Data Centers, Inc.'s Responses to Complaint Counsel's First Set of Interrogatories and Requests for Production ("Motion to Compel") was produced to Respondent on December 20, 2019.

4. During meet and confer negotiations conducted prior to filing Complaint Counsel's Motion to Compel, Robin Wetherill and I had an extended discussion with counsel for

Respondent about materiality and how Safe Harbor and GDPR were relevant. During this discussion, Respondent's counsel did not raise the issue of GDPR's effective date as a reason for why GDPR-related discovery was not relevant to the issue of materiality. If they had, we would have affirmatively discussed the frailty of this argument during our meet and confer discussions, as well as addressed it in Complaint Counsel's Motion to Compel.

5. On February 11, 2020, Robin Wetherill and I met and conferred with counsel for Respondent related to Complaint Counsel's Motion for Reconsideration. As part of these discussions, I asked counsel for Respondent how burdensome producing the GDPR-related documents really would be given that it would involve just adding a couple of search terms to his client's document production and whether he really thought it would produce that many documents so as to be unduly burdensome. Respondent's lead counsel responded that he didn't know how many documents would be responsive to such a search, but that his client disagreed with Complaint Counsel's theory of the case and therefore did not want to produce documents that could be used by Complaint Counsel to support that theory.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 11th day of February 2020 in Washington, D.C.

Respectfully submitted,

/s/ Linda Kopp

Linda Holleran Kopp
Division of Privacy and Identity Protection
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
Telephone: (202) 326-2267
Facsimile: (202) 326-3393
Electronic mail: lkopp@ftc.gov

Complaint Counsel

Notice of Electronic Service

I hereby certify that on February 11, 2020, I filed an electronic copy of the foregoing Complaint Counsel's Motion for Reconsideration, 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 February 11, 2020, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Motion for Reconsideration, 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

Linda Kopp
Attorney