ORIGINAL

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**

COMPLAINT COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS ADMINISTRATIVE COMPLAINT AND REQUEST FOR STAY AND REFERRAL

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TABLE OF AUTHORITIES

CASES

REGULATIONS

OTHER AUTHORITIES

TABLE OF CONTENTS

I. INTRODUCTION

Respondent RagingWire Data Centers, Inc. ("RagingWire") violated Section 5 of the FTC Act when it made deceptive statements in its privacy policy and marketing materials that it participated in, and complied with, the EU-U.S. Privacy Shield Framework ("Privacy Shield" or "Framework"). Compl. ¶¶ 4, 20-23. More specifically, RagingWire made express false claims that it was a certified Privacy Shield participant for ten months ***after*** its Privacy Shield certification had lapsed. Compl. ¶¶ 19, 22, 38-39 (Count 1). And contrary to RagingWire's express claim to have complied with the Framework's substantive privacy-related requirements, RagingWire failed to comply with Privacy Shield in three important ways: (1) it did not conduct a compliance review to assess whether its assertions regarding its privacy practices were accurate and implemented, *see* Count 2, Compl. ¶¶ 40-41; (2) it did not have an independent recourse mechanism for the entire period in which it participated in Privacy Shield, *see* Count 3, Compl. ¶¶ 42-43; and (3) it did not affirm to the U.S. Department of Commerce when it left the Privacy Shield program that it would continue to apply the Privacy Shield protections to data it had collected under the program, or else return or delete such data, *see* Count 4, Compl. ¶¶ 44-45.

RagingWire's Answer and Affirmative Defenses of Respondent RagingWire Data Centers, LLC ("Answer") admits that the above facts are true. Nevertheless, RagingWire asserts in its Motion to Dismiss Administrative Complaint and Request for Referral and Stay ("Motion") that the Complaint should be dismissed for failure to state a claim. Noting that the Complaint fails to use the words "material" or "materiality," RagingWire argues that the Complaint fails to plead a required element of a Section 5 deception claim: materiality. Mot. at 4. Because the detailed Complaint pleads more than sufficient facts by which the Commission could find that the alleged misrepresentations are material—including through the application of

black letter law that express claims like those alleged here are presumed to be material—the Commission should deny RagingWire's Motion.

RagingWire's Motion makes two additional requests. First, it asks the Commission to refer its Motion to the Administrative Law Judge ("ALJ"). The Commission should deny this request because the Commission amended its Rules of Practice in 2009 specifically to leverage its expertise to rule on matters of policy and law for all dispositive motions, including motions to dismiss. Second, the Motion requests a stay of the administrative proceedings pending its resolution. The Commission should also deny this request because Rule 3.22(b), as amended, generally precludes stays while dispositive motions are being decided in order to avoid delaying the ultimate resolution of a case.

II. LEGAL STANDARD

The Commission decides motions to dismiss under Rules 3.11(b)(2) and 3.22, 16 C.F.R. § 3.22; 16 C.F.R. § 3.11(b)(2), according to the same legal standards as their analogous counterparts in the Federal Rules of Civil Procedure, Rules 8(a) and 12(b)(6). *LabMd, Inc.*, Dkt. No. 9357, 2014 WL 253518, at *2 n.3 (F.T.C. Jan. 16, 2014).

Under Rule 8(a), a plaintiff must plead facts showing that a violation is plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 566 U.S. at 678.

In making this determination, the complaint's allegations must be "accept[ed] as true" and "construe[d] in the light most favorable to Complaint Counsel." *LabMD*, 2014 WL 253518, at *2 (quoting *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1288 (11th Cir. 2010)); *NL*

Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). Additionally, all reasonable inferences must be drawn in Complaint Counsel's favor. *See, e.g., Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272 (D.C. Cir. 2018); *Menaker v. Hofstra Univ.*, 935 F.3d 20, 30 (2d Cir. 2019); *McLin v. Ard*, 866 F.3d 682, 688 (5th Cir. 2017).

III. ARGUMENT

RagingWire's argument in its Motion to Dismiss that the Complaint fails to sufficiently plead materiality is without merit. The Commission should deny RagingWire's Motion because the Complaint, regardless of its wording, alleges more than sufficient facts to allow the Commission to infer that RagingWire's misrepresentations were material and that RagingWire is liable for those representations. RagingWire's related requests to refer its Motion to the ALJ and to stay all proceedings pending the resolution of its Motion should also be denied because they are contrary to the Commission's express policy to decide matters of law and policy and to expedite administrative proceedings.

A. RagingWire's Motion to Dismiss Should Be Denied Because the Complaint Adequately Pleads Materiality

RagingWire's Motion to Dismiss is based solely on its argument that the Complaint fails to plead "any facts that could support a finding of materiality," and that the Complaint "does not even contain the words 'material' or 'materiality.'" Mot. at 4-5. RagingWire's argument quibbles with the form, rather than the substance, of the FTC's allegations.

The FTC is not required to use the word "material" in its Complaint. Courts have repeatedly found that FTC complaints adequately alleged deceptive acts or practices in violation of the FTC Act without expressly spelling out a theory of materiality. *See, e.g., Fed. Trade Comm'n v. DeVry Educ. Grp., Inc.*, No. CV-16-00579-MWF-SSx, 2016 WL 6821112, at *5-6 (C.D. Cal. 2016); *Fed. Trade Comm'n v. AMG Servs, Inc.*, No. 2:12–cv–00536–GMN –VCF,

2012 WL 6800525, at *3 (D. Nev. 2012); *Fed. Trade Comm'n v. Cantkier*, 767 F. Supp. 2d 147, 155-56 (D.D.C. 2011).

Rather, the relevant inquiry is whether the complaint pleads sufficient facts to allow a reasonable inference of liability. *Iqbal*, 556 U.S. at 678-679 (determining whether complaint "plausibly give(s) rise to an entitlement to relief"). For example, in *Federal Trade Commission v. Cantkier*, the Court inferred materiality from allegations that the defendant mortgage service misled consumers about its affiliation with federal government mortgage relief programs because such information was "'likely to affect their choice of, or conduct regarding,' that service." 767 F. Supp. 2d at 157-158 (citations omitted); *see also Barnes v. Yahoo!, Inc.*, No. 05-926-AA, 2009 WL 4823840, at *4 (D. Or. Dec. 11, 2009) ("Although plaintiff does not specifically use the term 'reliance'… [t]aken as true, the allegations lead to the reasonable and plausible inference that plaintiff relied on defendant's promise."). Here, the Complaint sufficiently pleads facts that provide three independent bases from which the Commission can draw a reasonable inference that RagingWire's misrepresentations were material.[1]

First, because RagingWire's statements were express, they are presumptively material. It is black letter law that the Commission is "entitled to apply, within reason, a presumption of materiality and does so with…express claims." *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311, 322 (7th Cir. 1992) (citing *Fed. Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965)); *see also Novartis Corp. v. Fed. Trade Comm'n*, 223 F.3d 783, 786–87 (D.C. Cir. 2000); Fed. Trade Comm'n, *Policy Statement on Deception* ("Deception Statement"), 103 F.T.C. 110, 182-83 (Oct. 14, 1983) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)). Here, the Complaint alleges that RagingWire made express false claims that it complied with, and had

[1] At this stage, Complaint Counsel need not specify which theory or theories of materiality they will advance. *See Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("[A] complaint need not pin plaintiff's claim for relief to a precise legal theory.")

certified its adherence to, the EU-U.S. Privacy Shield Framework. *See* Compl. ¶¶20-22. These allegations alone provide a sufficient basis for the Commission to infer that RagingWire's misrepresentations were material.

Second, the Commission can reasonably infer that RagingWire's customers found its misrepresentations material because they related to the customers' legal obligations under European data protection law and Privacy Shield. Misrepresentations pertaining to consumers' legal rights and obligations have been found to be material and actionable under the FTC Act. *See Fed. Trade Comm'n v. Verity Intern., Ltd*., 443 F.3d 48, 63-64 (2d Cir. 2006) (affirming materiality where defendants' representation related to consumers' legal rights to contest telephone bill charges); *Fed. Trade Comm'n v. Partners in Health Care Ass'n, Inc.*, 189 F. Supp. 3d 1356, 1365 (S.D. Fl. 2016) (finding defendant's misrepresentations that its product, among other things, was health insurance satisfying the requirements of the Affordable Care Act, were material).

Here, the Complaint explains in depth how Privacy Shield offers one lawful means by which personal data can be lawfully transferred from the European Union to the United States under the European General Data Protection Regulation ("GDPR") and the Privacy Shield Framework. Compl. at ¶¶ 7-13. Specifically, the Complaint explains that, under GDPR, a company can only transfer personal data out of the European Economic Area ("EEA") with the benefit of a lawful mechanism such as Privacy Shield, and that it can otherwise be subject to significant financial penalties. *Id.* at ¶ 14. The Complaint also describes that Privacy Shield participants that want to transfer data originally collected from the EEA can comply with their Privacy Shield obligations for onward transfers by using an agent that is also a Privacy Shield participant. *Id. at* ¶¶ 10-12, 16 (explaining that Privacy Shield requires participants to ascertain,

before transferring any personal data originally collected from the EEA to an agent, that the agent is obligated to provide the same level of privacy protections as is required under Privacy Shield). The Complaint then alleges how RagingWire's Privacy Shield statements therefore signaled to RagingWire's customers that are subject to the GDPR and/or their own Privacy Shield obligations that they could lawfully transfer personal data from the European Union to a server located at one of RagingWire's U.S.-based data centers. *Id.* at ¶ 16.

RagingWire unsuccessfully tries to undermine this basis for materiality by arguing that "the Complaint does not allege that there are, in fact, customers that want to or do transfer protected data to RagingWire," and that "there is no reason to believe that such customers exist." Mot. at 4-5.[2] This argument is curious given RagingWire's statement in its Answer that "some of its customers" have locations in Europe, *see* Answer at 4, but it is also contradicted by the Complaint's allegations that RagingWire touted its Privacy Shield certifications. *See* Compl. ¶¶ 20-22. This allegation "strongly implies" that RagingWire sought customers to whom its certification would be material. *See American Home Products*, 98 F.T.C. 136, 164 (1981), *aff'd*, 695 F.2d 681 (3d Cir. 1982) ("The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers.").

The Complaint's allegations that RagingWire's claims related to its customers' legal obligations therefore provides another independent basis for the Commission to infer that RagingWire's misrepresentations were material.

[2] To the extent that RagingWire is suggesting that Complaint Counsel needs to show actual reliance, that is not the law. "[P]roof of consumer reliance is unnecessary to establish a §5 violation." *Fed. Trade Comm'n v. Freecom Communs., Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005). *See also, e.g., Chrysler Corp. v. Fed. Trade Comm'n*, 561 F.2d 357, 363, 363 n.5 (D.C. Cir. 1977); *Regina Corp. v. Fed. Trade Comm'n*, 322 F.2d 765, 768 (3d Cir. 1963).

And ***third***, the Complaint's allegations suggesting that RagingWire believed its misrepresentations were material "strongly implies" that the misrepresentations were, in fact, material. *See American Home Products*, 98 F.T.C.. at 164. Specifically, the Complaint alleges that RagingWire chose to participate in Privacy Shield and its predecessor, the Safe Harbor Framework. Compl. ¶¶ 17-18. RagingWire even sought to renew its Privacy Shield certification after the commencement of the FTC's investigation, and ultimately rejoined the program in June 2019. *See* Compl. ¶¶ 17, 23-24. The Complaint also alleges that RagingWire broadcast its misrepresentations about its participation, even in the face of Commerce's warning to remove its Privacy Shield statements after its certification had lapsed. *See id*. at ¶¶ 22-23. These facts evidence RagingWire's belief that it benefited from making those representations, which "strongly implies" that the misrepresentations were material. *See American Home Products*, 98 F.T.C. at 164; *see also Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311, 323 (7th Cir. 1992) (finding that Kraft's persistence in running deceptive advertising "despite repeated warnings" was evidence supporting the conclusion that Kraft believed it derived some benefit from the deceptive claims and that the claims were material to consumers). These allegations therefore provide a third basis for finding that RagingWire's misrepresentations were material.

In short, because the detailed Complaint pleads more than sufficient facts for the Commission to reasonably infer that RagingWire's deceptive statements were material, the Commission should deny RagingWire's Motion to Dismiss.

B. RagingWire's Request to Refer This Matter to the ALJ Should Be Denied Because the Motion Involves Questions of Law and Policy

FTC Rule 3.22(a), *as amended*, provides that the Commission will decide all dispositive motions, including motions to dismiss, unless the Commission refers the motion to the ALJ "in its discretion." 16 C.F.R. § 3.22(a). RagingWire asks the Commission to refer its Motion to the

ALJ because it claims that it would be "difficult" for the Commission to make a "dispassionate ruling on the law" given its recent vote to file the Complaint. Mot. at 6. RagingWire's request is without merit and should be denied.

The Commission amended its Rules of Practice, including Rule 3.22(a), in 2009 to bring the Commission's "expertise into play earlier and more often during the Part 3 process," and to address criticisms that its administrative process was too protracted. *See* 73 Fed. Reg. 58832, 58834 (Oct. 7, 2008); *see also* 74 Fed. Reg. 1804, 1806-07 (Jan. 13, 2009) (rule amendments bring the Commission's "expertise to bear sooner in the process, which can be expected to streamline cases…"). Rule 3.22(a), as amended in 2009, reflects the Commission's judgment on the proper balance between the important functions of the ALJ as a hearing examiner and the Commission's expertise on legal and policy determinations. *See* 73 Fed. Reg. at 58834; *see also* 74 Fed. Reg. at 1806.

Commentary during the public rulemaking process shows that, before finalizing Rule 3.22, the Commission specifically considered and rejected arguments that it would be unfair for the Commission to rule on motions to dismiss. The American Bar Association's Antitrust Section, among others, expressed concern about the impartiality and fairness of Part 3 proceedings if the Commission ruled on such motions shortly after having voted out a complaint. 74 Fed. Reg. at 1809-1810. After carefully considering these comments, the Commission concluded that the comments "failed to undermine the central premise supporting the rule change: that the Commission has the authority and expertise to rule initially on dispositive motions and that doing so will improve the quality of the decisionmaking and (as acknowledged by the Section) will expedite the proceeding." 74 Fed. Reg. at 1809-1810.

Because the Commission has already considered and rejected the only argument that RagingWire raises in support of its request for referral, the Commission should deny RagingWire's request to refer its Motion to the ALJ.

C. RagingWire's Request for a Stay Should Be Denied Because It Will Unnecessarily Delay the Ultimate Resolution of this Case

Rule 3.22(b) of the FTC Rules of Practice states that any "motion under consideration by the Commission shall not stay proceedings" before the ALJ unless the Commission so orders or otherwise provided by an applicable rule. 16 C.F.R. § 3.22(b). RagingWire requests a stay because it asserts that 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." Mot. at 5-6.

Like Rule 3.22(a), the Commission amended Rule 3.22(b) in 2009 as part of the Commission's efforts to expedite its administrative proceedings and reflects a policy decision to avoid delaying the ultimate resolution of the case. 73 Fed. Reg. 58832, 58835; 74 Fed. Reg. at 1810. This policy consideration is so significant that the Commission has even denied an *unopposed* motion for a stay pending the resolution of dispositive motions. *See* Order Denying Motion for Stay of Proceedings, *N.C. Bd. of Dental Examiners*, Dkt. No. 9343, 151 F.T.C. 640 (Feb. 15, 2011). Because RagingWire has not expressed a compelling justification to overcome the significant policy consideration to expedite adjudicative proceedings—particularly when, as here, RagingWire is unlikely to win its motion to dismiss for the reasons described above—the Commission should deny RagingWire's request.

IV. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Commission deny RagingWire's Motion to Dismiss and requests for referral and stay.

Dated: December 12, 2019

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2019, 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:

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Notice of Electronic Service

I hereby certify that on December 12, 2019, I filed an electronic copy of the foregoing COMPLAINT COUNSEL'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND REQUEST FOR STAY AND REFERRAL, with:

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