

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

RagingWire's services or its conduct with respect to those services. 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~~ conduct with respect to the product or service.") (internal quotation omitted).

Second, Respondent argued that

Privacy Shield and more than a year after the alleged deception began.” Opposition at 7.
argument appears to have carried weight wi

lex.europa.eu/legalcontent/EN/TXT/?qid=1552662547490&uri=CELEX

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), avail(,)]TM(l)-2 (b-6 (o)-bT1 1 Tf [(, ()2.388)Tj /TT;

misrepresentations contained therein. 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" and "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 argument 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 does 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 dispute 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 the 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:

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 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:

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Counsel for Respondent RagingWire Data Centers, Inc.

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

In the Matter of)	
)	
RagingWire Data Centers, Inc.,)	<i><u>PUBLIC</u></i>
)	
a corporation,)	DOCKET NO. 9386
)	
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.,)	DOCKET NO. 9386
a corporation;)	
)	

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 Privcm (br)3 (uam (bu727rRhi)-

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 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 proceeding.

3. The customer declaration dated Dec. 20, 2019, that was attached as Exhibit I to Robin Wetherill's Declaration in support of Complaint Counsel's Motion to Compel Responses to RagingWire Data Centers, Inc. 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 court

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 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 discussion 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~~ 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 did not know how many documents would be responsive to such a ~~search~~ batch and 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

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Complaint Counsel

