

INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

IN THE MATTER OF

RAGINGWIRE DATA CENTERS, INC.

Docket No. 9386. Order, January 6, 2020

Order denying respondent's motion to stay further proceedings pending resolution of respondent's Motion to Dismiss Administrative Complaint in this proceeding and rescheduling the hearing to commence on July 21, 2020.

ORDER DENYING STAY AND REFERRAL AND CHANGING HEARING DATE

On December 2, 2019, Respondent RagingWire Data Centers, Inc. filed a Motion to Dismiss Administrative Complaint in this proceeding. In addition to seeking dismissal of the Commission's Complaint in its entirety, that Motion requests that the Commission (1) stay further proceedings pending resolution of the Motion to Dismiss and (2) refer the Motion to Dismiss to the Administrative Law Judge assigned to this proceeding. Complaint Counsel have contested the Motion to Dismiss and oppose the requests for stay and referral. As set forth below, we deny Respondent's requests for stay and referral. We grant in part a separate, uncontested motion by Respondent to delay commencement of the administrative hearing.

I. THE REQUEST FOR A STAY

As to the request for a stay, Commission Rule of Practice 3.22(b) states in relevant part: "A [dispositive] motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders . . ." When the Commission first adopted this Rule, it explained that the provision's "purpose . . . was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions . . ." Rules of Practice; Final Rule, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009) ("Final Rule"). *See also* Rules of Practice; Proposed Rule, 73 Fed. Reg. 58832, 58836 (Oct. 7, 2008) ("Proposed Rule") (explaining that "[t]he Commission anticipates that new paragraphs [3.22](b) and (e) would expedite cases by providing that proceedings before the ALJ will not be stayed while the Commission considers a motion, unless the Commission orders otherwise . . .").

Here, Respondent argues, "a stay will avoid wasting the resources of the Commission, the FTC, and RagingWire." Motion to Dismiss at 6. The expenses at issue, however, are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending. *See In re La. Real Estate Appraisers Bd.*, 2018 FTC Lexis 7 (F.T.C. Jan. 12, 2018), *also available at* https://www.ftc.gov/system/files/documents/cases/d09374_lreab_commission_order_denying_respondents_expedited_motion.pdf. "Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters." *Id.*; *see In re LabMD*, 2013 WL 6826948, at *2-3 (Dec. 13, 2013) (denying a motion to stay proceedings in order to avoid pretrial expenses pending the Commission's ruling on a motion

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to dismiss); *N. Carolina Bd. of Dental Exam'rs*, 150 F.T.C. 851 (2010) (same).¹ Here, Respondent has not established that a stay would be appropriate.²

II. THE REQUEST FOR REFERRAL TO THE ADMINISTRATIVE LAW JUDGE

Respondent seeks referral of its Motion to Dismiss to the administrative law judge assigned to this proceeding. The Commission's Rules of Practice, however, expressly provide that motions to dismiss filed before the evidentiary hearing "shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a). This rule reflects an "inten[tion] to ensure that the Commission is appropriately involved earlier in the adjudicatory process," Proposed Rule, 73 Fed. Reg. at 58834, and a judgment that bringing the Commission's expertise to bear on dispositive motions will "improve the quality of the decisionmaking and . . . will expedite the proceeding," Final Rule, 74 Fed. Reg. at 1809; *see also* Proposed Rule, 73 Fed. Reg. at 58836. Respondent's sole reason for requesting referral—that the same Commissioners who voted to issue the Complaint might be unable to dispassionately review the motion—is unsupported by any facts indicating that the Commission cannot fairly and judiciously perform its statutory, adjudicatory duties under 45 U.S.C. § 45(b). Lacking any specific support, Respondent effectively asks the Commission to disregard Rule 3.22(a)'s core determination that, in view of its statutory role as an expert adjudicator, Final Rule, 74 Fed. Reg. at 1806, the Commission should rule upon motions to dismiss. We decline to do so.

III. RESPONDENT'S MOTION TO RESCHEDULE ADMINISTRATIVE HEARING

On December 4, 2019, Respondent filed a motion to reschedule the administrative hearing. Under the current schedule, the hearing will begin on July 7, 2020. Respondent moves that it be postponed until or after the week of August 3, 2020. Respondent suggests that the current date would interfere with the planned family vacation of its lead counsel. Complaint Counsel do not oppose Respondent's motion.

Commission Rule of Practice 3.41(a) provides that the Commission may order a later date for the commencement of an evidentiary hearing "upon a showing of good cause." Respondent's motion cites the fact that its lead counsel "is scheduled to be absent on a planned family vacation the week immediately prior to the currently scheduled July 7, 2020 start of the administrative hearing." Motion of Administrative Hearing at 2. While that could justify a short delay in the start of the hearing, Respondent has provided no reason why the hearing should be delayed for nearly a month. Consequently, and in view of the public interest in resolving this matter

¹ *See* Final Rule, 74 Fed. Reg. at 1805 (explaining that in amending its rules for adjudicative proceedings, the Commission "intended . . . to balance three important interests: the public interest in a high quality decisionmaking process, the interest of justice in an expeditious resolution of litigated matters, and the interest of the parties in litigating matters without unnecessary expense").

² In addition to arguing that a stay would save resources, Respondent asserts that it has acted in good faith and has taken affirmative corrective steps, so that there is no reason to anticipate future non-compliance. Motion to Dismiss at 5. These assertions raise factual issues, which, if relevant, would need to be assessed in the context of evidence developed at trial.

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efficiently and expeditiously, we find good cause to grant only a portion of the requested continuance and will reschedule the hearing to commence on July 21, 2020.

Accordingly,

IT IS HEREBY ORDERED that Respondent's request to stay further proceedings in this matter pending resolution of its Motion to Dismiss is **DENIED**;

IT IS FURTHER ORDERED that Respondent's request to refer its Motion to Dismiss to the Administrative Law Judge is **DENIED**;

IT IS FURTHER ORDERED that Respondent's Expedited Motion of Administrative Hearing is **GRANTED IN PART**. The evidentiary hearing shall begin on July 21, 2020, at 10:00 a.m. The Administrative Law Judge retains discretion to adjust any pre-hearing deadlines to the extent compatible with the hearing date as extended by this Order.

By the Commission.

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IN THE MATTER OF

RAGINGWIRE DATA CENTERS, INC.*Docket No. 9386. Order, February 3, 2020*

Opinion and Order denying respondent's Motion to Dismiss Administrative Complaint in this proceeding.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

By Commissioner Christine S. Wilson, for the Commission:

On November 5, 2019, the Commission issued an administrative complaint against RagingWire Data Centers, Inc. ("RagingWire" or "Respondent"), alleging that the company engaged in deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act ("FTC Act") by making false or misleading representations regarding its participation in the EU-U.S. Privacy Shield Framework and/or the Safe Harbor Framework, and its compliance with Privacy Shield Principles. Respondent has moved to dismiss the Complaint for failure to state a claim. Respondent's motion rests on its assertion that the Complaint fails to plead materiality adequately, a required element for showing that an act or practice is deceptive. We find the Complaint, construed in a light most favorable to Complaint Counsel-as required in the context of a motion to dismiss-adequately pleads that RagingWire's alleged misrepresentations were material. We therefore deny Respondent's motion to dismiss.

I. COMPLAINT ALLEGATIONS AND PROCEDURAL BACKGROUND

We summarize the Complaint's allegations below:

Since 1995, European Union ("EU") law has prohibited (or required EU Member States to prohibit) the transfer of personal data outside the EU, with exceptions, unless the European Commission has made a determination that the recipient jurisdiction's laws ensure that such personal data are protected (*i.e.*, meet the EU's "adequacy" standard). Compl. ¶¶ 5-6. To satisfy this standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the European Commission negotiated the EU-U.S. Privacy Shield Framework ("Privacy Shield"). *Id.* ¶ 7. Privacy Shield provides a mechanism for companies to transfer personal data from the EU to the United States in a manner consistent with the requirements of EU law on data protection. *Id.* ¶¶ 5, 7. Accordingly, personal data from the EU may lawfully be transferred to companies in the United States that participate in Privacy Shield. *Id.* ¶ 7. Privacy Shield took effect on August 1, 2016, replacing the U.S.-EU Safe Harbor Framework, a mechanism for personal data transfer that was in effect for a number of years before that. *Id.* ¶¶ 7-8. Under the EU's General Data Protection Regulation ("GDPR"), which took effect on May 25, 2018, transfers of personal information from the European Economic Area to the United States without the benefit of an authorized mechanism such as Privacy Shield are subject to severe penalties, including administrative fines of up to 20,000,000€ or 4% of the transferor's worldwide annual turnover from the preceding financial year, whichever is greater. *Id.* ¶¶ 6, 14.