

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF THE ADMINISTRATIVE LAW JUDGES  
Washington, D.C.



**In the Matter of:**

**RagingWire Data Centers, Inc.,**

**a corporation.**

**DOCKET NO. 9386**

**ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENT  
RAGINGWIRE DATA CENTERS, LLC**

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**ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENT  
RAGINGWIRE DATA CENTERS, LLC**

Respondent RagingWire Data Centers, Inc. (“Respondent” or “RagingWire”) hereby answers plaintiff Federal Trade Commission’s (“Plaintiff,” “FTC,” or “Commission”) Administrative Complaint, dated November 5, 2019 (the “Complaint”) (Dkt. No. 9386), and asserts affirmative and other defenses. Any allegation in the Complaint that is not expressly admitted below is denied.<sup>1</sup>

**PRELIMINARY STATEMENT**

This case is a waste of FTC resources, this Court’s time, and RagingWire’s resources. No harm has been alleged. There is no assertion that RagingWire is likely to make the alleged mistake again, and the requested relief is that RagingWire do what it is already doing. Moreover, the claimed brief lapse in technical compliance with the EU-U.S. Privacy Shield Framework (“Privacy Shield”) did not violate Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45. The FTC has failed to identify or even to plead that there is any evidence of materiality or harm in this case. RagingWire, moreover, has rectified the alleged past lapse, and there is no evidence that RagingWire poses a recidivist threat.

Put simply, RagingWire is in the business of providing physical spaces to house servers. It is not in the data business. RagingWire provides its customers the physical shell within which they can set up and keep their own servers. RagingWire does not have access to data on its customers’ servers. RagingWire’s 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),

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<sup>1</sup> The Complaint contains section titles and organizational headings to which no response is required. To the extent that the headings may be construed to contain allegations of fact to which a response is required, RagingWire denies all such allegations.

and the physical location of its data centers (e.g., how close is the data center to the client's operations center).

For over a decade, RagingWire was fully compliant with Privacy Shield and its precursor, the Safe Harbor Certification program. It posted a related Privacy Shield statement on its website. Compliance with Privacy Shield was just one of many certifications RagingWire maintained. Its other certifications generally incorporate requirements for physical protective measures. For a brief period, RagingWire was not technically in compliance with Privacy Shield, although it continued to implement the same protections and abide by the core principles of the program. RagingWire's leadership did not realize it was out of compliance, so the Privacy Shield statement remained on its website. RagingWire removed the statement and took actions to comply with Privacy Shield after it received notice from the Department of Commerce and FTC. It later became fully compliant again.

The Complaint alleges several claims all arising out of the same underlying alleged misrepresentation—the Privacy Shield statement that remained posted during the alleged lapse period—and all based on the allegation that that misrepresentation was deceptive under Section 5 of the FTC Act. However, the Commission has not established or even claimed that the alleged misrepresentation in this matter (the Privacy Shield statement) was material, and, indeed, RagingWire will provide support for a finding of immateriality. Without evidence of materiality, there can be no violation. *See In re Jerk, LLC*, 2015 FTC LEXIS 64, \*40 (F.T.C. 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). Materiality would only exist here if the alleged misrepresentation was a material factor in customers’ decisions to utilize RagingWire’s services during the short

lapse period. *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.”). There is no evidence that it was. In fact, the evidence will show that the alleged misrepresentation did not play such a role.

The Complaint also fails to recognize the key underlying fact that differentiates RagingWire from other respondents in Privacy Shield matters—it has no access to relevant data. Privacy Shield is “a mechanism to comply with data protection requirements when *transferring personal data* from the European Union . . . to the United States.”<sup>2</sup> RagingWire has no locations in Europe; some of its customers do. RagingWire does not access, let alone transfer, its customers’ data (regardless of where those customers are based). Nor do customers use RagingWire to transfer data into (or out of) the United States. They do not and cannot because RagingWire simply provides physical locations to house servers. If a customer needs a company to physically protect its servers, that customer can turn to RagingWire with its best-in-class physical protections. If a customer wants to do something with the data on those servers, that customer must go elsewhere because RagingWire is not a data company.

#### **RESPONDENT’S ANSWER AND AFFIRMATIVE DEFENSES**

1. Respondent admits Paragraph 1 of the Complaint.<sup>3</sup>
2. Respondent is without knowledge or information sufficient to form a belief as to the meaning of “specialized storage facilities” or “data colocation services” and denies that it

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<sup>2</sup> Privacy Shield, “Welcome to The Privacy Shield,” <https://www.privacyshield.gov/welcome> (last accessed Nov. 16, 2019).

<sup>3</sup> References to paragraph numbers in the Complaint correlate to the numbered paragraphs in the Complaint.

stores any data. Respondent avers that it provides data center services and admits to the remainder of Paragraph 2.

3. Respondent does not dispute the FTC's jurisdiction in this matter, but otherwise denies the allegations in Paragraph 3.

4. Respondent denies Paragraph 4 of the Complaint.

**Personal Data Transfers Under European Union Law**

5. Respondent admits the first sentence of Paragraph 5. Respondent avers that the EU Data Protection Directive speaks for itself, and Respondent is without knowledge or information sufficient to form a belief as to the truth of the remainder of Paragraph 5.

6. Respondent admits that the EU has enacted a data protection regime called the "General Data Protection Regulation" ("GDPR"). Respondent otherwise denies the remainder of the allegations in the first sentence in Paragraph 6. Respondent avers that the GDPR speaks for itself, and Respondent is without knowledge or information sufficient to form a belief as to the truth of the remainder of Paragraph 6.

7. Respondent is without knowledge or information sufficient to form a belief as to the meaning of "certain commercial transfers" as used in Paragraph 7. Respondent otherwise admits Paragraph 7.

8. Respondent is without knowledge or information sufficient to form a belief as to the lawfulness of the Safe Harbor Framework after October 2015. Respondent otherwise admits Paragraph 8.

9. Respondent is without knowledge or information sufficient to form a belief as to the meaning of "related requirements that have been deemed to meet the EU's adequacy

standard” as used in Paragraph 9. Respondent otherwise admits that companies must self-certify their compliance with the requirements of the EU-U.S. Privacy Shield.

10. Respondent avers that to the extent Paragraph 10 of the Complaint states legal conclusions, no response is required. Respondent otherwise admits that the EU-U.S. Privacy Shield contains the text quoted in Paragraph 10 (without the emphasis), but avers that the Commission’s selective quotation is misleading as framed.

11. Respondent avers that to the extent Paragraph 11 of the Complaint states legal conclusions, no response is required. Respondent is without knowledge or information sufficient to form a belief as to the meaning of “third-party agents” and “agent” in Paragraph 11. Respondent otherwise admits that the EU-U.S. Privacy Shield contains a requirement with regard to onward transfers, but avers that the Commission’s selective reference is misleading as framed.

12. Respondent admits the first sentence of Paragraph 12. Respondent admits that the EU-U.S. Privacy Shield contains the text quoted in the second sentence of Paragraph 12, but avers that the Commission’s selective quotation is misleading as framed.

13. Respondent avers that to the extent Paragraph 13 of the Complaint states legal conclusions, no response is required. Respondent admits that the European Commission’s adequacy decision contains the text quoted in the first sentence of Paragraph 13, but avers that the Commission’s selective quotation is misleading as framed. Respondent admits that Commerce maintains the referenced web page. Respondent is without knowledge or information sufficient to form a belief as to the last sentence in Paragraph 13.

14. Respondent is without knowledge or information sufficient to form a belief as to the allegation that applicable fines under GDPR Article 83 would be imposed on “the transferor.” Respondent admits that Article 83 of the GDPR provides for administrative fines of

up to 20,000,000 EUR or, under certain circumstances, up to 4% of the total worldwide annual turnover for the preceding financial year, for violation of Articles 44 to 49, which cover transfers of personal data outside of the European Economic Area (“EAA”).

15. Respondent admits Paragraph 15.

**RagingWire’s Business Practices**

16. Respondent avers that to the extent Paragraph 16 of the Complaint states legal conclusions, no response is required. Respondent admits that it owns and operates ten “data centers” located in the United States and that it offers colocation services, but it denies that it “store[s] customer data.” Respondent is without knowledge or information sufficient to form a belief as to the allegations in the second sentence of Paragraph 16, and denies the allegations to the extent that they suggest that RagingWire receives, facilitates or actually undertakes any data transfers.

17. Respondent admits Paragraph 17.

18. Respondent admits Paragraph 18.

19. Respondent avers that to the extent Paragraph 19 of the Complaint states legal conclusions, no response is required. Respondent admits that its Privacy Shield certification lapsed in January 2018.

20. Respondent admits that Paragraph 20 provides the correct web address for Respondent’s privacy policy and that the text quoted in Paragraph 20 appeared in its online privacy policy between January 2017 and October 2018, but avers that the Commission’s selective quotation is misleading as framed. Respondent denies the remainder of the allegations in Paragraph 20.

21. Respondent denies the allegations in the first sentence of Paragraph 21.

Respondent admits that the non-final materials attached as Exhibit A reference Respondent's participation in Safe Harbor, but otherwise denies the allegations in the second sentence of Paragraph 21. Respondent denies the remainder of the allegations in Paragraph 21.

22. Respondent denies that "Commerce warned the company in February 2018 . . . to take down its claims that it participated in Privacy Shield unless and until such time as it completed the steps necessary to renew its participation in the EU-U.S. Privacy Shield Framework." Respondent admits that it received a communication from Commerce in February 2018 regarding its Privacy Shield compliance. Respondent further admits that it received a communication from Commerce in May 2018 regarding its Privacy Shield compliance that directed Respondent to take down its Privacy Shield Statement until such time as it was back in compliance with Privacy Shield.

23. Respondent admits that it removed its Privacy Shield Statement from its online privacy policy in October 2018.

24. In response to Paragraph 24, Respondent avers that it regained its Privacy Shield certification in May 2019.

#### **RagingWire's Privacy Shield Non-Compliance**

25. Respondent avers that to the extent Paragraph 25 of the Complaint states legal conclusions, no response is required. Respondent otherwise denies the allegations in Paragraph 25 to the extent that they suggest Respondent failed to comply with all Privacy Shield Principles.



**RagingWire's Failure to Verify Compliance**

26. Respondent avers that Supplemental Principle 7 speaks for itself and that the Commission's selective references are misleading as framed.

27. To the extent that Paragraph 27 purports to be describing the Privacy Shield Principles and/or Supplemental Principles, Respondent avers that they speak for themselves and that the Commission's selective reference is misleading as framed.

28. Respondent denies Paragraph 28 insofar as it suggests that RagingWire was required to verify its implementation of certain privacy practices during the entire 2017-18 period and the implication that RagingWire did not maintain such privacy practices in the absence of verification. Respondent otherwise admits Paragraph 28.

29. Respondent denies Paragraph 29 insofar as it suggests that RagingWire was required to verify its implementation of certain privacy practices during the entire 2017-18 period; Respondent otherwise admits Paragraph 29.

**RagingWire's Failure to Verify Compliance**

30. Respondent admits that Principle 7(a)(i) of the Privacy Shield Principles and Supplemental Principle 11(a) contain the text quoted in Paragraph 30, but avers that the Commission's selective quotation and reference is misleading as framed.

31. Respondent denies the allegations in Paragraph 31 to the extent that they suggest TRUSTe is a subsidiary of TrustArc and not the new name of the entity; Respondent otherwise admits Paragraph 31.

32. Respondent admits Paragraph 32 to the extent that it asserts that Respondent contracted with TRUSTe to provide dispute resolution services before TRUSTe changed its name to TrustArc.

33. Respondent admits that Respondent's Privacy Shield statement contained the material quoted in Paragraph 33, but avers that the Commission's selective quotation is misleading as framed.

34. Respondent admits Paragraph 34, except that it renewed its dispute resolution subscription with TrustArc in June 2018.

**RagingWire's Failure to Properly Withdraw and Affirm Its Ongoing Compliance**

35. Respondent avers that Supplemental Principle 6(f) and Supplemental Principle 7 speak for themselves and that the Commission's selective reference is misleading as framed.

36. Respondent admits Paragraph 36, but avers that the Commission's selective reference is misleading as framed.

37. Respondent admits Paragraph 37, but avers that the Commission's selective reference is misleading as framed.

**COUNT 1**

**Privacy Shield Participation Misrepresentation**

38. Respondent incorporates its responses to Paragraphs 20-21 and avers that to the extent Paragraph 38 of the Complaint states legal conclusions, no response is required.

39. Respondent incorporates its responses to Paragraphs 17 and 19 and avers that to the extent Paragraph 39 of the Complaint states legal conclusions, no response is required. Respondent otherwise denies Paragraph 39.

**COUNT 2**

**Misrepresentation Regarding Verification**

40. Respondent incorporates its responses to Paragraphs 20-21 and avers that to the extent Paragraph 40 of the Complaint states legal conclusions, no response is required.

41. Respondent incorporates its responses to Paragraphs 26-29 and avers that to the extent Paragraph 41 of the Complaint states legal conclusions, no response is required.

Respondent otherwise denies Paragraph 41.

### **COUNT 3**

#### **Misrepresentation Regarding Dispute Resolution**

42. Respondent incorporates its responses to Paragraphs 20-21 and avers that to the extent Paragraph 42 of the Complaint states legal conclusions, no response is required.

43. Respondent incorporates its responses to Paragraphs 30-34 and avers that to the extent Paragraph 43 of the Complaint states legal conclusions, no response is required.

Respondent otherwise denies Paragraph 43.

### **COUNT 4**

#### **Misrepresentation Regarding Continuing Obligations**

44. Respondent incorporates its responses to Paragraphs 20-21 and avers that to the extent Paragraph 44 of the Complaint states legal conclusions, no response is required.

45. Respondent incorporates its responses to Paragraphs 35-37 and avers that to the extent Paragraph 45 of the Complaint states legal conclusions, no response is required.

Respondent otherwise denies Paragraph 45.

#### **Violations of Section 5 of the FTC Act**

46. Respondent avers that to the extent Paragraph 46 of the Complaint states legal conclusions, no response is required. Respondent otherwise denies the allegations in

Paragraph 46.

**RESPONDENT'S AFFIRMATIVE DEFENSES**

Respondent asserts the following defenses, without assuming the burden of proof on such defenses that would otherwise rest with the Plaintiff:

**FIRST DEFENSE**

The Complaint fails to state a claim on which relief can be granted under Section 5 of the FTC Act, 15 U.S.C. § 45.

**SECOND DEFENSE**

The alleged misrepresentation was not material.

**THIRD DEFENSE**

Granting the relief sought is contrary to the public interest. Respondent has rectified all alleged violations, implemented additional compliance procedures, and there is no recidivist risk.

**FOURTH DEFENSE**

Respondent has acted in good faith in all of its practices, including in the initial posting of the Privacy Shield statement. Respondent took affirmative steps to comply with Privacy Shield and took down the statement once it learned of the issue. Any delay in action was the result of understandable personnel issues that will not happen again in light of Respondent's since-adopted compliance procedures.

**FIFTH DEFENSE**

There is no danger of recurrence of alleged similar violations and the Commission's requested relief is not reasonably related to Respondent's alleged violations.

**SIXTH DEFENSE**

The alleged violation arose out of the actions of an employee who failed to follow the explicit instructions of an officer of the company to comply with Privacy Shield requirements.

**SEVENTH DEFENSE**

The Complaint seeks overlapping and duplicative relief as the various claims all arise out of an alleged single wrongdoing. All asserted claims arise out of the same alleged misrepresentation—the posting of the Privacy Shield statement during the short lapse period.

**ADDITIONAL DEFENSES**

Respondent reserves the right to assert any other defenses as they become known to Respondent.

**NOTICE OF CONTEMPLATED RELIEF**

WHEREFORE, Respondent requests that the Administrative Law Judge deny the Commission's requested relief and dismiss the Complaint in its entirety with prejudice, or alternatively without prejudice.

Dated: November 25, 2019

Respectfully submitted,

*/s/ Corey W. Roush* \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I certify that on November 25, 2019, a copy of the foregoing, Answer and Affirmative Defenses of Respondent RagingWire Data Centers, LLC, was electronically filed using the Commission's Electronic Filing System and was sent by that system and by certified mail to the following:

Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Dated: November 25, 2019

By: /s/ Corey W. Roush

Notice of Electronic Service

**I hereby certify that on November 25, 2019, I filed an electronic copy of the foregoing ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENT RAGINGWIRE DATA CENTERS, LLC, with:**

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

Donald Clark  
600 Pennsylvania Ave., NW  
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**I hereby certify that on November 25, 2019, I served via E-Service an electronic copy of the foregoing ANSWER AND AFFIRMATIVE DEFENSES OF RESPONDENT RAGINGWIRE DATA CENTERS, LLC, upon:**

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