

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

had been inadvertently produced, and should be returned. However, Nexway refused to specifically identify the supposedly privileged documents or to provide a privilege log as required by the CID. While doubting the validity of the privilege claim (among other reasons, Mr. Von Kroog is not an attorney and has never been a member of a bar in the U.S. or France), the FTC searched for and proactively sequestered approximately 200 documents that, as best as it can determine given Nexway's vague references, are allegedly privileged communications.

Nexway's vague, blanket privilege claim along with its refusal to identify the specific documents it considers privileged and produce a privilege log are hindering an ongoing federal investigation. Under this cloud of uncertainty, the FTC cannot use approximately 200 documents that are relevant to its investigation,

Jurisdiction and Venue

3. Section 3 of the FTC Act, 15 U.S.C. § 43, empowers the Commission to prosecute any inquiry necessary to its duties in any part of the United States; Section 6 of the Act, 15 U.S.C. § 46, empowers the Commission to investigate the business and conduct of any person, partnership, or corporation engaged in or whose business affects commerce; Section 20 of the FTC Act, 15 U.S.C. § 57b-1, empowers the Commission to require by CID the provision of oral testimony, documents, or other information relating to any Commission law enforcement investigation.
4. The Court has jurisdiction to enforce the Commission's duly issued CIDs, including the CID issued to Nexway. Sections 20(e) and (h) of the FTC Act, 15 U.S.C. §§57b-1(e) and (h), respectively, authorize the Commission to seek district court orders to enforce its CIDs in any jurisdiction in which the recipient of a CID "resides, is found, or transacts business" and district courts to enter such orders. Nexway resides, is found, and transacts business in the District of Columbia. Tyndall Decl. ¶¶ 8, 14. The Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337 and 1345.
5. Venue is proper in the District of Columbia. The current investigation by the Commission is nationwide in scope, but is being directed and carried on within this judicial district at the FTC's headquarters in Washington, DC. Tyndall Decl. ¶ 4. Venue is proper in the District of Columbia, which is the location of the investigating office. *NLRB v. Cooper Tire & Rubber Co.*, 438 F.3d 1198, 1202 (D.C. Cir. 2006) (holding that location of investigating office "may well be the most reasonable [venue] choice for

purposes of subpoena enforcement”); *United States Intern. Trade Comm’n v. ASAT, Inc.*, 411 F.3d 245, 249 (D.C. Cir. 2005). Venue is also proper under 28 U.S.C. § 1391.

The Commission’s Investigation

6. The Commission is investigating Nexway and others for violations of Section 5 of the FTC Act, 15 USC §45(a), and the Telemarketing Sales Rule (“TSR”), 16 C.F.R. § 310 *et seq.*, including assisting and facilitating unlawful practices and credit card laundering. Tyndall Decl. ¶¶ 15- 17. As part of this investigation, on January 28, 2020, the Commission issued a CID to Nexway. Tyndall Decl. ¶ 15. The CID was issued pursuant to Commission Resolution No. 012 3145, which authorizes the use of compulsory process under Section 20 of the FTC Act, 15 U.S.C. §57b-1.
7. The investigation was described as follows:

Whether you or other persons or entities have engaged in deceptive and unfair practices in violation of the FTC Act, 15 USC§ 45 by cred it card laundering, assisting or facilitating violations of the Telemarketing Sales Rule, 16 C.F.R. Part 310, or by making a false or misleading statement to induce any person to pay for goods or services and whether Commission action to obtain monetary relief would be in the public interest.

11. The CID also stated that failure to make privilege claims may result in a waiver of the privilege. Specifically, the CID included the following instruction:

For specifications requesting production of Documents, if You withhold from production any material responsive to this CID based on a claim of privilege, work product protection, statutory exemption, or any similar claim, You must assert the claim no later than the return date of wn,ntrIquesquecsd d4 (r)3 (e)4 (l)-2 (a)vilesegbas (g)2 gl(g)2[(S)-2 (of)3.3 (o)]TJ0

produced documents on a rolling basis, in March, May and June 2020. Tyndall Decl. ¶ 21.

15. Nexway's production was made in an electronic format designed to be easily loaded into an eDiscovery tool like Relativity. Indeed, Nexway's production was likely produced using such a tool. eDiscovery tools like Relativity are commonly used by the government and law firms to review large numbers of documents, and include search and tagging functions. eDiscovery tools, like Relativity, include functions that allow a user to make numerous targeted searches over thousands of documents. Baldwin Decl. ¶¶ 4-5.

16. Nexway produced approximately 8210 documents (this includes emails, attachments, contracts, and spreadsheets). Nexway did not provide a privilege log with its productions, or otherwise identify any privileged documents it had withheld. It merely included boiler-plate language in its cover letters reserving the right to claim privilege and to claw back any inadvertently produced documents. Baldwin Decl. ¶ 6; Tyndall Decl. ¶ 24.

17. For more than seven months, the FTC searched and reviewed the documents produced by Nexway. The FTC also used documents produced by Nexway in investigatory hearings, which involve showing documents to and asking questions of a witness during the course of an investigation, all of which are recorded by a court reporter. The FTC conducted its search and review, and investigational hearings, prior to Nexway identifying even a single specific document as privileged. Brooke Decl. ¶ 31.

18. The FTC served Nexway with two notices informing the company that (1) the FTC would be publicly disclosing documents that Nexway produced to witnesses in

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Nexway's Belated Privilege Claim, Refusal to Specifically Identify Privileged Documents, and Noncompliance with the CID's Requirement of a Privilege Log

22. On March 5, 2021, Nexway sent the FTC a letter, which responded to a number of the questions in the December 17, 2020 letter and, for the first time, claimed that one document – 7247 – was covered by the attorney-client privilege. Before this, Nexway had never claimed that any document was privileged. In particular, counsel for Nexway said that 7247 was protected by attorney-client privilege because it was provided to Oliver Von Kroog, Nexway/asknet counsel, to obtain legal advice. Nexway counsel claimed that 7247 had been inadvertently produced and requested that the FTC return the document and purge it from FTC document retention systems. Brooke Decl. ¶¶ 15-16.
23. On March 9, 2021, the FTC responded via letter requesting that Nexway provide the Commission with the information required by the CID to support a privilege claim for 7247. Brooke Decl. ¶ 18.
24. On April 19, 2021, Nexway sent a letter in response to the FTC's March 9, 2021 letter: (1) again claiming that 7247 was privileged; and (2) further requesting that the FTC return documentation between Nexway and Oliver Von Kroog that was inadvertently produced. Nexway's April 19, 2021 response did not (1) identify any other document besides 7247 or (2) include a privilege log. Brooke Decl. ¶¶ 19-20.
25. The FTC responded to Nexway by letter on April 27, 2021 ("April 27 letter"). In the April 27 letter, the FTC noted that Nexway's April 19, 2021 request concerning correspondence with Mr. Von Kroog was vague and overbroad, and failed to identify which documents Nexway claimed were privileged and why. Specifically, the April 27 letter noted that Nexway had "not identified any documents as being inadvertently

produced” and that Nexway’s reference to hypothetically privileged documents did not suffice as identification. Brooke Decl. ¶ 21.

26.

Nexway did not do so, the April 27 letter stated, the FTC would assume that no privileged documents were inadvertently produced. Brooke Decl. ¶ 25.

29.

32. Mr. Von Kroog is not an attorney and is not a member of a bar in the U.S. or France.

Instead, Mr. Von Kroog is a French juriste; an in-house legal advisor who has studied law at a university, but has not gone to law school, passed a bar, or been admitted to a bar.

Tyndall Decl. ¶¶ 25-28; Blumrosen Report. ¶¶ 21-22, 27-31, 38-39, 65.

33. Communications with a juriste or in-house counsel are not privileged under French law.

Blumrosen Report. ¶¶ 40, 42.

34. Nexway did not take reasonable steps to prevent any inadvertent disclosure and has not

taken reasonable steps to rectify any inadvertent disclosure. Nexway has repeatedly refused to review its production for potentially privileged documents and produce a privilege log specifically identifying the documents it claims are privileged and were inadvertently disclosed.

Sequestration of Documents

35. FTC staff searched for and identified approximately 200 documents produced by Nexway

that included Mr. Von Kroog's email address or were attached to documents with his email address. Even though Nexway failed to identify any purportedly privileged documents besides 7247, the FTC, out of an abundance of caution, proactively

sequestered the approximately 200 documents identified by its search that, as best as it can determine given Nexway's vague references, include communications Mr. Von Kroog received or sent, and attachments to those communications. Baldwin Decl. ¶¶ 7-8.

36. This sequestration is broader than would be required by any claim of attorney-client

privilege offered by Nexway, since, for example, the search did not exclude documents that were shared with other companies. Brooke Decl. ¶ 35.

37. As of today, Nexway has still not identified any document other than 7247 as privileged, or produced a privilege log. Brooke Decl. ¶ 33.

38. Nexway's effort to withhold documents required by the CID based on its unsupported privilege claim has impeded the Commission's ability to complete its investigation and is contrary to the public interest. Brooke Decl. ¶ 36.

Notice of Intent to Raise Issue of Foreign Law

39. The FTC intends to raise the issue of privilege under French law, and any other applicable foreign law. Pursuant to Federal Rule of Civil Procedure 44.1, "A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."

PRAYER FOR RELIEF

The FTC invokes the aid of this Court and requests the following:

1. The immediate issuance of an order directing Nexway to appear and show cause why the Court should not rule that (a) any right Nexway had to assert a privilege related to any communications with or documents provided to Mr. Von Kroog it produced in response to the FTC's CID has been waived; and (b) no attorney-client privilege applies to Nexway's communications with Mr. Von Kroog; or

2. In the alternative, the immediate issuance of an order directing Nexway to appear and show cause why the Court should not enter an order (a) requiring that Nexway produce to the FTC and to the Court a complete and thorough privilege log that complies with the CID and

FTC Rule 2.11; and (b) including an expedited briefing schedule regarding the validity of any Nexway privilege claims so that the FTC has an opportunity to challenge Nexway's claims as a whole and on a document-by-document basis, with in camera review of the documents if necessary; and

3. Such other relief as this Court deems just and proper.

Dated: November 17, 2021

Respectfully submitted,

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