

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 09-60202-CIV-COHN/SELTZER

THE CONTINENTAL GROUP, INC.,
a Florida Corporation,

Plaintiff,

v.

KW PROPERTY MANAGEMENT, LLC d/b/a KW
PROPERTY MANAGEMENT AND CONSULTING, LLC,
a Florida Limited Liability Company; KW HOLDING
ONE, LLC d/b/a KW PROPERTY MANAGEMENT AND
CONSULTING, LLC, a Florida Limited Liability
Company; THE GRAND PRESERVE AT NAPLES LLC d/b/a
KW PROPERTY MANAGEMENT AND
CONSULTING, LLC, a Florida Limited Liability
Company; and MARCY KRAVIT, an individual,

Defendants.

**PLAINTIFF'S MOTION FOR ADVERSE INFERENCE REGARDING CERTAIN FILES
REFERENCED IN PLAINTIFF'S COMPLAINT AND MOTION FOR PRELIMINARY
INJUNCTION, DUE TO SPOILIATION OF EVIDENCE BY DEFENDANT KRAVIT**

Plaintiff, The Continental Group, Inc. ("TCG") hereby moves for an adverse inference that certain files copied and removed from TCG's computers by Kravit prior to her resignation from TCG were taken not in furtherance of TCG business purposes but with the intention of using the information in her employment with the KW Defendants to compete in the property management business, and further for an adverse inference that those files were actually used in Kravit's employment with the KW Defendants, and therefore were used by the KW Defendants as well through Kravit as their agent and employee. TCG seeks this adverse inference for all purposes, including for purposes of determining preliminary injunctive relief. In support TCG states as follows.

I. Introduction: Why TCG seeks an Adverse Inference

TCG seeks an adverse inference for evidentiary purposes in this action that the files copied and removed from TCG's computers by Kravit prior to her resignation from TCG and found on Kravit's datatraveler USB device that include in their titles "TCG Marketing Package", "Outline of All Included HOA.07", "Continental Business Plan", "Customer List Report", "District Manager Check List", "IntroductionLetter", "Managers Checklist", "proposal-LEED Council", "Proposed Agenda", "Proposed in House Rating System", "Strategic Planning – Executive Summary", "TCF In House Training" and "TR – Sustainability Initiative":

(1) were taken not in furtherance of TCG business purposes but with the intention of using the information in her employment with the KW Defendants to compete in the property management business, and

(2) were actually used in Kravit's employment with the KW Defendants, and therefore were used by the KW Defendants as well through Kravit as their agent and employee.

TCG seeks this adverse inference with respect to the customer information, marketing information, business and strategic planning information, "green" or sustainability initiative information, training information, and business procedures, methods and practices information contained in these files because Defendant Kravit last accessed these files on her datatraveler USB device after being placed on notice through this litigation and Plaintiff's Motion for Preliminary Injunction that information pertaining to the specific subjects found in these files was among the information that Kravit had been alleged of wrongfully taking from TCG for the purpose of using such information in her employment with the KW Defendants and had further been alleged, on information and belief, of actually using in her employment with the KW Defendants consistent with her intentions at the time of the taking of these files, to unfairly compete with TCG in the property

management business. TCG seeks this adverse inference because Kravit intentionally destroyed evidence relating to her use of such files and information in her employment with the KW Defendants after being on notice that her use of such files and information in her employment with the KW Defendants was relevant and highly material to TCG's claims in this case. Because Defendant Kravit engaged in bad faith spoliation of critically relevant evidence regarding the metadata of electronic files in breach of her duty to preserve such information, such an inference is appropriate

II. Pertinent Background

On February 9, 2009, TCG filed its Verified Complaint for Injunctive Relief and Damages in this action against Kravit and certain corporate entities reasonably believed to constitute her current employer (the "KW Defendants"). In its complaint, TCG alleged that the Defendants violated the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 *et seq.*, and brought additional claims for breach of contract, tortious interference with business and contractual relations, and misappropriation of trade secrets. TCG specifically alleged that "Kravit illegally accessed and/or downloaded and otherwise copied and transferred information from TCG's computer systems in the weeks and days before she resigned her employment." *Id.* at ¶2. TCG alleged that Kravit accessed, and "apparently copied and transferred content from TCG's computer systems to herself for her benefit and/or as agent for KW." *Id.* at ¶39. TCG further alleged that "through their agents and employees, including Defendant Kravit . . . [the KW Defendants] obtained, used, and/or disclosed information of value from TCG unlawfully and in violation of the CFAA and/or legal or contractual obligations to TCG" *Id.*

In the Complaint and in TCG's Motion for Preliminary Injunction and supporting evidence, which were served on Defendant Kravit on February 13, 2009, *see* DE 9, TCG provided specific

examples of the subject matter of information wrongfully accessed and obtained by Kravit from TCG for use in her employment at KW and which she was believed to have actually used at KW in her employment with KW in competition with TCG. The files and information specifically identified in TCG's papers as having been obtained by Kravit from TCG's computers prior to her resignation, for her benefit and/or as agent for KW and which KW was alleged to have in turn obtained, used and/or disclosed, included files and information relating to (1) TCG's sustainability or "green" initiative; (2) information on TCG training; (3) marketing information, (4) customer or "prospect" information, (5) methods and operations documents, and (6) strategic and business planning information. Thus from the Complaint and the Motion for Preliminary Injunction it was immediately and unmistakably clear that this lawsuit was predicated upon Kravit's and the KW Defendants' possession and use of TCG's confidential and proprietary information, with a focus on specific these specific types of information as to the confidential information wrongfully taken from TCG and used by Kravit and the KW Defendants.

On February 17, 2009, the Court ordered Kravit and the KW Defendants to make available all portable computer and electronic storage devices for imaging by Plaintiff's forensic consultant. *See* Order dated February 17, 2009, DE 18. Results from the imaging evidenced that on February 14, 2009, the day after being served with process as well as the complaint and motion for preliminary injunction with supporting materials, Kravit accessed TCG files from her Data Traveler USB portable flash drive, and accessed one file on February 18, 2009. Specifically, on February 14th, Kravit accessed certain files on her flash drive including in their titles "TCG Marketing Package", "Outline of All Included HOA.07", "Continental Business Plan", "Customer List Report", "District Manager Check List", "IntroductionLetter", "Managers Checklist", "proposal-LEED Council", Proposed

Agenda”, “Proposed in House Rating System”, “Strategic Planning – Executive Summary”, “TCG In House Training” and “TR – Sustainability Initiative”. Kravit also accessed a file with information on TCG’s marketing plan on February 18th. From the “last written” data connected to these files, the files were from the time of Kravit’s employment with TCG. More importantly, these files reasonably appeared to be some of the very files Kravit was alleged to have taken from TCG’s computers shortly before her resignation from TCG, and further these specific files all appeared to contain TCG information on the very subjects upon which TCG’s Complaint and Motion for Preliminary Injunction had focused: customer information, marketing information, business and strategic planning information, “green” or sustainability initiative information, training information, and TCG business procedures, methods and practices. *See* Exhibit 1 & Attachment A to Exhibit 1.

As a result of Kravit’s deliberate activity interacting with these files from the Data Traveler USB flash drive on February 14 and 18, 2009, the data attached to these files about these files – the metadata -- regarding the last date the files were accessed was overwritten, leaving February 14, or 18, 2009, as the new – and only – record of the last date accessed. *See id.* For the reasons below, the adverse inference requested above for Kravit’s spoliation of this critically relevant evidence as to these files is appropriate.

III. Argument

A. Adverse Inference Standard

Spoliation is “the intentional destruction, mutilation, alteration, or concealment of evidence.” *Wilson v. Wal-Mart Stores, Inc.*, No. 5:07-cv-394-Oc-10GRJ, 2008 WL 4642596, at *1 n.4 (M.D. Fla. Oct. 17, 2008). The imposition of spoliation sanctions, including adverse inferences, is governed by federal law, *Martinez v. Brink’s, Inc.*, 171 Fed. Appx. 263, 269 n.7 (11th Cir. Mar. 8, 2006), but federal courts may look to state law for guidance. *Wilson*, 2008 WL 4642596 at *1. A party seeking an adverse inference as a sanction for spoliation of evidence must show that: (1) the evidence existed at one time; (2) the evidence is relevant to the moving party’s claim; and (3) the spoiler breached a duty to preserve the evidence. *Wilson*, 2008 WL 4642596 at *1; *Posely v. Eckerd Corp.*, 433 F. Supp. 2d 1287, 1315 (S.D. Fla. 2006) (citing *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004)). In the Eleventh Circuit, “an adverse inference is drawn from a party’s failure to preserve evidence only when absence of that evidence is predicated on bad faith.” *Penalty Kick Mgmt. Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1294 (11th Cir. 2003). Mere negligence in losing or destroying the records is not enough for an adverse inference, as it does not sustain an inference of consciousness of a weak case. *Bashir v. Amtrak.*, 119 F.3d 929, 931 (11th Cir. 1997) (citations omitted). However this court has stated that adverse inferences are “one of the least severe sanctions which the court can impose.” *Inmuno Vital, Inc. v. Telemundo Group, Inc.*, 203 F.R.D. 561, 574 (S.D. Fla. 2001); accord *Victor v. Makita U.S.A., Inc.*, No. 3:06-CV-479-J-33TEM, 2007 WL 3334260, at *2 (M.D. Fla. Nov. 9, 2007) (referring to an adverse inference as a “mild sanction”).

B. The evidence of Kravit's last date of access of the TCG files on the Data Traveler USB flash drive existed at one time.

The evidence that Kravit altered and destroyed existed at one time. It is indisputable that the Data Traveler USB flash drive contains accessible metadata that records and reflects the last date of access of information on that drive. Thus TCG's computer forensic consultant was able to access this metadata and discover that Kravit had last accessed the particular files at issue on the drive on February 14 and 18, 2009 – after Kravit was served with this lawsuit and after she had full knowledge of the substance of TCG's allegations and of the particular types of information that were the focus of TCG's allegations. Therefore, forensic consultants could have accessed this same information and found the previous "last date accessed" for the files at issue had Kravit not *re*-accessed them on February 14th and 18th, thereby altering and overwriting the records reflected by the metadata as to when, prior to February 14 and February 18, Kravit had last interacted in any way with these particular files from TCG.

C. The evidence of Kravit's last date of access of the TCG files on the The Data Traveler USB flash drive's metadata is critically relevant in this case.

The files' "last date accessed" from the Data Traveler USB flash drive that would have been reflected in the metadata had Kravit not re-accessed the files on February 14th and 18th, 2009 would have provided critically relevant evidence in this case. At its core, this case involves claims against Kravit and the KW Defendants for unlawfully accessing, obtaining, removing, copying, using, and disclosing confidential and proprietary information belonging to TCG. As such, TCG has brought claims under the CFAA, and state tort claims, that directly implicate Kravit's use of computers and portable electronic devices to access, copy, use, and disclose TCG's electronically-stored information – including her accessing and use of that TCG electronically-stored information following her

resignation from TCG and during her employment with the KW Defendants. The specific device identified as Kravit's Data Traveler USB flash drive was used to copy TCG's electronic files and information, and was allegedly a vehicle to transfer the TCG files and information for use and disclosure by the KW Defendants through KW computers and KW employees, including Defendant Kravit.

The metadata as to the "last accessed" date on this flash drive is critically relevant as evidence that Kravit did in fact access TCG's information during her employment with KW. More specifically, the evidence of exactly when Kravit again accessed this information – specifically whether Kravit did so during her employment with KW, as alleged – is critically relevant to demonstrating that Kravit in fact accessed TCG's confidential information on certain key subjects during her employment with the KW Defendants, a time when she had no legitimate business purpose or authority to do so, activity from which it reasonably may be inferred from that she had used or disclosed this information on behalf of the KW Defendants. Therefore, the metadata reflecting her "last date accessed" – before Kravit overwrote it with February 14th and 18th – would have been critically relevant to TCG's claims in this case.

D. Kravit breached her legal duty to preserve the metadata of her Data Traveler USB flash drive.

Kravit had a duty to preserve the metadata of her Data Traveler USB flash drive, and breached that duty by altering the metadata regarding her last date of access by deliberately and intentionally accessing the TCG files at issue on her flash drive after she was on notice of this lawsuit and of the critical relevance of evidence pertaining to her accessing of those files. "A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action."

Banco Latino, S.A.C.A. v. Gomez Lopez, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999) ("It is well

settled that Courts have the authority to sanction a party who destroys relevant and discoverable evidence.”); *Wilson*, 2008 WL 4642596 at *1. Kravit was served with the Summons, Verified Complaint, and Motion for Preliminary Injunction on February 13, 2009. These documents unmistakably put Kravit on notice of this lawsuit and her duty to preserve the metadata, particularly as to files containing information pertaining to the subjects which were the focus of the Complaint and Motion for Preliminary Injunction.

E. Kravit demonstrated bad faith in altering the metadata at issue.

Kravit also demonstrated the requisite bad faith for an adverse inference by spoliating the evidence of the dates of her access to the TCG files on her flash drive. In *Optowave Co., Ltd. v. Nikitin*, the court held that a party possessed the requisite bad faith by permitting his employees to reformat their computers’ hard drives, thereby destroying files and e-mails, even though he was on notice of potential litigation. No. 6:05-cv-1083-Orl-22DAB, 2006 WL 3231422, at *11 (M.D. Fla. Nov. 7, 2006). Destroying these electronic files was a “blatant disregard for the liberal rules of discovery which undermines the integrity of the judicial process and warrants sanctions.” *Id.* Like the spoliatorr in *Nikitin*, Kravit altered and destroyed electronic information by accessing the TCG files on her flash drive and overwriting the metadata regarding the last date she had accessed those files from the flash drive. Kravit’s bad faith is even more apparent than the party in *Nikitin* as Kravit was not simply aware of just potential litigation, but was on express notice of actual litigation involving her as a party when she was served with the Summons, Verified Complaint, and Motion for Preliminary Injunction. Additionally, Kravit was informed of the specific files and information that was pertinent to this case. Moreover, Kravit was specifically on notice that TCG had moved the Court to enjoin her from altering any electronic data on her storage devices that would reflect her

removal, use, or disclosure of this information. Kravit's evidence tampering was focused on precisely the files containing information pertaining to topics identified in TCG's Complaint and Motion for Preliminary Injunction, including some of the very files identified in those documents having been wrongfully taken from TCG and used at KW by Kravit and the KW Defendants.

This is not a case where records were destroyed pursuant to routine procedures "well in advance" of the time the records appeared relevant. *See Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975). Instead, Kravit altered and destroyed critically relevant evidence during the days after she was given express notice of the evidence's relevance and of her duty to preserve it. In fact, Kravit's rush to access many of these files the day after she was served with process demonstrates a clear intent to quickly hide her tracks and spoliage the evidence of when she last accessed these files after she had begun employment with KW. Therefore, Kravit demonstrated ample bad faith in spoliating this evidence and an adverse inference is appropriate. *See St. Cyr v. Flying J Inc.*, No. 3:06-cv-13-J-33TEM, 2008 WL 2608127, at *1 (M.D. Fla. June 29, 2008) (adverse inference is appropriate when a party destroys key evidence by selling van to a junkyard as scrap).

IV. Conclusion

For the reasons set forth above, TCG respectfully requests an adverse inference for all purposes relating to this litigation and consistent with the adverse inference set forth above.

Dated this 18th day of March, 2009.

Respectfully submitted,

s/Joan Canny

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Certificate of Service

I hereby certify that on March 18, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

s/Joan M. Canny

Joan M. Canny

SERVICE LIST

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