

**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 EXPEDITED MOTION FOR FURTHER CLARIFICATION OF THE
COURT'S ORDERS TO EXPEDITE DISCOVERY (DE 18 AND 24)**

Pursuant to Fed. R. Civ. P. 7(b) and 26(d) and S.D. Fla. L.R. 7.1, Plaintiff The Continental Group, Inc. hereby seeks further clarification of the Court's orders regarding expedited discovery, specifically that Defendants KW Property Management, LLC and KW Holding One, LLC should propose by close of business on February 20, 2009 a specific proposal for addressing their concerns about attorney-client privilege and attorney work product, as Plaintiff is not in a position to guess as to a proposal that would address those concerns to the KW Defendants' satisfaction, and that in the interim KW Property and KW Holdings are nonetheless obliged to produce for imaging at attorney Frank Simone's Broward office as previously proposed, the portable computers and other devices in those Defendants' possession, custody and control pertaining to Defendant Kravit and Devon "Marlene" Niemeier. Finally, Plaintiff seeks further clarification that the key word terms for the

forensic search to be negotiated between the parties by February 23, 2009 are for counsel of record's eyes only – meaning those specific attorneys that have entered an appearance in this action – and that the results of that search are to be provided to counsel of record only and not to any individuals or representatives of their clients. In support, Plaintiff states as follows:

A. Defendant KW should provide a specific filtering protocol, with search terms for potentially privileged communications and otherwise addressing its privilege concerns to its satisfaction by close of business February 20, 2009 and should produce its computers and devices for imaging in the interim pursuant to the Court's deadline.

1. On February 18, 2009, Defendant KW Property Management, LLC and KW Holding One, LLC filed a Motion to Clarify the Court's Order on Expedited Discovery, DE 18, in part raising concerns about attorney-client and work product privileges and a process by which such concerns would be addressed. These Defendants asserted that they had conferred with the Plaintiff and that Plaintiff opposed all the relief requested. Instead, Plaintiff's counsel requested a specific proposal to address Defendant KW's concerns about the protection of attorney-client communications in particular, and advised that a motion involving the Court in such an issue was premature and potentially unnecessary before the parties had exhausted their efforts to reach a specific agreement satisfying these Defendants' concerns. Rather than providing a specific proposal, these Defendants filed their motion with the Court.

2. The Court subsequently issued an Order which, in part, directed the parties to cooperate in filtering out, and not produce, documents or images to which and attorney-client or work product privilege is asserted in good faith, and further, that any such privileged documents that inadvertently are not filtered out, and are produced, shall not result in a waiver of the attorney-client or work-product privileges. DE 24. Despite Plaintiff's renewed request for a specific proposal from these Defendants that addressed the concerns at issue to these Defendants' satisfaction, these

Defendants have continued to refuse to make a specific proposal. Plaintiff is not in a position to speculate as to a filtering protocol and to otherwise address potentially privileged communications which would achieve the filtering and non-production of privileged materials in a manner satisfactory to these Defendants. In consequence, Plaintiff respectfully requests that the Court direct the Defendants who have brought forth these privilege concerns to make a concrete and specific proposal as to the filtering protocol to protect against disclosure, as well as any provision for inadvertent disclosure that would satisfy these Defendants concerns, and which could provide certainty to Plaintiff that these Defendants' concerns are addressed before commencing the review of the imaged computers and devices.

3. As *the identity of any counsel who might have engaged in communications with these Defendants and other terms which might indicate a potentially privileged communication is information uniquely in the possession of these Defendants*, a specific and concrete protocol for filtering potentially privileged communications must come from these Defendants and cannot be proposed by Plaintiff. In order that this review of imaged devices not be delayed, Plaintiff respectfully requests that these Defendants who have raised the privilege concerns be directed to provide a specific and concrete protocol to satisfy those concerns, including identifying the terms for filtering and the manner of filtering proposed, by close of business on Friday, February 20, 2009.

4. In light of the suggestions from these Defendants' counsel that the laptops may not be produced absent an agreement in place regarding such privilege concerns, Plaintiff in an abundance of caution also seeks further clarification that these Defendants are to produce the computers and devices for imaging as ordered, and that in light of an agreement by the parties as to a different location and in the absence of an agreement from these Defendants' counsel as to a time for

production, the equipment should be produced for imaging on February 20, 2009 at the office of Frank Simone, Esq., as proposed in Court and as apparently memorialized in the Court's order absent agreement of the parties as to a different location, at 11:00 a.m.

B. The search terms for the forensic search and the results of that search may include confidential information and should therefore be viewed by counsel who have entered an appearance in this action only and not by any representatives or employees of the Defendants.

5. The Court also clarified in its Order of February 18, 2009 that information obtained by Plaintiff in the course of expedited discovery was to be disclosed initially only to counsel of records for the parties as well as outside experts or consultants involved in the forensic search and imaging and the "drafters" or "recipients" of any e-mails or documents produced. The Court also directed that a copy of the keyword search be provided to KW Defendants' counsel within 24 hours of Plaintiff's receipt of the results of that search. As the forensic word search may include terms which are confidential and which are intended to identify information belonging to Plaintiff or which is indicative of violations of Plaintiff's contracts with its former employees, Plaintiff requests further clarification that the key word search terms themselves and the results of that search be provided only to KW Defendants' counsel who have entered an appearance in this action and not to any individuals or representatives of those Defendants and specifically excluding from disclosure any putative drafters or recipients of any of the data or documents resulting from the key word search absent specific consent to such disclosure by the Magistrate Judge.

6. Pursuant to S.D. Fla. L.R. 7.1(A)(3), the undersigned counsel has conferred in a good faith effort about the issues raised in this Motion, but was unable to obtain an agreement.

WHEREFORE, Plaintiff The Continental Group, Inc. respectfully requests further clarification of the Court's Order and instruct the Defendants that are seeking protection of attorney-client communications as part of the Court's Order on expedited discovery be instructed to provide a concrete and specific proposal to Plaintiff that would satisfy their concerns and the search terms for the forensic search and the results of that search be viewed only by counsel who have entered an appearance in this action, and not by any representative or employees of Defendants.

Dated this 19th day of February, 2009.

Respectfully submitted,

s/Joan Canny

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Certificate of Service

I hereby certify that on February 19, 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

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.

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