

**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 TO STRIKE OR, IN THE ALTERNATIVE, TO
DISREGARD THE DECLARATION OF DEFENDANT MARCY KRAVIT IN
SUPPORT OF KRAVIT'S RESPONSE TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION, AND SUPPORTING MEMORANDUM OF LAW**

Pursuant to Fed. R. Civ. P. 12(f), Plaintiff The Continental Group, Inc. ("TCG") moves to strike Defendant Marcy Kravit's declaration, in whole or in part, filed in opposition to Plaintiff's Motion for Preliminary Injunction because the statements in her declaration are not demonstrated to be from personal knowledge and/or are irrelevant to the matters for which the declaration has been offered. Kravit's declaration is also comprised of numerous opinions, speculative statements, improper legal conclusions, and unsupported self-serving statements. All of these statements should be stricken from the

record and/or disregarded by the Court for purposes of determining Plaintiff's Motion for Preliminary Injunction. In support, Plaintiff states as follows:

DISCUSSION

A. Applicable Legal Standards

At the preliminary injunction stage, a court may rely on affidavits which would not necessarily be admissible evidence for a permanent injunction as long as the evidence is "appropriate given the character and objectives of the injunctive proceeding." *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.* 51 F.3d 982, 985 (11th Cir. 1995) (internal quotation marks and citation omitted). A court, however, may strike, disregard, or give minimal weight to such evidence when determining whether to issue a preliminary injunction. *Gulf Coast Commercial Corp. v. Gordon River Hotel Assocs.*, No. 2:05-cv-564-FtM-33SPC, 2006 WL 1382072, at *2 (M.D. Fla. May 18, 2006) (court disregarded or gave minimal weight to affidavits containing an explanation of the applicable law of the case, restating material already before the Court, and instructing the Court on the law because it was not helpful to the trier of fact). Kravit's declaration here consisting almost entirely of statements not based on personal knowledge and/or statements irrelevant to the Court's analysis of the issues presented by Plaintiff's Motion for Preliminary Injunction.

Statements contained in Kravit's declaration that are not based on personal knowledge are inadmissible under Rule 602, FED. R. EVID. Rule 602 provides, in pertinent part:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness

has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

A declaration that has no probative value when it contains speculation or conclusions rather than statements of fact. *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1215 (11th Cir. 1999) (discussing issue in the context of a motion to dismiss, a declaration has no probative value and must be stricken when it contains speculation or conclusions rather than statements of fact); *Maiorana v. MacDonald*, 596 F.2d 1072, 1079 (1st Cir. 1979) (plaintiff's affidavit was defective because it contained statements not made on personal knowledge, purported to examine defendants' thoughts as well as their actions, and contained impermissible speculations and conclusory language); *Story v. Sunshine Foliage World, Inc.*, 120 F. Supp. 2d 1027, 1030 (M.D. Fla. 2000) (affidavits must be based on personal knowledge, and therefore affidavits based on nothing more than information and beliefs are not sufficient and are subject to a motion to strike). Kravit's statements which are irrelevant to the matter for decision should be stricken or disregarded pursuant to FED. R. EVID. 401 and 402, and that attest to contracts and other records not attached to her declaration should be stricken or disregarded pursuant to FED. R. EVID. 1002. Finally, FED. R. EVID. 403 permits the exclusion of relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleads the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

B. Kravit's declaration should be stricken and/or disregarded for purposes of Plaintiff's Motion for Preliminary Injunction.

Kravit's declaration demonstrates that she does not possess personal "knowledge" of many of the matters about which she purports to testify, but rather is comprised of speculative assertions, conclusions in lieu of material facts, improper opinion testimony, conjecture, and irrelevant statements. Bereft of the requisite foundation, this "evidence" is therefore inadmissible or, at a minimum, should be disregarded when determining Plaintiff's Motion for Preliminary Injunction. Although not exhaustive, the following list summarizes the more blatant statements made by Kravit:

Paragraphs 14 through 17: Kravit statements regarding her "access" and "authority" to access certain TCG's servers as well as other TCG employees' access to TCG's servers and the contents of TCG's electronic folders and drives on TCG's servers are not demonstrated to be from the personal knowledge of Kravit. Kravit, as affiant, has not stated any facts in her declaration that would support that she has any specific knowledge about TCG's computer systems and, in particular, the contents of TCG's electronic folders and drives or TCG employees' access to those folders and drives. Therefore, these statements should be stricken or disregarded by the Court.

Paragraphs 18, 20, and 23: Kravit makes the unsupported, conclusory, and self-serving assertions that she only "accessed and used information that was within the scope of her TCG job duties" during her employment with TCG, that she never accessed or copied any information from any drive on the TCG server to which she did not have access, and that she only copied, downloaded, and/or removed TCG company information in the ordinary course of her TCG job duties. Kravit does not provide any

underlying facts to support any of these statements. Therefore, these statements should be stricken and/or disregarded.

Paragraph 19: In this paragraph, Kravit asserts that in her “opinion” all contents of the drives on the TCG server to which she had access were relevant to and within the scope of her TCG job duties. Kravit’s assertion, however, is a baseless conclusion based *solely* on her own opinion. *See* FED. R. EVID. 702.

Paragraphs 28 through 32: In this paragraph, Kravit asserts that “her superiors knew” and that “[i]t was common knowledge to my superiors and my team” that she copied information to a portable electronic device, and she regularly carried and used her portable electronic device in the presence of other TCG employees. Regardless of whether her supervisors or other TCG employees knew she was copying information to her portable device, such knowledge is irrelevant to the issues for decision by the Court. Rather, the issues before the Court stem from whether she copied TCG information in violation of the CFAA and her restrictive covenant agreement during the weeks leading up to her resignation and after accepting employment with the KW Defendants of which her superiors and team presumably were not aware. Therefore, paragraphs 28 through 32 must be stricken as irrelevant to the matters before the Court on Plaintiff’s preliminary injunction motion.

Paragraphs 38 through 45: Kravit makes numerous unsupported, speculative, conclusory, and irrelevant statements in these paragraphs regarding TCG’s comprehensive customer service and maintenance program manual for a start up company. In particular, Kravit’s statements that these materials are “known throughout

the property management industry, and is not proprietary, but rather mere common sense knowledge” and “TCG makes no effort to protect their confidentiality once provided to third parties” are all improper legal conclusion in lieu of facts, and not based on any personal knowledge. Kravit has provided absolutely no indication as to how she reached these unsupported conclusions or how she knows what TCG considered proprietary and confidential information. Further, Kravit’s statements that she used similar start up materials prior to her employment at TCG or created a start up check list based in part on a checklist published by a trade publication are irrelevant and not determinative of whether TCG’s specific materials are confidential and proprietary. Finally, Kravit has not submitted the “similar start up materials” she used prior to her employment with TCG, or even TCG’s startup materials to support her assertions and thus these statements should be disregarded under FED. R. EVID. 1002 as well.

Paragraphs 52 through 61 and 75 through 92: Like paragraphs 38 through 45, Kravit continues to make numerous unsupported, speculative, conclusory, and irrelevant statements in these paragraphs regarding TCG’s burden analyses, contracts, Hurricane plans, and green initiative. First, Kravit’s bald assertions in paragraphs 59, 61, and 75 that TCG makes no effort to protect their confidentiality once provided to third parties with regards to TCG’s contracts, Hurricane plans, and green initiative, and TCG takes not steps to protect this information are improper legal conclusion in lieu of facts and not based on any personal knowledge. Kravit broad assertions lack any detail to support them. Moreover, Kravit states that the information contained in these documents are allegedly public information, but she fails to attach or otherwise provide these

documents. Finally, Kravit's statements that she authored articles on these topics are irrelevant to the issues before the Court. Thus, her statements are not only improper conclusions, irrelevant, and not based on personal knowledge, but should be disregarded under FED. R. EVID. 1002.

Paragraphs 66, 67, 97, and 98: Kravit's statements in these paragraphs regarding the requirements for property management companies, her explanation of specific Florida statutes, and "TCG does not have significant client good will" are irrelevant and/or constitute improper legal conclusions. *Gulf Coast Commercial Corp.*, 2006 WL 1382072, at *2. Thus, these statements should be disregarded.

Paragraph 123 through 149, 168 through 169, and 171 through 172: Kravit's claim that she resigned due to "discrimination, mistreatment and retaliation by TCG, an overall oppressive work environment, and TCG's unilateral reduction of salary without cause," that she was never provided an exit interview per TCG policies and without the exit interview, she was not specifically told what information must be returned, and that she was not paid for unused vacation time are irrelevant to the issues before the Court and unduly prejudicial under FED. R. EVID. 403. Notably, Kravit raises this alleged discrimination and mistreatment for the first time in her declaration. She makes absolutely no reference to this issue in her resignation letter attached to her declaration, but instead states that she is resigning from TCG because another "employment opportunity has presented itself that will enable her to substantially advance" her career. DE 60-2. Moreover, all of these statements do not support an unclean hands defense in this case because the conduct complained of does not relate to the matter in litigation and

Kravit has not shown that she was injured as a result of the alleged conduct. *Merril Lynch, Pierce, Fenner & Smith v. Dunn*, 191 F. Supp. 2d 1346, 1355 (M.D. Florida 2002); *see also Marin v. Seven of Five Ltd.*, 921 So. 2d 699, 700 (Fla. 4th DCA 2006) (noting that the conduct constituting unclean hands must be connected with the matter in litigation.). Thus, citing to an alleged complaint of discrimination and mistreatment by a third party almost a year before her resignation, TCG's alleged failure to give her an exit interview, and TCG's alleged failure to pay vacation time is entirely irrelevant to the issues in this case and before the Court on Plaintiff's preliminary injunction motion, and should be stricken.

Paragraphs 156 and 157: Kravit provides absolutely no facts to support that she holds personal knowledge about the terms contained in other TCG management contracts. Specifically, Kravit's assertions that "[m]any TCG management contracts have a provision which allows an association to buy out and terminate a property manager's non-compete contract for a set fee of 35% of the property manager's salary" and that she is "aware of multiple associations exercising this option, thereby relieving the particular property manager of his or her non-compete restrictions" are not based on personal knowledge and are entirely irrelevant to this matter. TCG's agreements with other managers are absolutely irrelevant to TCG's agreement with Kravit. Nor does it support Kravit's purported unclean hands defense. *See Dunn*, 191 F. Supp. 2d at 1355. Therefore, these paragraphs should be stricken.

Paragraphs 173 and 176 through 178: Kravit makes various vague assertions in these paragraphs that she has not and does not intend to disclose or disseminate any TCG

information, “did not work for KW or conspire with KW while working at TCG,” “did not solicit clients” of TCG while in the employ of KW, and has “never once solicited a TCG client” since leaving TCG’s employ. In essence, Kravit’s is improperly advancing arguments in her response to Plaintiff’s preliminary injunction motion under the guise of “facts.” Her statements also constitute impermissible legal conclusions. Accordingly, these paragraphs should be stricken as well.

CONCLUSION

For the foregoing reasons, Plaintiff The Continental Group, Inc. respectfully requests that Kravit’s declaration be stricken and/or disregarded by the Court in determining Plaintiff’s Motion for Preliminary Injunction.

Dated this 17 day of March, Respectfully submitted,
2009.

s/Joan Canny _____
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Certificate of Service

I hereby certify that on March 17, 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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