

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 KRAVITT, an individual,

Defendants

**DEFENDANTS' RESPONSE TO PLAINTIFF'S EXPEDITED MOTION FOR FURTHER
CLARIFICATION OF THE COURT'S ORDERS TO EXPEDITE DISCOVERY**

Defendants, KW PROPERTY MANAGEMENT, LLC, and KW HOLDING ONE, LLC
(collectively referred to as "KW"), file this Response to Plaintiff's Expedited Motion for Further
Clarification of the Court's Orders to Expedite Discovery, and in support thereof state as
follows:

1. On February 18, 2009, the Court issued an Order Granting in Part Motion to
Clarify and Amend Order to Expedite Discovery [D.E. 22] which, in part, directed the parties'
counsel to cooperate to filter out and not produce documents or images to which an attorney-
client or work product privilege is asserted in good faith.

2. Pursuant to the Court's Order, Defendants' counsel has contacted Plaintiff's counsel six times and informed Plaintiff's counsel of their proposal to filter out documents or images which are attorney-client or work product privileged. *See* emails between Franklin Zemel and Joan Canny attached as Composite Exhibit "A" hereto.

3. Specifically, Defendants' counsel proposed that once the laptops are imaged they be "escrowed" – that is, held aside and preserved until Defendants' counsel can immediately thereafter review the laptops for privileged information and log such privileged information appropriately. The subject laptops are currently in sealed boxes in the law office of Franklin Zemel Esq., (in Broward County as per the Court's Order) to preserve the chain of custody until Plaintiff's expert can image them, which is why the KW Defendants' counsel has not already reviewed the laptops' contents for privileged information. That can only be done once the laptops are imaged, and the images escrowed pending our review of the laptops' contents. Because some procedure to filter or remove such information from the escrowed images would still be necessary, Defendants' counsel proposed that Defendants' computer consultant, under the supervision of Plaintiff's computer consultant, identify and move the logged (privileged) information onto a separate CD to be held in escrow, pending a further determination by the Magistrate or Judge. This way, the chain of custody is maintained, the images are preserved, and the Court's Order is complied with.

4. Despite the fact that Defendants' counsel made this specific proposal at least six times, Plaintiff still does not acknowledge the fact that Defendant has done so. For example, on February 19, 2009, at 5:49 PM, Franklin Zemel sent an email to Joan Canny stating the following:

In case you didn't receive it, i am copying it below - this time in RED.

The laptops, as i have said at least twice, are here in my offices and to the extent that you wish to "image" them, my offices are where they will be located; as for a procedure, the laptops are in sealed boxes with an acknowledgement of a bonded courier that he witnessed laptop "X" being placed into Box "Y" etc, so that we had a proper chain of custody and there would be no concerns that the laptops had been tampered with; accordingly, I asked and you have rejected my proposal that the images be escrowed for later review by us to filter out this information, if it exists on the images; you seem to be demanding that we review the laptops prior to imaging and then take some action on privileged files, if they exist; i doubt that such a procedure is acceptable; so, again, my proposal has been the images be escrowed, following which we will review the laptops for privileged information and if we should identify such information, we would log it appropriately; we would still need some procedure to filter or remove such information from the escrowed images however; in that regard, I would suggest that our computer consultant, under the supervision of yours, would physically identify and cut the logged information onto a separate CD to be held, also in escrow, pending a further determination by the Magistrate or Judge; in this fashion, the chain of custody is maintained, the images are preserved and the Court's order is complied with;

If this proposal is not acceptable, either explain why or propose a reasonable alternative, in a cooperative manner; otherwise you'll have to seek the assistance from the court - I will not permit the boxes to be unsealed and the laptops imaged without initial precautions to protect privileged information, assuming that such information is even resident on the laptops; it is my understanding that there is a good faith basis to believe that such information may be resident on the laptops; See Para 5 of the Clarification Order

Joan Canny responded to the above email on February 19, 2009 at 6:20 PM as follows:

Dear Mr. Zemel:

You obviously are unwilling to provide me with the courtesy of a direct answer as to whether you are making the laptops available for imaging tomorrow, and if so, at what time and location. As a result, we are forced to seek the assistance of the court.

It appears that you are intent on holding up the imaging of the laptops pending an agreement as to how those images will be handled as to privilege. Yet you obviously have not provided me with a specific proposal for the filtering of potentially privileged communications, or for the handling of inadvertent disclosures. As a result, we are forced to seek the assistance of the court as to this matter as well.

If you should decide to comply with the court's order to make the laptops available tomorrow for imaging - an order which does not set any preconditions for the production of those computers for imaging,

nor does the court's subsequent order set any such preconditions, and thus the preconditions are unilaterally imposed by you in contravention of those court orders -- please advise us this evening and we will make every effort to make the arrangements for imaging on short notice.

5. As indicated in Composite Exhibit "A," various emails between Franklin Zemel and Joan Canny were exchanged whereby Franklin Zemel proposed that the laptops be imaged at his office and the images be kept in escrow until the documents could be reviewed.

6. Not only did Plaintiff's counsel ignore Defendants' counsel's proposal, but she also refused to submit a proposal of her own or indicate why Defendants' proposal was not acceptable.

7. Defendants' counsel has proposed a sensible solution to no avail, and cannot allow the laptops to be imaged without initial precautions to protect privileged information.

8. Plaintiff's counsel also states in ¶ 4 of her Expedited Motion for Further Clarification of the Court's Orders to Expedite Discovery that Defendants' counsel has not indicated a time and place for the imaging to take place. However, Defendants' counsel told Plaintiff's counsel six times that the two laptop computers are in Franklin Zemel's office and ready to be imaged at his office. *See* Composite Exhibit "A." In fact, as quoted above, Defendants' counsel advised Plaintiff's counsel that "the laptops are in sealed boxes with an acknowledgment of a bonded courier that he witnessed laptop "X" being placed into Box "Y" etc, so that we had a proper chain of custody and there would be no concerns that the laptops had been tampered with."

9. Again, Plaintiff's counsel ignored Defendants' counsel's emails indicating that the laptops are in Franklin Zemel's office. Plaintiff's counsel keeps asking if Defendants are going "to make the laptops available at some time other than 11 a.m. and at some location other than Mr. Simone's office." Plaintiff's counsel was asking this same question until 5:49 pm on

February 19th, and in her motion indicated that the laptops should be produced at the office of Frank Simone, Esq., despite the fact that on February 18th and 19th, Franklin Zemel advised Plaintiff's counsel numerous times that the two laptops were delivered to him and are in his possession.

10. The Court's Order requires that the computers be imaged at Defendants' counsel's office in Broward County. Franklin Zemel's office is in Broward County, and the computers are in sealed boxes in his office, as indicated to Plaintiff's counsel numerous times.

11. Plaintiff also requests that the results of the search only be viewed by counsel who have entered an appearance in this action, and not by any representatives or employees of the Defendants. Plaintiff's counsel did not contact Defendants' counsel regarding this issue, and to that extent, Defendants' counsel will have to meet and confer regarding this issue and further advise the court of their position.

WHEREFORE, Defendants respectfully request that the Court find that Defendants' proposal for the imaging of the laptops is sensible and reasonable, and that the imaging not take place until the issues regarding the privileged documents be resolved.

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009 I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. 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 Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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