

**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 TO COMPEL KW DEFENDANTS TO COMPLY
WITH THE COURT'S ORDER TO PRODUCE FOR IMAGING CERTAIN PORTABLE
COMPUTERS AND ELECTRONIC DEVICES, AND TO COMPEL FURTHER
COMPLIANCE WITH THE COURT'S ORDER REGARDING EXPEDITED
DISCOVERY**

Pursuant to Fed. R. Civ. P. 7(b) and S.D. Fla. L.R. 7.1, Plaintiff The Continental Group, Inc. hereby moves to compel Defendants KW Property Management, LLC, KW Holding One, LLC, and The Grand Preserve at Naples LLC d/b/a KW Property Management and Consulting, LLC (all three corporate defendants collectively referred to herein as the "KW Defendants") to comply with the Court's order of February 17, 2009, DE 18, as follows:¹

¹ Defendants KW Property Management and KW Holdings One (the "KW Named Defendants") are jointly represented by different law firms in this matter. It is uncertain whether Defendant The Grand Preserve is represented by counsel, as its registered agent has informed Plaintiff's counsel that it is represented by attorney Zemel, but attorney Zemel has denied such representation; to avoid any impropriety Plaintiff has moved for clarification of the representation of this Defendant.

Motion to Compel

Plaintiff moves to compel the KW Defendants to comply with the Court's order on expedited discovery by making available for imaging all portable computer and electronic storage devices called for by paragraph 2 of the Court's February 17, 2009 order, DE 18. Plaintiff also moves to compel these Defendants to comply with the Court's order at paragraphs 4 and 5 as to a word search and downloading of certain contents from the KW Defendants' servers and system, by informing Plaintiff as to the date(s), time(s) and location(s) for Plaintiff's computer forensic consultant to make such search and downloading within the time frame set by the Court, with adequate advance notice so that Plaintiff may arrange to conduct that search and imaging on the date(s), time(s) and locations necessary. *Id.*

Memorandum in Support

Following issuance of the Court's order on certain expedited discovery, Plaintiff contacted by email counsel of record for all Defendants on February 18, 2009, seeking to make arrangements for the imaging of certain portable computers and devices pursuant to paragraph 2 of the Court's order, and also seeking to make arrangements for the word search and downloading of KW's servers and system as ordered by the Court in paragraphs 4 and 5 of that order. DE 18. Plaintiff advised that absent a response by 3 p.m. on February 18, the imaging necessarily would need to take place on February 20 rather than February 19 so that adequate advance notice was provided to make the necessary arrangements with the computer forensic consultant. Plaintiff further advised that if no other location was agreed upon, that the location for the imaging would be attorney Frank Simone's office in Broward County as proposed by Plaintiff in court and consistent with the Court's order, at 11:00 a.m. Plaintiff likewise advised that information as to the date(s), time(s) and location(s) was

needed by 3 p.m. on Thursday, February 19, 2009, to ensure that adequate arrangements could be made for the word search and downloading during the February 23 to February 27, 2009 time period.

KW Named Defendants' co-counsel Simone did not respond to these communications and has not responded to any communications from Plaintiff's counsel, by phone, e-mail or facsimile, since the issuance of the Court's February 17, 2009 discovery order. KW Named Defendants' co-counsel Zemel responded that he would not agree to any deadlines from Plaintiff, now or in the future. Plaintiff's attempts on February 19, 2009 to obtain a direct response from KW Named Defendants' co-counsel Zemel as to (1) whether the responsive devices would be produced for imaging today, February 20, (2) if so, where and when the devices would be produced for imaging, (3) if the devices would not be produced, whether that was due to preconditions being set unilaterally by attorney Zemel, and (4) if due to preconditions, what the specific preconditions were and what the basis was for such unilateral conditions not imposed by the Court. Attorney Zemel did not respond to this specific request, as apparently conceded by attorney Zemel in his papers filed with the Court this date.

Although attorney Zemel has conceded that imaging of the computers is necessary before any filtering for privilege may take place, attorney Zemel has refused to make the computers available for imaging absent a putative agreement in place as to how the images will be filtered for privilege after the imaging. Moreover despite having specifically requested that "filtering" for privilege occur – a standard protocol in electronic discovery, in which a search is performed electronically for documents, files and data for attorney names and other terms reasonably contemplated to identify potentially privileged communications – attorney Zemel has failed to propose a filtering protocol including the names and terms to be filtered for. Because Plaintiff is in

no position to identify the terms and names that the KW Defendants believe would reasonably filter the imaged computers for privileged items, Plaintiff has repeatedly requested this filtering protocol from Defendants' counsel but Defendants' counsel continues to refuse to provide it. According to standard practice, the result set of such a filtering would be produced to the party from whom the electronic files and data were obtained, to review the result set for privilege and prepare a proper privilege log for those items concerning which privilege is actually asserted.

Because the KW Defendants are claiming to withhold the computers from imaging because of the absence of an agreement on a filtering protocol when imaging must proceed filtering, it appears that their basis for withholding the laptops from imaging is in bad faith. Moreover, because the filtering protocol is entirely dependent upon the KW Defendants to identify the names of their attorneys and the other key terms that they reasonably believe would identify potentially privileged communications, yet they have refused to provide that filtering protocol or the filtering terms, it likewise appears that the refusal to permit imaging based on the absence of an agreement on a filtering protocol is a transparent attempt to avoid the Court's order to produce the computers for imaging by today.² The Court should not countenance such conduct.

Likewise no response has been received from any attorney for the KW Defendants (or from Defendant The Grand Preserve if that Defendant is in fact unrepresented in this action) as to proposed date(s), time(s), and location(s) for the word search and downloading of KW servers and systems during the February 23, 2009 through February 27, 2009 time period. Given the time necessary to conduct such efforts, and Plaintiff's previously expressed desire to minimize the disruption to the business of the KW Defendants by such search and downloading, Plaintiff seeks a

² Plaintiff would note that Defendant Kravit, through her counsel, has fully complied with the Court's order to date.

proposal as to a date or dates and times and locations today so that the arrangements may be made for such search and imaging next week.

Plaintiff's computer consultant has been available for imaging today as Plaintiff has requested and consistent with the Court's order. Indeed, as noted above, Defendant Kravit has made available to Plaintiff's computer consultant for imaging the computers and devices ordered to be produced for imaging from her. The KW Defendants should be compelled to comply with the Court's order as well.

Conclusion

For the reasons set forth above, Plaintiff seeks to compel the production of the computers and devices for imaging as ordered by the Court, and to compel a proposal for definite date (or dates if necessary), time(s), and location(s) for the word search and downloading next week.

Certificate of Compliance with Local Rule 7.1(A)(3)

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 a resolution. Plaintiff has been unable to confer with Defendant The Grand Preserve because Plaintiff is uncertain as to whether this Defendant is represented by counsel in this action.

Dated this 20th day of February, 2009.

Respectfully submitted,

s/Joan Canny

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Group, Inc.*

Certificate of Service

I hereby certify that on February 20, 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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United States District Court, Southern District of Florida**

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