

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

CASE NO. 10-CV-22236-ASG

HOWARD ADELMAN AND JUDITH SCLAWY
as Co-Personal Representatives of the
ESTATE OF MICHAEL SCLAWY-ADELMAN,

Plaintiffs,

vs.

BOY SCOUTS OF AMERICA; et al

Defendants.

**PLAINTIFFS' OMNIBUS RESPONSE TO THE COURT'S
ORDERS (DE # 80, 91 and 100) REGARDING VARIOUS DISCOVERY MATTERS**

Prefatory to responding to the Court's Orders (DE 80, 91 and 100), the parties conferred on January 13, 2011, but were unable to complete discussions due to the office move of defense counsel Frederick Hasty. The parties agreed to jointly seek an extension of time until January 25, 2011, to respond to the Court's Order with respect to a discovery plan and to specific discovery issues and to reconvene following Ms. Hasty's office move in an attempt to formulate a joint report to the Court on a discovery plan. Defendants have appealed part of the Court's January 29, 2010, Order (DE # 97 and 98). Plaintiffs have not joined in those appeals, and in accordance with the Court's January 14, 2011 Order (DE 100), Plaintiffs respond as follows:

I. THE GPS ISSUE

The Parties disagree as to the GPS issue. Although Defendants Crompton and Schmidt represented to the Court that there was no availability to download the Garmin GPS, and that their lawyer would "hand carry" the device to North Carolina to a "forensic laboratory" selected by their

expert in North Carolina,” the Plaintiffs submitted to the Court that the downloading and reading of the GPS could easily be accomplished in the South Florida area.

Consistent with the Court’s order to locate local GPS forensic capabilities, with relative ease the Plaintiffs located multiple qualified sources to accomplish a download and analysis of the GPS and the data stored within the device as follows:

1. Robert Wyman
Wyman Enterprises, Inc.
3626 Coral Springs Drive
Coral Springs, Florida 33065

Mr. Wyman specializes in GPS Forensics and has extensive expertise, knowledge, and experience in downloading and analyzing GPS devices and the data contained therein.

2. Bryan R. Emond, PE, CMI
SEA, Ltd.
3340 N.W. 53rd Street
Suite 402
Fort Lauderdale, Florida
954-777-4790

Mr. Emond is a marine and mechanical engineer with a Master of Science degree in Mechanical Engineering from the United States Naval Post-Graduate School and a Bachelor of Science degree in Marine Engineering from the United States Coast Guard Academy. He has extensive knowledge, expertise and practical operational experience in the use of GPS equipment, and is intimately familiar with the downloading of GPS data and the analysis of that data.

3. James Charley Hogwood
15324 61st Place North
Loxahatchee, Florida 33470

Mr. Hogwood is a United States Army and Florida National Guard veteran who has served as a Calvary reconnaissance scout and a scout navigator. In connection with his service, he has taught courses in land navigation, orienteering, and map reading among other things. Mr. Hogwood has extensive knowledge and expertise, including practical field operations experience, with GPS devices. He is intimately familiar with, and experienced in, the procedures for downloading and reading GPS systems.

It was not until the afternoon of January 13, 2011, that defense counsel Frederick Hasty finally advised Plaintiffs' counsel of the name of the North Carolina laboratory he was proposing. As the Court will readily see from the information appearing on that laboratory's website, Guardian Digital Forensics is nothing more than a typical, run-of-the-mill litigation forensics operation. See Exhibit A. It certainly has no more to recommend it than any of the similar operations in the South Florida area the Plaintiffs located. See Composite Exhibit B.

Accordingly, Plaintiffs submit to the Court that:

- a. The GPS in the possession of defense counsel Hasty and his clients be inspected, downloaded and read here in South Florida with all parties present; and
- b. The procedure be videotaped to afford additional protection.

This is the most reasonable cost-effective and sensible approach to resolving this issue.

There is no need to impose the time and cost of downloading the GPS in an out-of-state forensic laboratory if the information the defendants seek can be obtained by way of a simple download right here in South Florida. The three experts listed above have all indicated that it will be possible to determine from the downloading procedure itself whether any information has been lost from the GPS device. Thus, there is no need to resort to any "forensic laboratory" measures. If it is determined that data has been lost, it would be appropriate for the Court to consider whether forensic laboratory testing is necessary at that time and in that event. Forensic laboratory testing is premature and unnecessary at this time.

While the Plaintiffs contend that there is no justification for requiring a trip to North Carolina to download the GPS when that can easily be accomplished locally, the Plaintiffs estimate that the hourly cost for their expert to fly to North Carolina for a GPS related event will be no more than

\$500 per hour, portal to portal. Assuming that the event can occur in one day, air travel and related transportation costs should not exceed \$500, with meal expenses not to exceed \$75.

Should the Court require an additional alternative for the GPS download and analysis other than those presented by the parties, the Plaintiffs suggest that the GPS be downloaded and analyzed by the manufacturer of the device, *i.e.*, **Garmin International, Inc.** which is located in Olathe, Kansas.

II. CELL PHONES/COMPUTER/ELECTRONICS ISSUE

This is a wrongful death action wherein the Plaintiffs' teenage son, while on a Boy Scout activity, was forced to endure a 20-mile hike in the Florida Everglades in temperatures in excess of 100 degrees Fahrenheit. There are numerous acts of negligence, as more specifically stated in the Complaint. This is not a criminal case nor is it a witch hunt. Accordingly, the cell phone and electronic activities and all such related discovery should be reasonably limited to the day of the incident as it applies to the cell phone, *i.e.*, May 9, 2009.

Furthermore, the Plaintiffs oppose the Boy Scout's request for a broad based Court Order which requires preservation of "all physical/tangible evidence" as being overbroad, ambiguous and unduly burdensome. Defendants are essentially asking the Court (and the Plaintiffs) to "guess" what is protected "physical/tangible evidence."

Plaintiffs have already agreed to *preserve* Michael's cell phone. Therefore, the Defendant's motion to that effect is unnecessary and a waste of the Court's time and resources. Consistent with their agreement to do so, the Plaintiffs have provided the defendants with the cell phone numbers and provider information for Michael Sclawy-Adelman and his parents. Despite agreeing to do so on December 8, 2010, no Defendant has provided cell phone numbers or provider information for

their cell phones, forcing the Plaintiffs to propound additional interrogatories to obtain that information.

It is unreasonable, unrealistic, financially prejudicial and overly burdensome to expect that the Plaintiffs should have to give up their cell phones and/or be forced to purchase new phones simply because the Defendants think they “might” contain some information which Defendants they think “might” be relevant.

Unlimited Access to Cell Phone Information Is Overbroad and Abusive

At no time has any defendant clarified exactly why they want the cell phones (or the personal computers), despite the Plaintiffs’ several inquiries in that regard. **Most recently, on January 7, 2011, Plaintiffs’ counsel wrote to all defense counsel asking that they identify any *specific* information or even the type of information which they contend is contained within the cell phone (or the personal computers) and which they contend is relevant to this case.**

Only counsel for Defendants Crompton and Schmidt bothered to respond at all to this request. Mr. Hasty’s response was, “I think the information is relevant and if you don’t see that then there is no need for further discussion. We agree to disagree.”

Apparently, the Defendants wish to have the Adelman family’s cell phones preserved so that they may conduct some sort of, as yet unspecified, “testing” of the devices to obtain some sort of, as yet unspecified, information. Unlimited access to the cell phones must be prohibited because the Defendants are not entitled to examine and discover every byte of information on the phones in contravention of the Plaintiffs’ privacy and without regard to attorney-client or work product privileges.

Most significantly, the Defendants have made no showing that “testing” of any of the cell phones is necessary to obtain relevant information. There has been no claim of destruction of evidence. Nor has there been any suggestion, much less proof, of the likelihood of any relevant evidence existing on the cell phones. Finally, there has been no investigation of any less intrusive means of obtaining any information the Defendants contend “might” exist inside the cell phones.

Plaintiffs respectfully request that before any “testing” of the Plaintiffs’ or Michael’s cell phones be allowed, that the Defendants be required to submit specific reasons for such testing, to include the reasonable basis for a belief that relevant information exists on the devices that cannot be obtained through other less intrusive measures, and other such restrictions as may be appropriate.

Plaintiffs’ Cell Phone Records

The Defendants have requested that the Plaintiffs produce their cell phone “records” for months before Michael Sclawy-Adelman’s death on May 9, 2009, and for an unspecified period beyond. Defendants contend that who the decedent and his parents called is relevant to the claims in this lawsuit. Plaintiffs contend, by contrast, that to the extent their cell phone records are relevant at all, any records should be limited to the day of the hiking tragedy, *i.e.*, May 9, 2009. Under no circumstances should the defendants be permitted to invade the privacy of either Michael or his parents beyond that which is even remotely relevant to this legal action.

The Plaintiffs do not have any cell phone records. Their cell phone provider does not provide them with an itemization of the communications made to or from their cell phones. In fact, in response to this specific inquiry and request, their cell phone provider has refused to give them

with any information regarding communications made/received from any of the cell phones without a subpoena.

Finally, the cell phone provider has advised that it has no record of the content of any calls, messages or text messages that were transmitted to or from any of the Adelman family's cell phones.

Defendants' Cell Phones and Cell Phone Records

What is sauce for the goose is sauce for the gander. Therefore, the Plaintiffs have advised the Defendants that Plaintiffs expect that any conditions imposed upon the Plaintiffs' (and Michael's) cell phone and cell phone records must likewise be imposed upon the Defendants.

The Plaintiffs have already requested of defense counsel that the cell phones of Defendants Crompton and Schmidt be preserved, as well as those of any and all employees, officers, directors, representatives or agents, be they paid or volunteers, from each of the defendant organizations who made cell phone calls/messages or received cell phones call/messages on May 9, 2009, regarding the hike and/or Michael Sclawy-Adelman's death. The defendants have not expressly agreed.

Unlimited Access to Adelman Family's Computers Is Overbroad and Abusive

Defendants Crompton and Schmidt have requested that all computers and email accounts that were utilized by Plaintiffs and/or Michael to access information regarding Troop 111 activities and/or to communicate with others regarding Troop 11 be preserved in an original and unmodified condition. Defendants South Florida Council and Boy Scouts of America apparently include the family's personal computers in their motion to preserve "all physical/tangible evidence."

Plaintiffs have already agreed to *preserve* Michael's computer. Plaintiffs oppose, however, any broad based, non-specific Court Order which requires preservation of "all physical/tangible evidence" as it may apply to the family's personal computers as being

overbroad and further oppose any wholesale access to the family's computer hard drives as overbroad, unduly burdensome, and a gross invasion of privacy.

As with their cell phones, it is unreasonable, unrealistic, financially prejudicial and overly burdensome to expect that the Plaintiffs should have to give up their personal computers and be forced to purchase new computers simply because the Defendants think they "might" contain some information which Defendants they think "might" be relevant.

Most significantly, under no circumstance should the Defendants be permitted to have unlimited access to any of the computers. The Plaintiffs, and presumably Michael, have private data stored in their computers, including financial, medical, family and friend communications, and other personal data which has no bearing whatsoever upon the issues in this litigation. Such invasion of the Plaintiffs' constitutionally protected right to privacy cannot be permitted. The Plaintiffs' computers also contain communications between the Plaintiffs and their legal counsel which are privileged under both attorney-client and work product privileges. The only information, to the extent that it exists at all, which could be *remotely* be relevant would be non-privileged emails which involve the May 9, 2009 hike and/or compliance with the hiking merit badge requirements.

As with the cell phones, the Defendants should not have access to the computer hard drives in order to comb through every word, every sentence, every data fragment, every document, every calendar entry, every byte of information, every internet site or every chat room visited. Defendants are not entitled to know what movies the Plaintiffs access, what books, newspapers, or magazines they see; what products they purchase, inspect or investigate, or any of the other information of a completely private and personal nature unlimited access to their hard drives may reveal.

No Court would ever order any person or business to produce their entire personal or business filing cabinet for inspection in order for their adversary to see if they contain “some useful information,” yet that is what the Defendants would be seeking if they were allowed to access the computer hard drives.

To the extent that any computer discovery is permitted, the Plaintiffs submit that the same conditions apply to the computers of the Defendants.

III. SPECIFIC DISCOVERY SCHEDULE

The Court has ordered a specific discovery schedule. While the parties will confer again at a time following the office move of Mr. Hasty’s firm, with the object of filing a joint report to the Court, the Plaintiffs have set forth the following plan as of the January 14, 2011, date the Court has required them to respond.

Plaintiffs initiated consultation with all Defendants by telephone and the following depositions have been agreed to by the parties:

- a. **February 7 and 8, 2011** -- Plaintiffs, Howard Adelman and Judith Sclawy.¹
- b. **February 14, 2011** – The South Florida Council.
- c. **February 14, 2011** – Jeff Hunt, Executive Director South Florida Council
- d. **February 18, 2011** – Joshua Crist, Chief Operating Officer South Florida Council
- e. **February 18, 2011** – John Anthony, Scout Executive South Florida Council
- f. **February 21, 2011** – Joe Knight, District Executive South Florida Council
- g. **February 23-24, 2011** Boy Scouts of America, Irving, Texas

¹ Plaintiffs had previously offered January 27 and 28, 2011 for their deposition and those dates were available for well over a month.

- h. **March 7, 2011** – Andrew Schmidt
- i. **March 8, 2011** – Howard Crompton
- j. **March 9, 2011** – Plantation United Methodist Church
- k. **March 10, 2011** – Tim Smiley, Former Pastor Plantation United Methodist Church

Additional Depositions Will Be Need But Have Not Yet Been Determined

Plaintiffs also anticipate that one of the parties will set the depositions of National Park Service personnel pursuant to subpoenas, including but limited to:

- a. Ranger Wynn Carney
- b. Ranger Gary Shreffler
- c. Ranger Edward Clark

It is also anticipated that the depositions of various personnel from the Collier County Sheriff's Office and/or the personnel involved with the emergency response teams will be taken by one of the parties pursuant to subpoenas, including by not limited to:

- a. Officer Kevin O'Neill
- b. Deputy Comings
- c. Deputy Miller

The depositions of the Collier County Medical Examiner, Dr. Borges will also likely be taken by one of the parties pursuant to subpoena, as will EMT Armando Pina, and Big Cypress Aviation Manager, Mike O'Leary. Plaintiffs further anticipate that one of the parties may take the depositions of Chase Crompton and Kristopher Leon, two other scouts who were on the May 9, 2009, hike.

In addition, additional discovery may be required arising from the above listed depositions. Plaintiffs propose that the dates of January 24, 2011 - February 4, 2011, February 28, 2011 through March 4, 2011, March 10-30, 2011 and April 1-8, 2011 be held open by all parties for further discovery as allowed by the Federal Rules of Civil Procedure.

IV. PRODUCTION OF DOCUMENTS BY PLAINTIFFS

Plaintiffs have produced copies of certain documents which have not been otherwise objected to and/or which are not privileged, as identified at the inspection at the offices of Plaintiffs' counsel on November 24, 2010. Many of those documents are highly personal and sensitive in both format and content, including, sympathy cards, funeral registries and other grief and highly emotional personal notes, cards, and memorabilia. To ensure that none of those materials were damaged or destroyed during the reproduction process, they had to be copied one at the time, by hand, in counsel's office. Copies of certain additional materials tagged by Defendants were also required to be copied by hand, one page at the time. Plaintiffs agreed long ago to transmit these materials to Defendants no later than ten days prior to the Plaintiffs February 7-9, 2011 depositions and/or earlier, if possible. Copies of those documents were made available for Defendants' pick up on January 14, 2011, more than 3 weeks before the Plaintiffs' scheduled depositions.

Outstanding Written Discovery

Further in response to the Court's order on outstanding written discovery, it should be noted that Defendants, individually and jointly, have objected to virtually every request for production and request for tangible items. In response to 91 requests for documents propounded by the Plaintiffs,

the **five defendants have collectively produced only 47 pieces of paper.**² Since Defendants have only responded to a small fraction of Plaintiff's written discovery (other than the numerous objections) those items now must be the subject of motions to compel.

Plaintiffs submit that additional discovery, including requests for admissions, interrogatories and requests for production, will be served upon the Defendants within the next twenty days to be responded to and answered no later than March 1, 2011. As set forth above, Plaintiffs have propounded additional interrogatories and requests for production regarding cell phone information and records from the Defendants. The Plaintiffs also anticipate the likelihood that additional follow-up discovery will be required following the taking of depositions and after receipt of responses to Plaintiffs' prior discovery.

Plaintiffs further request that if the Defendants continue to refuse to answer their written discovery, that an omnibus hearing be held before Magistrate McAliley on all discovery that is still in dispute.

It is clear that the Defendants are on a fishing expedition and this Court must reel in their excessive and abusive discovery practices now and move this case along to the April 8, 2011, discovery deadline. It is axiomatic that the scope of discovery should be reasonable and relevant. Discovery is not used to burden, annoy or harass. "District courts need not condone the use of discovery to engage in fishing expeditions." *Liles v. Stuart Weitzman, LLC*, 2010 WL 1839229 * 5 (S.D. Fla. May 6, 2010)(quoting *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004)). Carte

² Boy Scouts of America produced 3 pages (not 3 documents); South Florida Council produced 29 pages (not 29 documents); Plantation United Methodist Church produced zero pages; Crompton produced zero pages and Schmidt produced 3 pages (not 3 documents).

blanche access to computer hard drives does not fall within the scope of reasonable and relevant discovery.

While Fed. R. Civ. P. 34 permits a party to request documents, it does not give the requesting party the right to conduct their own search for the documents. *See e.g., Balfour Beatty Rail, Inc. v. Vaccarello*, 2007 WL 169628 * 3 (M.D. Fla. Jan. 18, 2007). Defendants are not entitled to direct access of the Adelman family's computers absent a showing that the Plaintiffs have failed to comply with discovery requests. *See In Re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003); *Floeter v. City of Orlando*, 2006 WL 1000306 * 3 (M.D. Fla. April 14, 2006). Even if the Defendants could make such a showing, which they cannot, it would be appropriate for the Court to impose strict limitations upon any such access.

A recent opinion of the Florida Fifth District Court of Appeal dealing with personal computers and cell phones may provide useful guidance to the Court. In *Holland v. Barfield*, 35 So. 3d 953 (Fla. 5th DCA 2010), the Court held that a trial court order requiring the production of cell phone SIM card and the wholesale examination of the computer hard drive, which is essentially what the Defendants here are seeking, caused irreparable harm to the Plaintiff because it did not protect against disclosure of confidential and privileged information.

Plaintiffs respectfully request that the Court limit cell phone discovery to May 9, 2009, and any documents from the Adelman's computers to the subjects of the May 9, 2009, hike and/or compliance with the hiking merit badge requirements.

Respectfully submitted,

/s/ Robert D. Peltz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 14, 2011, 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.

/s/ Robert D. Peltz
ROBERT D. PELTZ

SERVICE LIST

**HOWARD ADELMAN AND JUDITH SCLAWY-ADELMAN
VS.
BOY SCOUTS OF AMERICA, et al
CASE NO.: 10-CV-22236-ASG**

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

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