

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,

v.

BOY SCOUTS OF AMERICA;
THE SOUTH FLORIDA COUNCIL INC.,
BOY SCOUTS OF AMERICA; PLANTATION
UNITED METHODIST CHURCH; HOWARD
K. CROMPTON, Individually, and
ANDREW L. SCHMIDT, Individually,

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' APPEAL OF
MAGISTRATE'S DISCOVERY ORDER DATED DECEMBER 29, 2010**

COME NOW, the Plaintiffs HOWARD ADELMAN AND JUDITH SCLAWY as Co-Personal Representatives of the ESTATE OF MICHAEL SCLAWY-ADELMAN, by and through their undersigned attorneys and file their Response to the Appeal by all of the Defendants of the Magistrate's Order dated December 29, 2010 directing the Parties to prepare a Joint Discovery Plan and would respectfully show the Court as follows:

Rather than simply address the nature of their substantive objection to the Magistrate's Order, the Defendant Boy Scouts of America instead complains that the Plaintiffs have identified 50 potential witnesses in their Rule 26 Disclosures, implying that it has been somehow prejudiced by this fact. What the Defendant fails to advise the Court is that it has identified 55 witnesses on its own

Disclosure, many of which are the same witnesses listed by the Plaintiffs. Likewise, co-Defendant South Florida Council, Inc. has set forth 57 witnesses on its Rule 26 Disclosure, many of which are group designations (i.e. Bethesda Memorial Hospital, Dade County Medical Examiner Department, etc), therefore making the potential number of witnesses even higher.

Unfortunately, it also appears as if certain of the Defendants are not interested in reaching a constructive solution to move discovery forward. Counsel for the Defendants Crompton and Schmidt were well aware of the fact that the documents shown on November 24, 2010 by the Plaintiffs to the Defendants were in the process of being copied and on their way to him at the time he filed his Notice of Joinder in the Appeal. Since this issue is fully addressed in the Plaintiff's Response to the Defendants' Motion to Compel [DE.102], the Plaintiffs will not reiterate these matters again, but only point out that many of the materials were documents which the Defendants already had in their possession. The remaining documents largely consisted of personal notes, sympathy cards and similar materials, which were sent to the Plaintiffs following their son's death and were in no way critical to the Defendants' ability to participate in the preparation of a discovery schedule. In any event, the documents have already been delivered, so that excuse is no longer available to the Defendants.

The further suggestion of the Defendants Crompton and Schmidt that they are not in a position to be able to participate in the preparation of a discovery plan by listing witnesses until after the Plaintiff does so is a transparent ploy to delay the actual start of depositions in this case. In this regard, it is significant to note that the Joint Scheduling Report prepared by counsel for all the parties stipulated that the parties would mutually exchange their witness lists pursuant to Rule 26 on October 17, 2010. The Defendants have been in possession of the Plaintiffs' Rule 26 Witness Disclosure since September 15, 2010 (4 months) and thus, have had more than sufficient opportunity

to determine which witnesses they feel the need to depose and to propound any discovery they felt necessary to clarify this issue.

It is also significant to note that the Defendants, particularly Crompton and Schmidt, are in the possession of significantly much more information than the Plaintiffs on the liability issues in this case. Crompton and Schmidt, the two adult scout leaders, planned, conducted and participated in the May 9, 200, hike on which Michael Sclawy-Adelman died. Therefore, they have personal knowledge of all aspects of the liability issues in this case. On the other hand, neither of the Plaintiffs (Michael's parents) were present during the hike. Accordingly, they have had to rely upon the information provided by others.

Similarly, the organizational defendants have been involved for many years with establishing guidelines, supervising and conducting various scouting activities, including hikes of the nature of the one on which the Plaintiffs' son died. As such, they have a great deal of knowledge and experience in these matters, unlike the Plaintiffs. To somehow suggest, as attempted by counsel for the Defendants Crompton and Schmidt, that the Defendants are unable to either determine which witnesses they wish to depose at this time is disingenuous.

With all of that being said, the Plaintiffs believe that a discovery plan, such as recommended by the Magistrate will not only help the parties move forward with discovery, but is absolutely critical to avoid further delays. It is apparent that enough information is known to all of the parties at this time to prepare a discovery schedule, even if it is necessary to subsequently tweak once deposition discovery is underway.

The fact that none of the parties at this moment have all of the information necessary to fully know and evaluate every aspect of this case in no way supports the suggestion that a discovery plan is premature or unworkable. All it means is that discovery is necessary to move the case forward,

which is precisely why a discovery plan like the one suggested by the Magistrate is necessary.

At this point, the parties have agreed to the scheduling of the following depositions

- a. **February 7 and 8, 2011** -- Plaintiffs, Howard Adelman and Judith Sclawy.
- 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
- 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

Based upon discovery and discussions with other counsel it is anticipated that at least one of the parties will set the following additional depositions

- a. Collier County Sheriff's Officer Kevin O'Neill
- b. Collier County Deputy J.R. Comings
- c. Collier County Deputy Miller
- d. Collier County Medical Examiner, Dr. Borges
- e. EMT Armando Pina
- f. Big Cypress Aviation Manager, Mike O'Leary
- g. Chase Crompton (Boy Scout)
- h. Kristopher Leon (Boy Scout)

- i. Park Ranger Wynn Carney
- j. Park Ranger Gary Shreffler
- k. Park Ranger Drew Gilmour
- l. Park Ranger Edward Clerk

There is no reason why these depositions cannot be set at this time, leaving the door open to set any additional ones that the parties subsequently feel necessary.

The only modification to the Magistrate's Order, which the Plaintiffs would suggest, relates to those witnesses, whose appearance at a deposition is not under the control of any party and may require subpoena. Since specific dates for these depositions may depend upon each witnesses availability, a workable solution would be to modify the order to require that the parties each make themselves available for specific blocks of time between now and the April discovery cut-off, during which times those depositions would be set when the witness is available.

For example, 2 or 3 days each week (i.e. every Tuesday and Thursday, or every Monday, Wednesday and Friday) could be set aside each week. Alternatively, entire weeks could be selected in which counsel would be required to make themselves or another attorney from their firm available for these depositions. This way the depositions could be set quickly and definitively without scheduling delays. Plaintiff's counsel has utilized this procedure successfully with opposing counsel in many other cases involving multiple parties and numerous witnesses to complete discovery quickly and efficiently and believes it would be helpful here.

Respectfully submitted,

/s/ Robert D. Peltz
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VS.**

BOY SCOUTS OF AMERICA, et al

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

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