THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Miami Division

Howard Adelman and Judith Sclaway-Adelman,
as Co-Personal Representatives of
The Estate of Michael Sclawy-Adelman,

Plaintiffs,

vs.

Boy Scouts of America, a Foreign Corporation;
The South Florida Council Inc.,
Boy Scouts of America;
Plantation United Methodist Church;
Howard K. Crompton, individually; and
Andrew L. Schmidt, individually,

Defendants.
_____/

CASE NO. 1:10-cv-22236-ASG

District Ct. Judge: Alan S. Gold

Magistrate Judge: Chris M. McAliley

SOUTH FLORIDA COUNCIL INC., BOY SCOUTS OF AMERICA'S AND BOY SCOUTS OF AMERICA'S, REPLY TO RESPONSE TO MOTION FOR PRESERVATION OF EVIDENCE AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Defendants, South Florida Council Inc., Boy Scouts of America, ("South Florida Council") and Boy Scouts of America, by and through their undersigned counsel, hereby file their Reply to Plaintiffs' Response to the Motion for Preservation of Evidence Concerning Michael Sclawy-Adelman's Cell Phone and all other physical/tangible evidence.

1. This cause of action was filed on June 8, 2010.
2. Plaintiffs did not disclose Michael Sclawy's cell phone that he had on his person during the hike until November 24, 2010.
3. Based on this late disclosure, the Defendants are not certain what other physical/tangible evidence may be discovered. We only ask that any such evidence be preserved.
4. As this Court is aware, two months of arguments have surrounded the GPS device, cell phones and other electronic device. The disagreements range from what should be produced to whether and how the electronic devices should be examined and tested.

5. Specifically, as it relates to cell phones, Boy Scouts of America and South Florida Council agree with Plaintiffs that preservation of evidence should be limited to usage on May 9, 2009. Plaintiffs indicate that a cell phone provider has no record of the content of the calls; however, decedent's cell phone may retain data related to the location of cell towers that could be used to pinpoint locations of the hikers on the day in question. It may also retain records of calls made or received or text messages made or received on the date of the incident. Such evidence is relevant. Moreover, it has been argued by Plaintiffs that merely turning on an electronic device may destroy the data. This is further proof that a protocol must be established for testing.
6. A general order providing guidelines on destructive and non-destructive testing is required as shown by the lack of progress made regarding electronic device issues.
7. Boy Scouts of America and South Florida Council moved for an Order simply to preserve all tangible/physical evidence and to preclude non-destructive or destructive testing unless and until protocol is established. Boy Scouts of America and South Florida Council are not suggesting that Plaintiffs' personal computers be impounded; rather, that nothing be deleted related to the incident and that examination of data is done pursuant to written, agreed-upon or court established general protocol.
8. This requested relief is not unorthodox. It should be expected between litigants. "Florida definitely recognizes the duty to preserve evidence after a lawsuit has been filed." Silhan v. Allstate Ins. Co., 236 F.Supp.2d 1303, 1311 (N.D.Fla. 2002). These Defendants submit that they will not conduct any non-destructive or destructive testing on any physical/tangible evidence in this case without agreed upon-written protocol. Defendants simply ask that Plaintiffs agree to this request, which is in the best interest in preserving the integrity of this proceeding.

9. This request is not unduly burdensome. It is quite easy to preserve evidence and not conduct testing absent an agreement as to protocol. There is also no need to "guess" what is protected. Any evidence that a party wants to conduct destructive or non-destructive testing on should be preserved.

10. A general order requiring the preservation of evidence and precluding destructive and non-destructive testing absent written agreed protocol will prevent future problems similar to the ones already present and will promote a smoother discovery process.

11. An example of such an order that discusses testing protocol can be found in Jeld-Wen, Inc. v. Nebula Glasslam Intern., Inc., 249 F.R.D. 390, 394 (S.D.Fla. 2008).

> The parties may perform testing, including destructive testing, on the laminated windows and doors, but only after ten business days' notice (from receipt of the notice) of such testing has been provided to all parties. A protocol for the proposed destructive testing will be supplied with the notice. Any objections to the proposed protocol of the testing must be served within five days of receipt of the notice. All parties are allowed to observe and record such testing. The testing party agrees to pay for transport to and from the testing location and all other expenses related to the testing.

12. A similarly worded Order would suffice for the present matter in terms of protocol.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was sent January 20, 2011 to: Ira H. Leesfield, Esq., Robert D. Peltz, Esq., LEESFIELD & PARTNERS, P.A., 2350 South Dixie Highway, Miami, FL, 33133; Frederick E. Hasty, Esquire, Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., Grove Plaza Building, 5th floor, 2900 Middle Street, Miami, FL, 33133;Greg Gaebe, Esq., Devang Desai, Esq., Gaebe, Mullen Antonelli, Esco & DiMatteo, 420 S. Dixie Highway, Third Floor, Coral Gables, FL, 33146.

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