**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; et al

Defendants.
_____/

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY FROM THE BOY SCOUTS OF AMERICA AND THE SOUTH FLORIDA COUNCIL, INC. (DE # 126)**

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The law does not support the Boy Scout Defendants' objections and lack of adequate responses to the Plaintiffs' discovery requests.

It is too well settled to require extensive citation or argument that the scope of discovery extends to:

> . . .any non-privileged matter that is relevant to any party's claim or defense . . . Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26 (b)(1).

Defendants' objections are improper under the law. Our federal courts have made it clear that parties shall not make non-specific, boilerplate objections such as the Defendants have made here,

because such objections do not comply with Local Rule 26.1 G 3(a). Objections that merely state that a request is overly broad or unduly burdensome (as the Defendants have done) are *meaningless* and are deemed without merit by our courts. *See e.g., Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 400 (S.D. Fla. 2008). Indeed, federal courts have held that such objections are not proper objections at all. *Id*. at 400-01 (quoting *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982)).

It is equally well established that a "party resisting discovery 'must show specifically **how** . . . each interrogatory [our Request for Production] is not relevant or **how** each question is overly broad, burdensome or oppressive . . . .'" *Panola Land Buyers Ass'n. v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985)(*quoting Josephs v. Harris Corp.,* 677 F.2d 985 (3d Cir. 1982)(internal citations omitted); *see also Abdin v. American Security Ins. Co.*, 2010 WL 1257702 * 2 (S.D. Fla. March 29, 2010)(meaningless boilerplate objections are inappropriate). In other words, the resisting party must expressly state how any particular discovery request is "out of bounds." *Benfatto v. Wachovia Bank, N.A.*, 2008 WL 4938418 *2 (S.D. Fla. Nov. 19, 2008). The Boy Scout Defendants have not met their burden.

The Boy Scout Defendants run even further afoul of the law on discovery because they first recite a "formulaic objection" followed by an answer to the request. As the *Guzman* court observed:

> It has become common practice for a party to object on the basis of any of the above reasons, and then state that 'notwithstanding the above,' the party will respond to the discovery request, subject to or without waiving such objection. Such objection and answer preserves nothing, and constitutes only a waste of effort and the resources of both the parties and the court.

*Id*.

Under federal law, Plaintiffs' Request for Production No. 9 <u>is not</u> overbroad. It is directly related and relevant to the issues raised in the Amended Complaint. Policies, procedures, guidelines, etc. which the Boy Scouts may have formulated, promulgated and/or implemented for the safety of boy scouts with respect to <u>any</u> exertional or outdoor activities are relevant here with respect to,

among other things: (1) whether any policies, procedures, guidelines, etc. exist at all; (2) whether they exist for only some exertional or outdoor activities but not others; or (3) whether they exist for any activities but were not followed in this instance.

The Boy Scout Defendants' contend that the Plaintiffs' discovery must be solely limited to "hiking" activities, first aid, and/or merit badges is clearly unsupportable under the broad and liberal standards governing discovery. The Plaintiffs have asserted claims for negligent selection and retention of the scoutmaster defendants, Crompton and Schmidt. The policies, procedures, guidelines, and any other documentation related to the training, selection, evaluation and retention of Scoutmasters in general, and to the extent that they exist, with respect to all exertional and outdoor activities, are relevant in this action and may lead to admissible evidence.

The Plaintiffs contend that the Boy Scout Defendants should have appropriate and adequate policies, procedures, and guidelines in place to ensure the safety and well being of the children participating in all scouting activities and that those policies, procedures, guidelines, etc. should be consistent across all exertional and/or outdoor scouting activities, not just hiking. Children participating in all exertional and/or outdoor scouting activities are equally at risk for serious injury or death due to heat stroke and/or exposure to the elements, regardless of whether they are participating in archery, biking, camping, trekking, climbing or attending a jamboree as reflected by the news article (attached as Exhibit 3 to the Plaintiffs' Motion to Compel, DE # 126) relating to hundreds of cases of heat-related injuries occurring during the 2005 National Boy Scout Jamboree.

Policies, procedures, guidelines, training, etc. regarding: any type of situation that requires or results in medical issues and/or treatment; how scoutmasters should handle and respond in emergency situations; training, evaluating, selecting and retaining scoutmasters; and any and all other policies, procedures, guidelines, training, etc. related to keeping the boy scouts safe, regardless of the activities they are participating in, are highly relevant here.

Furthermore, a crucial issue in this case is the amount of involvement and/or control the Boy Scout Defendants have and/or may exercise with respect to the charter organizations, the local councils, and the troop level Scoutmasters and the actual troop activities. The South Florida Council contends that neither it nor the Boy Scouts of America have any control over what occurs at the Scoutmaster and/or Troop level of the organization, and went to great lengths in their Motion to Dismiss Counts VII and VIII (DE # 5) to assert that position.[1] Plaintiffs expect that a professed lack of control and troop level involvement will be a recurring theme of the Boy Scout Defendants throughout this litigation.

Plaintiffs are entitled to discovery which will lead to admissible evidence related to the control and organization involvement issues and defenses. The Plaintiffs believe that the discovery sought in Request No. 9 will demonstrate the fallacy of the Boy Scouts' position. Discovery cannot be limited to hiking, first aid or merit badges, and scouting handbooks. The Defendants myopic focus on hiking is unsupportable under the Federal Rules of discovery.

With respect to **Request No. 16**, the Plaintiffs have significantly narrowed the temporal scope of this request to the **five years** before Michael's death and the period since. Although all injuries/deaths occurring during Boy Scout activities are *arguably* relevant to the above issues, and to all of the claims and allegations of the Amended Complaint, the Plaintiffs have limited their request to only those complaints involving: (1) death; or (2) illnesses/injuries that were serious enough to require medical care, which were due to heat related causes, exposure to the elements and/or exertion during outdoor activities. The Defendants have agreed to the 5 year timeframe, but stubbornly refuse to produce anything that doesn't relate specifically to injuries or deaths that

[1] After a hearing on that motion, Judge Gold denied the Boy Scouts of America's and the South Florida Council's motions to dismiss.

occurred during "hiking" activities.

Contrary to the Defendants' contention, discovery under the Federal Rules is not limited to merely identical or nearly identical incidents, *i.e.*, "hiking" or "trekking." Discovery related to the complaints of other injuries and/or deaths can be relevant to show notice of the risks to scouts, to show the magnitude of the dangers involved, to show the ability to correct, alleviate, or minimize the risks and dangers, the lack of safety, the standard of care and/or causation.. *See e.g., Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 650 (11th Cir. 1990)(*citing Jones v. Otis Elevator Co.*, 861 F.2d 655, 661 (11th Cir. 1988)). Whether such information is admissible at trial is a question for another day. But the discovery of such information is clearly permissible under the federal rules. *See Pinchinat v. Graco Children's Products, Inc.*, 2005 WL 5960928 * 2 (M.D. Fla. April 7, 2005).

In *Josephs v. Harris Corp.*, 677 F.2d 985 (3d Cir. 1982), the Court held that information from the manufacturer as to prior accidents involving the equipment which injured the Plaintiff and accidents involving the other types of equipment the defendant manufactured was relevant to the issues in the case and may have led to relevant evidence. Therefore, the other incidents were also discoverable. *Id.* at 991. *See also, e.g., Sumner v. Biomet, Inc.*, 2009 WL 3064615 (M.D. Georgia Sept. 17, 2009)(even if prior accidents may not be admissible at trial, the information is still relevant in discovery because it is reasonably calculated to lead to admissible evidence); *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 617 (5th Cir. 1977)(discovery as to existence and details of other injuries and deaths is reasonably calculated to lead to the discovery of admissible evidence).

All of the discovery the Plaintiffs seek in the disputed requests are relevant to the issues raised in the Amended Complaint and are permissible discovery under the Federal Rules of Civil Procedure.

For all of the foregoing reasons, and subject to receipt of the Defendants' better responses to the above Requests for Production, the Plaintiffs move for the entry of an order compelling production of the discovery which is the subject of Plaintiff's Motion to Compel.

Respectfully submitted,

/s/ Robert D. Peltz
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 4, 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**

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**CASE NO.: 10-CV-22236-ASG**

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

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