THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Miami Division

Howard Adelman and Judith Sclawy,
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

BOY SCOUTS OF AMERICA'S RESPONSE TO PLAINTIFFS' APPEAL OF MAGISTRATE JUDGE'S ORDER FOLLOWING FEBRUARY 11, 2011 DISCOVERY CONFERENCE [DE 153]

DEFENDANT, Boy Scouts of America ("BSA"), by and through its undersigned counsel, and pursuant to Federal Rule of Civil Procedure 72(a) and Local Magistrate Judge's Rule 4(a)(1), responds to Plaintiffs' Appeal of Magistrate Judge's Order Following February 11, 2011 Discovery Conference:

1. This is a wrongful death action stemming from an incident that occurred on May 9, 2009, when Michael Sclawy-Adelman died while taking part in a **hike** through The Florida Trail in the Big Cypress National Park of the Florida Everglades.

2. Interrogatory 10 asks:

> Please state whether Defendant Boy Scouts of America has ever been a party, either plaintiff or defendant, in a lawsuit other than the present matter within the last **20 years** relating to allegations of negligence resulting in injuries or death to boy scouts while participating in **outdoor activities**. If so state whether this defendant was the plaintiff or defendant, the nature of the action, and the date and court in which such suit was filed. (emphasis added).

3. BSA objected that it was overly broad in time and in scope, not likely to lead to the discovery of relevant evidence, unduly burdensome and harassing.

4. Magistrate Judge Chris M. McAliley denied Plaintiffs' Motion to Compel, finding among other reasons that the interrogatory was unnecessarily over broad.[1]

5. However, she upheld interrogatory *number 9*, which is identical to *number 10* except that it replaces the words "*outdoor activities*" with the more reasonably limited area of "*hikes and hiking activities.*" She also limited interrogatory number 10 to 5 years prior to the date of the incident.

6. This was a fair and reasonable decision. Plaintiffs wish to make this lawsuit a referendum on the entire Boy Scouts of America organization. To do so, Plaintiffs have propounded a plethora of discovery,[2] and seek to conduct a fishing expedition to learn of lawsuits that arise out of potentially hundreds of outdoor Boy Scout related activities. *See* List of Merit Badges attached as *Exhibit "A."* This lawsuit concerns 1 specific activity: hiking. Judge McAliley recognized Plaintiffs' unnecessarily over broad intentions and limited it to a reasonable interrogatory; interrogatory number 9, which seeks information on BSA lawsuits in the past 5 years relating to injuries or deaths while participating in hikes or hiking activities. Her reasoned decision should be upheld.

MEMORANDUM OF LAW

Magistrate Judges are "entrusted with a great deal of discretion in their oversight of the discovery process." Principe v. Seacoast Banking Corp. of Florida, Slip Copy, 2010 WL 2976766 at * 2 (S.D.Fla.). "[I]n the absence of a legal error, the district court may reverse only if there was an 'abuse of discretion' by the magistrate judge." Koch Foods of Alabama LLC v. Gen. Electric Capital Corp., 531 F.Supp.2d 1318, 1319 (M.D. Ala. 2008).

> The Magistrate Judge's ruling on a non-dispositive matter must be affirmed unless 'it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.' The 'clearly erroneous or contrary to law' standard of review is extremely deferential. A

[1] Undersigned did not have time to secure a copy of the transcript from the February 11, 2011 hearing prior to drafting this Response. However, undersigned, to the best of his recollection, recalls Judge McAliley stating that many of Plaintiffs' interrogatories and requests for production were "unnecessarily broad and burdensome."

[2] Plaintiffs have already issued over 100 requests for production from BSA through 7 separate requests for production and through a notice of deposition duces tecum to BSA's Corporate Representative.

> finding is clearly erroneous only if 'the reviewing court, after assessing the evidence in its entirety, is left with a definite and firm conviction that a mistake has been committed.' 'The mere fact that a reviewing Court might have decided the issue differently is not sufficient to overturn a decision when there are two permissible views of the issue.' With respect to the "contrary to law" variant of the test, an order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure.
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> Tolz v. Geico Gen. Ins. Co., Slip Copy 2010 WL 298397, *3 (S.D.Fla.) (internal citations omitted); *see also* Fed.R.Civ.P. 72(a) and S.D.Fla. L.R., Mag. J. Rule 4(a)(1).

Magistrate Judge McAliley's Order Following February 11, 2011 Discovery Conference should not be reversed, because Plaintiff cannot establish that it is "clearly erroneous" or "contrary to law." Fla.R.Civ.P. 72(a); S.D.Fla. L.R., Mag. J. Rule 4(a)(1); Principe at * 2.

Plaintiffs cite no statutory, rule or case authority, other than asserting a relevancy argument, to provide grounds for finding Judge McAliley's ruling to contrary to law. Notably, Plaintiffs' relevancy argument is identical to their arguments made through their Motion to Compel and during the hearing (i.e. that lawsuits for heat-related deaths/illnesses from "all outdoor" activities is relevant to the issues raised on the Complaint). [DE # 129]. "[I]n reviewing a discovery order of the magistrate judge, the court does not consider *de novo* arguments of counsel raised and rejected by the magistrate . . ." Mayfair House Assoc., Inc. v. QBE Ins. Corp., 2010 WL 472827, *1 (S.D.Fla.). Thus, Plaintiff's relevancy argument should not be considered.

Judge McAliley did permit extensive discovery, including one specific event – the 2005 Jamboree. However, she was not prepared to extend interrogatory number 10 to **all** outdoor activities, which is an unnecessarily overly broad interrogatory and represents a fishing expedition. The discovery rules do not permit a party to go on a fishing expedition. Porter v. Ray, 461 F.3d 1315, 1324 (11th Cir. 2006). "The potential for discovery abuse is ever-present, and courts are authorized to limit discovery to that which is proper and warranted in the circumstances of the case." Katz v. Batavia Marine & Sporting Supplies, Inc., 984 F.2d 422, 424 (Fed.Cir. Ohio 1993). Seeking every lawsuit concerning a BSA "outdoor" activity is a fishing expedition. This case concerns an alleged heat-related death that occurred during a hike.

The breadth of interrogatory number 10 as written by Plaintiffs is analogous to discovery in Melendez v. Mason, 2007 WL 1471799 (M.D.Fla), a civil rights case. There, the plaintiff sought discovery of all arrests made by Detective Mason in his 19 year career and all internal complaints launched by citizens against Kissimmee Police Department in the last 10 years. Id. at *1. Defendants objected asserting the requests were over broad and unduly burdensome. Id. The Court agreed with Defendants, and in denying Plaintiff's Motion to Compel, held that the requested documents must be limited "to categories that bear some reasonable relationship to the claims pending in this case. Umbrella references to 'all' records of activity over a decade or two are characteristic of an improper fishing expedition, not permitted under the rules of discovery." Id.

Judge McAliley did not abuse her discretion by determining that lawsuits concerning illness/death stemming from hikes over the past 5 years bear a reasonable relationship to the claims pending in this case. In fact, Plaintiffs through their Motion to Compel list 21 bullet-points concerning issues in this case. *See* [DE 129]. Not one bullet point includes the term "outdoor." Plaintiffs cannot argue lawsuits from "outdoor" injuries/deaths touch and concern the issues in this case when none of their listed issues involves the breadth of that overly broad area.

BSA offers merit badges in 125 activities, many of which are outdoor related yet have nothing to do with the issues in this case (e.g. archery, space exploration, athletics, bird study, cooking, engineering, fly-fishing, insect study, motor boating, nature, snow sports oceanography, golf). *See Exhibit "A."* Further, there are over **190 Boy Scout Activities**, many of which take place "outdoors," and none of which relate to this case. *See* List of Activities attached as *Exhibit "B."* Plaintiffs would ask that BSA search for lawsuits stemming from every single specifically indentified Boy Scout Activity that could conceivably occur outdoors; that is overly broad, unduly burdensome and represents a fishing expedition. Like in Melendez, these requests concerning all "outdoor" activities bear no relationship to the claims pending in the case.

Judge McAliley's rulings were correct; certainly, it cannot be said that she abused her discretion or in limiting the scope of discovery to hikes and hiking activities as opposed to all outdoor activities. Plaintiffs have not carried their burden, and their appeal should be denied.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was sent March 8, 2011 to: Robert D. Peltz, Esq, Ira H. Leesfield, 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., 2800 Ponce de Leon Boulevard, Suite 800, Coral Gables, FL 33134;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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