

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG
Magistrate Judge: Magistrate Judge Chris M. McAiley

HOWARD ADELMAN and JUDITH SCLAWY-
ADELMAN, as Co-Personal Representative 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.

**DEFENDANT, HOWARD K. CROMPTON'S RESPONSE TO PLAINTIFFS'
MOTION TO COMPEL AND/OR FOR SANCTIONS**

The Defendant, HOWARD K. CROMPTON, by and through the undersigned
counsel, and in accordance with the applicable Federal Rules of Civil Procedure and the
Local Rules of the Southern District, hereby files this Response to Plaintiffs' Motion to
Compel and/or for Sanctions, as follows:

**The Defendant Complied With This Court's Order [DE 118] and Plaintiffs' Request
for Sanctions is Therefore Without Basis**

1. On January 27, 2011, this Court held a discovery conference before
Magistrate McAiley. During the conference, Magistrate McAiley stated that she was
going to order inspections of cellular telephones. Undersigned counsel immediately
contacted Howard Crompton that day and asked to have his cellular telephone brought to

the undersigned counsel's office immediately for safekeeping. The specific phone was a Blackberry Storm (hereinafter "the Blackberry Storm") company phone, which is owned and controlled by Park Row Printing (Park Row, Inc.).

2. The next day, on January 28, 2011, this Court entered an Order on the inspection. [DE 118]. The Order directed Plaintiffs to:

"provide to the Defendants the names and contact information of three experts in South Florida who Plaintiffs believe are qualified to perform the inspection of the cellular telephone." [DE 118].

Plaintiff's designated three experts, one of which was Carter Conrad, Jr. The Order directed these Defendants to "select one of the three experts to perform the inspection" by February 7, 2011. [DE 118]. On February 7, 2011, counsel for the Defendant spoke to and selected Carter Conrad, Jr., and filed *Notice of Designation of Expert* on February 8, 2011. [DE 134]. On February 11, 2011, undersigned counsel even sent Mr. Conrad a copy of this Court's Order, so he too would understand and comply with this Court's instructions. *See Exhibit A attached hereto.*

3. The Defendant at all times complied with all aspects of this Court's Order and timely sent Howard Crompton's Blackberry Storm to Mr. Conrad. *See correspondence dated February 16, 2011, from undersigned counsel to Mr. Conrad via Federal Express, enclosing the Blackberry Storm, along with copies of other information related to the device, attached as Exhibit B.*

4. Plaintiffs are making false assumptions and misleading this Court by stating that "the Defendants have deliberately disregarded the Order by refusing to provide the information necessary to allow the inspection of the Blackberry Storm." [DE

172, p. 4]. That statement is Plaintiffs basis for sanctions, and such a basis clearly does not exist. The Defendant provided to Mr. Conrad the Blackberry Storm, the instructional information related to it, and this Court's Order, in a timely manner which would have allowed Mr. Conrad to complete the inspection prior to the February 22, 2011 deadline imposed by this Court. Plaintiffs have misrepresented the obligations of the Defendant and have based their request for sanctions upon an additional requirement – providing a password – which is not part of this Court's Order. As will be shown more fully below, the Defendant has made a diligent inquiry and search and there is no “password” known to the Defendant.

Defendant, Howard Crompton, Does not Know the “Password”

5. Mr. Conrad contacted undersigned counsel several weeks after he received the Blackberry Storm, and asked if Howard Crompton knew of a “password” for the Blackberry Storm. The “password” was allegedly needed to retrieve the data from the device. Undersigned counsel told Mr. Conrad that the answer to that question was unknown, and undersigned counsel would ask if Howard Crompton knew of such a “password.” Undersigned counsel consulted with Howard Crompton, and he did not remember using a password in connection with the Blackberry Storm.

6. Undersigned counsel also asked Mr. Conrad where the 188 text messages were which he found on Michael Adelman's cell phone. Mr. Conrad stated that he chose not to produce them with his report. He was requested by undersigned counsel to release the text messages and to date they have not been produced to undersigned counsel.

The Blackberry Storm is Company Property that Belongs to Park Row Printing

7. Because the Blackberry Storm is a company device owned by Park Row Printing, counsel for the Defendant contacted and interviewed George Crompton, Owner and President of Park Row Printing. *See affidavit of George Crompton, attached hereto and incorporated herein, as Exhibit C.*

8. George Crompton, as Owner and President of Park Row Printing, is the person who controls the use of the company's cellular telephones, including the Blackberry Storm.

9. George Crompton produced a receipt kept by Park Row Printing which shows that on July 10, 2010, Howard Crompton purchased with the company's account a new cellular phone (a Blackberry Bold) and stopped using the Blackberry Storm as his company phone. *See Receipt attached hereto as Exhibit D.*

10. In November of 2010, David Rourke, an employee of Park Row Printing, went to his boss, George Crompton, and asked for a new cellular telephone. David Rourke's existing cellular telephone was old and beginning to break down. *See affidavit of David Rourke, attached hereto and incorporated herein, as Exhibit E.*

11. At that time, the Blackberry Storm was not being used by any employee of Park Row Printing, and was not receiving wireless service from Verizon.

12. On November 30, 2010, George Crompton made the decision to give the Blackberry Storm his employee, David Rourke, to use for business and personal purposes.

Park Row Printing and its Employees do not Know of a Password for the Blackberry Storm

13. On November 30, 2010, David Rourke received the Blackberry Storm from George Crompton. The Blackberry Storm was not hooked up to wireless service from Verizon. David Rourke called Verizon from a Park Row Printing land-line, and activated wireless service for the Blackberry Storm. David Rourke turned on the Blackberry Storm, it came to the main screen, and it worked. David Rourke did not use a password, was not given a password, and did not need a password to use the Blackberry Storm.

14. David Rourke used the Blackberry Storm for business purposes and personal purposes from November 30, 2010, until January 27, 2011, when Park Row Printing was contacted by Howard Crompton to relinquish the device to Howard Crompton's attorneys for the subject inspection.

15. On January 27, 2011, the day Howard Crompton was contacted by undersigned counsel to retrieve the Blackberry Storm from Park Row Printing, George Crompton and David Rourke went to a Verizon Wireless store with the Blackberry Storm. George Crompton bought a new Blackberry Bold 9650 for Park Row Printing to give to David Rourke. At the store, George Crompton told a Verizon representative to deactivate the Blackberry Storm from receiving wireless service. George Crompton specifically told the representative to preserve the Blackberry Storm's condition and to make certain that information was not removed from it. *See Confirmation of Purchase on January 27, 2011, attached hereto as Exhibit F.*

16. The Blackberry Storm was given to Howard Crompton and hand-delivered to undersigned counsel. The Blackberry Storm has not been used or activated by undersigned counsel, Howard Crompton, George Crompton, or David Rourke, since January 27, 2011.

Mr. Conrad Should Contact Verizon or Another Expert may be Necessary

17. The Defendant has made a diligent search and inquiry and there is no known password. Mr. Conrad's need for a password to access the data is not within the control of the Defendant. The Defendant does not currently have possession of the Blackberry Storm. Based on these facts, Plaintiffs' *Motion to Compel and/or for Sanctions* must be denied.

18. Mr. Conrad should consider contacting Verizon, and the Defendant does not object to him doing so. The Blackberry Storm is not currently receiving wireless service from Verizon. It is clear that when David Rourke received the Blackberry Storm when it was not receiving wireless service, he called a Verizon representative who activated the Blackberry Storm. David Rourke was able to turn it on, see the main screen, and access its features, without a password.

19. Plaintiffs' *Motion to Compel* is premised on the assumption that Mr. Conrad's conclusion – that he can only access the data if he is given a password – is accurate. The Defendant does not concede that this is correct. But if it is, then it is clear that the next step is that the Blackberry Storm needs to be taken to Verizon in order to set it up to be accessed. The Defendant is willing to allow Verizon to have access to the Blackberry Storm in order to accomplish Mr. Carter's inspection. The Defendant does not

know how to retrieve the information. At all times the Defendants believed that the Blackberry Storm could simply be turned on and the information would be readily accessible to Mr. Conrad.

20. It should further be noted that during the January 27, 2011 discovery conference, counsel for the Defendant voiced hesitancy to agree to the Magistrate's proposal that Plaintiffs could choose three (3) cellular telephone experts, of which the Defendant had to designate one (1) to perform the inspection. Counsel for the Defendant stated that the basis of counsel's hesitation was the underlying assumption that all of the "experts" chosen by Plaintiffs would be competent to perform the inspection. The Court assured counsel for the Defendant that such a concern was not warranted.

21. At that time, counsel for the Defendant was concerned because it was the Defendant who first wanted to have Michael Adelmans' cell phone inspected, and so counsel wanted to ensure that the individual who was ultimately designated to inspect Michael's phone was fully competent to perform the inspection. This was based on the fact that Plaintiffs failed to disclose Michael's cell phone under Rule 26, and it was inadvertently discovered during an inspection at Plaintiffs' counsel's office. Based on those circumstances, undersigned counsel wanted Michael's cell phone to be fully explored by a competent expert. Plaintiffs' request for inspection of the Blackberry Storm was secondary to the Defendant's request. As noted above, Mr. Conrad withheld Michael Adelman's 188 text messages and has not produced them to undersigned counsel.

22. The Defendant has shown that the “password”, if one even exists, is not under the custody or control of the Defendant and/or Park Row Printing, and that undersigned counsel initiated a diligent search and inquiry.

23. Notwithstanding, Mr. Conrad’s position that a “password” is necessary cannot be the basis for a ruling, due to the lack of any evidence beyond Mr. Conrad’s own assurances that his assumption is correct.

24. Therefore, Plaintiffs’ *Motion to Compel* must be denied because the Defendant cannot provide a password. Plaintiffs’ *Motion for Sanctions* is without merit because the Defendant has clearly not disregarded this Court’s Order. The Defendant did not refuse to provide information. The information is not in the possession of the Defendant.

25. Plaintiffs’ *Motion to Compel and/or for Sanctions* must be denied.

I HEREBY CERTIFY that on March 25, 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 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.

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