UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG/GOODMAN

HOWARD ADELMAN et al.

Plaintiffs,

v.

BOY SCOUTS OF AMERICA, et al.

Defendants.
_____/

PLAINTIFFS' RESPONSE TO MOTION FOR RECONSIDERATION FILED BY DEFENDANTS' CROMPTON AND SCHMIDT

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 counsel and file their Response to the Motion for Reconsideration filed by the Defendants Crompton and Schmidt to the Magistrate Judge's Order Concerning Text Messages on Michael Sclawy-Adelman's Cellular Telephone [D.E. 196] and would respectfully show the Court as follows:

Standard for Reconsideration

The Defendants' Motion for Reconsideration is merely an improper attempt to reargue and reiterate the same arguments which were previously made. It is well settled that:

> [T]here are three major grounds which justify reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest and justice . . . [a] Motion for Reconsideration should not be used as a vehicle to present authorities available to time at the first decision or to reiterate arguments previously made. [citations omitted].

Doe v. Princess Cruise Lines, Ltd., 696 F.Supp.2d 1282 (S.D. Fla. 2010).

It is clear that the Defendants' motion does not meet any of these three grounds and simply raises the same arguments and points, which the Defendants initially relied upon in their original Motion to Compel, however, this time, they take 14 pages to do so. Despite the excessive length of the Defendants' Motion, these matters have already been previously addressed.

It is extremely difficult to understand how the Defendants can argue with a straight face that there is the need to correct some clear error or prevent manifest injustice, when the Magistrate Judge conducted an in-camera inspection of the text messages and concluded that "the text messages are neither relevant nor discoverable." [D.E. 196]. Accordingly, this is not a situation in which the Court simply relied upon the representations of the parties as to what the text messages might or might not show, but actually reviewed each of the text messages themselves to determine their relevancy.

To suggest, as the Defendants have, that the Magistrate Judge was incapable of determining what was relevant and what was not for the purposes of discovery is completely frivolous. The Magistrate Judge not only had available all the pleadings in the court file, but a description from the Defendants as to what they felt the relevant issues were in reference to the text messages. Although the Defendants claim in their Motion for Reconsideration that the striking of their unauthorized and excessively long Reply "deprived [them of] an opportunity to suggest parameters for the in-camera inspection, since the harsh language was that the Reply "will not be considered,"[1] [D.E. 204, ¶15], a review of the Defendants initial motion shows that they set forth essentially the same areas of interest for the Court's guidance, albeit in less space and much less repetitiously.[2] See Defendants' Motion to Compel Production, ¶5 and 9 [D.E. 177].

It is also significant to note that in its stricken Reply, the "defense agrees," with the Plaintiffs' suggestion that "an in-camera inspection needs to be done." [D.E. 183,¶ 1]. The

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[1] The Defendants gloss over the fact that the reason that their Reply was stricken, was that it was completely unauthorized and in violation of the procedures of Magistrate Judge Goodman, which do not permit the filing of replies without authorization from the Court. [D.E. 188]. In addition, the Reply, which was 7 pages long, exceeded the length permitted by the Magistrate Judge's rules for the filing of initial motions. As pointed out by the Magistrate Judge's order, his procedures were the same as those for the prior Magistrate Judge. [D.E. 188].

[2] Defendants' Reply [D.E. 183] which was stricken by the Court, sets forth the same parameters in paragraphs 4 and 5 as in its initial motion. Paragraph 6 does goes on to add several additional completely irrelevant ones, such as "Michael's studying for and schedule of Advance Placement Tests over the weekend when he died," "Michael's tutoring of other students the week before the hike," "Michael's travels and participation on the debate team" and "Michael's plans during Spring of 2009."

Defendants then go on to object to the suggestion that the in-camera inspection should be performed by Mr. Conrad and instead state "the Defendants submit that the inspection should be done by a Magistrate of this Court." *Id.* Accordingly, it is clear that the Defendants got what they wanted and that they now cannot complain about the result.

The Defendants further suggestion that Judge McAliley's Order of January 28, 2011[D.E. 118] somehow contemplated all of Michael's text messages from the time that his family purchased the phone in 2007[3] through the date of his death, blatantly misreads both the order itself as well as the Court's comments occurring during the course of the hearing.

Finally, the Defendants suggestion that there has been newly discovered evidence requiring a reconsideration is also not supported by the record. The Defendants contend that the recently subpoenaed records produced by T-mobile show that a text message was "received" by Michael during the course of the hike. Reference to the "phone book" produced by Mr. Conrad containing the various phone numbers stored on Michael's phone, show that this was a text message sent by one of Michael's friends who was not on the hike, which happened to be sent to him while he was on the hike. The fact that a random friend coincidentally sent a single email to Michael's phone during the course of Michael's participation in a Boy Scout activity does not render the email relevant to the issues in this case. Since the Court has already reviewed the subject matter of this email, along with all of the others, during the course of its in-camera inspection, there is no newly discovered evidence which would be sufficient to change the Court's original ruling.

In conclusion, the Defendants have shown absolutely no basis whatsoever to justify a reconsideration of this Court's prior order concerning the text messages on Michael's cell phone [D.E. 196] and accordingly, their Motion for Reconsideration must be denied.

Dated: **May 24, 2011**.

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[3] The Defendants statement that the Plaintiffs have contended that "all 188 text messages would have been on Michael's cell phone on the date it was purchased . . ." [D.E. 204, ¶27] is not only nonsensical, but a blatant misrepresentation of what the Plaintiffs argued in their Response. The Plaintiffs indicated that the 188 text messages contained on Michael's phone had been accumulating since the time it was purchased on July 3, 2007, not that they had pre-existed his purchase of the phone. [D.E. 182, ¶ 9].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 24, 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
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