UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

HOWARD ADELMAN AND JUDITH SCLAWY
as Co-Personal Representatives 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.
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MOTION FOR JUDICIAL REVIEW OF DENIAL OF *TOUHY* REQUESTS AND TO COMPEL APPEARANCE OF U.S. PARK SERVICE EMPLOYEES FOR DEPOSITION

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 attorneys and file their Motion for Judicial Review of the Department of Interior's Denial of their *Touhy* Requests and further move this Honorable Court for the entry of an order Compelling the Attendance at Deposition of U.S. Park Service Employees and would respectfully show the Court as follows:

Background

This case arises from the death of 17 year old Michael Sclawy-Adelman during a 20 mile Boy Scout of America merit badge hike on May 9, 2009 in the Big Cypress Preserve. The hike was being led by Scout Masters Howard Crompton and Andrew Schmidt. After Michael exhibited a progression of continually worsening heat symptoms, the leaders stopped to rest at a clearing at approximately the 15-mile point of the hike. Approximately 1½ hours later, Michael stopped breathing and was unable to be resuscitated, following which a 911 call was eventually made.

According to the Collier County Medical Examiner, the probable cause of Michael's death was heat stroke as temperatures reached 100 degrees in the Preserve during the course of the hike, as indicated in the National Park Service [hereinafter "NPS"] Report.

Four Park Service Rangers participated in a formal investigation into the circumstances surrounding Michael's death. This investigation included interviews with the two Scout Leaders (Crompton and Schmidt), the compilation of weather data for the Preserve, various observations and findings of the Rangers and other related matters. As part of their investigation, the Rangers also downloaded Crompton's GPS, which he had bought on the hike and then prepared a map with selected coordinates tracing the progress of the hike. A copy of the relevant portions of the NPS Report, which was originally produced in response to a Freedom of Information Act request, is attached hereto as Exhibit "1." The conclusion of the NPS as reflected in its Report was that the primary cause of Michael's death was due to the "heat" and that contributing factors, included "errors in judgment" and "insufficient equipment [and] experience."

During the course of discovery in this case, the Defendants Crompton and Schmidt have denied making a number of significant statements concerning the events occurring during the hike, which are attributed to them by the Rangers in their Report. They have also challenged other portions of the Report, such as the weather data showing the extreme heat in the Preserve, while also contesting the admissibility of significant portions of the report.

In addition, the Defendants have also formally plead the U.S. Park Service as a Fabre defendant in their Answers, contending that the NPS was negligent in issuing a permit to use the trail on the day of Michael's death, by failing to warn the Scouts of the environmental conditions on the trail, in failing to timely respond to the 911 emergency call following Michael's collapse and by "tamper[ing] with [Cromptons] GPS device and removing valuable data from the GPS device when they downloaded information from it." See Amended Answer of Crompton and Schmidt attached as Exhibit "2" hereto.

<u>*Touhy* Requests</u>

Pursuant to the provisions of 43 C.F.R. §2.80 et seq., the Plaintiffs made an initial formal "*Touhy* request" on February 7, 2011 upon the Department of Interior [hereinafter "DOI"] and NPS

to depose the four Park Rangers who had performed the investigation into Michael's death[1]: (1) Chief Ranger Edward Clark, (2) Ranger Gary Shreffler, (3) Ranger Wynn Carney and (4) Ranger Drew Gilmour. See Exhibit "3" hereto. As reflected by both the Plaintiffs' original and supplemental *Touhy* requests, the purpose of the requested depositions was limited to inquiry of a factual nature regarding the actions taken by the Rangers, their observations and the statements made to them as well as the circumstances surrounding the GPS download. The DOI was expressly advised that the depositions were not intended to seek expert testimony or conclusions.[2] The *Touhy* requests further indicated that the depositions would be used to preserve the Ranger's testimony, so that they would not need to be called to testify to trial. Nevertheless, on March 1, 2011 the DOI sent a letter denying the Plaintiffs' original request, which is attached as Exhibit "4" hereto.

The gist of the DOI's denial of the Plaintiffs' initial request was that the NPS Report was sufficient to provide the information sought by the Plaintiffs, since it constituted a "complete record of the incident and our subsequent investigation, and included detailed statements of each employee who directly participated in response and investigation." The DOI's response also indicated that it was concerned that allowing the witnesses to testify

> "could detrimentally effect the Preserve's relationship with at least one Defendant, the Boy Scouts of America, with which National Park Service has partnered in the past and hopes to continue to do so in the future."

See Exhibit "4." The DOI further asserted that the affirmative defenses naming the NPS as a Fabre defendant raised by the Defendants was without merit as "the performance of the Preserve employees in connection with the incident was beyond reproach," thereby, making it unnecessary for them to produce testimony in order to respond to the matters asserted in the affirmative defenses. See Exhibit "4."

On March 4, 2011, the Plaintiffs supplemented their previously filed *Touhy* request to point out a number of matters, which were overlooked by the DOI in its letter of March 1, 2011 *and* to

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[1] A request was also made to depose EMT Armando Pena, who had attended to Michael as part of the emergency helicopter response. It was subsequently learned, however, that Mr. Pena was no longer employed by the U.S. Park Service.

[2] The DOI conceded in its denial that based upon the Plaintiff's *Touhy* request "these individuals are not being asked to testify as expert witnesses . . ." See Exhibit "4," p.1.

further provide *additional* information based upon new developments that had occurred, subsequent to the filing of the initial request. A copy of this supplement is attached as Exhibit "5" hereto. Pursuant to discussions with counsel representing the DOI and NPS, additional supplements were provided by written communications dated March 9, 2011, March 11, 2011 and March 21, 2011, copies of which are attached as Composite Exhibit "6."

These written supplements to the initial *Touhy* request,[3] which were *solicited* by the DOI's counsel, set forth a number of new matters, which had arisen following the service of the initial *Touhy* request. One of the more significant new developments was the fact that during a subsequent court ordered download of Crompton's GPS by Defendant's expert, it was determined that all of the *time data* from the tracking of the hike was now "missing" and no longer on the GPS. See Exhibit "7." The Rangers had taken possession of Crompton's GPS immediately following the hike and subsequently downloaded the data, which should have identified the longitude, latitude, time and altitude for each tracking point.

Although the NPS did not produce the downloaded data itself pursuant to the parties original FOIA requests, it did produce as part of its Report, several maps of the Preserve with the GPS tracking points superimposed on the maps.[4] See Exhibit "1." Because of the volume of tracking points identified on the maps, the NPS only posted the data (longitude, latitude and time) for several selected points that were most relevant. Nevertheless, the fact that the NPS maps contained some time data clearly demonstrated that time data was obtained during their download.

At the time of the recent Court ordered download, however, all of the time data was gone.[5]

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[3] In these supplements, the Plaintiffs also offered to work with the DOI to reduce the number of employees called and to otherwise limit any inconvenience to NPS.

[4] The tracking points are represented by the blue dots on the maps, which form part of Exhibit "1."

[5] On March 17, 2011, Magistrate McAliley entered an order granting the Plaintiff's Motion to Compel a report from Forensic Laboratory, the Defendant's expert which performed the Court ordered download and to thereafter depose the appropriate representative of the company. [D.E.169]. The Court ordered report, which has just been produced, does not address the issue of the missing time data, however, the deposition of Defendant's expert is scheduled for June 3, 2011. In a prior joint conference between Mr. Daniel, the expert, and counsel for both the Plaintiffs and Defendants, he confirmed that there was no time data on Crompton's GPS at

Subsequent to the NPS download, the GPS had been returned to Crompton and/or his counsel, who are now claiming that the NPS did something in the course of their download to "tamper with the GPS" and/or otherwise spoliate evidence. See Exhibit "2." Of course, none of these issues were in any way addressed by the NPS report.

On April 14, 2011, the NPS performed a download of the data saved on its computer from its original download of Crompton's GPS in the presence of counsel for all of the parties. The NPS produced a CD disk to all of the parties containing a record of all of the downloaded data from this joint inspection, which shows the time data as well as the longitude and latitude associated with each tracking point.

A second new development reported in these supplements arose as a result of the depositions of Crompton and Schmidt, which occurred following the original *Touhy* request. In his deposition, Schmidt testified that on the morning of the hike, he had obtained a permit for the group to hike in the Big Cypress Preserve after purportedly talking to two Rangers and allegedly discussing the group's intention to conduct a 20 mile Merit Badge hike that morning. See excerpts of Schmidt's depositions, attached as Exhibit "8" hereto, pages 91-100. This so-called permit and Schmidt's alleged conversation with the Rangers forms a significant portion of the defendants Fabre Affirmative Defense naming the NPS. Neither the issuance of the permit nor the reported conversation with the Rangers is in any manner discussed by the NPS Report.[6]

In his deposition, the Defendant Crompton was "extremely critical" of the emergency response from the NPS following his call for assistance, and claimed that it cost Michael any chance of survival. See excerpts of Crompton's depositions, attached as Exhibit "9" hereto, pages 82-6. These claims were also included as part of the "Fabre" defense subsequently asserted by Crompton and Schmidt in their Amended Answer filed on March 21, 2011. See Exhibit "2." In addition, both

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the time of his download.

[6] During the April 14, 2001 meeting between the NPS and counsel for the parties, the NPS produced a sealed evidence bag containing what the Rangers verbally indicated were all of the permits that were executed on May 9, 2009. The permit allegedly executed by Schmidt was not included therewith. Nevertheless, in the absence of testimony establishing that the Rangers had checked the permit boxes, retained all of the permits for that day and preserved them up until the time of the inspection, there is a lack of context to explain the significance of this evidence.

Crompton and Schmidt accused the Park Rangers of failing to properly investigate the incident and in inaccurately reporting crucial verbal statements, which they made during their investigation. See deposition excerpts attached as Exhibit "8" and "9." Once again, none of these issues were addressed in the NPS Report.

On March 25, 2011, the DOI denied the Plaintiffs' Supplemental Request. A copy of the correspondence is attached as Exhibit "10" hereto. Although recognizing the validity of a number of points and arguments raised by the Plaintiffs in challenging the DOI's original analysis of the *Touhy* request, the DOI essentially concluded that while factor 4 was no longer implicated, based upon factors 1, 5, 6 and 7, the request would again be denied. The basis for these denials are discussed in more detail below.

Throughout this matter, counsel for the Plaintiff has had numerous discussions with counsel for the DOI to try to tailor the request for testimony, so that it would be mutually agreeable. In one final effort, the Plaintiffs again supplemented their *Touhy* request on April 28, 2011 to further reduce the number of NPS employees to be deposed and to limit the potential areas of inquiry. A copy of this Supplement is attached as Exhibit "11." In response to the DOI's verbal denial of this last request, this motion was prepared and finalized because of the running of the discovery period in this case. Literally, as the Plaintiff was preparing to file this motion, it received a written denial from the DOI, which is attached as Exhibit "14." Although this denial concedes that some of the information requested "is not in any record," it denies the Plaintiff's supplemental *Touhy* request, with the exception of agreeing to provide an affidavit regarding the GPS download process.[7] Accordingly, the DOI's latest letter does not substantially change the issues discussed herein, other than to belatedly recognize the validity of a number of the Plaintiff's arguments.

Following the DOI's refusal to voluntarily produce its employers for deposition, the Plaintiffs have issued the subpoenas for the depositions of two of the four Rangers whose testimony was originally requested and a third who was subsequently identified as having been involved in the

[7] The denial letter, dated June 1, 2011 also agrees to provide an affidavit regarding an unrelated request for information regarding a sign at the beginning of the trail.

download from Mr. Crompton's GPS.[8]

Standard of Review

Although departments of the federal government are permitted to promulgate regulations regarding employee testimony in civil litigation, *Touhy v. Ragen*, 340 U.S. 462 (1951), the Eleventh Circuit has concluded that such regulations may clash with the "Federal Rules of Civil Procedure [which] strongly favor full discovery whenever possible." *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194 (11th Cir. 1991). Accordingly, the Eleventh Circuit has concluded that an agency "cannot put a blanket ban on all requests for testimony." *Moore*, 927 F.2d at 1198.

In striking the appropriate balance between the judicial system's need for full discovery and the agency's need to conduct its business, the Eleventh Circuit has looked to both the provisions of Federal Rule of Civil Procedure 45 (b) and 5 U.S.C §706. In this regard, the Eleventh Circuit has noted that under Rule 45(b) a court is empowered to "quash or modify [a] subpoena if it is unreasonable and oppressive." 5 U.S.C §706 sets forth a number of grounds upon which an agency's action can be overturned, including where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *See* 5 U.S.C §706 (2)(A). Based upon facts before it, the Eleventh Circuit concluded in *Moore* that the agency's denial of the *Touhy* request was supported under the circumstances. *Moore*, 727 F.2d at 1198. Nevertheless, the Court's opinion makes it clear that such agency's denials may not be sustained, where they are unsupported by the evidence and facts in a particular case.

In reversing the DOI's application of its *Touhy* rules, the Ninth Circuit in *Exxon Shipping Co. v. United States Department of Interior*, 34 F.3d 774 (9th Cir. 1994) expressly relied upon the Eleventh Circuit's balancing standard set forth in *Moore*. The Ninth Circuit concluded that

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[8] The Plaintiffs have taken this multi-faceted approached, because of the lack of clarity regarding the precise procedures to be used in challenging an agency's denial of a *Touhy* request. For example, in *Moore v. Armour Pharmaceutical Co.*, 927 F.2d 1194 (11th Cir. 1991), the agency's action was analyzed in the context of a motion to quash a subpoena, which had been issued after the agency's refusal to voluntarily produce its employee for deposition. In *Boca Raton Community Hospital Inc. v. Tenet Healthcare Corp*., 2006 WL 1523234 (S.D. Fla.), the issue arose on an "appeal" of the agency's denial addressed to the District Court in which the underlying case was pending. The DOI's regulations, as set forth in 43 C.F.R. §2.80-§2.90, do not set forth any procedures for review of its actions in response to a *Touhy* request.

> Section 301 does not, by its own force, authorize federal agency heads to withhold evidence sought under a valid federal court subpoena.

34 F.3d at 777. The Ninth Circuit went on to further hold that

> neither the statute's text, its legislative history, nor Supreme Court case law supports the governments argument that §301 authorizes agency heads to withhold documents or testimony from federal courts.

34 F.3d at 778 (limitations on state court subpoena and contempt powers stem from the sovereign immunity of the United States and from the Supremacy Clause, which limitations do not apply when a federal court exercises its subpoena power against federal officials).

In addition to discussing the Constitutional questions raised by the DOI's analysis, the Ninth Circuit went on to hold that

> "The government's argument would also violate the fundamental principle that "'the public. . . has a right to every man's evidence.'"

34 F.3d at 779.

Although recognizing the broad scope of the full discovery allowed by the Federal Rules of Civil Procedure, the Ninth Circuit also acknowledged that the government had legitimate concerns regarding the use of its employee resources. As a result, the Ninth Circuit adopted the balancing test utilized by the Eleventh Circuit in *Moore*, concluding

> Section 301 does not create an independent privilege to withhold government information or shield federal employees from valid subpoenas. Rather, the district courts should apply the federal rules of discovery when deciding on a discovery request made against government agencies, <u>whether or not the United States is a party to the underlying action</u>. Under the balancing test authorized by the rules, courts can ensure that the unique interests of the government are adequately considered.

34 F.3d at 780 (emphasis added). *Also see Watts v. S.E.C.*, 48 2 F.2d 501 (D.C. Cir. 2007)(adopting the balancing tests enunciated in *Moore* and *Exxon*).

Despite the standard enunciated by the Eleventh Circuit in determining the propriety of *Touhy* requests, it is clear that the DOI follows its own contradictory standard. In its original denial, the DOI stated:

> "It is the policy of the Department of Interior (Department), of which NPS is an agency, to not permit its employees to testify either in deposition or at

> trial, in litigation to which they United States is not a party." See Exhibit "4," p. 1.

Although, the DOI goes on to indicate that in "very limited circumstances the Department will vary from this policy," it is obvious from the responses to the Plaintiff's requests in this case, that this is mere window dressing and that there is no real legitimate consideration of even the DOI's own stated criteria.

Department of Interior Touhy Criteria

The DOI has adopted nine factors for consideration in responding to *Touhy* requests, which are set forth in 43 C.F.R. §2.88. These factors are:

(1) The ability to obtain the testimony from another source.
(2) The appropriateness of the testimony under relevant federal law.
(3) The effect on the National Park Services' ability to conduct its official business unimpeded.
(4) The effect on the National Park Services' ability to maintain impartiality in conducting its business.
(5) The effect on the National Park Services' ability to minimize the possibility that it will become involved in issues that are not related to its mission and programs.
(6) The effect on the National Park Services ability to avoid spending public employees time for private purposes.
(7) The effect on the National Park Services' ability to avoid the negative cumulative effect of granting similar requests.
(8) The effect on the National Park Services' ability to insure that privileged or protected matters remain confidential.
(9) The effect on the National Park Services' ability to avoid an undue burden on it.

See also Exhibit "4" hereto.

In its initial denial of the Plaintiffs *Touhy* request, the NPS concluded that factors 2, 3, 8 and 9 were not implicated by the Plaintiffs' request and accordingly, were not relied upon in its denial. See Exhibit "4" hereto. In its denial of the Plaintiff's Supplemental *Touhy* request, the DOI backed off of its reliance on factor number 4, concluding that it "does not weigh either for or against allowing the employees testimony." See Exhibit "10" hereto. Although the Plaintiffs will focus their argument on factors 1, 5, 6 and 7, they also believe that factor number 4 deserves some mention, particularly as it relates to the motivation of the DOI in denying the Plaintiffs' request.

Factor 1 - Ability to Obtain the Testimony from Another Source

In reviewing the DOI's analysis of this factor, there are two totally distinct areas of proposed testimony. One relates to matters that are clearly not mentioned or discussed in any manner in the Park Service Report. The other area involves information that is contained within the Park Service Report, but has been attacked by Crompton and Schmidt as being inaccurate or by their counsel as being inadmissible. Since each involves different considerations, they will be discussed separately.

A. Areas Not Addressed by NPS Report

The areas of proposed testimony not addressed in any manner in the Park Service Report include:

(1) The GPS download and claimed spoliation of evidence.

As previously discussed, the Rangers took possession of Crompton's GPS immediately following the hike and subsequently downloaded the data, which should have identified the longitude, latitude, time and altitude for each tracking point. In its report, the NPS did not produce the downloaded data, but only several maps of the Preserve with the GPS tracking points superimposed on the maps. Due to the volume of tracking points identified on the maps, the NPS only posted the data (longitude, latitude, time) for several selected points that were most relevant. Nevertheless, the fact that the NPS maps contained some time data, clearly shows that time data was obtained during their download.

Following the NPS download, it eventually returned the GPS to Crompton and/or his attorneys. Subsequently, during a court ordered download of the data conducted in Raleigh, North Carolina by the Defendant's expert Lars Daniel, all of the "time data" was gone. While the download produced data for the longitude, latitude and altitude, there was absolutely no "time data" for the track of the GPS covering the subject hike.

In the Amended Answer subsequently filed by Crompton and Schmidt, it is averred that:

> The NPS tampered with [Crompton's] GPS device and removed valuable data from the GPS device when they downloaded information from it. This was an unauthorized destruction and spoliation of evidence.

See Exhibit 2, Second Affirmative Defense. None of these issues are addressed in any manner by the Park Service Report.

As discussed above, on April 14, 2011, the NPS performed a download of data from its computer, which counsel for the DOI indicated contained the original downloaded GPS information

obtained by the Rangers. Copies of the data from this download were produced by CD to counsel for the parties who were present at the time. Nevertheless, the CDs were unaccompanied by any type of verification, documentation or authentication.

The data received from the NPS on April 14, 2011 shows the missing "time data," which was not present on the GPS at the time that it was downloaded by Defendant's expert. Nevertheless, there is no explanation presented by the NPS as to where and how the "time data" disappeared leading up to the court ordered download in Raleigh. Accordingly, the parties are entitled to determine the reasons behind the missing data and whether there have been any attempts by any of the parties to spoliate evidence.

(2) The Park Permit and the Rangers' reported discussions with Schmidt.

Another area on which the NPS Report is silent is the issuance of the so-called Park Permit to Schmidt and the Rangers reported discussions with him at the beginning of the hike. As noted above, the Defendants have formally plead the U.S. Park Service as a Fabre defendant in their Answers, contending that the Park Rangers were negligent in issuing a permit to use the trail on the day of Michael's death and by failing to warn the Scouts of the environmental conditions on the trail. See Exhibit "2" hereto. The NPS report does not address either the "permit" issue, nor the purported discussions between Schmidt and the Park Rangers in any manner.

Although the DOI has made statements in its denial letter (See Exhibit 10), which would tend to contradict these issues, such statements contained in a letter obviously do not arise to the level of actual evidence. In order to produce evidence to respond to these claims, the Plaintiffs obviously need the opportunity to depose the Park Rangers involved on these specific points.

For example, during the April 14, 2011 meeting between the NPS and counsel for all the parties, the Park Rangers produced a "permit" for the day of the hike, which it was verbally represented constituted the only permit executed that day. Also see Exhibit 10. The permit produced by the Rangers had been executed by another group and not by Schmidt or Crompton. Likewise, the Rangers produced a hiking "sign in sheet" for the trail, which although executed by the group filling out the permit, was not filled out by Schmidt and Crompton.

In order to establish the significance of these papers, the Plaintiffs need to be able to present the testimony of the Park Service explaining:

> A description of the backcountry use permit process at the Big Cypress Preserve, the purpose for requesting the execution of such permits by hikers,

> the Park Services retention of all backcountry use hiking permits which had been filled out and deposited on May 9, 2009 at the Big Cypress Preserve and their storage and retention up until the date of the inspection by the parties on April 14, 2011, the location in storage of the "hiking log" for the Big Cypress Preserve for May 9, 2011 and its storage and retention from the date of Michael's death up until the inspection by the parties on April 14, 2011.

See Supplement *Touhy* request Exhibit "11."

The importance of these matters also goes beyond the simple issue of the so-called Park Permit, but to the credibility of the Defendants Crompton and Schmidt as well as whether there have been misrepresentations made to the Court.

(3) The timeliness and appropriateness of the NPS emergency response.

As part of the Defendants' Fabre affirmative defense, the Defendants Crompton and Schmidt have asserted that the emergency response to Crompton's belated 911 call for assistance was untimely, inadequate and negligent and that such actions "caused or contributed the cause of death of Michael Adelman." See Exhibit "2." Since the NPS Report does not address these issues in any fashion, it is obviously extremely important for the parties to be able to obtain testimony from the Park Rangers regarding the circumstances surrounding the 911 call, the efforts which were taken to locate Michael and whether the Rangers in fact acted appropriately. The conclusion of the DOI in its denial letter that "it is our contention that the performance of the Preserve employees in connection with the incident was beyond reproach," hardly constitutes admissible evidence that can be used at trial. See Exhibit "4," p.2.

B. Areas in Report Challenged By Defendants

The second area of testimony relates to statements and/or other factual matters referred to in the Park Service Report, but which have been challenged by the Defendants based upon a claimed lack of proper predicate. The Plaintiff seek to depose the Rangers to supply any necessary predicate to meet these objections. As to these matters, the DOI expresses the rather naive view that the NPS report

> "contain[s] the same evidence that our employees would give at the deposition. They represent the Preserves complete record of the incident and our subsequent investigations, and include detailed statements of each employee who directly participated in the response and investigation. We do not believe that anything the employees could say at deposition could add to these records."

See Exhibit "4" hereto.

As pointed out in the Plaintiffs' Supplemental *Touhy* request, this statement is unsubstantiated by either the law or the facts applicable to this matter. There is in fact considerable critical information and evidence in this case, which is exclusively within the possession of the NPS and Park Rangers that is not addressed or even mentioned in the Park Service Report. Therefore, even to the extent that the entire Park Service Report is considered to be admissible, it fails to address a number of critical issues for which there is simply no alternative testimony or evidence available to the Plaintiff and other parties.

(1) Weather Data

One such highly critical issue relates to the weather data produced by the NPS as part of its Report. See Exhibit "1." This data, which shows rising temperatures throughout the day reaching 100 degrees at 2:00 p.m. is contained on a sheet of paper without any additional information as to its source or derivation. Defendant's counsel have made it clear in depositions that they intend to object to admissibility of this data and other portions of the Report. Accordingly, the Plaintiff's need to question the Rangers to authenticate and explain the source of this single sheet of paper.

(2) Statements Challenged by Schmidt and Crompton

Critical statements which were attributed by the NPS report to the Defendants Crompton and Schmidt have been denied by the Defendants in their depositions taken on March 7 and 8th of this year. Although the Park Rangers took a brief written statement of Crompton, the great majority of statements contained in their report were from verbal conversations with the two Scout Leaders. Both Crompton and Schmidt have complained in their depositions that the Park Rangers did not take notes or otherwise contemporaneously record their verbal statements. As such, they have challenged their accuracy. *See* excerpts from the deposition of Howard Crompton attached as Exhibit "8" hereto.

The NPS Report is completely silent as to these issues. Other than the single brief written statement taken of the Defendant Crompton, there is no indication as to whether the Rangers took notes, recorded the statements or otherwise verified the information provided. Accordingly, this information can only be supplied by the direct testimony of the Park Rangers.

Specifically, the following statements attributed to Crompton and Schmidt and the NPS Report have been challenged by the Defendants on those grounds:

1. Ranger Wynn Carney indicates in his Supplemental Narrative that

> "H. Crompton stated that at approximately 1300 hours they made it to Ten Mile Camp [the half way point] and stopped for lunch, but none of the hikers ate much because they were all extremely hot. I asked H. Crompton how much food Sclawy-Adelman ate and he advised that he did not know."

Ranger Gary Shreffler likewise indicated in his Narrative that

> "Crompton replied that they stopped for lunch around 10 Mile Camp but everyone was really hot and didn't want to eat anything."

On his deposition, Crompton denied making these statements and claimed that he observed Michael eat during this time. See Exhibit "9," pp. 117-125. The statements contained in the Report are significant, since they clearly show that Michael was beginning to show signs of heat exhaustion and heat stroke, which continued to progress until his death.

2. Gary Shreffler reported in his Narrative that Crompton had advised him that after the group had finished lunch, they began the hike back toward the beginning of the trail after which Michael

> "had begun to stumble some so they stopped to drink some water and rest."

See Exhibit 1. On his deposition, Schmidt denied that Michael began to stumble or become dizzy before they had stopped at the clearing. See Exhibit 8, pp. 168-170. Once again, this is significant, since stumbling, dizziness and incoherence are all signs and symptoms of progressively worsening heat stroke.

3. In Wynn Carney's Supplemental Narrative, he indicates that Schmidt advised him that

> "The reason he had separated from the party was to get more water because they were out. . . Schmidt appeared to be exhausted, so I gave him some water. I asked Schmidt where Sclawy- Adelman and H. Crompton were located. Schmidt advised me that they were on the Florida Trail, just south of mile marker 12 . . . I asked Schmidt the condition of Sclawy-Adelman when [he] the part of the incident area and he advised that Sclawy-Adelman was overheated, breathing (unresponsive).

See Exhibit "1." On deposition, however, Schmidt expressly denied making these statements. See

Exhibit "8," pages 204-10. Schmidt also denied having left Crompton and Michael in order to get assistance, since he testified that he did not feel that Michael was in any type of life threatening emergency condition at the time. See Exhibit 8, pp. 187-194. In addition, the statement that Michael was just south of mile marker 12, rather than at mile marker 15 as he testified on his deposition, goes to the issue of whether it was Crompton and Schmidt who were responsible for any dealings by misleading to the rescuers as to his true location.

> 4. In Wynn Carney's Supplemental Narrative, he further indicated: I asked H. Crompton and Schmidt to tell me what happened on the Trail when they noticed Sclawy-Adelman showing signs of exhaustion. H. Crompton advised me that approximately 15:30 hours and near mile 15 of the hike, Sclawy-Adelman began stumbling. H. Crompton stated that he advised Sclawy-Adelman to sit down and rest giving him water to drink, a damp towel to cool him off. H. Crompton advised that he told [the other scouts] to continue the hike down the trail to get more water back at Oasis.

See Exhibit "1." Both Crompton and Schmidt, however, have denied making these statements to the Rangers. Instead, they have testified that the two other Scouts, Kris Leon and Chase Crompton, the Defendant's son, were getting bored and asked if they could finish the hike on their own. Schmidt and Crompton both testified that they told the Scouts that they could go ahead on their own, even though they were only 12 or 14 years of age and were out in the middle of the great Cypress Preserve, where none of them had ever hiked before. See Exhibit 8, pp. 172-192.

C. Inability to Obtain Testimony from Other Sources

It is clear from the foregoing that the Plaintiff will be unable to obtain testimony on these important issues from other sources. Michael is dead. The two adult leaders are both Defendants in this case. One of the two surviving Scouts is the son of one of these Defendants. The only remaining Scout, who is still active in the Troop is clearly an adverse witness. Not only did he show up at his deposition with defense counsel in tow, but has met repeatedly with Defendants' counsel, while refusing to meet with Plaintiff's counsel. Perhaps even more significantly, however, under his version of the events given during his deposition, he and Chase Crompton left the Group at mile 13 of the hike, after Michael had wandered off the trail into the overgrown bush[9] and claims not to

[9] The Medical Examiner testified that Michael's body was filled with numerous scratches and cuts, consistent with having wandered off of the trail into the dense surrounding

have witnessed any of the following events thereafter. *See* excerpts of deposition of Kris Leon, Exhibit "12, pp. 87-100.

Throughout this rather lengthy process, the Plaintiff has repeatedly pointed out to the DOI the need to obtain specific testimony and its unavailability from other sources. See Exhibits 3, 5, 6 and 11. The DOI's response has been not only naive and unrealistic, but completely fanciful and irrational. Instead of referring to facts and evidence or even making a token effort at responding to the specific points raised by the Plaintiff, the DOI has merely set forth platitudes, such as its "contention that the performance of the Preserve employees in connection with the incident was beyond reproach," as its so-called legal analysis. See *Exhibit 4.*

Such a lack of grasp of the legal system is even more apparent in the DOI's second written denial, Exhibit 10. Although acknowledging, on page 3, that:

> you have, in turn, suggested that the original records did not adequately address Defendants' allegations of negligence on the part of NPS and concerns about spoliation of the GPS evidence.
>
> To the extent that this might be true, we believe that the additional records described above-the standard operating procedures for permit issuance, the permit, the trail head log and the GPS download-contains sufficient factual information to address these allegations.
>
> . . . as to answering allegations that the response of NPS employees was unreasonable, or that the NPS misrepresented statements of individuals Defendants during the investigation of the incident, we do not see how the testimony of the individuals would be more valuable in the records themselves.

Contrary to the DOI statements, the so-called "trail permit issuance procedures," which the DOI produced do nothing to answer any of these questions.

In fact, the only mention they contain of hiking permits are:

> Section 1.5
> . . . (a)(2)(a) All back country users, including ORV users, hunters, hikers, bicyclist and boaters must possess a backcountry use permit when in the backcountry.

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brush. Both the Scouts and leaders have testified that the trail was well cleared and that one would not have encountered any brush, which would have resulted in cuts or scratches, so long as one stayed on it.

Section 1.6
. . . the following activities require a permit . . .
. . . Backcountry permit.

See Exhibit 13.

Likewise, while the recent GPS data provided by the Park Service contains the information which was "missing" from the prior Court ordered download, it does nothing whatsoever to explain when, how and where the data taken directly from Crompton's GPS "went missing," or to authenticate it.

Factor 5 - Effect on NPS Ability to Minimize the Possibility of Involvement on Issues Unrelated to Mission and Programs

Although this litigation involves a dispute between private parties, each of the Defendant's have named the National Park Service as a Fabre Defendant, accusing it of negligence in issuing a permit to use the trail on the day of Michael's death, failing to warn the Scouts of the environmental conditions on the trail, failing to timely respond to the 911 emergency call following Michael's collapse and by tampering with Crompton's GPS and removing valuable data from it. See Exhibit "2."

Accordingly, the Defendants have not only named the National Park Service as a Fabre Defendant, but challenged the ability and competency of its Rangers to perform their core functions. Assuming that the Court allows the Fabre defenses to remain at the time of trial, the jury will thereafter be asked to render a written verdict, which will pass upon the competence and integrity of the Park Rangers in the performance of their official job duties. The mere fact that the DOI blighly "contend[s] that the performance of the Preserve employees in connection with the incident was beyond reproach," is meaningless and of no evidentiary value. Regardless of the DOI's "contention," the jury will be asked to analyze the actual evidence to determine whether the Rangers performed their official job duties with competence and integrity. At the end of the trial, if the jury should attribute any negligence for Michael's death to the NPS, this will constitute a publicized public proclamation that the Rangers did not perform their job duties and responsibilities competently and properly. The DOI's unsupported statement that the proposed testimony is not related to the mission and programs of the NPS is therefore completely without foundation in fact, law or logic.

In further assessing this factor, it is important to keep in mind that the NPS assumed the role of investigating the facts surrounding this incident, which occurred on its property. The proposed inquiry is therefore directly related to and limited to the specific obligations undertaken by the NPS in investigating this accident. Thus, this is not a circumstance, such as in *Moore*, where the agency was performing research on a scientific project and was sought to be called in to act as an expert in litigation having nothing whatsoever to do with the agency's work. Here, the NPS undertook the obligation to investigation Michael's death and the Plaintiff is only seeking to inquire into the results of this investigation, which was performed in the course and scope of their agency duties.

Factor 6 - Effect on NPS' Ability to Avoid Spending Public Employee's Time for Private Purposes

As reflected in the Plaintiff's final modified *Touhy* request, the Plaintiff has requested the opportunity to depose three employees on very specific and extremely limited areas. See Exhibit "11." It is hard to imagine that each deposition could possibly last even several hours due to the extremely limited scope of proposed inquiry. To further reduce the impact upon the NPS, the Plaintiff has indicated in its *Touhy* requests that it will take the depositions at a time and place of the Park Services' selection and that the purpose of the depositions will be to preserve the testimony for trial, so that the witnesses will not be called upon again to testify. The Plaintiff has even offered to pay for the Rangers time in testifying. Therefore, the impact on the NPS is extremely slight at most.

In fact, the negligible nature of this impact is evidenced by the DOI's own analysis. Factor 3 consists of "the effect on the National Park Services' ability to conduct its official business unimpeded." Under its own analysis, the NPS concluded that this factor was not even implicated by the Plaintiff's request.

Similarly, Factor 9 of the DOI criteria is an analysis of "the effect on the National Park Services' ability to avoid an undue burden on it." Once again, in performing its analysis, the DOI has concluded that this factor would not be impacted by the Plaintiff's request. Therefore, the DOI has recognized as part of its own analysis that the Plaintiff's request would not pose an undue burden on it or in any way impede its ability to conduct its official business. Accordingly, the time which would be spent by employees for private purposes is negligible at most and by the DOI's own analysis have no impact on the NPS.

Moreover, as discussed under Factor 5, the proposed testimony also relates to the NPS' mission and programs. Therefore, not only will the ultimate time be extremely negligible, but to the extent that it supports the NPS' mission and programs, it cannot even be said to have a purely private purpose.

Factor 7 - Effect on NPS Ability to Avoid Negative Cumulative Effect of Granting Similar Request

Unlike the situation in *Moore*, which involved claims of defective medications used to treat what the Court described as "an epidemic," this case involves a single, isolated, specific, discrete event. There has not even been a suggestion by the DOI that similar events are occurring either at Big Cypress Preserve or at its other parks. There have been simply no *facts* presented to support the conclusion that by providing limited testimony in an isolated case of this nature will somehow subject the NPS to a barrage of requests for its employees to testify. Therefore, the conclusion that there will be "similar requests in the future," "the cumulative effect of which would be significant" is purely illusory and without any factual basis.

Factor 4

Initially, the Park Service indicated in its original denial that it was concerned that its "relationship with at least one Defendant, The Boy Scouts of America, with which NPS was partnered in the past and hope to continue to do so in the future" would be detrimentally affected.

This concern is totally misplaced. Every citizen in our country has a right to a fair trial, which requires the ability to present all of the evidence in a case that is relevant and admissible under the evidentiary rules. They should not be denied that right because of a relationship between one of the parties and a witness. This is even more true, when the witness is an agency of the United States Government, which is required to act on behalf of all of the citizens, and not merely a selected few.

Although the DOI subsequently retreated from this position when they were called out on it, the original position which it took is clearly relevant to its motivation in denying the Plaintiff's request.

Conclusion

Regardless of whether one utilizes the standards set forth in Federal Rule Civil Procedure 45 or 5 U.S.C. §706, it is clear that the DOI's denial of the Plaintiff's *Touhy* request must be

reversed.

In this Circuit, an agency's action is considered to be arbitrating and capricious, if the agency

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so impossible that it could not ascribed to a difference in view or the product of agency expertise.

United States of America v. Walker, 2009 WL 2611522 (M.D. Ga. 2009)(overturning agency denial of *Touhy* request)(*quoting Miccosukee Tribe of Indians of Fla. v. United States*, 566 F.3d at 1257, 64 (11th Cir. 2009). As found by the Court in the *Walker* case, an agency's "unsubstantiated and subjective belief that [it's employee] possess no relevant information [is] arbitrary and capricious," where there is clearly evidence before the Court to the contrary. The discretion afforded to agencies in assessing *Touhy* factors does not mean that Courts are required to accept explanations for agency decisions "that run counter to the evidence before the agency," or are "implausible." *Walker*, 2009 WL 2611522 at *3.

Additional Claim for Relief

Additionally, the Plaintiff moves this Honorable Court for the entry of an order finding that the portions of the NPS report which are attached hereto as Exhibit "1" will be admissible into evidence at the trial of this cause. The denial of this request would serve as a further ground for the overruling of the DOI's denial of the Plaintiff's *Touhy* request.

Dated: **June 2, 2011.**

Respectfully submitted,

/s/ ROBERT D. PELTZ
ROBERT D. PELTZ (Fla. Bar No. 220418**)**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 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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