

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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**PLAINTIFFS' RENEWED MOTION FOR REHEARING OR MODIFICATION OF  
ORDER ON MOTION FOR RECONSIDERATION AND  
ACCOMPANYING MEMORANDUM OF LAW**

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 move this Honorable Court for the entry of an Order of Rehearing on and/or Modification of its Order on Motion for Reconsideration [D.E. 222], and would respectfully show the Court as follows:

1. In the Court's Order on Motion for Reconsideration [D.E. 222] the Court noted that the billing records from T-Mobile showed that two text messages were sent to the decedent's cell phone on the date of the hike (May 9, 2009). This Court went on to further hold:

If it were possible, the Court would direct the telephone expert (Mr. Conrad) to produce before the parties the substance of these two text messages and only these two text messages). However, there does not appear to be any technologically viable way to release only those

two messages and not the other 186 messages. In particular, the parties advised the Court at today's hearing that Mr. Conrad cannot determine which text messages were sent on May 9, 2009.

[D.E. 222].

2. The Court has made it clear that the basis for its conclusion is that the two text messages sent on May 9, 2009 are discoverable, however, that the other text messages are not. Nevertheless, the Court has indicated that it is unaware of any other "technologically viable way to release only these two messages and not the other 186 messages."

3. In its conclusory paragraph, the Court further indicated that it was "willing to evaluate any good faith motion advocating a different assessment." It appears that Mr. Conrad's entire report was not attached to the Defendant Crompton's Motion for Reconsideration, which is why a technologically viable way to separate the two text messages was not clear at the time of the Court's Order. A complete copy is attached as Exhibit "2" hereto.

4. Attached as Exhibit "1" is a copy of the phone record from T-Mobile, which was discussed in the hearing on June 7, 2011 and which was attached to the Defendant's Crompton's Motion for Consideration as an exhibit. This document shows that there were two text messages sent to Michael's phone on May 9, 2009. The T-Mobile records further indicate the phone numbers of the callers from which these text messages originated: to wit (1) 954-529-2696 and (2) 954-554-4668.<sup>1</sup>

5. A copy of Mr. Conrad's entire report is attached as Exhibit "2" hereto. As reflected therein he was able to identify the phone numbers for each of the text messages, which were sent to Michael's phone, but not the dates. Therefore, while it may not be possible to limit the production to only the two specific text messages sent on May 9, 2009, it is technologically possible to limit the

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<sup>1</sup> The Plaintiff has placed an arrow next to the two text messages on Exhibit "1" in handwriting to assist the Court.

production to those text messages originating from the senders of those two text messages by having Mr. Conrad produce only those text messages originating from the two phone numbers identified as having sent text messages on May 9, 2009.

6. In review of the report prepared by Mr. Conrad, this will reduce the number of text messages to be produced to only six (6), which will include the two that were sent on May 9, 2009.<sup>2</sup>

7. In its Order, this Court further indicated that what was relevant was not the substance of the text messages, which it has already reviewed in camera, but “the identity of witnesses who communicated with the decedent on the day of his death.” The Plaintiff would further point out that it is not necessary to even produce any of the texts to identify their senders, since that can be done by using the “phonebook contacts” index contained at pages 4 and 5 of Mr. Conrad’s report, which lists the name and phone number of Michael’s contacts.<sup>3</sup> In fact, the first of the two texts (954-529-3696) was sent by Sam Kent, a friend of Michaels. Four (4) other texts were sent from Sam’s phone to Michael’s phone. See Exhibit “2.”

8. The second text was sent by Howard Adelman (954-554-4668) to his son’s phone at 8:03 p.m. after he did not return from the hike as expected. Mr. Adelman testified to sending this text on his deposition. See Exhibit “3” hereto. This is only text from Mr. Adelman reflected on Mr. Conrad’s report.

9. According to the invitation of the Court contained in its Order on Motion for Reconsideration [D.E. 222] for the parties to propose alternative technologically feasible methods of accomplishing the purposes set forth in the Court’s order, the Plaintiff moves this Honorable

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<sup>2</sup> The Plaintiff has indicated the 6 text messages originating from the senders of the two text messages with handwritten arrows on Exhibit “2” to assist the Court.

<sup>3</sup> The Plaintiff has indicated the two phone numbers on the Phone book Contacts Index from Michael’s phone with handwritten arrows on Exhibit “2” to assist the Court.

Court to modify its order to require Mr. Conrad to produce only those text messages sent from phone numbers 954-529-3696 and 954-554-4668, which will include the two sent on May 9, 2009.

Memorandum of Law

As reflected in the Plaintiff's Motion, this Honorable Court invited the parties in its order on Motion for Reconsideration [D.E. 222] to propose alternative technologically feasible methods of accomplishing the purposes set forth in the Court's order. Pursuant to the Court's authorization, the Plaintiff has set forth a technologically feasible method of accomplishing purposes set forth in the Court's order, which are to provide the Defendants with the substance of the two texts which were sent to the Plaintiff's cell phone during the course of the hike, while at the same time recognizing the concerns set forth by the Plaintiffs regarding the other texts.

Certification of Compliance with Local Rules and Magistrate's Discovery Procedures

Undersigned counsel certifies that he has conferred directly with counsel for the Defendants by phone on at least 3 occasions in a good faith effort to reach an agreement as to the issues set forth in this motion prior to its filing. Although counsel have actually discussed the issues raised by this motion in an effort to resolve this dispute as required by the Court's Discovery Procedures, they have been unable to reach an agreement on such matters.

Dated: **June 9, 2011**

Respectfully submitted

/s/ Robert D. Peltz  
**ROBERT D. PELTZ**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 9, 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 Service List below 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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