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' REPLY TO SCHMIDT'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION

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 Reply to the Defendant Schmidt's Response to Plaintiffs' Motion to Compel Production [D.E. 234] and would respectfully show the Court as follows:

In their initial motion, the Plaintiffs discussed the obvious relevancy and lack of privilege applicable to items 2, 3, 5, 7 and 31 from the Defendant Schmidt's Privilege Log. Following the filing of the Plaintiffs' Motion, the Defendant Schmidt voluntarily produced 8 additional emails corresponding to items 4, 6, 10, 11, 12, 13, 14 and 17,[1] which are attached as Exhibit "1" hereto. It is apparent from a review of the newly produced emails that they are even less subject to objection than the first batch. Although it is difficult for the Plaintiff to respond to the Defendant Schmidt's discussion of the remaining emails in light of the extremely limited information available in his Privilege Log, based upon the standards utilized by the Defendant Schmidt to object to these emails as being irrelevant and privileged, one can only come to the conclusion that the Defendant's objection as to the remaining 19 emails which have not yet been revealed are equally as frivolous. One cannot even imagine how emails relating to the details of Michael's funeral could conceivably

[1] Although the Defendant produced 10 emails, 2 were from the group originally obtained by the Plaintiff prior to the filing of this motion (items 2 and 3). For some reason which is unclear, the Defendant chose not to produce or waive its objection to 3 of the emails, which had been previously obtained by the Plaintiff, items 5, 7 and 31. In any event, this leaves 19 emails, which have not been produced out of the original 32.

be "privileged. See items 4, 6, 12.[2]

As with the earlier group of emails which the Plaintiff had been able to obtain prior to its motion, at least two of these emails contradict the testimony of the Defendants Schmidt and Crompton regarding Michael's cause of death. As previously noted, while these Defendants' have taken the position ***in this litigation*** that Michael did not die as a result of a heat related ailment, in the emails attached as Exhibits 10 and 11, the Defendant Schmidt confirms that Michael "succumbed to symptoms of heat exhaustion." Since these emails were designed for publication to the entire Pine Island District's Scouting Community in order to explain the circumstances of Michael's death, the prior claims of a lack of relevancy and privilege are completely spurious and without any legal or factual justification whatsoever.

The Defendants Schmidt attempts to justify the withholding of the emails identified as items 21-30 on the grounds that they relate to the issue of denying Michael the posthumous award of his Eagle following his death. Although the leadership of the South Florida Council supported the posthumous award of Michael's Eagle, the award was opposed by the Defendant Schmidt. Eventually, the National BSA Organization refused to award Michael the Eagle Rank and he was instead given the "Spirit of the Eagle Award."

As noted in the Plaintiff's original motion, the Defendants Crompton and Schmidt implicitly argued throughout discovery in this case that the Plaintiffs filed this suit because they were"angry" over the refusal of the Boy Scouts of America to award Michael's Eagle rank. There is also no doubt that the Plaintiffs have suffered additional emotional distress as a result of this decision by the Boy Scouts of America.

The question of whether evidence on this issue is admissible at trial or not, however, is not before the Court at this time. Instead, "discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the subject matter of action." *See e.g. Adelman v. Boy Scouts*, 2011 WL 1930427 (S.D. Fla. 2011) at *3.

It is also disingenuous for the Defendants Schmidt to argue that this subject is not an appropriate matter for discovery when all of the Defendants have spent an inordinate amount of time questioning Judith Sclawy and Howard Adelman on these issues as well as going to great lengths

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[2] In the Plaintiffs original motion, it designated this email as item number 3, rather than 6 and 12 as reflected by the Defendant's more recent production. In identifying the emails for the purposes of its motion, the Plaintiff was obviously relying upon the brief description contained in Schmidt's privilege log. Therefore, it is possible that there is in fact another email corresponding to item number 3, which will only be able to be determined upon an inspection of all of the emails withheld by the Defendant Schmidt.

questioning a number of witnesses, including Patricia Geyer over the issue of whether Michael had sufficiently completed all of the requirements to become an Eagle Scout prior to his death in an effort to support the Boy Scouts of America's decision not to award it.[3]

Although Schmidt has set forth a significant laundry list of negligent actions in Exhibit C to his response in an effort to limit discovery to them, the list is far from complete. Moreover, Schmidt also ignores the fact that there are other issues in this case, such as damages. In addition, discovery may also be used to probe the motivation and bias of witnesses as well as their relationship to the parties.[4]

Finally, the question of whether the original notice to produce was overbroad or not is irrelevant to the discoverability of the specific documents contained in the Plaintiff's privilege log. The purpose of a privilege log is to identify documents which a party claims are privileged and to set forth a nature of the privileged claimed. The Defendant Schmidt has clearly failed to carry this burden[5] and accordingly, the Court should require the production of the remaining emails.

Respectfully submitted,

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

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[3] See questioning of Judith Sclawy at pages 68-71, 99-109, 117-126, 168-170, 175-178, 190-194, 200-207, 215-222, 251-256 and 281-284 of her deposition.

See questioning of Howard Adelman at pages 23-25. 169-171, 227-230, 293-300, 304, 307, 314 and 319 of his deposition.

See questioning of Patricia Geyer at pages 6-42 of her deposition.

[4] For example, the Defendant Schmidt has labeled one of the leaders of Troop 111 as an expert witness and implies that this somehow protects communications which he had with this individual immediately after Michael's death, long before there was a lawsuit. It is obvious that a party cannot prevent another party from taking the deposition of a fact witness by labeling that individual as its expert. Moreover, the relationship between Schmidt and his new expert Dean Kubler is fair game for discovery.

[5] The question of whether the Plaintiffs' original notice was overbroad or not is irrelevant to the inquiry of whether the specific documents which are contained in the Defendant's Privilege Log meet the standard of relevancy applicable in discovery. The Plaintiff has not moved to compel additional documents that were not produced in response to its notice to produce. What is at issue is whether the objections made to the documents identified by the Defendant are legally supportable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **July 6, 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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