

66450-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG
Magistrate Judge: Magistrate Judge Jonathan Goodman

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.

_____/

**DEFENDANTS' REPLY REGARDING PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION FOR PROTECTIVE ORDER AS TO DEPOSITION OF
CARTER CONRAD, JR.**

The Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, hereby file their Reply Regarding Plaintiffs' Response to Defendants' Motion for Protective Order:

1. Plaintiffs give no legal authority to support their action, they do not reference the language of any specific Court Order, and they do not challenge the legal authority cited by these Defendants. Instead, Plaintiffs lodged a personal attack on undersigned counsel by stating in the first line of their Response that the Motion for Protective Order is "inaccurate and misleading". For the reasons described below, the Defendants' Motion should be granted.

2. Mr. Conrad was authorized to do only the following with **Mr. Crompton's Blackberry data**:

The expert shall turn on the cellular telephone, retrieve any data from May 8, 2009 and May 9, 2009 and **produce a report that identifies all data for those two days** found on the telephone. [DE 118].

This Order clearly states that only the data from May 8-9, 2009 may be **identified**.

3. No Court Order cited by Plaintiffs expanded DE 188 and Mr. Conrad's authorization with regard to Mr. Crompton's cell phone data. [See, e.g., DE 189, DE 196, DE 222, and DE 230]. This Court gave Mr. Conrad directions regarding Michael's *text messages*, but no additional authorization to identify data was given to Mr. Conrad as to both Michael's and Mr. Crompton's phone call data.

4. DE 118 only allowed Mr. Conrad to **identify the data from May 8th and 9th**. At Mr. Conrad's deposition, however, Plaintiffs' counsel asked Mr. Conrad:

“Do you recall whether there was **any data for prior time periods** which **would have indicated** whether or not the storage capacity of the phone had still not been reached as of May 8th or 9th? [p.197].

This question required Mr. Conrad to disclose the identity of data on Mr. Crompton's cell phone for time periods prior to May 8th and 9th, and to make a determination whether the “indication” Plaintiffs' counsel asked for was present or not. Plaintiffs' counsel also asked:

“Could you tell **from your analysis** [of data for prior time periods] whether or not the reason that there was no record of the phone calls made by Mr. Crompton on May 9th was likely due to the Blackberry having reached its capacity and starting to override data?” [p.203].

The question called for Mr. Conrad to disclose his analysis of data prior to May 8th and 9th, which he was not authorized to do. Plaintiffs' represent that Mr. Conrad was authorized to perform *analysis* of the data from **May 7th**, in order to answer Plaintiffs' counsel's questions. The Orders contain no language authorizing *analysis* of data from May 7th.

5. Plaintiffs' counsel has stated that undersigned counsel “continued to insist that Plaintiffs do not have the right to inquire: (1) whether there was any data in existence on the Blackberry for the time period of May 7, 2009 (or earlier)”. (See DE 271, p. 4, ¶2) (Emphasis in original). This statement is accurate and shows that Plaintiffs' counsel understood the nature and meaning of the inquiry he made at the deposition. The inquiry about May 7th was improper, necessitated seeking protection, and was the reason for the termination. It is stunning to undersigned counsel that Plaintiffs' counsel would even attempt such an inquiry when, prior to the deposition, Plaintiffs' counsel demanded an assurance from undersigned

counsel that no attempt would be made at any inquiry outside the scope of the Court Orders.¹ (See e-mail sent by Robert Peltz, Esquire, as Exhibit “1”).

6. Plaintiffs have represented that “the essence of the Court’s order” was “limiting the analysis into the *substance* of ... Crompton’s phone calls and/or text messages”. This statement by Plaintiffs’ counsel is incorrect: Mr. Conrad was not given the task of analyzing the substance of phone calls, he was given the task of identifying data on May 8th and 9th. Therefore, Plaintiffs’ counsel erred by asking him to identify data on May 7th.

7. Contrary to Plaintiffs’ assertion, undersigned counsel did not ask “similar questions”. Undersigned counsel asked no questions about the phone calls on Michael’s cell phone made prior to May 8th and 9th. Undersigned counsel’s questions did not violate the scope of the Court Orders, Plaintiffs’ counsel’s questions did.

8. Plaintiffs’ Response does not accurately characterize undersigned counsel’s position at the deposition and during the conferral process. The transcript is absolutely clear that undersigned counsel did not obstruct Mr. Conrad from answering “any questions relating to the *potential reasons for the lack of data* recovered for May 8 or 9, 2009” [See DE 271; p. 4, ¶5] (Emphasis added). These questions were answered over objection, even though Plaintiffs’ counsel was in bad-faith trying to compel Mr. Conrad, a self-proclaimed neutral party, to provide expert testimony, without a proper predicate.² Clearly, Plaintiffs’ counsel’s “certification” does not accurately portray undersigned counsel’s conduct. [See Exhibit “2”].

9. Finally, neither at deposition nor in their Response have Plaintiffs made a proffer as to areas of any additional inquiry. Mr. Conrad’s entire file was marked and attached as Exhibits. Plaintiffs’ request for fees and costs is based only on the anticipated travel time to West Palm Beach. Should this Court permit Plaintiffs to ask further, undisclosed questions, these Defendants will stipulate to having the deposition concluded telephonically. Undersigned counsel’s terminating of the deposition under these circumstances was justified under the Federal Rules. No costs or fees should be awarded because of Plaintiffs’ counsel’s improper questioning of Mr. Conrad.

¹ When Plaintiffs’ counsel violated the scope of the Order, Undersigned counsel was surprised and prejudiced, and at 7:15 p.m., there was no ability to call the Magistrate for an emergency hearing.

² [See DE 271-2, p. 5, lines 13-25; p.6, lines 3-20; p.8, lines 1-11; p. 8, lines 13-16; p.9-10, lines 13-25, lines 1-25; p.11, lines 1-12; p.11 (all); p. 12 (all)].

I HEREBY CERTIFY that on August 11, 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, 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.

WICKER, SMITH, O'HARA, MCCOY &
FORD, P.A.

Attorney for Howard K. Crompton and
Andrew L. Schmidt

2800 Ponce de Leon Boulevard
Suite 800

Coral Gables, FL 33134

Phone: (305) 448-3939

Fax: (305) 441-1745

By: /s/ Drew M. Levin

Frederick E. Hasty III

Florida Bar No. 260606

Drew M. Levin

Florida Bar No. 0048419

Service List

Ira H. Leesfield, Esquire
Leesfield & Partners, P.A.
2350 South Dixie Highway
Miami, FL 33133

Robert D. Peltz, Esquire
Leesfield & Partners, P.A.
2350 South Dixie Highway
Miami, FL 33133

William S. Reese, Esquire
Lane, Reese, Summers, Ennis & Perdomo
Douglas Centre, Suite 304
2600 Douglas Road
Coral Gables, FL 33134

Greg M. Gaebe, Esquire
Gaebe, Mullen, Antonelli, Esco & DiMatteo
420 South Dixie Highway, 3rd Floor
Coral Gables, FL 33146

William L. Summers, Esquire
Lane, Reese, Summers, Ennis & Perdomo
2600 Douglas Road, Suite 304
Coral Gables, FL 33134

Ubaldo J. Perez, Jr., Esquire
Law Office of Ubaldo J. Perez, Jr., P.A.
8181 N.W. 154 Street, Suite 210
Miami Lakes, FL 33016

Horace Clark, Esquire
U.S. Department of the Interior
Office of the Regional Solicitor
Southeast Region
75 Spring Street, S.W., Suite 304
Atlanta, GA 30303