IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO: 10-cv-22236-GOLD/GOODMAN

HOWARD ADELMAN et. al.,

Plaintiffs,

vs.

BOY SCOUTS OF AMERICA et. al.,

Defendants.

_____/

**NON-PARTIES' MOTION TO QUASH SUBPOENA AND, IN THE ALTERNATIVE, FOR PROTECTIVE ORDER AND INCORPORATED MEMORANDUM OF LAW**

Non-Parties, Verizon Wireless Personal Communications LP d/b/a Verizon Wireless ("Verizon Wireless") and Alltel Communications LLC d/b/a Alltel Wireless ("Alltel Wireless"), pursuant to Federal Rules of Civil Procedure 45(c)(3) and 26(c), respectfully request that this Court enter an order quashing six subpoenas that were transmitted by facsimile on September 8, 2011 to Verizon Wireless and Alltel Wireless in Bedminster, New Jersey. To the extent that the subpoenas are not quashed, Verizon Wireless and Alltel Wireless respectfully request that the Court enter a protective order with respect to the timing of the depositions, the locations of the depositions, and the time within which Verizon Wireless and Alltel Wireless may respond to the subpoenas, including the assertion applicable privileges and specific objections.

**INTRODUCTION**

On September 8, 2011, former counsel for Defendants Howard K. Crompton and Andrew Schmidt faxed six subpoenas to Verizon Wireless and Alltel Wireless in Bedminster, New

Jersey. The six subpoenas are attached hereto as Exhibits A-F.[1] Four of the subpoenas require Verizon Wireless and Alltel Wireless to produce 23 categories of historic documents from over two years ago and require Verizon Wireless and Alltel Wireless to designate witnesses to testify concerning 23 different topics of testimony – by September 19, 2011. *See* Exhibits A-D. Two of the subpoenas require the production of at least 18 categories of historic documents from over two years ago and require Verizon Wireless and Alltel Wireless to produce six witnesses to testify concerning over 18 different designated topics of testimony – by September 26, 2011. *See* Exhibits E-F. All of the subpoenas were sent to Verizon Wireless and Alltel Wireless in Bedminster, New Jersey, but require the production of documents and witnesses for deposition in Miami, Florida.

As a practical matter, Verizon Wireless and Alltel Wireless cannot review all of the records necessary to identify responsive documents and potential witnesses in the 6 to 12 business days allotted in the subpoenas duces tecum. Based upon an initial review of the subpoenas duces tecum, Verizon Wireless and Alltel Wireless anticipate that they will have to designate multiple corporate representatives from locations outside of the State of Florida to testify concerning all of the identified topics and that it will take approximately four weeks to identify responsive documents.

Undersigned counsel has conferred with counsel for Defendants about the timing of the subpoenas, the scope of the subpoenas, and the location of the depositions required under the subpoenas. Given the very short time line to comply with the subpoenas, the requirement under

[1] Exhibit A is a copy of a subpoena as received by Verizon Wireless on September 8, 2011 by facsimile. Exhibits B-F are copies of subpoenas provided to undersigned counsel via electronic mail on yesterday afternoon by former counsel for Defendants, Drew Levin, Esq.

Fed. R. Civ. P. 45 for a timely motion to quash, modify, and/or object to the subpoenas, and undersigned counsel's understanding that there is a fact discovery cut-off date of September 30, 2011 in this case, Verizon Wireless and Alltel Wireless file the motion now as a prophylactic measure while internal investigation and assessment of the subpoenas continue.

## ARGUMENT

I. The Subpoenas Should be Quashed Because They are Defective Under Fed. R. Civ. 45(c)(3).

First, the subpoenas are all defective because they were not properly served. Rule 45(b)(2) permits service of a subpoena "within the district of the issuing court." In this case, all of the subpoenas were issued by the U.S. District Court for the Southern District of Florida, but they were sent by facsimile to Verizon Wireless and Alltel Wireless in New Jersey. *See* Exhibit G (containing fax confirmation sheets provided to undersigned counsel by former counsel for Defendants, Drew Levin, Esq.). Even assuming that service by facsimile is permissible under Rule 45, none of the subpoenas were served properly "within the district of the issuing court" and should, therefore be quashed. [2]

Second, Rule 45(c)(3) provides that an issuing court must quash or modify a subpoena that (i) fails to allow a reasonable time to comply, (ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that persons resides, is employed, or regularly transacts business in person, or (iii) subjects a person to undue burden.

[2] In fact, delivery of a subpoena by facsimile is not proper service under Rule 45. "[S]ervice of a subpoena by facsimile does not satisfy Rule 45's requirement that the subpoena be 'delivered' to the subpoenaed person." *Johnson v. Petsmart, Inc.*, 2007 U.S. Dist. LEXIS 73567 *5 (M.D. Fla. 2007) (citing *Firefighters' Inst. For Racial Equal. v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000); *see also United States v. Sandoval*, 2010 U.S. Dist. LEXIS 78726 *6-*7 (S. D. Fla. 2010).

In this case, four of the six subpoenas were faxed on September 8, 2011 – just six business days before the scheduled deposition. Given the fact that Defendants require the production of 23 categories of historic documents, six business days is not a reasonable time to comply. Even compiling the over 18 categories of historic documents and designating the six-requested witnesses in the twelve days allotted by the remaining four subpoenas is not a reasonable time to comply with the subpoenas.

To determine whether many of the categories of historic documents responsive to any of the subpoenas are likely to exist, Verizon Wireless and Alltel Wireless must make an assessment of both active computer systems and inactive legacy computer systems across the country. This undertaking requires multiple persons located in different departments and different states to coordinate their efforts. Such an undertaking cannot be accomplished without undue burden in less than four weeks time depending on the categories of responsive documents identified as likely to still exist.

Finally, even though all of the subpoenas were faxed to Verizon Wireless and Alltel Wireless in New Jersey and the relevant custodians and "persons with most knowledge" requested to provide deposition testimony are in New Jersey (or elsewhere outside of the State of Florida), each of the subpoenas commands that the documents be produced and deponents appear in Miami, Florida – more than 100 miles from where the persons reside, are employed, or regularly transact business in person. Subpoenas requiring the testimony of witnesses located more than100 miles away are routinely quashed. *See, e.g., Isola Condo. Ass'n, Inc. v. QBE Ins. Corp.*, 2009 U.S. Dist. LEXIS 130752 *24 (S.D. Fla. 2009); *The Hartford Ins. Co. v. Bellsouth Tele-Communications, Inc.*, 2005 U.S. Dist. LEXIS 45884 *9-*10 (S.D. Fla. 2005); *Rifkin/Miami*

*Management Corp. v. Metropolitan Dade County*, 1998 U.S. Dist. LEXIS 8949 *3-*4 (N.D. Fla. 1998).[3]

Rule 45(c)(1) requires an attorney issuing a subpoena to take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena. Apparently, this was not done in this matter as the pending discovery cut-off must have been known to Defendants well before September 8. Requiring non-parties to identify 18 to 23 categories of historic documents and produce at least six witnesses and fly them around the country for depositions with notice of just 6 to 12 business days is an undue burden and expense.

For these reasons, all six of the subpoenas duces tecum faxed to Verizon Wireless and Alltel Wireless on September 8, 2011 should be quashed.

II. The Subpoenas Should be Quashed Because They Require the Production of Confidential Commercial Information.

In the event that the subpoenas are not quashed under the mandatory provisions of Fed. R. Civ. P. 45(c)(3)(A), they should be quashed or modified pursuant to Fed. R. Civ. P. 45(c)(3)(B) because they require the disclosure of a trade secrets and other confidential commercial information. Several of the categories of documents requested by Defendants explicitly require the production of confidential commercial information such as the number of cell towers, the radio frequency plans, and coverage information for Verizon Wireless and Alltel Wireless in a particular geographical location. *See* Exhibit A-D, Schedule "A" at (a), (b), (d), and (g); Exhibits E-F, Schedule "A" at (10), (12), (13). Other categories implicitly require the production of such information which require disclosure and identification of Verizon Wireless

[3] Attached hereto as Composite Exhibit H are copies of all of the unpublished decisions cited in this Motion in alphabetical order.

or Alltel Wireless cell towers and equipment. *See* Exhibit A-D, Schedule "A" at (c), (e), and (f)-(l). The number of cell towers, the radio frequency plans, and coverage information for Verizon Wireless and Alltel Wireless in a particular geographical location are highly confidential commercial information that Verizon Wireless and Alltel Wireless protect from public disclosure. This information derives independent economic value from not being generally known or ascertainable by proper means by persons who can obtain economic value from its disclosure or use. This information is the subject of reasonable, if not extensive, efforts to maintain its secrecy and therefore qualifies for protection from disclosure. *See* Fla. Stat. §688.002(4).

From a review of the Amended Complaint, it appears that the facts pertain to a very limited geographical area and a specific cell tower, identifiable by global positioning satellite coordinates. Defendant's need for Verizon Wireless's and Alltel Wireless's confidential business information appears minimal, particularly in light of the very limited geographical area apparently at issue. To this end, the wholesale invasion of Verizon Wireless's and Altell Wireless's confidential business information pertaining to over 700 miles from Florida to the Georgia state line is not warranted in this case – particularly as Verizon Wireless and Alltel Wireless are non-parties.[4] *See, e.g.,* Exhibit A-D, Schedule "A" at (d) (requiring production of radio frequency plans from Everglades, Florida to the Georgia state line).

[4] In the alternative to quashing or modifying the subpoenas, Verizon Wireless and Alltel Wireless request entry of a protective order requiring confidential documents to be filed under seal, limiting the parties who may view such documents, limiting their use to this case alone, and providing for their destruction at the end of this case.

III. In the Alternative, the Court Should Enter a Protective Order Allowing Adequate Time to Respond to the Subpoenas, Requiring Depositions to Take Place in the Geographic Location of the Witness, and Affording Verizon Wireless and Alltel Wireless Additional Time to Preserve Specific Objections and Assert Evidentiary Protections.

In the event that the subpoenas are not quashed, a Protective Order should be entered prohibiting Defendants from scheduling depositions of Verizon Wireless and Alltel Wireless before October 14, 2011. To determine whether many of the categories of historic documents responsive to any the subpoenas exist, and, if so, to then locate them, Verizon Wireless and Alltel Wireless must, among other things, assess active computer systems and inactive legacy computer systems located across the country. Persons located in different departments within the companies and in different states will necessarily have to coordinate their search in a good faith effort to respond to the subpoenas and to compile the responsive documents identified. Counsel for Verizon Wireless and Alltel Wireless must then review the responsive documents for privilege, confidentiality, and other evidentiary protections from disclosure. Verizon Wireless and Alltel Wireless do not anticipate that this undertaking can be accomplished in less than four weeks time depending on the categories of documents identified as likely to still exist.

Further, once responsive documents are identified it is highly likely that the persons with the most knowledge of the documents and the deposition topics identified in Defendants' subpoenas will be located in geographical areas over 100 miles away from the Southern District of Florida. Requiring Verizon Wireless, Alltel Wireless, and the individual deponents to undertake the expense of travel to the Southern District of Florida would be an undue burden on these non-parties, particularly when such depositions could be conducted in the state in which the deponents reside. *See, e.g., Isola Condo. Ass'n, Inc.*, 2009 U.S. Dist. LEXIS 130752 at *24;

*Hartford Ins. Co.*, 2005 U.S. Dist. LEXIS 45884 at *9-*10; *Rifkin/Miami Mgt. Corp.*, 1998 U.S. Dist. LEXIS 8949 at *3-*4.

Finally, Verizon Wireless and Alltel Wireless should be granted protection to preserve their ability to object specifically to certain requests and assert applicable evidentiary privileges after Verizon Wireless and Alltel Wireless have had a meaningful opportunity to determine whether certain categories of documents exist and privileges apply. A preliminary review of the subpoenas demonstrates that several requests are facially overbroad and unduly burdensome. For example, several requests require production (and related testimony) of "the RF plan for the areas that provide coverage for the Florida Trial in the Big Cypress National Preserve, in Everglades, Florida, through Florida to the Georgia State line." *See* Exhibit A-D, Schedule "A" at (d). In addition to requiring the production of confidential commercial information, requests such as these would require the production of RF plans covering what appears to be a 700-mile radius. This information cannot be material or relevant to the action which appears to concern a specific location in the Big Cypress National Preserve that can be identified with specificity by global positioning system coordinates or mile marker numbers.

Similarly, several requests appear to require Verizon Wireless and Alltel Wireless to create documents that do not otherwise exist – "a table shall be provided listing all towers, their gps locations, orientation and sectorization. The generic name of the tower, the FCC ID, the street address and technology employed for each tower will be listed in this table. The labels for the towers will correspond to the labels shown on the RF maps provided." Exhibit E-F, Schedule "A" at (13); *see also id.* at 10-12. It is axiomatic that in responding to a request for discovery, a party is not required "to create responsive materials, only to produce those in its

possession, custody or control." *Hart v. Lindgren-Pitman, Inc.*, 2008 U.S. Dist. LEXIS 114426 (S.D. Fla. 2008) (citing *Marchese v. Dep't of the Interior*, 2004 U.S. Dist. LEXIS 20680 (E.D. La. 2004)).

Given the professional tenor of preliminary communications between undersigned counsel and counsel for Defendants, undersigned counsel is confident that once Verizon Wireless and Alltel Wireless have had a meaningful opportunity to determine whether certain categories of documents exist and privileges apply, undersigned counsel and counsel for the Defendants should be able to meaningfully confer and resolve, or at least significantly narrow, any specific issues that might require resolution by the Court. In the event that the Court does not quash the subpoenas outright, Verizon Wireless and Alltel Wireless will need approximately four weeks to prepare its responses to the subpoenas.

## CONCLUSION

Based on the foregoing, Non-Parties Verizon Wireless and Alltel Wireless respectfully request that the Court quash the six subpoenas faxed on September 8, 2011 and, in the alternative, enter a protective order (i) prohibiting Defendants from scheduling any depositions before October 14, 2011, (ii) requiring Defendants to schedule any depositions within in the city and state of the residence of any individual designated to provide testimony pursuant to the subpoenas, (iii) prohibiting discovery of confidential commercial information, or otherwise privileged information, and (iv) preserving Verizon Wireless and Alltel Wireless's ability to specifically object to subpoena requests and move for additional protection after a meaningful opportunity to determine whether certain categories of documents exist and privileges apply.

## CERTIFICATION

Pursuant to Local Rule 7.1, I hereby certify that undersigned counsel has conferred with Counsel for Defendants – Drew Levin, Esq., Kevin Franz, Esq., and Eric Kleinman, Esq. – who issued the subpoenas and noticed the depositions at issue, in a good faith effort to resolve the issues raised in this Motion, and that the conference was partially-successful to the extent that the deposition noticed for September 19, 2011 has been cancelled. Given, however, the fact that the pending fact discovery cut off involves a court-set deadline, the parties were not able to resolve all of the issues with respect to the time required by Verizon Wireless and Alltel Wireless to respond to the subpoenas. Undersigned counsel attempted to confer with counsel for Plaintiffs by electronic mail on September 16, 2011 but has not been successful as of the filing of this Motion.

Dated: September 16, 2011

Respectfully submitted,

/s/ Robert J. Alwine
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY hereby certify that on September 16, 2011, the foregoing document was electronically filed with the Clerk of 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 in the attached Service List in the manner specified, either via transmissions 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 J. Alwine

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