**THE UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**Miami Division**

Howard Adelman and Judith Sclaway-Adelman,
as Co-Personal Representatives of
The Estate of Michael Sclawy-Adelman,

CASE NO. 1:10-cv-22236-ASG

Plaintiffs,

District Ct. Judge: Alan S. Gold

vs.

Boy Scouts of America, a Foreign Corporation; Magistrate Judge:
The South Florida Council Inc.,
Boy Scouts of America;
Plantation United Methodist Church;
Howard K. Crompton, individually; and
Andrew L. Schmidt, individually,

Defendants.
_____/

**DEFENDANT'S, SOUTH FLORIDA COUNCIL INC., BOY SCOUTS OF AMERICA, AMENDED MOTION TO DISMISS COUNTS VII AND VIII OR FOR A MORE DEFINITE STATEMENT AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW, Defendant, South Florida Council Inc., Boy Scouts of America, by and through its undersigned counsel, hereby files its Amended Motion to Dismiss Counts VII (paragraphs 64-69) and VIII (paragraphs 70-75) for failure to state a claim upon which relief can be granted pursuant Local Rules 7.1(a)(1) and 7.2, of the United States District Court for the Southern District of Florida and Federal Rules of Civil Procedure 8(a)(2), 12(b)(6) and 15(a)(1)(A),[1] or, in the alternative, for a More Definite Statement under Rule 12(e) and Incorporated Memorandum of Law and states more fully as follows:

[1] The Answer and Affirmative Defenses and Incorporated Motion to Dismiss filed by The South Florida Council Inc., Boy Scouts of America was served on July 1, 2010. Pursuant to Federal Rule of Civil Procedure 15(a)(1)(A), The South Florida Council Inc., Boy Scouts of America hereby amends its pleading once as a matter of course within 21 days after serving it.

1. This is a wrongful death/negligence action stemming from an incident that occurred on May 9, 2009, when Michael Sclawy-Adelman allegedly died of a heat stroke while taking part in a hike through The Florida Trial in the Big Cypress National Park of the Florida Everglades. *See* State Court Complaint attached as *Exhibit "A."*
2. Plaintiffs seek damages against South Florida Council under three theories: negligence, negligent selection and retention and negligent supervision.
3. The Counts for negligent selection and retention and for negligent supervision should be dismissed with prejudice; or in the alternative, Plaintiff should be required to provide a more definite statement.

## MEMORANDUM OF LAW

### I. STANDARD OF REVIEW

A Motion to Dismiss under Rule 12(b)(6) is proper when a plaintiff has failed to state a claim upon which relief may be granted. Williams v. Santana, slip op. 2010 WL 326053 at * 1 (S.D. Fla.); Fed.R.Civ.P. 12(b)(6). It is properly granted when "no construction of the factual allegations will support the cause of action." Marshall Cty. Bd. Of Educ. v. Marshall Cty. Gas Dist., 992 F.2d 1171, 1174 (11th Cir. 1993). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" Ashcroft v. Eqbal, 129 S.Ct. 1937, 1949, 173 L.ED.2d 868 (2009) (internal citations omitted).

## II. RELATIONSHIP BETWEEN THE SOUTH FLORIDA COUNCIL AND SCOUTMASTERS

Counts VII and VIII must be dismissed with prejudice, because a locally established council, such as the South Florida Council, has no responsibility for hiring, retaining, supervising or controlling local Scoutmasters. Thus, the claims against it for negligent selection, retention and supervision, fail as a matter of law.

As a matter of law**,** neither Boy Scouts of America nor The South Florida Council has the right or opportunity to control or direct a Scoutmaster's day-to-day conduct. *See* Glover v. Boy Scouts of America, 923 P.2d 1383, 1385-1388 (Utah 1996) ("the Boy Scouts of America and the [Local] Council act in a chartering and advisory capacity and do not retain the right to control day-to-day troop operations."); *see also* Wilson v. United States, 989 F.2d 953, 959 (8th Cir. 1993) (BSA lacked direct control over the specific activities of local Scouting units), *aff'g* Wilson v. Boy Scouts of America, 784 F. Supp. 1422, 1425-26 (E.D. Mo. 1991) (BSA "does not choose or directly supervise the scoutmaster or other volunteers at the troop level"); Wilson v. St. Louis Area Council, 845 S.W.2d at 570-72 (council had no right to control the activities of Troop leaders); Anderson v. Boy Scouts of America, 589 N.E.2d 892 (Ct.App.Ill. 1992) (finding that nothing in the Federal charter, bylaws, rules or regulations of the BSA impose any supervisory or controlling power over local charters by either the BSA or Local Council; local scouting units are autonomous in the operation of daily activities).

Without such responsibility, South Florida Council owes ***no selection, retention or supervision-related duty*** as a matter of law to the Plaintiffs in this case. *See* Pycsa Panama, S.A. v. Tensar Earth Technologies, Inc., 625 F.Supp.2d 1198, 1254 (S.D.Fla. 2008) (holding that negligent hiring and negligent supervision claims failed as a matter of law, due to lack of employment relationship). Similarly, there is no employment relationship between South Florida Council and Howard K. Crompton or Andrew L. Schmidt. As such, Counts VII and VIII must be dismissed against The South Florida Council with prejudice for failure to state a cause of action.

## III. COUNT VII (NEGLIGENT SELECTION AND RETENTION OF SCOUTMASTERS)

Notwithstanding the uniform nation-wide case law stating that a council has no authority to select, hire or supervise Scoutmasters, Plaintiffs fail to properly plead causes of action under Counts VII and VIII, which must be dismissed.

To state a cause of action for **negligent selection/hiring**, the Plaintiff must allege facts sufficient to show that: "(1) the employer was required to make an appropriate investigation of the employee and failed to do so; (2) an appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and (3) it was unreasonable for the employer to hire the employee in light of the information he or she knew or should have known." Malicki v. Doe, 814 So.2d 347, 362 (Fla. 2002); *see also* Pycsa Panama, S.A. v. Tensar Earth Technologies, Inc., 625 F.Supp.2d 1198, 1254 (S.D.Fla. 2008).

Count VII fails to state a cause of action for negligent selection/hiring against The South Florida Council, because it does not allege that The South Florida Council was required to investigate Howard K. Crompton or Andrew L. Schmidt before they allegedly were appointed/retained as Scoutmasters by South Florida Council. It further fails to plead that any investigation of those two individuals would have revealed some sort of unsuitability for a particular duty to be performed for appointment as Scoutmasters in general. Finally, there is no allegation that it was unreasonable for The South Florida Council Inc. Boy Scouts of America to allegedly appoint Howard K. Crompton and/or Andrew L. Schmidt in light of any information that was known or should have been known.

To state a cause of action for **negligent retention**, the Plaintiff must allege facts sufficient to show that – *during the course of employment* – an employer became aware or should have become aware of problems with an employee that indicated his unfitness, and the employer failed to investigate or take corrective action such as discharge or reassignment. Garcia v. Duffy, 492 So.2d 435, 438-439 (Fla. 2d DCA 1986); *See* Malicki at 362 (finding that the distinction between negligent hiring and

retention concerns the time at which the employer is charged with knowledge of the employee's unfitness).

Count VII fails to state a cause of action for negligent retention against The South Florida Council Inc. Boy Scouts of America, because it does not allege any problems with Howard K. Crompton or Andrew L. Schmidt that arose *during* their appointment/employment as Scoutmasters. It does not allege that The South Florida Council Inc. Boy Scouts of America became aware or should have become aware of the Scoutmasters' alleged unfitness for the job. Furthermore, the Count fails to allege that The South Florida Council Inc. (after notice) failed to investigate the Scoutmasters' unfitness or take corrective action such as discharge.

Therefore, Count VII fails to plead facts sufficient to state a cause of action for negligent selection and retention of scoutmasters and should be dismissed.

## IV. COUNT VIII (NEGLIGENT SUPERVISION)

To state a cause of action for **negligent supervision**, the plaintiff must plead that, "during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further actions such as investigation, discharge, or reassignment." Dept. of Environ. Protection v. Hardy, 907 So.2d 655, 660 (Fla. 5th DCA 2005). "The Plaintiff must allege facts sufficient to show that once an employer received actual or constructive notice of the problems with the employee's fitness, it was unreasonable for the employer not to investigate or take corrective action." Id.

Count VIII does not allege that The South Florida Council Inc. became aware or should have become aware of any problems associated with Howard K. Crompton or Andrew L. Schmidt that indicated their unfitness. Nor does it allege that The South Florida Council Inc. (after notice) failed to take further actions including investigation, discharge or reassignment. Thus, Count VIII fails to state a cause of action for negligent supervision and should be dismissed.

## V. MOTION FOR MORE DEFINITE STATEMENT (ALTERNATIVE REQUEST)

In the alternative, Defendant requests that this Court order Plaintiffs to provide a more definite statement as to Counts VII and VIII under Federal Rule of Civil Procedure 12(e). "The function of a motion for a more definite statement is to require that a vague, indefinite, or ambiguous pleading be so amended as to enable the party required to respond thereto to intelligently discern the issues to be litigated and to properly frame his answer or reply." Conklin v. Boyd, 189 So.2d 401, 403-404 (Fla. 1st DCA 1966); Barnett v. Bailey, 956 F.2d. 1036, 1042 (11th Cir. 1992). Counts VII and VIII are so vague and ambiguous that the Defendant cannot reasonably be required to respond thereto. *See* Fed.R.Civ.P. 12(e). Those counts are vague and ambiguous in that they do not state what if any "unfitness" was exhibited by Howard K. Crompton or Andrew L. Schmidt and do not explain how The South Florida Council Inc. Boy Scouts of America knew or should have known of such alleged unfitness.

WHEREFORE, Defendant, The South Florida Council, Inc. Boy Scouts of America, respectfully requests that this Honorable Court dismiss Count VII and Count VIII, or in the alternative, require Plaintiffs to provide a more definite statement, and award such other relief as this Court deems necessary and just.

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## CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed July 13, 2010 to: Mark A. Sylvester, Esq., LEESFIELD & PARTNERS, P.A., 2350 South Dixie Highway, Miami, FL, 33133; Frederick E. Hasty, Esquire, Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., Grove Plaza Building, 5th floor, 2900 Middle Street, Miami, FL, 33133.

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