DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS & ST. JOHN

FLORA NICHOLAS and PAUL GAYTER, in their own right and as next friend of S.G., **Plaintiffs,** **v.** **WYNDHAM INTERNATIONAL, INC., WYNDHAM MANAGEMENT CORP., SUGAR BAY CLUB and RESORT, CORP., RICK BLYTH and BRYAN HORNBY,** **Defendants**	**CIVIL NO. 2001/147-M/R**

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ORDER ON PLAINTIFFS' MOTION FOR ENFORCEMENT OF THE COURT'S SCHEDULING ORDER

THIS MATTER came for consideration on Plaintiff's Motion for Enforcement of the Court's Scheduling Order. Hornby filed opposition to the motion. The Wyndham Defendants did not file opposition. Plaintiffs replied to Hornby's opposition.

Plaintiffs seek to prohibit Defendants from issuing subpoenas to third parties for purpose of conducting additional fact discovery beyond the court ordered deadlines. Plaintiffs cite Hornby's continuing subpoenas to third parties such as Emelia Distanto and Inova Fairfax Hospital for documents and

depositions, and complain that Hornby "is attempting to now obtain through one means, Rule 45, what he has been precluded from obtaining through another, the expired discovery schedule." Plaintiffs request that the Court affirm that Rule 45 subpoenas are discovery devices and that Rule 45 subpoenas issued by Defendants at this stage of litigation are in contravention of the factual discovery deadline set by the Court's Scheduling Order.

In opposition to the motion, Hornby recites that he issued a subpoena *duces tecum* to Emila Disanto dated February 25, 2003 but was unable to timely serve such subpoena because of inability to locate Ms. Disanto. Hornby also notes that the parties agreed to extend discovery upon health care providers beyond the February 28, 2003 discovery deadline (Ex. "C" to Hornby's opposition). Hornby asserts that such agreement is further evidenced by the Court ordering the parties to complete all medical non-psychological witness depositions by October 31, 2003.[1] (Order dated August 28, 2003, ex. "D" to Hornby's opposition). Hornby correctly notes that at the July 23, 2003 conference, I stated that a party may issue a subpoena *duces tecum* to a third party at

1. That Order was directed to <u>depositions</u> of such witnesses and was not intended to sanction further subpoenas for collection of factual discovery.

any time irrespective of the discovery schedule (ex. "E" to Hornby's opposition). Hornby argues that issuance of subpoenas on non-parties is appropriate at any time.

I have previously ruled that subpoenas propounded by a party to other persons or entities which require no action or exertion by the other party are outside of mainstream discovery [see *e.g. Perez v. Sphere Drake*, St.X Civ. No. 2001/11, Order dated July 15, 2003, relying on *O'Boyle v. Jensen*, 150 F.R.D. 519, 420 (M.D.Pa. 1993)]. Consistent with such position, I stated on the record at the July 23, 2003 hearing that Hornby may proceed with sending subpoenas to third parties. I later expressed my misgiving with regard to the correctness of such position at the August 27, 2003 conference (see Order dated August 27, 2003, ftn. 3) and commented on the likely success of this motion in the Order dated September 3, 2003.

In *O'Boyle*, 150 F.R.D. at 520, the Court held without discussion or cited precedent that the Court's discovery deadline did not preclude parties from gathering additional information through independent lines of inquiry not directed to, or requiring participation of the other side (*i.e.* subpoenas). A more thorough analysis of such issue is found at *Mortgage Information Service, Inc. v. Kitchens et al.*, 210 F.R.D. 562, 566

(W.D.N.C. 2002) wherein the Court adopted the rule followed by the majority of jurisdictions that a Rule 45 subpoena does in fact constitute discovery (citing *Dreyer v. GACS, Inc*., 204 F.R.D. 120, 122 (N.D.Ind. 2001); *Integra Lifescience v. Merck KGaA*, 190 F.R.D. 556, 561 (S.D.Cal. 1999); *Marvin Lumber and Cedar Co. v. PPG Indus. Inc*. 177 F.R.D. 443, 444 (D.Minn. 1997); *Rice v. U.S.*, 164 F.R.D. 556, 557 (N.D.Okla. 1995); 7 MOORE'S FEDERAL PRACTICE § 34.03[2][a]. As stated in *Dreyer*, 204 F.R.D. at 123:

> In short, Rule 45 subpoenas, which are intended to secure the pretrial production of documents and things, are encompassed within the definition of 'discovery' as enunciated in Rule 26(a)(5) and, therefore, are subject to the same time constraints that apply to all of the other methods of formal discovery...[to] allow a party to continue with formal discovery...that is, discovery which invokes the authority of the court...whether in guise of Rule 45, or any of the other discovery methods recognized by Rule 26(a)(5), after the discovery deadline unnecessarily lengthens [the] discovery process, and diverts the parties' attention from the post-discovery aspects of preparing a case for trial... [internal citations omitted].

See also *Leach v. Quality Health Services, Inc.*, 162 F.R.D. 40, 42 (E.D.Pa. 1995); *Puritan Inv. Corp. v. ASLL Corp. et al.*, 1997 WL 793569 *1-2 (E.D.Pa. 1997); *Grant v. Otis Elevator Co.,* 199 F.R.D. 673, 675 (N.D. Okl. 2001); *Marvin Lumber & Cedar Co. v. PPG Indust., Inc*. 177 F.R.D. 443, 444 (D.Minn. 1997).

Upon consideration of all such authority, I find that my previous written and spoken position was in error and adopt the clear majority position that use of Rule 45 subpoenas constitutes discovery and is thus governed by the temporal restraints of the previous case Scheduling Orders.

Accordingly and upon consideration of all pleadings and exhibits herein, it is hereby;

ORDERED as follows:

1. Hornby may proceed with his subpoena *duces tecum* to Emilia Disanto.
2. Hornby may proceed with his subpoena *duces tecum* issued July 23, 2003 to the record custodian of Inova Fairfax Hospital.
3. All parties herein may not issue any further subpoenas for any discovery matter.[2]
4. Any failure of Hornby to acquire any documents sought by the subpoenas described in number 1 and 2 above shall not constitute grounds for continuance of any

2. The Wyndham Defendants' Motion for Leave to serve subpoena upon Green Hedges School will be dealt with by separate Order.

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dates provided in the Scheduling Order dated August 27, 2003 (as amended September 3, 2003).

ENTER:

Dated: October 1, 2003 _____/s/_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By:_____
Deputy Clerk