

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

Flora Nicholas and Paul Gayter, in )  
their own right and as next friend )  
of S.G., ) Civ. No. 2001-147 MR  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
Wyndham International Inc., Wyndham )  
Management Corporation, Sugar Bay )  
Club & Resort Corporation, Rick )  
Blyth and Bryan Hornby, )  
 )  
Defendants. )  
 )  
\_\_\_\_\_ )

**ATTORNEYS:**

**Daryl C. Barnes, Esq.**  
St. Croix, U.S.V.I.  
**Joseph Petrosinelli, Esq.**  
Washington, D.C.  
*For the plaintiffs,*

**Douglas C. Beach, Esq.**  
St. Thomas, U.S.V.I.  
*For defendants Wyndham International Inc., Wyndham  
Management Corp., Sugar Bay Club & Resort Corp., and  
Rick Blyth,*

**John A. Zebedee, Esq.**  
St. Thomas, U.S.V.I.  
*For defendant Bryan Hornby.*

**ORDER**

Moore, J.

Defendant Bryan Hornby has filed a motion requesting that I sanction the plaintiffs or, alternatively, reconsider the scope of this Court's previously ordered independent psychological examinations. The defendant's motion was filed in response to the failed attempt to complete psychological examinations on January 24-26, 2004. After reviewing the briefs submitted by the defendant in support of his motion, as well as the plaintiffs' opposition brief, I will once again order the parties to complete psychological examinations, but with adjustments to the format and location of the examinations.

The unnecessary events of January 24, 2004 require these adjustments, for which I find both parties share the blame, as evidenced by the drastically conflicting facts recited by each side. Whichever version is most accurate, it is clear that this Court must more closely oversee the psychological examination process to insure it proceeds according to civilized norms and to protect the rights of all parties. Although I believe that the sanctions sought by defendant are premature, my order rescheduling the psychological examinations will incorporate certain adjustments to allow the Court to more closely monitor

the behavior of both sides.

First, the psychological examinations shall take place at the Ron Delugo Federal Building and United States Courthouse on St. Thomas between May 17, 2004 and May 28, 2004. If the parties cannot agree on specific dates within these two weeks, I will select the dates for them. A room at the courthouse will be designated as the examination room. A separate room will be designated as a waiting room for Flora Nicholas, Paul Gayter, S.G., and Andrew Gayter, as well as their counsel. If any member of the plaintiffs' family elects to stay at the courthouse before or after their examination sessions and while their other family members are being examined, he or she will be required to remain in this waiting room while not being examined. A third room will be designated for use by the defendant's counsel. While within the courthouse, the litigants shall not use their cellular phones.

Second, the demonstrated level of mutual distrust and hostility between the parties requires the presence of a neutral observer to oversee the psychological examinations. The observer shall remain immediately outside the testing room and work with both sides to facilitate the timely and orderly completion of the psychological examinations. Below I set forth a procedure to allow the parties to jointly select such a neutral observer. If

they are unable to do so, I will select one for them. Any questions or problems that arise during the examination session first shall be addressed to the observer.

Third, to further facilitate this Court's oversight of the parties, all of the examinations shall be videotaped. While the main purpose is to allow the Court to observe any behavior during the examinations to which either side may object, it will also allow whichever of the defendants' experts that is not in the room during the examination to observe it in lieu of the two-way mirror option provided in the original order. Without further order of this Court, no copies of the video recordings will be made, the originals will be kept in the Court's custody, and the tapes will not be made public or released to the parties. The parties shall evenly split the cost for both the video recording and for the neutral observer.

Fourth, the defendant's experts may administer the written psychological test without time restraints. In their briefs, the plaintiffs noted that their "unfamiliarity and 'comfort level'" with these tests slowed their response time.<sup>1</sup> Because the plaintiffs admittedly have difficulty finishing these tests under time restraints, they will be allowed to proceed at their own pace until they complete each question, however long it takes to

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<sup>1</sup> Plt.'s Opp'n at 11.

complete the written examinations. After all the written tests are complete, the defendant's experts will have a total of thirteen hours to perform their examinations. As before, the thirteen hours shall be divided in the following manner: six hours total with both parents, five hours total with S.G., and two hours total with Andrew Gayter.<sup>2</sup>

Accordingly, it is hereby

**ORDERED** that the parties shall have fifteen (15) days from the date of this order to agree upon a neutral third-party to observe the conduct of all parties during the examinations. As soon as the parties have agreed to an observer, they shall independently file with the Court notices that such an agreement has been reached. If, after fifteen days, the parties have not reached such an agreement for whatever reason, I will appoint an observer. The parties shall evenly split the cost of the observer at his or her ordinary and reasonable rates; it is further

**ORDERED** that the parties shall arrange for all of the psychological examinations, including the written exams, to be video recorded. The recording equipment shall be in place before the start of the examinations each morning and will allow for one

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<sup>2</sup> As discussed below, the plaintiffs retain the option not to have Andrew undergo examination if they agree to refrain from presenting any evidence or expert opinion regarding Andrew at trial.

of the defendants' experts to observe the examinations as they take place. The main purpose of recording the examinations is for the Court's review should a dispute arise over a participant's behavior. Without further order of this Court, no copies of the video recordings will be made, the originals will be kept in the Court's custody, and the tapes will not be made public or released to the parties. The parties shall evenly split the cost of recording the examination sessions; it is further

**ORDERED** that the psychological examinations shall take place at the Ron Delugo Federal Building and United States Courthouse on St. Thomas between May 17, 2004 and May 28, 2004. If, within fifteen (15) days from the date of this order, the parties have not agreed on and notified the court of specific dates for the examinations within this two weeks, I will set specific days for the examinations. On each day of the examinations, all parties involved shall arrive at courthouse at 9:00 a.m.; it is further

**ORDERED** that, if the plaintiffs or Andrew Gayter elect to stay in the courthouse while one of their family members is undergoing testing, they shall remain in a designated waiting room and shall not disturb the ongoing tests. The observer shall remain immediately outside the testing room and work with both sides to facilitate the timely and orderly completion of the

psychological examinations and shall report any problems to the Court as necessary; it is further

**ORDERED** that the litigants shall not use cellular phones while in the courthouse and that any questions or issues should be brought to the attention of the observer; it is further

**ORDERED** that both of the defendants' experts may not be present at the same time in the examination room during the examinations. Whichever expert is not present may observe the examination sessions through a video remote, but may not retain a copy of any recordings of examinations; it is further

**ORDERED** that the defendant's experts will have unlimited time to administer written tests to the plaintiffs and to Andrew Gayter. The defendants are ordered to follow the instructions as set forth in the testing materials and to make a good faith effort to complete the tests. The defendants may complete tests at their own pace without undue interference from the defendant's expert, but their obligation to participate in this stage of the discovery process will not be satisfied until they have in good faith completed each question; it is further

**ORDERED** that after the plaintiffs and Andrew Gayter have completed the written testing phase, the defendant's experts shall have a total of thirteen hours (13) to complete their psychological examinations. The thirteen hours shall be

distributed in the following manner: six hours total with both parents, five hours total with S.G., and two hours total with Andrew Gayter. The plaintiffs retain the option not to produce Andrew Gayter for these examinations, but, if he does not participate, the plaintiffs shall be barred at trial from presenting any testimony, evidence or expert opinion referring to Andrew's emotional damages or damages to his relationship with S.G. or to the parent plaintiffs; and it is further

**ORDERED** that the attorneys for the defendant and for the plaintiffs shall fully explain the contents of this order to, respectively, their psychological experts and the plaintiffs. The plaintiffs and the defendant's experts will be expected to understand and follow the procedures outlined herein; it is further

**ORDERED** that Hornby's expert reports shall be provided by June 21, 2004. Upon notification as provided at paragraph 7 of the Court's August 27, 2003 order, the Clerk of the Court shall then distribute the Wyndham defendants' medical/psychological experts' reports which have been previously filed under seal; it is further

**ORDERED** that all psychological expert witness depositions shall be completed by August 5, 2004; it is further

**ORDERED** that, other than motions *in limine*, all motions

including *Daubert* motions will be filed by October 20, 2004. Dispositive motions must only be served as provided in Rule 56.1 of the Local Rules of Civil Procedure ["LRCi"] by October 20, 2004. All motions *in limine* must be filed at least twenty-one (21) days before the Monday of jury selection week, with any responses due within (5) days of service thereof and any reply within three (3) days of service of the response; it is further

**ORDERED** that the plaintiff will complete and deliver to the defendants' attorneys their Joint Final Pretrial Order in accordance with LRCi 16.1 App. 1 by November 12, 2004. The defendants will complete their portion and prepare and file the final form by November 26, 2004. The Court will enforce LRCi 16.1(c)(1) regarding amendments to the final pretrial order; it is further

**ORDERED** a status conference will be held at the St. Corix Magistrate Judge's chambers on July 6, 2004, at 2:00 p.m.; it is further

**ORDERED** a final pretrial conference is scheduled at the St. Croix Magistrate Judge's chambers on November 29, 2004 at 11:00 a.m.; it is further

**ORDERED** that trial will be scheduled in St. Thomas during the December, 2004 or January, 2005 trial periods. A precise trial date will be set at a future calendar call. This date may

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be continued if there are pending dispositive motions or if his calendar is otherwise encumbered. The parties shall adhere to all dates listed above unless otherwise notified by the Court.

**ENTERED this 29th day of March, 2004.**

**For the Court**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**WILFREDO MORALES**  
**Clerk of the Court**

**By: \_\_\_\_\_/s/\_\_\_\_\_**  
**Deputy Clerk**

**Copies to:**  
St. Croix Magistrate Judge  
Daryl Barnes, Esq.  
Joseph Petrosinelli, Esq.  
Douglas C. Beach, Esq.  
John A. Zebedee, Esq.  
Mrs. Jackson  
Jeffrey Corey