DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

LARRY NYFIELD, **Plaintiff,** **v.** **VIRGIN ISLANDS TELEPHONE CORP., ST. CROIX CABLE TV, INC., INNOVATIVE COMMUNICATION CORP., and JEFFREY PROSSER,** **Defendants**	**CIVIL NO. 1999/202**

TO: Mary Faith Carpenter, Esq.
Kevin Rames, Esq.

ORDER ON DEFENDANT INNOVATIVE COMMUNICATION CORP.'S MOTION FOR EXAMINATION OF PLAINTIFF

THIS MATTER came for consideration on motion of Defendant Innovative Communication Corporation (ICC) for examination of the Plaintiff. Plaintiff filed opposition to the motion and ICC replied to such opposition. Plaintiff was allowed to file a sur-reply and affidavit of Andre Hector.

ICC seeks an order for "physical and mental examinations of Plaintiff" by Dr. Olaf Hendricks a practicing psychiatrist. Plaintiff's objections to such motion are as follows:

1. Dr. Hendicks is currently employed as an expert witness and a treating physician for Andre Hector who has pending litigation (for employment discrimination) against the same Defendants as herein. Plaintiff

asserts that "Hector has conveyed confidences about his employment, Prosser and ICC and his knowledge of their policies and procedures that makes it a breach of ethics for Dr. Hendricks to now attempt to act at the same time as an expert for the Defendants in this case."

2. Dr. Hendricks practices psychiatry and is not qualified to do physical examinations or express opinions as to physical injuries.
3. Defendants have not complied with Fed. R. Civ. p. 35 regarding the scope of the intended examination.
4. Defendants are not entitled to such examination because they have not shown that Plaintiff's mental condition is in controversy.

In its reply, ICC argues that there is no conflict involved and that Plaintiff has placed his emotional state in issue by seeking damages for "mental anguish, loss of enjoyment of life, humiliation, embarrassment, loss of reputation and related claims." ICC did not respond to Plaintiff's misgivings concerning Dr. Hendricks' ability to perform a physical examination and the scope of the proposed examination.

I. Mental Condition at Issue

Plaintiff's Complaint includes allegations in Count I that Plaintiff..."has suffered mental anguish, pain, and suffering and loss of enjoyment of life, all of which are expected to continue into the foreseeable future." The same allegations and "loss of reputation" are included in the damages alleged in Count II. Counts III and IV allege that Plaintiff has been damaged "as set out herein" and "as alleged herein." Fed. R. Civ. P. 35(a) provides as follows:

> **(a) Order for Examination.** When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed ro certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or person s by whom it is to be made.

"Rule 35 therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the

Rule's requirements of 'in controversy' and 'good cause'... Of course there are situations where the pleadings alone are sufficient to meet these requirements. A Plaintiff in a negligence action who asserts mental or physical injury...places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury." *Schlagenhauf v. Holder*, 379 U.S. 104, 118-119, 85 S.Ct. 234, 243 (1964). See also: *Ragge v. MCA Universal Studios*, 165 F.R.D. 605, 608 (C.D. Cal. 1995); *Jansen v. Packaging Corp. of America*, 158 F.R.D. 409, 410 (N.D.Ill. 1994); *Hirshheimer v. Associated Metals & Minerals Corp*. 1995 WL 736901 *2 (S.D.N.Y.).

If past is prologue, Plaintiff's able attorneys will leave no potential field of damages unplowed and will assert Plaintiff's claim for mental anguish. To the extent Plaintiff declares otherwise, this Order will provide appropriately.

II. Physical Condition at Issue

Plaintiff has made no claim for physical injury and absent specific claim therefor, it is presumed that Plaintiff's "pain and suffering" is emotional and mental in derivation. In any event, Defendants have not defended their need for physical examination and Dr.

Hendrick's qualifications with regard thereto need not be considered.

III. Dr. Hendricks' Conflict of Interest

The claims of Plaintiff herein are remote from those of Andre Hector. *Hector v. ICC* involves the discharge of a security officer and Plaintiff was in an advertising position with a different subsidiary. There is no requirement that a Rule 35 examination be conducted by a physician wholly unconnected with either party and absent evidence of bias, Defendants should be allowed their chosen examiner. *Powell v. United States*, 149 F.R.D. 122, 124 (E.D. Va. 1993).

The purportedly confidential matters discussed by Andre Hector with Dr. Hendricks as referred to in Hector's affidavit are in any event largely subject to discovery. Whether or not Dr. Hendricks would be in violation of Rules 5.02 or 1.17(a) of the APA Ethics Code is a matter better considered by Dr. Hendricks and that organization than by this Court.

IV. Scope of Examination

Rule 35(a) contemplates the imposition of conditions upon an examination. "An order to compel examination

furthermore 'shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made'... Parties seeking a court ordered mental or physical examination should provide the necessary details...

The failure to provide all particulars about the examination does not necessitate denial of a motion for examination... The court may sustain the motion but 'leave the specifics to be worked out by the parties'... It may order the examination 'subject to further motion and order which shall specify those details'... It may also sustain the motion, subject to agreement of the parties on the particulars of the examinations... If they cannot agree, the Court may resolve the procedure upon further motion of the parties...Deferring this task to the parties permits them to better accommodate each other's interests, as well as the availability of the physician and the party to be examined." *Hertenstein v. Kimberly Home Health Care, Inc.*, 189 F.R.D. 620, 623 (D. Kan. 1999).

In this matter, ICC has specified Dr. Hendricks as the examiner, has designated a time and place and has

stated that "The scope of the examinations be all physical and mental injuries alleged by Plaintiff, as well as pre-existing physical or mental conditions." Such scope is over broad.

Upon consideration of the above, it is hereby;

ORDERED as follows:

1. If Plaintiff shall stipulate that he will not assert any claim for mental anguish and will not present testimony and/or expert witness testimony in such regard, ICC's motion is DENIED.[1] If Plaintiff does not so stipulate, the following provisions shall apply.
2. ICC may have Dr. Hendricks conduct an appropriate mental examination of Plaintiff. The parties shall cooperate in scheduling thereof.
3. Except to the extent any physical examination is an inherent part of such standard mental examination, ICC may not examine Plaintiff's physical condition.
4. The scope of such examination shall be limited to procedures and testing relevant to Plaintiff's assertion that his damages include mental anguish, pain and

1. See *e.g. Hardy v. Essroc Materials, Inc.* 1998 WL 103306 *1 (E.D. Pa.)

suffering, and loss of enjoyment of life including future damage therefrom. ICC's notice of such examination shall include the time, place, and intended duration thereof as well as an outline of the type of testing to be done. ICC shall promptly provide Plaintiff with a report of such examination [Rule 35(b)].

ENTER:

Dated: April 17, 2001

_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
WILFREDO MORALES
Clerk of Court

By:_____
Deputy Clerk