

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

GO FAST CHARTERS LLC,	)	
	)	
Plaintiff,	)	CASE NO. ST-10-CV-672
	)	
v.	)	
	)	
TEXACO CARIBBEAN, INC. and	)	JURY TRIAL DEMANDED
WILLIAM McCOMB, P.E.,	)	
	)	
Defendants.	)	
_____	)	

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION
(Filed: July 31, 2015)

Presently before the Court are the "Motion for a Protective Order" and the "Motion to Quash Subpoenas Issued at Plaintiff's Request and For Expedited, Interim Relief" filed by Defendant Texaco Caribbean, Inc. ("Defendant").¹ Plaintiff Go Fast Charters, LLC ("Plaintiff") responded to both motions, and Defendant filed replies to Plaintiff's responses. After reviewing the parties' submissions, and for the reasons set out below, the Court will grant the Motion for a Protective Order, and deny the Motion to Quash Subpoenas Issued at Plaintiff's Request and For Expedited, Interim Relief.

¹ William McComb, P.E. was dismissed from this action by Order dated August 27, 2012, pursuant to a stipulation between said party and Plaintiff. Texaco Caribbean, Inc. is the sole remaining defendant in this action.

I. Motion for Protective Order.²

Defendant seeks a protective order to relieve it from the duty of responding to Plaintiff's First Set of Requests for Admission, dated April 3, 2015. In support of its motion, Defendant argues that the court-approved deadline to complete written discovery was January 1, 2014, and Plaintiff's service of 173 requests for admissions thereafter was untimely, unreasonable, and unduly burdensome. In response, Plaintiff requests that this Court deny Defendant's motion, arguing that a protective order is permissible only if good cause is shown, and that its requests for admissions are timely and not unduly burdensome. Additionally, Plaintiff argues that Defendant ignores increasing authority holding that requests for admissions are not a general discovery device subject to the usual deadlines for written discovery, and cites to several cases for this proposition. Defendant replies with citations to another group of cases which hold that requests for admissions are governed by written discovery deadlines set forth in pretrial orders.³ In order to grant the relief Defendant requests, this Court must first find that good cause has been shown.⁴ The finding that good cause does or does not exist is committed to the sound discretion of the trial court.⁵

The Court's Order dated May 21, 2013, approved the parties' joint motion to amend the previous scheduling order, and incorporated the dates and terms therein. In pertinent part, the motion stated that "all fact discovery, including written discovery and depositions of fact witnesses shall be completed on or before January 1, 2014 [and] Go Fast shall serve responses to Request for Production of Documents propounded on November 9, 2011 no later than May 1, 2013." On April 23, 2015, well after the close of fact discovery, Plaintiff served Defendant with its requests for admissions. Notwithstanding the aforesaid deadline, Plaintiff argues that requests for admissions are not a general discovery device subject to the fact discovery deadline in the Order, and, therefore, were properly served on Defendant.

The parties' disagreement raises an issue which is the subject of dispute among federal courts around the United States regarding Rule 36 of the Federal Rules of Civil Procedure, which governing requests for admissions. On one hand, Plaintiff suggests that this Court should follow the line of cases which hold requests for admissions are not the usual discovery.⁶ These cases note that the purpose of request for admissions is "to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be."⁷ On the other hand, many other cases have held that requests for admissions are a form of written

² Defendant avers there was an attempt to resolve this discovery dispute, and a certificate to this effect, executed by both counsel, was filed with the motion. Therefore, the requirements of FED. R. CIV. P. 26(c)(1) and LRCi 37.1 and 37.2 have been met for this motion.

³ The discovery process in civil litigation before the Superior Court is governed by Rules 26 through 37 of the Federal Rules of Civil Procedure and Rules 37.1 and 37.2 of the Local Rules of Civil Procedure. SUPER. CT. R. 7, 39(a).

⁴ FED. R. CIV. P. 26(c)(1).

⁵ *E.g., Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992).

⁶ *See, e.g., Thomas v. Schroer*, 2:13-CV-02987-JPM-cgc, 2015 U.S. Dist. LEXIS 85908 (W.D. Tenn. July 1, 2015); *O'Neill v. Medad*, 166 F.R.D. 19 (E.D. Mich. 1996); *Hurt v. Coyne Cylinder Co.*, 124 F.R.D. 614 (W.D. Tenn. 1989).

⁷ *Thomas v. Schroer*, 2015 U.S. Dist. LEXIS 85908 at * 2-3 (citations and quotation marks omitted).

discovery and subject to the deadlines contained in pretrial discovery orders.⁸ The basis for this train of thought is "...that the structure and purpose of the federal rules suggest that requests for admission are discovery subject to the discovery deadlines."⁹

After reviewing the cases, the discovery rules, and the committee notes thereto, I conclude that requests for admissions are a class of fact discovery which are subject to the deadlines of pretrial discovery orders. There are several reasons for this decision. The Federal Rules of Civil Procedure are sub-divided into eleven parts, each of which group together provisions covering a procedural area of civil litigation. Rule 36 is placed in the midst of the set of rules titled "Disclosures and Discovery." In addition, the rationale used by the cases supporting Plaintiff's argument is found in the Advisory Committee Notes for the 1970 Amendments to Rule 36. The first paragraph of those Notes provides, in full,

Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rule are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, **the procedural operation of the rule is brought into line with other discovery procedures**, and the binding effect of an admission is clarified.¹⁰

By noting that one purpose of the 1970 amendments was to harmonize the procedural aspects of Rule 36 with *other discovery rules*, the Advisory Committee made clear that requests for admission, though somewhat different from interrogatories and requests for production of documents, are still a variety of written fact discovery.

Further, Rule 26 of the Federal Rules of Civil Procedure expressly treats requests for admissions in the same fashion as other discovery methods. As with interrogatories, a trial court may place restrictions on the number of requests for admissions, as it can for depositions and interrogatories.¹¹ Also, a party has the same obligation to supplement responses to requests for admissions it has to supplement answers to requests for production of documents and interrogatories.¹² Taken together, the foregoing strongly supports the conclusion sought by Defendant – that requests for admissions are a form of written fact discovery and subject to the same court-ordered deadlines governing other types of fact discovery.

⁸ See, e.g., *United States ex rel. Fry v. Guidant Corp.*, No. 3:03-0842, 2010 U.S. Dist. LEXIS 72137 (M.D. Tenn. July 19, 2010); *Coram Health Care Corp. of Ill. v. MCI Worldcom Commc'ns, Inc.*, Case Number: 01 C 1096, 2001 U.S. Dist. LEXIS 18909 (N.D. Ill. Nov. 16, 2001); *Bailey v. Broder*, 94 Civ. 2394 (CSH)(SEG), 1997 U.S. Dist. LEXIS 19275 (S.D.N.Y. Dec. 5, 1997).

⁹ *Gluck v. Ansett Austl., Ltd.*, 204 F.R.D. 217, 219 (D.D.C. 2001).

¹⁰ FED. R. CIV. P. 36, Advisory Committee Notes, 1970 Amendment (emphasis added) (citing Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L.J. 371 (1962)).

¹¹ FED. R. CIV. P. 26(b)(2)(A).

¹² FED. R. CIV. P. 26(e)(1).

Moreover, as a matter of policy, it is preferable from a case management standpoint to treat requests for admissions as written fact discovery. Orders placing limits on the time in which written discovery must be propounded and answered is critical to an orderly progression of a civil lawsuit. Written discovery is part of an early stage of civil litigation, which dictates the flow of the later stages of a case. The responses to propounded written discovery, including requests for admissions, are used when deciding the type and number of oral depositions necessary, as well as for framing the questions for those depositions. Responses to requests for admissions also are part of the record which may be used in support of, or in opposition to, motions for summary judgment.¹³ Absent deadlines for all kinds of written fact discovery, motion and discovery practice would be haphazard, and the ability to efficiently move from one stage of litigation to the next would be jeopardized, causing unwanted delay.¹⁴

In this matter, the parties agreed that written discovery would be completed by January 1, 2014, and the Court approved this deadline. Defendant did not propound its requests for admissions until April 23, 2015. Defendant did not request an amendment to the discovery order to permit this additional written discovery, as it should have. To the extent Defendant desired to have requests for admissions placed on a separate timeline from other forms of written discovery, it was free to negotiate this with Plaintiff during their Rule 26(f) conference, and to bring the matter to the Court's attention if the parties could not reach agreement on that subject. For these reasons, the Court finds that Defendant has established good cause in support of its request for a protective order, and the same will be granted.¹⁵ Because the legal issue raised in this motion practice is the subject of a deep divide around the country, I determine that an award of costs would be unjust.¹⁶

II. Motion to Quash Subpoenas Issued at Plaintiff's Request and for Expedited, Interim Relief.

Defendant also filed a motion to quash five subpoenas issued by Plaintiff on the grounds that: 1) Defendant was not furnished with advance notice pursuant to Rule 45 of the Federal Rules of Civil Procedure; 2) the subpoenas failed to include the mandatory language required by Rule 45 of the Federal Rules of Civil Procedure; and 3) the subpoenas were issued after the deadline for fact discovery and are overly broad.¹⁷ In response to Defendant's motion to quash, Plaintiff argues that Defendant has no standing to bring this motion, that Defendant did not comply with Rules

¹³ See, FED. R. CIV. P. 56(c)(1)(A) (noting that admissions are one part of the record which may be used to sustain a motion for summary judgment).

¹⁴ Cf., SUPER. CT. R. 1 (The Rules of the Superior Court "...shall be liberally construed to secure...the elimination of unjustifiable expense and delay.").

¹⁵ Because of the finding that Plaintiff's requests for admissions were improperly issued and need not be answered at all, Defendant's argument that the same discovery is unduly burdensome is moot.

¹⁶ See, FED. R. CIV. P. 26(c)(3), 37(a)(5)(A)(iii).

¹⁷ In light of the disposition of this motion as set forth below, the court will not reach the first two arguments raised by Defendant. However, the Court notes that both parties' reliance on *Bertrand v. Cordiner Enters., Inc.*, 55 V.I. 247 (V.I. Super. Ct. 2011), which reconciled the procedures and requirements of SUPER. CT. R. 11 and FED. R. CIV. P. 45, is not justified because the Supreme Court of the Virgin Islands overruled the *Bertrand* rationale. *Terrell v. Coral World*, 55 V.I. 580, 590-91 & n. 12 (V.I. 2011) ("However, this Court has effectively rejected the argument that Superior Court Rule 7 can be invoked to have a federal rule 'supplement' a local rule in such a manner.") (citing *Blyden v. People*, 53 V.I. 637, 659 (V.I. 2010), *aff'd sub nom.*, *Virgin Islands v. Blyden*, 437 Fed. Appx. 127 (3d Cir. 2011)).

37.1 and 37.2 of the Local Rules of Civil Procedure, and that Defendant's motion to quash is an attempt to prevent the discovery of highly relevant information. Defendant replies that, although a formal certification was not filed, the parties did in fact confer about the subpoenas, and it has standing to challenge the subpoenas.

Plaintiff is correct that, as a general rule, federal courts hold that a party to litigation lacks standing to move to quash a subpoena issued to a third party.¹⁸ But, because the Superior Court is not an Article III court, the issue of standing raises prudential, not subject matter, concerns and its existence is not mandated in all instances.¹⁹ Further, a party has the authority to request that a court enforce its own discovery orders.²⁰ One of Defendant's principal arguments is that Plaintiff violated the May 21, 2013, Order by issuing subpoenas duces tecum to several third parties after the expiration of the deadlines for completion of fact discovery. Therefore, the Court concludes that Defendant has the authority to bring the present motion.²¹

Plaintiff also argues that the motion to quash is not properly before the Court because Defendant has not initiated a conference about this dispute pursuant to LRCi 37.1 or filed a stipulation as required by LRCi 37.2. Defendant replies that the parties did confer about the subpoena issue, and that Plaintiff, through counsel, stated a desire to review the matter, but later unilaterally proceeded with the subpoena process. Defendant also questions whether LRCi 37.1 and 37.2 apply to disputes involving third-party subpoenas.

Taking the second point first, by its own terms, LRCi 37.1 applies to "...any motion relating to discovery pursuant to Federal Rules of Civil Procedure 26-37, other than a motion relating to depositions..." Rule 26 defines the scope of discovery to include "...any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."²² Thus, discovery, as contemplated by Rule 26, and adopted by this Court, encompasses information in the possession of third parties which must be obtained through the subpoena process.²³ It follows, then, that disputes about obtaining discovery in the hands of third parties are governed by LRCi 37.1 and 37.2 and the procedures set forth therein.

¹⁸ E.g., *JAK Prods. v. Bayer*, Civil Action No. 2:15-CV-00361, 2015 U.S. Dist. LEXIS 66935 at * 30-31 (S.D. W.Va. May 22, 2015) (citations omitted); *Media v. Doe No. 4*, 12 Civ. 2950 (JPO), 2012 U.S. Dist. LEXIS 170554 at * 4-5 (S.D.N.Y. Nov. 30, 2012) (citations omitted).

¹⁹ See, *McIntosh v. People*, 57 V.I. 669, 687 n. 16 (V.I. 2012) (citing *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 564 (V.I. 2012)).

²⁰ See, e.g., *CDW, LLC v. NETech Corp.*, CASE NO. 1:10-cv-00530-SEB-DML, 2012 U.S. Dist. LEXIS 993 (S.D. Ind. Jan. 4, 2012) (the trial court granted the defendant's motion to enforce a discovery order with respect to production of documents); *Dialog Info. Servs., Inc. v. Am. Chem. Soc'y*, Civil Action No. 90-1338, 1991 U.S. Dist. LEXIS 18572 (D.D.C. Dec. 19, 1991) (the trial court granted the defendant's motion to enforce a protective order).

²¹ See, *Gourmet Gallery Crown Bay, Inc. v. Crown Bay Marina, L.P.*, Case No. ST-2014-CV-513, 2015 V.I. LEXIS 25 (V.I. Super. Ct. Mar. 5, 2015) (granting the defendant's motion to quash third-party subpoenas issued prior to the parties establishing a discovery plan under Rule 26(f) of the Federal Rules of Civil Procedure).

²² FED. R. CIV. P. 26(b)(1).

²³ See, e.g., *Chauppette v. Northland Ins. Co.*, CIVIL ACTION NO. 08-4193 SECTION "C" (2), 2009 U.S. Dist. LEXIS 114075 at * 2-4 (E.D. La. Nov. 19, 2009); *In re CIGNA Corp. Sec. Litig.*, CIVIL ACTION NO. 02-8088, 2006 U.S. Dist. LEXIS 3863 at * 3 (E.D. Pa. Feb. 1, 2006) ("...the Court finds that third-party discovery of CIGNA customers and brokers is appropriate and within the proper scope of discovery under Rule 26, F. R. Civ. P.").

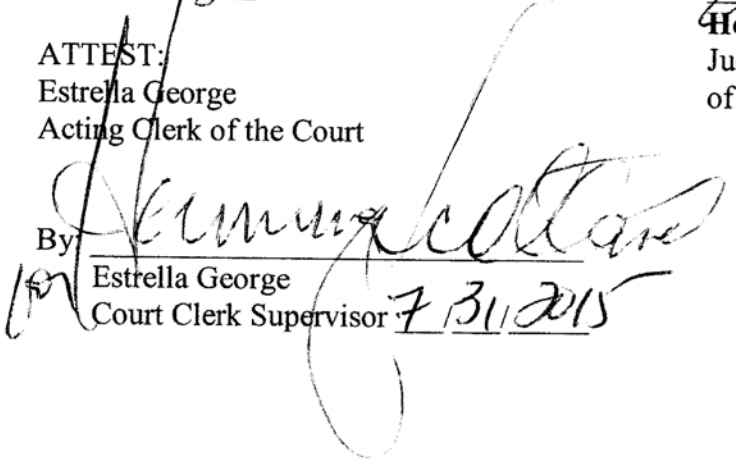
This Court has consistently denied discovery motions when the movant failed to observe the requirements of LRCi 37.1 and 37.2.²⁴ Defendant's argument that it viewed further attempts to confer with Plaintiff as, in essence, futile does not justify the failure to file a stipulation or the alternative certification authorized under LRCi 37.2(c). And, it does not appear from the record that compliance with these rules was impossible. Therefore, Defendant's motion to quash will be denied, but without prejudice to a re-submission if further discussions between the parties on this topic are not fruitful.²⁵

III. Conclusion.

Requests for admissions are written discovery, and subject to the deadlines set forth in pretrial discovery orders. Plaintiff propounded its requests for admissions outside of the deadline for written discovery set forth in the Court's May 21, 2013, Order, and did not request leave to belatedly serve the same. Therefore, Defendant's Motion for a Protective Order will be granted. Moreover, third-party subpoenas also constitute discovery, and disputes over the same are subject to the provisions of LRCi 37.1 and 37.2. Since Defendant failed to comply with those rules, its Motion to Quash Subpoenas Issued at Plaintiff's Request and For Expedited, Interim Relief will be denied without prejudice. An appropriate order will be issued contemporaneously with this opinion.

Dated: July 31, 2015

ATTEST:
Estrella George
Acting Clerk of the Court

By 
Estrella George
Court Clerk Supervisor 7/31/2015


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

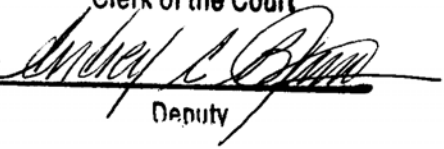
CERTIFIED A TRUE COPY

Date

7/31/15

Clerk of the Court

BY


Deputy

²⁴ *Demming v. V.I. Water & Power Auth.*, Case No. ST-11-CV-586, 2013 V.I. LEXIS 3 (V.I. Super. Ct. Jan. 20, 2013) (denying the plaintiff's motion to compel discovery from the defendant); *Penn v. Whitecap Inv. Corp.*, Case No. ST-12-CV-290, 2012 V.I. LEXIS 63 (V.I. Super. Ct. Dec. 12, 2012) (same); *Carty v. Mason*, Civil No. ST-06-CV-433, 2012 V.I. LEXIS 12 (V.I. Super. Ct. Apr. 23, 2012) (denying the defendant's motion for a protective order)

²⁵ See, *Demming*, 2013 V.I. LEXIS 3 at *9.