

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**HEARTS WITH HAITI, INC. and** )  
**MICHAEL GEILENFELD,** )  
 )  
**Plaintiffs** )  
 )  
**v.** )  
 )  
**PAUL KENDRICK,** )  
 )  
**Defendant** )

**No. 2:13-cv-00039-JAW**

**MEMORANDUM DECISION ON MOTION TO QUASH**

The defendant, Paul Kendrick, moves to quash a subpoena served on his employer, RBC Capital Markets, LLC, by the plaintiffs on September 18, 2014. Defendant’s Motion to Quash and/or Exclude Information Obtained From Subpoena Issued in Violation of the Court’s Discovery Order and in Violation of Rule 45 (“Motion”) (ECF No. 268). Oral argument was held before me on November 21, 2014. Because the subpoena was served without leave long after the close of discovery, I grant the motion.

The oft-amended discovery deadline in this action was February 28, 2014. ECF No. 95. The plaintiffs did not seek leave of court before serving the subpoena, nor did they inform the defendant or his attorneys of their intent to serve the subpoena before doing so, which counsel for the plaintiffs admitted at oral argument was a violation of Federal Rule of Civil Procedure 45(a)(4).

A subpoena seeking production of documents from a person or entity not a party to the action in which the subpoena is generated that is served after the discovery deadline is a form of discovery. *Williamson v. Horizon Lines LLC*, 248 F.R.D. 79, 83 (D. Me. 2008). The plaintiffs

seek to avail themselves of an exception to the discovery deadline for information of which they did not know or could not have known before the discovery deadline. Plaintiffs' Opposition to Defendant's Motion to Quash and/or Exclude Information Obtained from Subpoena "Issued in Violation of the Court's Discovery Order and in Violation of Rule 45" ("Opposition") (ECF No. 274) at 6-7.

Such an exception does exist, *Williamson* at 83, but it does not excuse the party seeking discovery from a third party after the discovery deadline from first seeking leave of court to serve the subpoena or other form of discovery request. *Dag Enter., Inc. v. Exxon Mobil Corp.*, 226 F.R.D. 95, 105 (D.D.C. 2005). At oral argument, the plaintiffs' attorney contended that plaintiffs' counsel served the subpoena at issue three days after the publication of an interview with the defendant in the *Portland Press Herald* in which the defendant stated that he was indirectly involved in the arrest of Plaintiff Geilenfeld in Haiti, that plaintiffs' counsel learned of the arrest through an email sent out by the defendant, and that the subpoena was "narrowly drawn" to obtain information about the arrest and about possibly related civil litigation against Geilenfeld in Haiti, concerning which they learned for the first time that the defendant and his alleged agent had arranged legal representation.

Nonetheless, the subpoena at issue here is not narrowly drawn; it does not even mention the arrest. It is unduly broad for the purpose for which the plaintiffs contend that it was intended. *See* Subpoena, Exh. A to Motion. Moreover, even if all of the plaintiffs' other justifications were factually correct, the fact remains that they did not seek leave of court before serving the subpoena. They have not suggested that any emergency or imminent loss or destruction of documents required them to do so. *See generally McGuire v. Warner*, No. 05-40185, 2009 WL 2370738, at \*2 (E.D. Mich. July 29, 2009).

The plaintiffs' attorney emphasized at oral argument, and much of plaintiffs' written opposition is concerned with, their contention that the defendant lacks standing to seek to quash the subpoena due to his previous stance on a similar issue and his own violations of various discovery rules and orders of this court . Opposition at 4-6, 7-8. The fact that the defendant may have served subpoenas "throughout the course of this litigation" without prior notice to the plaintiffs, as the plaintiffs assert, does not mean that he cannot now take the position that the plaintiffs committed sanctionable error by failing to provide him with timely notice of post-discovery deadline service of a subpoena on a third party – a transgression likely by its very nature to be more objectionable than belated notice during the discovery period.

In any event, the plaintiffs did not come to the court to object to any of the defendant's allegedly untimely notices. Nor does the fact that the defendant served a different third party with a subpoena seeking documents after the close of discovery, Opposition at 7-8, bar the defendant from seeking to quash the subpoena at issue. It is undisputed that the subpoena to which the plaintiffs refer did not result in any discovery being provided to the defendant as a result of that other subpoena, and, thus, the plaintiffs could not have been prejudiced in any way by its untimely service. *Pegoraro v. Marrero*, 281 F.R.D. 122 (S.D.N.Y. Feb. 3, 2012), the only authority cited by the plaintiffs in support of this argument,<sup>1</sup> Opposition at 8, is distinguishable. In that case, the court found that the defendants "used their failure to comply with the discovery schedule to their advantage[.]" and did not claim that the plaintiff's failure to comply with the discovery schedule prejudiced them in any way, and accordingly held that "equitable estoppel principles militate

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<sup>1</sup> The plaintiffs also cite in this section of their brief the case of *Davis v. Wakelee*, 156 U.S. 680 (1895), a nineteenth century case that stands for the general principle that equitable estoppel is available where a party takes a second position in the same litigation, contrary to its initial position, to the prejudice of the party who acquiesced in the former position. *Id.* at 689. That principle has very little value for the instant case, where the defendant gained no perceivable advantage from serving a post-discovery subpoena on a third party which did not result in the provision of any information by that third party.

against a finding that the plaintiff's motion [to compel discovery] is untimely based on the plaintiff's failure to comply with the discovery schedule." 281 F.R.D. at 127-28. Here, there has been no showing that the defendant used his post-discovery service of a subpoena to his advantage, the defendant is claiming that failure to quash the subpoena served on RBC would prejudice him, and a motion to compel is not before the court.

Even if the defendant did not have standing to seek to quash this subpoena, or if he were somehow estopped to seek such relief, "a court still has the authority to quash the subpoena on ground of untimeliness." *Galloway v. Islands Mech. Contractor, Inc.*, Civil Action No. 2008-071 (1:08-cv-00071), 2013 WL 163985, at \*4 (D.V.I. Jan. 14, 2013).

On the showing made, the defendant's motion to quash is **GRANTED**. The remaining relief sought by the defendant—an order prohibiting the plaintiffs from using any information already received in any way, an order "enjoin[ing] the Plaintiffs from any further review of materials received through the Subpoena,"<sup>2</sup> an order requiring the plaintiffs to provide the defendant with copies of every document received from RBC as a result of the subpoena, an order that the plaintiffs "inform RBC forthwith that the Subpoena has been quashed and no further responsive documents should be produced," and an order that the plaintiffs destroy all materials produced by RBC and any copies thereof, Motion at 8—is unnecessary. The plaintiffs' attorneys are officers of the court, and the court is confident that they will take the necessary steps to comply with the court's decision.

#### **NOTICE**

***In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.***

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<sup>2</sup> I accept the representation of counsel for the plaintiffs that all documents received from RBC in response to the subpoena have been sequestered and not reviewed by anyone.

*Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.*

Dated this 30<sup>th</sup> day of November, 2014.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

**Plaintiff**

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**Plaintiff**

**MICHAEL GEILENFELD**  
*Individually and in his capacity as  
Executive Director of St Joseph  
Family of Haiti on behalf of St  
Joseph Family of Haiti and its  
residents (per Order #84 acting in  
Individual Capacity Only)*

represented by **PETER J. DETROY , III**  
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