MEMORANDUM

DATE: November 16, 2009

TO: Discovery Subcommittee

FROM: Andrea Kuperman

CC: Judge Lee H. Rosenthal

SUBJECT: Case Law Regarding Compelling Party Officers to Attend Trial in Distant Fora

---

This memorandum addresses an issue that has been raised in connection with the Discovery Subcommittee's consideration of possible amendments to Federal Rule of Civil Procedure 45. There is a split of authority as to whether Rule 45 permits a court to issue a subpoena requiring a party or a party's officers to travel more than 100 miles to testify at trial. Two judges within the same federal district have recently reached opposite conclusions, both stating that their decisions are based on the text of the rule. In *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006), the court held that Rule 45 permits requiring a party's officer to attend trial in a distant forum. In *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) ("*Big Lots Stores*"), the court held that Rule 45 does not permit requiring a party's officer to attend trial at a distant courthouse if the officer was not served within 100 miles of that courthouse. The *Big Lots Stores* court rejected the view expressed in *Vioxx*, but noted that *Vioxx* adhered to the majority rule.

In considering whether to amend Rule 45 to resolve the split of authority, the Subcommittee is interested in determining whether the *Vioxx* interpretation is in fact the majority rule or whether it is a unique holding. The Subcommittee requested that I review the case law on this issue. I have focused largely on cases after the most recent substantive amendments to Rule 45 in 1991 because many of the cases finding that Rule 45 allows compelling a party's officer to travel to trial from a

distant location support this construction by relying on the 1991 amendments. The case law reveals that the *Vioxx* holding is not unique and that a number of courts have referred to it as the majority view of Rule 45, but that there are also a number of cases that have disapproved of this view. *Cf.* Don Zupanec, *Subpoena – Attendance at Trial – Geographical Limitation – Parties and Officers*, FED. LITIGATOR, Sept. 2008, at 13 ("[W]hile [the *Vioxx* view] remains the predominant view, several courts have recently rejected it, concluding instead that Rule 45(b)(2) specifies requirements for proper service of a subpoena to compel attendance while Rule 45(c)(3)(A)(ii) sets forth circumstances under which a subpoena must be quashed, but does not alter the requirements for proper service.") (citing *Lyman v. St. Jude Med. S.C., Inc.*, No. 05-C-122, 2008 WL 2224352 (E.D. Wis. May 27, 2008); *Mazloum v. Dist. of Columbia Metro. Police Dep't*, 248 F.R.D. 725 (D.D.C. 2008)). The *Vioxx* view seems difficult to reconcile with the current language in the rule, but the fact that many courts have taken a similar view may indicate that many courts believe that they should be able to compel a party's officer to attend trial, at least as a matter of policy.

I. Relevant Language in Rule 45

In resolving this issue, two interrelated provisions of Rule 45 are relevant. The first provision focuses on service:

> **(2)** ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:
>
> **(A)** within the district of the issuing court;
>
> **(B)** outside the district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
>
> **(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued

by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

FED. R. CIV. P. 45(b)(2). The second provision focuses on quashing or modifying a subpoena:

(3) *Quashing or Modifying a Subpoena*

(A) *When Required*. On timely motion, the issuing court must quash or modify a subpoena that:

. . . .

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

. . . .

(B) *When Permitted*. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

. . . .

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

FED. R. CIV. P. 45(c)(3)(A)(ii), 45(c)(3)(B)(iii).

II. The View that Rule 45 Permits Compelling a Party's Officer to Attend Trial More than 100 Miles Away

The *Vioxx* case purportedly describes the majority view of the interplay between subsections

(b)(2) and (c)(3)(A)(ii) of Rule 45. *Vioxx* was a multidistrict litigation case in which the court considered a motion to compel the appearance of a Merck & Co., Inc. ("Merck") representative at one of the trials. The representative requested was Mr. Anstice, who was President of Human Health for Canada, Latin America, Japan, Australia and New Zealand, and who had previously served as Merck's President of Human Health for the United States. *Vioxx*, 438 F. Supp. 2d at 664. In his prior position, "Mr. Anstice was responsible for the marketing activities and commercial operations of Merck during the time Vioxx was being developed and marketed." *Id.* The court had previously ruled that the plaintiff could compel Mr. Anstice to appear and testify at the trial, compel Mr. Anstice to testify at the trial from a remote location via video transmission, or present Mr. Anstice's former testimony from a state court trial involving Vioxx. *Id.* at 665. Merck's counsel agreed to accept service on Mr. Anstice's behalf and received the subpoena via email in Chicago; the parties agreed that service would be considered effectuated on Mr. Anstice at his home in Pennsylvania. *Id.* The subpoena's caption listed both the Eastern District of Louisiana and the District of New Jersey, and sought to compel Mr. Anstice to testify live at the trial in New Orleans. *Id.* Merck and Mr. Anstice moved to quash the subpoena, arguing that Mr. Anstice was beyond the court's subpoena power. *Id.* Merck based its argument on the fact that Rule 45(b)(2) requires service within 100 miles from the place of trial, and that New Orleans is more than 100 miles from Pennsylvania. *Vioxx*, 438 F. Supp. 2d at 665. The plaintiff argued that "the interplay between Rule 45(b)(2) and Rule 45[(c)](3)(A)(ii) grants district courts authority to subpoena parties or officers of parties—such as Mr. Anstice—to testify at trial regardless of where they might be served." *Id.* Merck responded that "Rule 45(b)(2) defines the Court's subpoena power; whereas, Rule 45(c)(3)(A)(ii) allows a Court to quash a subpoena within its subpoena power," and the plaintiff countered that "the 'person who is

not a party or an officer of a party' language of Rule 45(c)(3)(A)(ii) permits the inverse inference that parties and their officers are subject to compulsion to attend trials that occur outside the 100 mile limit otherwise available to non-parties." *Id.* at 666.

The court agreed with the plaintiff:

> The plain, unambiguous language of Rule 45 supports the PSC's position. Rule 45(b)(2), which imposes the 100 mile rule, is expressly limited by Rule 45(c)(3)(A)(ii). Rule 45(c)(3)(A)(ii) mandates that a district court must quash a subpoena if it requires "a person who is *not a party or an officer of a party*" to travel more than 100 miles from his residence or place of employment. (emphasis added). In this case, Mr. Anstice is a Merck officer. Accordingly, Rule 45(c)(3)(A)(ii) does not require the Court to quash the subpoena. Instead, Rule 45(c)(3)(A)(ii) supports the inverse inference that Rule 45(b)(2) empowers the Court with the authority to subpoena Mr. Anstice, an officer of a party, to attend a trial beyond the 100 mile limit.

Id. at 667. The court "acknowledge[d] that nothing in the history or adoption of current Rule 45(b)(2), the substance of which was located in Rule 45(e) prior to December 1, 1991, or Rule 45(c)(3)(A)(ii), the substance of which was newly adopted in 1991, conveys any intention to alter the 100 mile rule," and that "the 1991 advisory committee's notes to Rule 45(b) and 45(c) reinforce[d] Merck's argument." *Id.* (citations omitted). But the court concluded that it could not "consider the history or intent behind the 1991 amendment to Rule 45 as the rule [wa]s plain and unambiguous on its face." *Id.* (citation omitted). The court held that looking solely at the language in the rule compelled the finding that "the interaction between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii) vest[ed] the Court with the authority to subpoena Mr. Anstice to testify at trial in New Orleans." *Vioxx*, 438 F. Supp. 2d at 667.

The *Vioxx* court noted that while the text of the rule resolved the issue, its understanding was "bolstered by the realities of modern life and multi-district litigation." *Id.* The court found the 100-

mile rule to be antiquated:

> Realistically, the purposes behind the 100 mile rule no longer justify its existence. While a cross-country trip may have been deemed impossible in 1793 [when Congress enacted a statute allowing courts to issue trial subpoenas if the witness did not live more than 100 miles from the issuing court] or harassing and economically burdensome in 1964 [when the Supreme Court found the justifications for the 100 mile rule to be to protect witnesses from long trips and to minimize costs], it is now commonplace and a necessary incident to multi-district litigation. Additionally, the current costs borne by a witness traveling cross-country to testify at trial are generally much less than the costs incurred by an army of attorneys and their respective entourages traveling cross-country to depose the very same witness. Moreover, in the present case, the PSC will bear Mr. Anstice's travel expenses[,] eliminating any case-specific value to the rule's second goal. While these twin rationales were laudable in 1793, the[y] are now questionable, if not anachronistic. Modern day litigation should not be restrained by antiquated relics of a bygone era.
>
> Certainly, our founding fathers could not have envisioned a world of superhighways, commercial jet airlines, or high speed commuter trains, just as they most likely could not have envisioned a single, consolidated lawsuit consisting of thousands of parties seeking billions of dollars in damages allegedly caused by an allegedly defective prescription drug prescribed to millions of patients across the country and world. *See Cathaleen A. Roach, It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81, 83–84 (1990). Yet, while superhighways, jet airliners, and commuter trains have provided access to the vast expanses of our nation and beyond and allowed the United States to flourish socially and economically, our federal court system's subpoena power is still bound by a 100 mile colonial leash.

Id. at 668. The court also found that the 100-mile rule "actually inhibits the truth seeking purpose of litigation" because without live testimony, the jury must rely on deposition testimony, "'a second-best.'" *Id.* (quoting *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Learned Hand, J.)). The court described a deposition as "a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom," and found that "[t]he 100 mile rule forces this predicament

upon the jury." *Id.* The court noted that "[w]hatever minimal benefits the 100 mile rule provides witnesses, it is severely outweighed by its detrimental effect upon the trial process." *Id.* The court "believe[d] that the 100 mile rule as it currently exists has little utility," and "suggest[ed] that an amendment to [Rule 45] would be wise." *Vioxx*, 438 F. Supp. 2d at 668 (citing James B. Sloan & William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 40–44 (1992); Roach, *supra*, at 109–117). The court took "comfort in knowing that its ruling [was] supported by the realities of our present world . . . [and] in knowing that the majority of courts that have been faced with the same issues have ruled likewise." *Id.* at 669. Finally, the court noted that its conclusion was consistent with the objectives of 28 U.S.C. § 1407, the statute governing multidistrict litigation, explaining that "[i]f one court is going to be legislatively mandated to handle thousands of cases from throughout the nation, it needs some national reach at least as to the parties." *Id.* But, "[h]aving found that Rule 45 alone g[ave] [the court] authority to subpoena Mr. Anstice, the Court f[ound] that it [did not] need . . . [to] reach the issue of whether 28 U.S.C. § 1407 expand[ed] the Court's trial subpoena power." *Id.* at 669 n.2.

Many courts considering this issue have concluded that a court has the power to subpoena parties or parties' officers who live or work more than 100 miles from the courthouse. *See, e.g.*, *Seiter v. Yokohama Tire Corp.*, No. C08-5578 FDB, 2009 WL 3663399, at *1 (W.D. Wash. Nov. 3, 2009) ("The Court agrees with the majority position that corporate officers of a party may be subpoenaed and required to travel more than 100 miles from where they reside, are employed, or regularly transact business."); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, --- F.R.D. ---, 2009 WL 2972518, at *9 (S.D.N.Y. Sept. 16, 2009) (same); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, MDL No. 1358 (SAS), 2009 WL 1840882, at *1 (S.D.N.Y.

Jun. 24, 2009) ("The majority of courts to reach the issue have determined that this rule, by reverse inference, permits the service of a subpoena on a party or a party's officer who is beyond the 100 mile radius, provided no undue prejudice results. This Court agrees."); *Clark v. Wilkin*, No. 2:06 cv 693 TS DN, 2008 WL 648542, at *1 (D. Utah Mar. 10, 2008) ("The express application of [Rule 45(c)(3)(A)(ii)] to persons who are not parties suggests that parties do not fall under the 100 mile rule."); *Scottsdale Ins. Co. v. Educ. Mgmt., Inc.*, No. 04-1053, 2007 WL 2127798, at *3 (E.D. La. Jul. 25, 2007) (concluding that "requiring an appearance by a corporate representative of Scottsdale [who was located more than 100 miles from the courthouse] [wa]s not a violation of Rule 45(b)(2)" because "the provisions of Rule 45(c)(3)(A)(ii) specify that the 100 mile restriction applies only to persons who are not a party or an officer of a party"); *Creative Sci. Sys., Inc. v. Forex Capital Markets, LLC*, No. C 04-3746 JF (RS), 2006 WL 3826730, at *2 (N.D. Cal. Dec. 27, 2006) ("The majority view and more persuasive analysis, however, is found in *Vioxx*. Although there is tension between the two portions of the rule, the better reading of the rule as a whole is to give effect and meaning to the phrase 'who is not a party or an officer of a party' in paragraph (c)(3)(A)(ii)."); *Williams v. Asplundh Tree Expert Co.*, No. 3:05-cv-479-J-33MCR, 2006 WL 2598758, at *2 (M.D. Fla. Sept. 11, 2006) (rejecting the argument that a court "cannot expand its subpoena power to reach corporate officers outside the 100 mile limit" and noting that "a majority of cases have found a distinction between ordinary employees and high-level representatives of a corporation"); *Ferrell v. IBP, Inc.*, No. C98-4047-MJM, 2000 WL 34032907, at *1–2 (N.D. Iowa Apr. 28, 2000) (disapproving of *Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388 (N.D. Iowa 1998) ("*Land O' Lakes*"), because it "does not follow the majority of courts which have addressed the issue," and concluding that the equities favored requiring the party's officers to travel to trial); *NWL Holdings,*

Inc. v. Eden Ctr., Inc. (*In re Ames Dep't Stores, Inc.*), No 01-42217 (REG), 2004 WL 1661983, at *1 (Bankr. S.D.N.Y. Jun. 25, 2004) ("Though the case[ ]law and commentary are not uniform—in no small part by reason of reliance by courts and commentary on case[ ]law preceding 1991 amendments to the Federal Rules—this Court believes that the correct view is that limitations on subpoenas on non-parties are not applicable when the subpoenaed person is a party, or an officer of one."); *cf. Am. Fed'n of Gov't Employees Local 922 v. Ashcroft*, 354 F. Supp. 2d 909, 915 (E.D. Ark. 2003) ("*American Federation*") (concluding that the court would have the authority to compel a party's officer or high-level employee to appear to testify at an arbitration hearing, even if the employee lived outside the district and beyond the 100-mile limit in Rule 45); Michael B. Brennan & Todd M. Krieg, *Amendments to the Federal Rules of Civil Procedure*, WIS. LAW, Mar. 1992, at 20 (1992) (discussing the 1991 amendments and noting that "a party wanting to serve a subpoena on a nonparty who lives outside the district and more than 100 miles from the court in a state that has no law permitting service, can argue that the express reference in Rule 45(b)(2) to subparagraph (c)(3)(A)(ii) incorporates the latter provision into the service provision").[1]

In reaching the view that courts have the power to compel parties and their officers to attend trial in distant fora, the cases have focused on a variety of considerations. For example, in *Creative Science Systems*, the court concluded that the *Vioxx* view was correct because "[f]ollowing [*Land O' Lakes*], and refusing to see that phrase ['who is not a party or an officer of a party' in Rule 45(c)(3)(A)(ii)] as affecting the analysis, would result in the phrase being pure surplusage, without

---

[1] The authors argued that their construction "is supported by the [Advisory Committee's] Notes which indicate that the change in subparagraph (c)(3)(A)(ii) permits a court to order trial attendance from anywhere in-state regardless of the local state law." Brennan & Krieg, *supra*, at 20. The authors predicted that "[t]he ambiguity regarding service in Rule 45(b) will no doubt result in litigation concerning this issue." *Id.*

effect under any circumstances," and concluded that "[s]uch constructions are to be avoided, when possible."[2] 2006 WL 3826730, at *2 (citation omitted). The court noted that in *Land O' Lakes*, the court had concluded that "'[t]here simply is no 'negative implication,'' arising from paragraph (c)(3)(A)(ii) that parties and officers of parties are subject to a different rule," but the *Creative Science Systems* court "respectfully disagree[d], both in light of the words of the statute and the hoary principle that '*expressio unius est exclusio alterius*.'"[3] *Creative Sci. Sys.*, 2006 WL 3826730, at *2 n.2 (first alteration in original).

In *Ferrell*, the court noted that the majority of courts considering the issue had found that subpoenas could be issued to distant parties and their officers, and concluded that the specific equities of its case required that result. *See Ferrell*, 2000 WL 34032907, at *1–2. The court explained that the case was originally scheduled at a location well within the 100-mile range for subpoena service

---

[2] Arguably, it is possible to read Rule 45(b)(2) and (c)(3)(A)(ii) without creating surplusage by viewing Rule 45(b)(2) as setting out the requirements for proper service of a subpoena and Rule 45(c)(3)(A)(ii) as creating a limit on properly served subpoenas. Under this construction, the limits on service would apply to all subpoenas, whereas the limits on travel would apply only to persons not parties or officers of a party. An example is given in *Big Lots Stores*. In *Big Lots Stores*, the court explained that "if both a nonparty witness and a party, both residents of Texas, in a case before this Court [in New Orleans] were served with trial subpoenas at their depositions in New Orleans, the Court would have to grant the nonparty witness's motion to quash under Rule 45(c)(3)(A)(ii), but under that same rule, the party could be compelled to appear at trial." 251 F.R.D. at 219. In that example, both witnesses would have been properly served under Rule 45(b)(2) because they were served within the district of the trial court, but the subpoena to the nonparty witness would have to be quashed under Rule 45(c)(3)(A)(ii) as requiring a nonparty to travel more than 100 miles. The subpoena issued to the party's officer would not have to be quashed under that section. This construction gives effect to the phrase "a person who is neither a party nor a party's officer" in Rule 45(c)(3)(A)(ii).

[3] The *Creative Science* court focused on the fact that paragraph (c)(3)(A)(ii) expressly applies to witnesses who are not parties or a party's officer, but did not expressly resolve the difference between proper service under paragraph (b)(2) and the requirement to quash certain subpoenas under paragraph (c)(3)(A)(ii). Those courts holding the minority view of the rule do not seem to disagree with the proposition that paragraph (c)(3)(A)(ii) excludes parties and their officers from the requirement to quash subpoenas requiring travel of more than 100 miles, but instead focus on the fact that despite this exception, paragraph (b)(2) requires proper service on all subpoenaed persons.

under Rule 45(b)(2), but that the judge and the parties had agreed to hold the trial in a different location. *Id.* at *2. The court concluded that "[i]t would seem inequitable, at best, to allow the defendant to stipulate to transfer of the trial, and then to rely on the trial location in an attempt to avoid the presence of its key officers at trial." *Id.*

In *Aristocrat Leisure*, the court also seemed to focus on equitable factors. The court "agree[d] with the majority position that corporate officers of a party may be subpoenaed and required to travel more than 100 miles from where they reside, are employed, or regularly transact business," and concluded that "[h]aving chosen to avail themselves of the many benefits of th[e] forum, it [wa]s disingenuous for the Bondholders and their corporate officers to reverse course . . . and contend that they [we]re beyond the reach of this Court's subpoena power." 2009 WL 2972518, at *9. The court explained that its "view f[ound] support in the purpose behind the Rule's geographic limitation, which 'gives nonparty deponents protection from expending time and money to comply with a subpoena' and is intended to 'protect [nonparty] witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest.'" *Id.* (quoting *Edelman v. Taittinger* (*In re Edelman*), 295 F.3d 171, 178 (2d Cir. 2002)).[4] With respect to

[4] In *Edelman*, the Second Circuit considered "whether a foreign national temporarily in the United States is subject to being subpoenaed and deposed here as an aid to ongoing litigation in France," pursuant to 28 U.S.C. § 1782(a). 295 F.3d at 173. The court considered Rule 45 because section 1782(a) provides: "'The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, *in accordance with the Federal Rules of Civil Procedure*.'" *Id.* at 175 (quoting 28 U.S.C. § 1782(a)) (*Edelman* alteration omitted) (emphasis added). The court noted that Rule 45(b)(2) provides for a subpoena to "'be served at any place within the district of the court by which it is issued,'" *id.* at 178 (quoting FED. R. CIV. P. 45(b)(2)), and that Rule 45(c)(3)(A)(ii) "states that unless a person is a party to the litigation or an officer of a party, he cannot be compelled to travel more than 100 miles from where he resides or works to be deposed," *id.* (citing FED. R. CIV. P. 45(c)(3)(A)(ii)). The court then explained: "*That particular subdivision* of Rule 45 gives nonparty deponents protection from expending time and money to comply with a subpoena. The purpose of the 100 mile exception is to protect such witnesses from being

subpoenas served on non-officer employees of parties who resided more than 100 miles from the courthouse, the *Aristocrat Leisure* court found that such subpoenas had to be quashed, "declin[ing] to classify non-officer employees as 'parties' for purposes of evading the clear language of Rule 45(c)(3)(A)(ii)." *Id.* at *10 (citation omitted). The court explained that Rule 45 provides an exception to the 100-mile rule only for parties and their officers. *Id.* (citation omitted). With respect to subpoenas served on the corporate parties themselves, the court concluded that "there [wa]s no basis under the 100-mile rule to quash the subpoenas seeking testimony of the Bondholders' corporate representatives," and found that "[t]he Bondholders, as parties to this action, affirmatively have taken advantage of the benefits of this forum, and the Court has the power to require these parties to produce corporate representatives to testify on their behalf at trial." *Id.* (citation omitted). The court noted that "[i]f the Bondholders' position [that corporate representative subpoenas require non-corporate-officers to travel more than 100 miles to attend trial] were correct, parties responding to trial subpoenas would have an incentive to avoid the subpoena simply by producing employees that are not corporate officers as their party representatives." *Id.* The court concluded that "[t]his type of evasive behavior by parties that have affirmatively chosen to pursue their claims in this forum is clearly not what Rule 45 was intended to promote." *Aristocrat Leisure*, 2009 WL 2972518, at *10.

In *Ames Department Stores*, the court found that the language of the rule required finding that

---

subjected to excessive discovery burdens in litigation in which they have little or no interest." *Id.* (internal citation omitted) (emphasis added). In context, the court's discussion of the 100-mile limitation appears to refer to paragraph 45(c)(3)(A)(ii)'s requirement to quash certain subpoenas served on persons who are not parties or officers of a party, but does not address whether that provision expands the court's ability to serve subpoenas on persons outside of Rule 45(b)'s limits. The Second Circuit directed the district court on remand to consider whether Rule 45(c)(3)(A)(ii) would require quashing the subpoena based on the argument that the witness qualified as an officer of a party in the French litigation and therefore could be compelled to travel more than 100 miles. *Id.* at 181. The Second Circuit held that if the witness was found to be an officer, the subpoena may be sustained, *id.*, but the court did not need to address the interplay between Rule 45(c)(3)(A)(ii) and Rule 45(b) because it appears that the witness was served within the district of the issuing court.

a subpoena could extend further for parties and officers of parties:

> Rule 45(c)(3)(A)(ii) grants the ability to quash, based on a travel obligation of more than 100 miles, where the subpoenaed person "is not a party or an officer of a party." Since that provision easily could have been drafted, if it had been the rulemaking intent, to simply omit the italicized language and make its provisions applicable to "a person" generally, the compelling interpretation is that its application is limited to those persons who are particularly described—*i.e.*, to non-parties or their officers.
>
> Then, the ability to serve a subpoena in the first place—granted under Rule 45(b)—is expressly made subject to the provisions of subparagraph (c)(3)(A). The Court notes that FED. R. CIV. P. 45 was amended in 1991, at which time the present paragraph (c) was added, as was the qualifying condition in paragraph (b) that refers to subparagraph (c)(3)(A). Eden Center properly observes, in its letter reply, that the Committee Notes to the 1991 amendments say that subparagraph (c)(3)(A) "restates the former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1) with one important change," and that the change the Advisory Committee referred to was a different one, unrelated to this controversy. But it is noteworthy, in this Court's view, that the pre-1991 Rule did not by its terms make distinctions between parties and non-parties, and thereafter it did.
>
> That suggests to this Court either that the Rule always contemplated such a distinction (and that the 1991 amendments confirmed or codified it), or that it was an additional change not mentioned. In any event, it seems clear to this Court that the addition of the words "who is not a party or an officer of a party," as part of the 1991 amendments, to language that did not previously include it, was not inadvertent, and is significant.

2004 WL 1661983, at *1–2 (footnotes omitted). The court acknowledged the contrary authority, but found that most of the contrary cases relied on pre-1991 authority:

> As noted, the case[ ]law and commentary is mixed, and there is some that does indeed support Eden Center's position. But only one of Eden Center's cases or secondary authority sources even addresses the "who is not a party or an officer of a party" language. The others either predated the 1991 amendments, and thus had no opportunity to address the significance of the "who is not a party or an officer of a

> party" language, or failed to address it for unknown reasons. *In re Vienna Park Properties*, [120 B.R. 320 (Bankr. S.D.N.Y. 1990), *vacated on other grounds*, 125 B.R. 84 (S.D.N.Y. 1991),] relied on by Eden Center in its motion, is in the former category. As that decision (which quoted the relevant portion of Rule 45 at the time) makes clear, the key language was not then in the Rule. Another case upon which Eden Center relies, *Smith v. Chason*, [No. Civ. A. 96-10788-PBS, 1997 WL 298254 (D. Mass. Apr. 10, 1997),] while decided after the 1991 amendments, did not discuss the "who is not a party or an officer of a party" language, and relied only on pre-1991 authority. Similarly, while Wright & Miller, relied on by Eden Center in its motion, does indeed say that the 100-mile limit "applies to a party as well as to an ordinary witness," it cites only a single 1967 case for that view,[5] and inexplicably fails to address either the "who is not a party or an officer of a party" language, or the later contrary case[ ]law, discussed above. Its observations in this respect cannot be regarded as persuasive for that reason.

Id. at *2 (footnotes omitted). The *Ames Department Stores* court found the contrary authority in *Land O' Lakes* unpersuasive for several reasons:

> This Court initially disagrees with the *Land O' Lakes* court's conclusion, reached without reference to authority, that section (b) did indeed have the purpose or effect of defining a kind of jurisdictional reach, in a section captioned "Service," and in each of whose subsections mechanical aspects of the service of process are discussed. But even assuming, *arguendo*, that section (b) did have the additional purpose or effect of defining jurisdictional reach, the asserted jurisdictional reach was made expressly conditional on a separate subsection (c)(3)(A)(ii), which had the very different subject matter, much more relevant here, of "Protection of Persons Subject to Subpoena," so that protective provisions, which granted substantive (or at least procedural) rights to some—but less than all—of those required to travel more than 100 miles to testify, were incorporated into Rule 45(b). And the *Land O' Lakes* court found no "negative implication" in subsection (c)(3)(A)(ii)'s drafting; this Court cannot

---

[5] The 1967 case is *Steel, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 41 F.R.D. 337 (D. Kan. 1967). In *Steel*, the court held that a plaintiff can be required to attend a deposition in the district in which it chose to sue, but cannot be compelled to attend trial beyond the limits set out in Rule 45. *Id.* at 339. The court stated that "[w]ith respect to [a party plaintiff's] attendance at trial, his status is that of any other witness," and "[i]f he resides outside the district and more than 100 miles from the place of trial, his attendance cannot be required." *Id.*

> agree. The drafting scheme, in this Court's view, is a classic example of what judges and lawyers think of under "*expressio unius*." Finally, as noted, *Land O' Lakes* has been subsequently criticized and rejected, in its own court, by later authority, which, with lengthy citations, has observed that *Land O' Lakes* "does not follow the majority of courts which have addressed the issue."

Id. at *3 (footnotes omitted). The *Ames Department Stores* court noted that many other cases have reached a conclusion contrary to that reached by the *Land O' Lakes* court, some expressly addressing the language of Rule 45 and others not expressly relying on the rule. *See id.* & n.17. Finally, the court noted that commentary on Rule 45 suggests that courts have the ability to compel a party's officer to travel from a distant location:

> Among the parties themselves, there is the general assumption that each will appear at the trial, which relieves Rule 45 of any special concern about that. If it should for any reason become necessary to have a party appear at the trial who it turns out will not appear voluntarily—including a person who is in the control of a party, which sweeps the corporation under this category as well—the court has all the leverage it needs to compel the party's appearance. If the court directs the attendance of the party, disobedience can be compelled with something the seeking party would enjoy even more than the invoking of the contempt penalty: a default judgment against the recalcitrant party. Hence Rule 45 shows little tension when a party is involved.
>
> It more than compensates for that relaxation by working hard, and often, on the nonparty witness, addressing at several points the protections erected for the convenience of nonparties and then adding a provision that allows even the nonparty to be directed to travel far to the courthouse, apparently even across the country if need be, but only on a very strong showing.

Id. at *3–4 (quoting David D. Siegel, Commentary on Rule 45 at C45-16, in 28 U.S.C.A. (quotation marks omitted)). The court rejected the argument that it should quash the subpoena because the officer's videotaped deposition could be taken, noting that credibility was at issue. *Id.* at *4.

In *Clark*, the court found that the majority view was "supported by the Second Circuit's

observation that '[t]he purpose of the 100 mile exception is to protect such witnesses from being subjected to excessive discovery burdens in litigation *in which they have little or no interest*,'" 2008 WL 648542, at *1 (quoting *Edelman*, 295 F.3d at 178) (footnote omitted) (alteration and emphasis added by *Clark* court), and explained that "[p]arties to a suit have great interest in its outcome; therefore, the purpose behind the 100 mile rule does not apply to them," *id.* The court further explained that "other parties and the Court have an interest in the appearance of parties at trial, which is a further reason the 100 mile limitation should not apply to parties." *Id.* The court rejected the argument that "the majority rule would provide 'unfettered discretion' for counsel to 'impose undue burdens and expenses on opposing parties for improper purposes,'" noting that "[t]his concern . . . has not been shared by the majority of federal courts because Rule 26(c) authorizes a district court to modify or quash a subpoena in order to 'protect *a party* or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Id.* at *2 (footnotes omitted). The court concluded that special fairness considerations required compelling the defendant's attendance at trial because the defendant was alleged to be the sole witness to the accident at issue, the defendant was the only witness with knowledge of the condition of his trailer at the time of the accident, and the defendant's live testimony was needed because certain evidence was provided to the plaintiffs only after the defendant's deposition. *Id.* The court held that "[b]ecause Wilkin [wa]s a party to the action, Rule 45(b)(2) d[id] not protect him from being served with a trial subpoena even though he live[d] outside the district and further than 100 miles [from] th[e] Court," and that the court had inherent power to order the defendant's appearance. *Id.*

In *American Federation*, the court considered the issue of whether an arbitrator had authority to subpoena the director of the agency involved in the arbitration to appear and testify in an

arbitration hearing held in Forrest City, Arkansas, when the director lived in Dallas, Texas, more than 100 miles from Forrest City. *See Am. Fed'n of Gov't Employees Local 922*, 354 F. Supp. 2d at 911. The subpoena was served on the record keeper in Forrest City, rather than the party whose attendance was sought, but the court concluded that the subpoenaed party at least tacitly agreed to service in this manner. *See id.* at 916. The court found, assuming the arbitrator's subpoenas had to comply with Rule 45, that it had authority to compel a high-level representative of a party to the arbitration to attend the arbitration hearing, relying on the fact that the majority of courts have allowed compelling trial testimony of a party's high-level employees even when the person lives more than 100 miles from the courthouse. *Id.* at 915–16. Although the court found that compelling the party's director to attend the arbitration hearing did not violate the 100-mile rule in Rule 45, it is noteworthy that the court separately found service on a record keeper in the same city where the arbitration hearing was to be held to be proper. Because service was effected within the area permitted under Rule 45(b)(2), the situation arguably fell within the exception in Rule 45(c)(3)(A)(ii) for a party's officers. However, because the court found that the subpoena was properly served, the court did not need to resolve whether Rule 45(c)(3)(A)(ii) allowed for nationwide service on party officers.

In *Scottsdale*, the court considered a motion to quash a subpoena issued to the plaintiff corporation where all representatives of the corporation were located more than 100 miles from the courthouse. The issuing party argued that "because Scottsdale filed suit in the Eastern District of Louisiana[,] it ha[d] consented to th[e] Court's jurisdiction and should be required to appear at trial." 2007 WL 2127798, at *3. The court concluded that "[b]ecause the subpoena was directed to [plaintiff] Scottsdale and not the former corporate representative . . . , and because the provisions of

Rule 45(c)(3)(A)(ii) specify that the 100 mile restriction applies only to persons who are not a party or an officer of a party, there is no problem with issuing a subpoena to a party in the litigation who is outside of the geographic area." *Id.* Although the court found that the subpoena complied with Rule 45(b)(2), it found that lack of personal service on Scottsdale violated Rule 45(b)(1), and concluded that because a corporate representative would not be able to offer testimony on the remaining issue in the case, it was unnecessary to require a corporate representative to travel 1,500 miles, particularly since deposition testimony on the issue for which the representative was requested was available. *See id.*

In *Seiter*, the defendant moved to quash a trial subpoena served on a *former* corporate officer who had been designated as a corporate representative and who lived outside the district and more than 100 miles from the courthouse. 2009 WL 3663399, at *1. The court noted that a majority of courts have found that Rule 45(b)(2)(B) and Rule 45(c)(3)(A)(ii) permit service of a subpoena on a party's officer beyond the 100-mile limit. *Id.* The court agreed with the majority and concluded that the subpoena to the former officer, who was not a current officer and who resided outside the geographic area permitted in Rule 45, had to be quashed. *Id.* (citing *Aristocrat Leisure*, 2009 WL 2972518). Because the court concluded that the subpoenaed person was not a corporate officer, it arguably did not need to decide whether Rule 45 permitted service on party officers residing outside Rule 45's geographic scope.

Many of the cases stating that they are applying the majority rule with respect to subpoenas issued to parties or officers of parties rely on cases that indirectly support the conclusion that Rule 45 permits compelling officers to attend trial more than 100 miles away, but that do not directly

address the interplay between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii).[6] For example, in *National Property Investors*, the court considered Rule 45 in the context of analyzing a motion to transfer venue under 28 U.S.C. § 1404(a), and found that "the number of potential non-party North Carolina witnesses, and the fact that, unlike party witnesses, FED. R. CIV. P. 45(c)(3)(A)(ii), non-party witnesses cannot be compelled to testify before this Court [in New Jersey], weigh in favor of transferring venue in this case." *Nat'l Prop. Investors*, 917 F. Supp. at 329. The court did not address whether paragraph (c)(3)(A)(ii) places a limit on subpoenas that are properly served under

[6] For example, *Vioxx* cites *American Federation*; *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1504 (D. Kan. 1990); *Ferrell*; *Archer Daniels Midland Co. v. Aon Risk Servs., Inc.*, 187 F.R.D. 578, 587 (D. Minn. 1999); *Younis v. American University in Cairo*, 30 F. Supp. 2d 390, 395 n.44 (S.D.N.Y. 1998); *Prudential Securities, Inc. v. Norcom Development., Inc.*, 1998 WL 397889, at *5 (S.D.N.Y. Jul. 16, 1998); *Stone v. Morton International, Inc.*, 170 F.R.D. 498, 500–01 (D. Utah 1997); *Venzor v. Chavez Gonzalez*, 968 F. Supp. 1258, 1267 (N.D. Ill. 1997); *Nat'l Property Investors VIII v. Shell Oil Co.*, 917 F. Supp. 324, 329 (D.N.J. 1995); and *M.F. Bank Restoration Co. v. Elliott, Bray & Riley*, No. Civ. A. 92-0049, 1994 WL 719731, at *8 (E.D. Pa. Dec. 22, 1994). *See Vioxx*, 438 F. Supp. 2d at 666. *Aristocrat Leisure* cites *MTBE Prods. Liab. Litig.*, *Younis*, *Ames Department Stores*, and *American Federation*. *See Aristocrat Leisure*, 2009 WL 2972518, at *9. *Seiter* cites *American Federation*, *Younis*, and *Creative Science*. *See Seiter*, 2009 WL 3663399, at *1. *American Federation* cites *Archer Daniels Midland*, *Younis*, *Venzor*, and *National Property Investors*. *See Am. Fed'n of Gov't Employees Local 922*, 354 F. Supp. 2d at 915–16. *Williams* cites *Ferrell*. *See Williams*, 2006 WL 2598758, at *2. *Clark* cites *American Federation*, *Ames Department Stores*, *Mason*, *Ferrell*, *Archer Daniels Midland*, *Younis*, *Prudential Securities*, *Stone*, *Venzor*, *National Property Investors*, and *M.F. Bank Restoration*. *See Clark*, 2008 WL 648542, at *1 n.10. *Ames Department Stores* relies on *Ferrell*; *Younis*; *Prudential Securities*; *Stone*; *Venzor*; *National Property Investors*; *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994); and *M.F. Bank Restoration*. *See Ames Dep't Stores*, 2004 WL 1661983, at *3 n.17. *Ferrell* relies on *Archer Daniels Midland*, *Younis*, *Prudential Securities*, *Stone*, *Venzor*, *National Property Investors*, *Exxon Shipping*, and *M.F. Bank Restoration*. *See Ferrell*, 2000 WL 34032907, at *1. *MTBE Products Liability Litigation* notes that the majority of courts follow the *Vioxx* rule and cites *Vioxx* for its collection of cases reaching the same conclusion. *See MTBE Prods. Liab. Litig.*, 2009 WL 1840882, at *1 & n.2. However, many of the cases cited by courts as expressing the majority view of Rule 45 do not actually examine the correlation between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii). For example, in *Exxon Shipping*, the court examined whether a federal housekeeping statute permitted a federal agency to withhold government information or prevent employees from complying with valid subpoenas, and noted that the Federal Rules of Civil Procedure provide adequate limits on discovery. *See Exxon Shipping*, 34 F.3d at 779. The court noted that "[t]he Federal Rules . . . afford nonparties special protection against the time and expense of complying with subpoenas," *id.* (citing FED. R. CIV. P. 45(c)(3)(A)(ii)), but did not discuss the service requirements in Rule 45 or the rule's application to party officers.

paragraph (b)(2). As a result, it is just as consistent with the minority view, which does not appear to disagree with the construction that paragraph (c)(3)(A)(ii) excludes parties and party officers, but instead concludes that despite the fact that (c)(3)(A)(ii) excludes parties and their officers, paragraph (b)(2) requires proper service.

In *Venzor*, the court refused to admit hearsay statements in connection with a motion for summary judgment under the exception for statements against penal interest, rejecting the argument that "Rule 804's requirement that the declarant be unavailable is met because [defendant] Houk lives and works outside the 100-mile range of a civil subpoena." *Venzor*, 968 F. Supp. at 1267. The court explained that the "limitation on a trial subpoena applies only to 'a person who is *not* a party,'" *id.* (quoting FED. R. CIV. P. 45(c)(3)(A)(ii) (emphasis added by *Venzor* court)), and found that there was "no reason to believe that Houk will be unavailable to testify at trial, and thus Rule 804(b)(3) is not a basis to admit Houk's statements," *id.* Although this statement supports the conclusion that parties can be compelled to travel more than 100 miles for trial, the court did not analyze the interplay between paragraph (b)(2) and paragraph (c)(3)(A)(ii) and did not address service or party officers.

In *Archer Daniels Midland*, the court considered the appropriate location for depositions of the plaintiff's officers, directors, representatives, and employees. The defendant sought to compel these witnesses to travel for their depositions to Minnesota because the plaintiff had chosen to file suit there. *Archer Daniels Midland*, 187 F.R.D. at 587. The court noted that there is a distinction between a party's ordinary employees, who "are subject to the general rule that a deponent should be deposed near his or her residence, or principal place of work," *id.* at 587 (citing *Metrex Research Corp. v. United States*, 151 F.R.D. 122, 125 (D. Colo. 1993); FED. R. CIV. P. 45(c)(3)(A)(ii)), and a party's officers, directors, managing agents, and Rule 30(b)(6) designees, *id.* at 588. The court

noted that as to the latter category, "there is a well-recognized, general rule that a plaintiff is required to make itself available for a deposition in the District in which the suit was commenced, because the plaintiff has chosen the forum voluntarily, and should expect to appear there for any legal proceedings, whereas the defendant, ordinarily, has had no choice in selecting the action's venue." *Id.* (citations omitted). Despite this general rule, the court held that the plaintiff had demonstrated that "the equities require[d] that the exception, and not the general rule, govern the place where its corporate directors, officers, and Rule 30(b)(6) designees, should be taken," and concluded that "Decatur, Illinois, where the bulk of these corporate representatives work and reside" was the proper location. *Id.* Although the court found that officers of a plaintiff can be required to travel to the trial forum for depositions and relied on Rule 45(c)(3)(A)(ii) to conclude that ordinary employees should be deposed near their residence or place of employment, the court did not directly address whether officers of a party can be compelled to travel more than 100 miles even if they are served outside the limits in Rule 45(b)(2).

In *Younis*, the court concluded, in the context of considering a motion to dismiss based on forum non conveniens, that the majority of witnesses were located in Egypt and that "[t]heir testimony, like that of the few who reside elsewhere in the United States, cannot be compelled by this Court." 30 F. Supp. 2d at 395. The court noted that "[o]nly officers of [defendant] AUC could be compelled to appear here." *Id.* at 395 n.44 (citing FED. R. CIV. P. 45(c)(3)(A)(ii)). Although this statement supports the inference that officers could be served outside the limits in Rule 45(b)(2), the court did not directly address the service issue.

In *Prudential Securities*, the court considered a motion to transfer under section 1404(a). In that context, the court noted that the only nonparty witness whose testimony had been identified

as being needed at trial was located in Florida, which was far enough to make the witness outside the subpoena power of either of the potential venues—New York and North Carolina. 1998 WL 397889, at *5 (citing FED. R. CIV. P. 45(b)(2); FED. R. CIV. P. 45(c)(3)(A)(ii)). The court did not specifically address compelling a party's officer to attend trial.

In *Stone*, the plaintiff sought to compel the defendant to produce a particular officer for a deposition in Utah. 170 F.R.D. at 499. The officer had been the plaintiff's supervisor in Utah at the time of the events at issue in the lawsuit, but was located in Germany at the time of the lawsuit. *See id.* The court considered its subpoena power under Rule 45:

> Rule 45, F.R.C.P. is the usual rule for compelling a non-party witness to appear for deposition or trial. *Rule 45(b)(2)* provides for service of a subpoena for a deposition and *provides for a 100 mile limitation as to the place of appearance*, subject to Rule 45(c)(3)(A) F.R.C.P. Rule 45[(c)](3)(A) allows a court, on motion, to quash or modify the subpoena. Subsection (c)(3)(A)(ii) provides the subpoena may be quashed or modified if it requires "a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person." *Rule 45 F.R.C.P. allows a corporate officer of a party to be subpoenaed to appear beyond the 100 mile limitation*. . . . Rule 45, F.R.C.P. does extend the subpoena power more broadly to a corporate officer than to a non-party because the corporate officer of a party may be considered the corporate alter ego. However, the question of the application of Rule 45, F.R.C.P. to corporate officers is particularly important in light of the fact that many corporations have a variety of officers and business locations in various places with many outside the United States. *Rule 45 would seem to answer the issue as to requiring a corporate officer of a party to appear in a remote location*. However, the rule does not expressly state that a subpoena is the method to obtain the presence of a nonparty corporate officer of a party for deposition.

Id. at 500–01 (footnote omitted) (emphasis added). Although the court concluded that Rule 45 permits requiring a party's officer to travel more than 100 miles to a deposition, it did not address the issue of whether a party's officer may be served outside the 100-mile limit. The court noted that Rule

45(b)(2) provides a 100-mile limitation as to the place of appearance, subject to Rule 45(c)(3)(A)(ii), *id.* at 500, but Rule 45(b)(2) addresses the proper place for service rather than the place of appearance. The court found the rules confusing as to whether a corporation is required to produce a director, officer, or managing agent pursuant to notice under Rule 30(b)(1), and stated that "[b]ecause of the ambiguity in the Rules, and the possible confusion, as well as the need for clear guidance for the courts, the Judicial Conference of the United States should clarify the Rules of Civil Procedure on this issue." *Id.* at 503–04, 503 n.3. With respect to the place of the deposition, the court noted that "the deposition of a corporate officer 'should ordinarily be taken at its principal place of business,' or at the deponent's residence or place of business as a matter of convenience," and found that the defendant's principal place of business in Chicago was an appropriate place for the deposition of the corporate officer from Germany. *See id.* at 504 (internal citation omitted).

In *M.F. Bank Restoration*, the plaintiff moved to quash trial subpoenas served by the defendant on the plaintiff's employees who lived more than 100 miles from Philadelphia, the location for trial. 1994 WL 719731, at *8. The plaintiff relied on Rule 45(c)(3)(A)(ii). *Id.* The court held that "[b]ecause *none of these six employees is represented to be an officer* of [the plaintiff], and because [the defendant] has not supported the subpoenas on an independent basis, the motion will be granted." *Id.* The court concluded that non-officer employees could not be compelled to travel more than 100 miles for trial, but did not address whether a party's officer could be served outside the 100-mile limit or compelled to travel more than 100 miles.

In *Mason*, a pre-1991 amendments case, the court concluded that there was no error in requiring one of the defendant's employees to attend trial for the plaintiff's case in chief. 741 F. Supp. at 1504. The court concluded that although the employee "reside[d] more than 100 miles from

th[e] district, he [wa]s Texaco for purposes of th[e] lawsuit, and thus a party to the action." The court did "not believe that the limitation of FED. R. CIV. P. 45(e)[7] applie[d] to this situation, particularly considering defendant's stated intention to call this key witness in any event." *Id.* Because it was before the 1991 amendments, *Mason* did not analyze the rule text that existed after the 1991 amendments that seems to permit a party or a party's officer to travel more than 100 miles for trial, at least if properly served. In addition, *Mason* focused on the equitable factor that the defendant already planned to call the witness itself. *See id.*

III. The View that Rule 45 Does Not Authorize Nationwide Service on a Party's Officers

The view contrary to the *Vioxx* court's view regarding the interplay between Rules 45(b)(2) and 45(c)(3)(A)(ii) is expressed in *Big Lots Stores*. In that case, the plaintiffs moved to quash subpoenas the defendants had served on nine opt-in plaintiffs who lived outside the state and more than 100 miles from the courthouse. 251 F.R.D. at 214. The plaintiffs argued that the court's power to issue subpoenas was limited to those places listed in Rule 45(b)(2). *Id.* The defendant argued that Rule 45(c)(3)(A)(ii), particularly as interpreted by *Vioxx*, "effectively provides for nationwide service of subpoenas on parties and party officers." *Id.* There court observed that "[t]here is disagreement among courts about whether Rule 45(c)(3)(A)(ii) authorizes courts of the United States to issue subpoenas to parties and party officers in places outside the territorial limits defined in Rule 45(b)(2)," but noted that a majority of courts have held that it does. *Id.* at 215 (citing *Vioxx*, 438 F. Supp. 2d at 666 (citing cases)). The court explained that "[a] minority of courts have ruled the other way, essentially holding that Rule 45(b)(2) defines the scope of a court's subpoena power and the places where a trial subpoena may be properly served," and that "Rule 45(c)(3)(A)(ii) imposes a

---

[7] Before the 1991 amendments, subsection (e) contained the 100-mile limit on service for any witness at trial.

limitation on that power but does nothing to expand the scope of the power beyond the parameters set forth in 45(b)(2)." *Id.* at 215–16. The court noted that there was no circuit court authority on this issue and concluded that the minority position is the better view. *Id.* at 216. The court stated that "[o]ddly, both the *Vioxx* court and courts adopting the minority position hinged their decisions on the 'plain meaning' of the words in the rules, yet they came out very different ways." *Big Lots Stores*, 251 F.R.D. at 216.

The court explained that its construction was based on the text of Rule 45:

> Nothing in the language of Rule 45(b)(2) itself provides for service at any place other than those locations specified in the rule itself. As the authors of an authoritative treatise on federal practice and procedure explain, Rule 45(b)(2) "states only that a subpoena may be served at any place listed in subdivisions (b)(2)(A)–(D). The provisions concerning the possibilities for proper service" are listed in 45(b)(2). WRIGHT AND MILLER, 9A FEDERAL PRACTICE AND PROCEDURE § 2451 at 387 (emphasis added). The terms of Rule 45(b)(2) themselves do not provide for nationwide service of a subpoena. The Rule provides only that a subpoena may be served (A) within the judicial district of the issuing court; (B) in areas outside the district but within the 100-mile "bulge" from the location of the district court; (C) within the state of the issuing court consistent with state rules governing the power of state courts of general jurisdiction to issue trial subpoenas; or (D) under circumstances specifically provided for in a federal statute.
>
> To read the "subject to Rule 45(c)(3)(A)(ii)" clause as *expanding* the territorial reach of where a party or party officer may be served with a trial subpoena ignores the ordinary meaning of the phrase "subject to." The phrase "subject to" ordinarily operates to limit a power or right, not expand it. Webster's defines "subject to" as meaning "dependent upon something," as in "His consent is subject to your approval." When a rule or statute defining a judicial power or a legal right is "subject to" a cross-referenced rule or statute, the ordinary sense of that construction is that the power or right is limited by the cross-referenced provision. Another familiar example is a cause of action that is "subject to" a statute of limitations. Courts also frequently use the phrase "subject to" in judicial decisions to explain a limitation or subordinating effect.

Id. at 216–17 (internal citations omitted). The court concluded that "[n]othing in the text [of Rule 45(c)(3)(A)(ii)] affirmatively expands the geographic scope of where the Court may issue subpoenas," and that this section "spells out only the conditions under which a court *must* quash a subpoena." *Id.* at 217.

The court disagreed with the result reached in *Vioxx*:

> To reach that result the Court would have to turn a clause intended as a limiting clause on its head and ignore the territorial restrictions on where a trial subpoena may be properly served. The position of Big Lots would essentially require the Court to read the limiting ("subject to") clause of Rule 45(b)(2) as stating "In addition to the provisions of Rule 45(c)(3)(A)(ii), a subpoena may be served at any place[.]" The Court would then have to impute, when Rule 45(b)(2) does not so provide, that a subpoena for a party or its officer may be properly served anywhere in the country. Reading Rule 45(c)(A)(3)(ii) as creating a scheme of nationwide subpoena service, if only on parties, would have the effect of rendering Rule 45(b)(2) pointless with respect to parties and party officers. Under the majority view, it does not matter whether a subpoena is served on a party or party officer in any of the places listed in 45(b)(2). In other words, there is no requirement that service must be made in accordance with those territorial limitations in order for it to be proper. But as Wright and Miller explain, Rule 45(c) establishes permissible limits on a properly served subpoena. *See* WRIGHT AND MILLER, 9A FEDERAL PRACTICE § 246[3] at 476 (explaining that Rule 45(c)[(3)(A)](ii) "authorizes the district court to limit the use of subpoenas even when they comply with Rule 45(a) and (b)"). Thus, *in order for a subpoena to be properly served and have force, it must be served in accordance with the terms set forth in Rule 45(b)(2). Rule 45(c)(3)(A)(ii) spells out circumstances when a court must quash a subpoena, but it does not alter the requirements for proper service of a subpoena.*

Id. at 217–18 (emphasis added) (additional internal citations omitted). The court found that its construction was supported by the intent behind the rule:

> It strikes the Court as exceedingly odd that Congress would create a system of nationwide subpoena service in the backhanded manner that Big Lots suggests. It is even odder that Congress would do so in a subsection with the heading "Protecting a Person Subject

> to a Subpoena." FED. R. CIV. P. 45(c). Although a subsection heading or title is not necessarily determinative of a statute's meaning, it may be considered to clarify ambiguities. The Court's perspective is further informed by the observation that when Congress has sought to provide for service of subpoenas in places other than those listed in Rule 45(b)(2), it has done so with unmistakable clarity.

Id. at 218 (internal citation omitted). The court held:

> The better reading of subdivisions (b)(2) and (c)(3)(A)(ii) of Rule 45 is that the territorial scope of a court's subpoena power is defined by subdivision (b)(2), subject to the limitations spelled out in subdivision (c)(3)(A)(ii). Thus, to compel a person to attend trial, the person must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection in Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers. Thus, for example, if both a nonparty witness and a party, both residents of Texas, in a case before this Court were served with trial subpoenas at their depositions in New Orleans, the Court would have to grant the nonparty witness's motion to quash under Rule 45(c)(3)(A)(ii), but under that same rule, the party could be compelled to appear at trial. A similar situation presented itself in this case. A number of opt-in plaintiffs traveled to New Orleans to give videotaped depositions for perpetuation purposes. Even though Big Lots could have issued subpoenas to those individuals at their depositions to compel their attendance at trial, it did not. Had it done so, the Court would have no trouble in denying plaintiffs' motion to quash. But the Court will not acrobatically interpret Rule 45 to give force to Big Lots' procedurally improper subpoenas.

Id. at 218–19.

The court also concluded that "[t]he broader context of the Federal Rules . . . militate[d] in favor of quashing Big Lots' subpoenas," noting that the defendant could present the video depositions and transcripts of the plaintiffs it sought to subpoena, as provided in the Federal Rules. *Big Lots Stores*, 251 F.R.D. at 219. The court explained: "That the rules provide procedures for presenting testimony in situations like the one that exists here further counsels against reading Rule 45(b)(2)'s cross-reference to Rule 45(c)(3)(A)(ii) as creating nationwide subpoena service for parties and party

officers." *Id.*

The court noted that while it did not need to examine Rule 45's history to reach its conclusion, the history "support[ed] the Court's reading that Rule 45(b)(2) limits the places in which proper subpoena service may be made and that Rule 45(c)(3)(A)(ii) functions to limit a court's subpoena power once the subpoena is properly served within the court's assigned territorial boundaries." *Id.* The court further noted that "courts' powers to issue subpoenas have long been geographically restricted." *Id.* The court found that while the majority view is in part derived from the addition of paragraph (c)(3)(A)(ii) in the 1991 amendments, "there is no substantive difference in the territorial limits for proper subpoena service between the pre-1991 version of Rule 45, Rule 45 as amended in 1991, and the current version amended as of December 1, 2007." *Id.* at 220. The court "discern[ed] nothing in the 1991 textual revision of Rule 45 that created nationwide subpoena service." *Id.* In addition, the court found that the advisory committee notes associated with the 1991 amendments did not "signal that the 1991 amendments created a system of nationwide subpoena service for parties and party officers." *Big Lots Stores*, 251 F.R.D. at 221. In reviewing the committee notes, the court stated that "[t]he committee explained that the revision of subdivision (c) enlarged and clarified the protections afforded to persons subject to subpoena that had emerged in court decisions[,] . . . [b]ut it said nothing about expanding the scope of the places where proper subpoena service might be made." *Id.* Moreover, the court found that "before the 1991 amendments, courts recognized not only that they did not have the power to compel the presence of witnesses who lived beyond the 100-mile bulge or outside of the state in which they sat, but also that *service* of a subpoena had to be made in accordance with the terms of Rule 45(e) in order to be valid." *Id.* The court concluded that "[i]n light of the widespread recognition among courts that their subpoena

powers were limited to the places listed in old Rule 45(e), if the 1991 amendments created a system of nationwide subpoena service, it would be reasonable to expect that the rule itself would unambiguously say so, as Federal Rule of Criminal Procedure 17(e)(1) does, and that the committee would have so stated." *Id.* at 221.

The *Big Lots Stores* court emphasized that while the 1991 amendments expanded the reach of properly served subpoenas with respect to parties and party officers, it did not expand the scope of permissible service:

> Before the 1991 amendments to Rule 45, several commentators drew attention to the shortcomings of the 100-mile rule of Rule 45(e) with respect to parties and party officers in the context of complex and multidistrict litigation. *See generally* Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81 (1990);[8] Richard J. Oparil, *Procuring Trial Testimony from Corporate Officers and Employees: Alternative Methods and Suggestions for Reform*, 25 AKRON L. REV. 571 (1991); Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37 (1989) (criticizing state court systems for holding onto 100-mile rule); Carolyn Hertzberg, Note, *Clever Tool or Dirty Pool? WPPS Closed Circuit Testimony and the Rule 45(e) Subpoena Power*, 21 ARIZ. ST. L.J. 275 (1989). As the rule stood before the 1991 amendments, parties and party officers could avoid appearing at trial simply because they lived more than 100 miles from the courthouse. To be sure, the 1991 amendments addressed that problem with the addition of subdivision (c)(3)(A)(ii): parties and party officers can no longer escape the force of a trial subpoena merely because they live far away from the site of trial. But as discussed *supra*, *the 1991 amendments did not change the well-recognized requirement that the subpoena itself must still be served within the territorial boundaries demarcated in the rule in order to be valid*. Indeed, less than a year after the 1991 amendments to Rule 45 became effective, commentators were decrying the

---

[8] Professor Roach proposed, prior to the 1991 amendments, that Rule 45 be amended to differentiate between party and nonparty witnesses and between multidistrict litigation and single-district litigation. *See generally* Roach, *supra*.

> inadequacies of the amendments, noting that under the 1991 amendments the "archaic 100 mile Rule itself remains untouched and unimproved." James B. Sloan and William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 34 (1992) (emphasis added). To eliminate the 100-mile rule, those commentators proposed that Rule 45(b)(2) be amended to read: "A subpoena requiring the attendance of a witness at a hearing or trial . . . may be served at any place within the United States." *Id.* at 40. That language, which closely resembles Federal Rule of Criminal Procedure 17(e)(1), would appear to provide for nationwide subpoena service. But it is not part of the Federal Rules, and *the 1991 amendments retained the well-established limitations on the territorial scope of courts' subpoena powers*. Moreover, courts considering the effect of the 1991 amendments—even courts adopting the majority view—have acknowledged that "nothing in the history or adoption of current Rule 45(b)(2) . . . conveys any intention to alter the 100 mile rule." *Vioxx*, 438 F. Supp. 2d at 667. *See also JamSports* [*& Entm't, LLC v. Paradama Prods., Inc.*], [No. 02 C 2298,] 2005 WL 14917, at *1 [(N.D. Ill. Jan. 3, 2005)]. *The "realities of modern life and multi-district litigation*," *Vioxx*, 438 F. Supp. 2d at 667, *may present compelling reasons for nationwide subpoena service, but until the Rules provide for such a scheme, the Court is bound to apply the Rules as they are written*.

Id. at 221–22 (emphasis added).

Several courts, including a number of recent decisions, have reached a similar conclusion to that expressed in *Big Lots Stores*. *See, e.g.*, *Iorio v. Allianz Life Ins. Co. of N. Am.*, No. 05cv633 JLS (CAB), 2009 WL 3415689, at *4 (S.D. Cal. Oct. 21, 2009) ("Rule 45 does not give the Court the power to serve subpoenas to appear at trial on party officers outside the 100-mile radius, absent any other state or federal law providing otherwise . . . ."); *Dolezal v. Fritch*, No. 08-1362-PHX-DGC, 2009 WL 764542, at *2 (D. Ariz. Mar. 24, 2009) ("The Court has read *Vioxx*, [*Big Lots Stores*], and related cases, and finds [*Big Lots Stores*] to be persuasive."); *Chao v. Tyson Foods, Inc.*, 255 F.R.D. 556, 559 (N.D. Ala. 2009) ("The Court finds that the minority interpretation of Rule 45 described in *Big Lots* and other similar cases is correct."); *Maryland Marine Inc. v. United States*,

No. H-07-3030, 2008 WL 2944877, at *5 (S.D. Tex. Jul. 23, 2008) (in considering a motion to transfer under section 1404(a), concluding that "[w]hile Rule 45(c)(3)(A)(ii) provides specific circumstances under which a court must quash a subpoena, 'it does not alter the requirements for proper service of a subpoena'") (quoting *Big Lots Stores*, 2008 WL 1977507, at *5) (additional citation omitted); *Lyman v. St. Jude Med. S.C., Inc.*, 580 F. Supp. 2d 719, 734 (E.D. Wis. 2008) ("The Court agrees with the reasoning in *Big Lots Stores* and the other courts that adhere to the purported minority interpretation of the interplay between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii)."); *Mazloum v. Dist. of Columbia Metro. Police Dep't*, 248 F.R.D 725, 728 (D.D.C. 2008) ("[T]here does not appear to be a basis in the text of Rule 45(c)(3)(A)(ii) to authorize valid service of a subpoena upon a party witness beyond the normal 100-mile range of a federal court's subpoena power."); *JamSports*, 2005 WL 14917, at *1 ("Read in context, the cross-reference of Rule 45(c)(3)(A)(ii) in Rule 45(b)(2) is meant to reflect that even if service of a subpoena is otherwise proper under Rule 45(b)(2), the subpoena is to be quashed if it imposes a requirement identified in Rule 45(c)(3)(A)(ii)."); *Land O' Lakes*, 181 F.R.D. at 397 ("Rule 45(c)(3)(A)(ii) simply does not extend the range of this court's subpoena power, although it does provide that the court may quash a subpoena, *otherwise within its power*, for a non-party witness, under certain circumstances.") (emphasis added); *see also* David T. Maloof & Barbara Sheridan, *Taking Evidence at the Flood Tide: How to Obtain the Testimony of Departing, Departed and Unavailable Admiralty Witnesses*, 34 J. MAR. L. & COM. 55, 69 n.69 (2003) ("With respect to deposing witnesses visiting the U.S., keep in mind that, pursuant to Rule 45, a court may issue a subpoena compelling a party or an officer of a party to travel more than 100 miles from their place of residence, employment or place from which they regularly conduct business in person in order to comply with that subpoena, *providing the*

subpoena was served pursuant to the requirements of Rule 45(b).") (emphasis added); *cf. Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, No. CIV 08-1101 JB/RLP, 2009 WL 3672499, at *2 (D.N.M. Sept. 29, 2009) (noting that Rule 45(b)(2) did not "appear to permit Guidance to serve a subpoena upon the Defendants' employees" because they were located "outside of the district, in excess of 100 miles from the courthouse, outside the boundaries of the state of New Mexico," and Guidance had "not provided the Court with good cause nor a federal statute providing for subpoena beyond those limitations," but concluding that "[e]ven if the . . . employees could be subpoenaed, rule 45 provides that the Court would be required to quash that subpoena on motion by the Defendants" because the employees were not officers of the defendants);[9] *Square D Co. v. Breakers Unlimited, Inc.*, No. 1:07-cv-806-WTL-JMS, 2009 WL 1702078, at *1 (S.D. Ind. Jun. 11, 2009) ("In that sense, then, the relevant question essentially is whether a party may be compelled to attend trial and testify if that party is not subject to being subpoenaed under Rule 45. While the Court recognizes the cases cited by Square D that suggest the contrary, the Court does not believe that Rule 45—or any other Federal Rule of Civil Procedure—provides the last word regarding the situation here."); Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 226 (2003) (discussing Rule 45(b)(2) and noting that "a federal district court has no jurisdiction to compel compliance with an arbitral order or subpoena served on a person (*party or non-party*) who resides outside of the forum of the arbitration, or at least more than 100 miles from

---

[9] The *Guidance Endodontics* case arguably supports the minority position because it considered service of the subpoena separately from whether it had to be quashed. The court concluded that service was improper without regard to whether the employees were officers of a party, implying that service would have been improper for both non-officer employees and officers. The court only considered the employees' non-officer status in concluding that even if service had been proper, it would be necessary to quash the subpoenas.

the place of the hearing")[10] (footnote omitted) (emphasis added); Richard J. Oparil, *Procuring Trial Testimony from Corporate Officers and Employees: Alternative Methods and Suggestions for Reform*, 25 AKRON L. REV. 571, 573 (1992) (noting that the 1991 amendments to Rule 45 "do not directly address the problem of obtaining subpoena power over officers of a corporate party who are outside of the judicial district" and that the "rule changes essentially left the geographic limitations on trial subpoenas intact").[11]

---

[10] This article does not discuss Rule 45(c)(3)(A)(ii).

[11] Mr. Oparil argues that "the court has power to compel the corporate party to testify through particular officers, directors, and managing agents, by means of a subpoena served on the corporation to testify through the designated officials," but notes that "[w]hile logical and persuasive, most courts have not adopted this argument." Oparil, *supra*, at 576 (footnote omitted). The article further notes that some courts have concluded that "federal courts have 'inherent power' to compel testimony by party representatives," but that "[o]ther courts reject this approach." *Id.* at 578–79. Mr. Oparil suggests several possible reforms for having party officers testify at trial, arguing that "[t]he most straightforward amendment would be a blanket rule requiring corporate parties to produce key officials at trial or risk entry of an adverse judgment," noting that Washington and California have adopted similar approaches. *Id.* at 587. He advocates modifying Rule 45 to track the Washington rule, which provides:

> A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association which is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in Rule 30(a) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before . . . . [F]or good cause . . . the court may make orders for the protection of the party or managing agent to be examined.

Id. at 587–88 (quoting WASH. CIV. R. 43(f)(3)) (quotation marks and footnote omitted) (alterations made by Oparil). However, Mr. Oparil notes that "a majority of the Federal Courts Committee of the Association of the Bar of the City of New York rejected such an approach," finding that "'[t]he disadvantage of being compelled to rely on deposition testimony at trial, particularly given the availability of video-taped depositions, does not justify the increased inconvenience to witnesses, and increased expense and complexity of litigation, that would be entailed by authorizing nationwide service on a case by case basis.'" *Id.* at 589–90 (quoting REPORT ON PROPOSED CHANGES TO RULE 45(e)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE (Feb. 17, 1989)) (additional internal quotation marks omitted). Mr. Oparil argues that the Federal Courts Committee "did not adequately consider that videotaped depositions are more expensive and may be more time consuming

The cases arriving at the same conclusion as *Big Lots Stores* have largely focused on the text of the rule. In *Land O' Lakes*, the plaintiffs sought to compel one of the defendant's officers to testify at trial even though he lived and worked more than 100 miles from the trial court's location. 181 F.R.D. at 396. The court rejected the argument that Rule 45(c)(3)(A)(ii) created nationwide service for subpoenas addressed to parties and party officers:

> Rule 45(c)(3)(A)(ii) simply does not extend the range of this court's subpoena power, although it does provide that the court may quash a subpoena, otherwise within its power, for a *non-party* witness, under certain circumstances. There simply is no "negative implication," upon which the Johnsons appear to rely, that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2).

Id. at 397. The court explained:

> In short, Rule 45(b)(2) defines the court's subpoena power, and David Seehusen is beyond it, while Rule 45(c)(3)(A)(ii) allows for quashing a subpoena *otherwise within the court's subpoena power*, but in circumstances not applicable here. This is what is meant in Rule 45(b)(2) by the statement that the court's subpoena power as defined in that subsection of the rule is "subject to" the provisions of Rule 45(c)(3)(A).

Id. (emphasis added). The court noted that the rules provide an alternative in situations where a party's officer is outside the court's subpoena power, noting that the officer's "unavailability to testify in person falls precisely within Rule 32(a)(3), which provides that '[t]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the

---

for the court in having to rule on objections," and that "[a] systematic, easy to apply, general rule seems far preferable." *Id.* at 590 (footnote omitted). The second possible approach suggested by Mr. Oparil was to amend Rule 45 "to apply Rule 30(b)(6) deposition procedures to trials." Oparil, *supra*, at 591. The third suggested approach "would be to give trial courts discretion to require corporate parties to make their officers, directors and managing agents (who as individuals are outside the subpoena power) available for examination at trial upon a showing of need." *Id.* at 592.

witness is at a greater distance than 100 miles from the place of trial or hearing[.]'" *Id.* (quoting FED. R. CIV. P. 32(a)(3)(B)) (alteration added by *Land O' Lakes* court).

Similarly, in *JamSports*, the court considered a motion to quash a trial subpoena seeking the attendance of the defendant's executive vice president and chief financial officer, who lived and worked in Texas, at a trial in Illinois. 2005 WL 14917, at *1. The officer "was not served within [the court's] district, the 100-mile 'bulge,' or the state of Illinois." *Id.* The court rejected the argument that the cross-reference in Rule 45(b)(2) to Rule 45(c)(3)(A)(ii) "expands the geographic reach of a court's subpoena power with regard to a person who *is* 'a party or an officer of a party.'" *Id.* The court explained:

> Nothing in the history of the adoption of Rule 45(c)(3)(A) suggests that it was intended to alter the longstanding geographic limitations on the reach of a district court's subpoena power. Nor does the text of the Rule support the reading proposed by JamSports or in the cases upon which it relies. Rule 45(c)(3)(A) does not confer authority for service of a subpoena; it confers authority to quash or modify a subpoena. It provides an exception to Rule 45(b)(2), not an addition to that Rule. *See Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388, 396–97 (N.D. Iowa 1998).
>
> Read in context, *the cross-reference of Rule 45(c)(3)(A)(ii) in Rule 45(b)(2) is meant to reflect that even if service of a subpoena is otherwise proper under Rule 45(b)(2), the subpoena is to be quashed if it imposes a requirement identified in Rule 45(c)(3)(A)(ii)*. Specifically, even if a subpoena is served within the geographic boundaries of a district, outside the district but within 100 miles of the place of trial, or outside the state in which the district lies, it must be quashed if it requires a non-party witness to travel more than 100 miles from where he or she resides, employs, or regularly transacts business. To provide a concrete example, a witness who lives and works in Galena, Illinois can properly be served with a subpoena under Rule 45(b)(2) to appear at a trial in Chicago, because Galena is within the Northern District of Illinois. But if the witness is not a party or officer of a party, she is entitled under Rule 45(c)(3)(A)(ii) to have the subpoena quashed, because it would require her to travel more than 100 miles.

Id.

In *Mazloum*, the court considered a motion in limine to preclude the defendants from using portions of a nominal defendant's deposition testimony at trial in lieu of his live appearance. 248 F.R.D. at 725–26. The defendants argued that using the deposition testimony was permitted because the witness was an "unavailable witness" under Rule 32(a)(4)(B) since he resided in Florida, more than 100 miles from the place of trial. *Id.* at 726. The plaintiff argued that because the witness was still a party to the litigation, was designated as a Rule 30(b)(6) witness, and was a "managing agent" of one of the defendants, he was "'by definition *available* even if he happen[ed] to be literally outside the 100-mile limit set forth in Rule 32.'" *Id.* at 726–27 (record citation omitted) (emphasis in original). The court concluded that the witness was unavailable and that his deposition testimony could be used under Rule 32. *Id.* at 727. Even though it found that sufficient to resolve the pending issue because the plaintiff had not attempted to serve a trial subpoena on the witness, the court analyzed Rule 45 because it seemed likely that the plaintiff might attempt to serve a trial subpoena and that a motion to quash would follow. *Id.* The court noted that "the majority of federal district courts that have addressed the interaction between Rule 45(b)(2)(B) and Rule 45(c)(3)(A)(ii) have held that the latter authorizes a federal court to issue a trial subpoena upon a party witness outside of the 100-mile radius limitation contained in Rule 45(b)(2)(B)." *Id.* (citing *Clark,* 2008 WL 648542, at *1 ("collecting cases from ten different federal courts that reflect the 'majority' position"). But the court stated that "there are reasons to question that majority position." *Mazloum*, 248 F.R.D. at 727.

The *Mazloum* court explained:

> To begin with, based simply on the text of Rule 45(b)(2) it would seem that Rule 45(c)(3)(A)(ii) functions as a *limitation* on the scope

> of Rule 45(b)(2)(B) rather than an expansion of authority. In relevant part, Rule 45(b)(2) states: "*Subject to* Rule 45(c)(3)(A)(ii), a subpoena may be served at any place . . . " *See* FED. R. CIV. P. 45(b)(2) (emphasis added). The phrase "subject to," of course, commonly refers to a constraint, and there is no reason to believe that it does not do so here. The majority position, however, appears to interpret that phrase as if it read: "*In addition to the provisions* of Rule 45(c)(3)(A)(ii), a subpoena may be served at any place . . . " *That is an odd construction*.
>
> But even if one were to accept the apparent majority reading—that Rule 45(c)(3)(A)(ii) could somehow be an expansion of the reach of Rule 45(b)(2)—the terms of Rule 45(c)(3)(A)(ii) do not appear to support the conclusion that the majority of courts have reached. The logical jump that those decisions make, as this Court understands it, begins with Rule 45(c)(3)(A)(ii), which mandates that a court quash any subpoena served upon a non-party (or an employee of a party who is not an officer) that would require that witness to travel more than 100 miles "from where that person resides, is employed, or regularly transacts business in person." *See* FED. R. CIV. P. 45(c)(3)(A)(ii). From that proposition, those courts have concluded that a party witness may be served with a subpoena beyond 100 miles from the place of trial pursuant to Rule 45(b)(2)(B).
>
> *But that may not logically follow from the text of the Rule*. Indeed, the upshot of Rule 45(c)(3)(A)(ii) with respect to party witnesses is, as this Court sees it, that a court is not required to quash a properly served subpoena even if it required a party witness to travel more than 100 miles. If, for instance, Mazloum had served Fiorito with a trial subpoena while he was present in the District for his 30(b)(6) deposition, Rule 45(c)(3)(A)(ii) would not compel this Court to quash that subpoena (assuming Fiorito is in fact a party) even if he had to travel from Florida to attend the trial. *But there does not appear to be a basis in the text of Rule 45(c)(3)(A)(ii) to authorize valid service of a subpoena upon a party witness beyond the normal 100-mile range of a federal court's subpoena power*. Two other federal courts, which evidently comprise the "minority" position, have reached this conclusion. *See Jamsport & Entm't, LLC v. Paradama Prods., Inc.*, 2005 WL 14917 at *1 (N.D. Ill. Jan. 3, 2005); *Johnson v. Land O' Lakes*, 181 F.R.D. 388, 397 (D. Iowa 1998).

Id. at 728 (fourth, fifth, and sixth emphasis added). The court expressed concern about reading extensive deposition transcripts into the trial record, noting that "it is unusual to present such an

important witness's testimony through lengthy deposition excerpts," and urged the parties to agree to videotape the witnesses' testimony or otherwise present it in a "live" manner. *Id.* Finally, the court noted that "[a]t least one other federal court has suggested that 'the court's inherent power enables the court to order' that a party witness appear at trial notwithstanding the fact that the witness resides outside of the 100-mile service radius authorized by Rule 45(b)(2)," *id.* at 728 n.4 (citing *Clark*, 2008 WL 648542, at *2), but the court was "not inclined to exercise its inherent power in a manner that would conflict with the structure and terms of the Federal Rules of Civil Procedure," *id.*

In *Lyman*, the court noted that "[t]he majority of courts interpret these provisions [in Rule 45(b)(2)(B) and Rule 45(c)(3)(A)(ii)] together to mean . . . that a court may compel the trial testimony of a party or a party's officer even when the person to be compelled resides beyond the 100-mile range for subpoenas." 580 F. Supp. 2d at 733 (citations omitted). The court disagreed with the majority view, explaining:

> Rule 45(b)(2) sets forth certain requirements for a subpoena to be properly served and to have the force to compel attendance. Rule 45(c)(3)(A)(ii) provides specific circumstances under which a court must quash a subpoena, "but it does not alter the requirements for proper service of a subpoena." *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213, 217–18 (E.D. La. 2008). Therefore, to compel attendance at trial, the person "must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection in Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers." *Id.* at 218 (emphasis in original).
>
> The Court agrees with the reasoning in *Big Lots Stores* and the other courts that adhere to the purported minority interpretation of the interplay between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii). As one court noted, the majority position makes a "jump" that "may not logically follow from the text of the Rule." *Mazloum v. District of Columbia Metropolitan Police Dep't*, 248 F.R.D. 725, 727–28

> (D.D.C. 2008). "There is simply no 'negative implication' . . . that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2)." *Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388, 397 (N.D. Iowa 1998).
>
> Ultimately, the "upshot of Rule 45(c)(3)(A)(ii) with respect to *party* witnesses is . . . that a court is not *required* to quash a *properly* served subpoena even if it required a party witness to travel more than 100 miles." *Id.* at 728 (emphasis in original); *see also JamSports and Entertainment, LLC v. Paradama Prods., Inc.*, No. 02 C 2298, 2005 WL 14917 (N.D. Ill. 2005) ("Read in context, the cross-reference of Rule 45(c)(3)(A)(ii) in Rule 45(b)(2) is meant to reflect that even if service of a subpoena is otherwise proper under Rule 45(b)(2), the subpoena is to be quashed if it imposes a requirement identified in Rule 45(c)(3)(A)(ii)").

Id. at 733–34. The court explained that because service of the subpoena was not proper under Rule 45(b)(2), the subpoena had to be quashed, but noted that Rule 32(a)(4)(D) allows the introduction of videotaped deposition testimony when a witness is outside the scope of a subpoena. *Id.* at 734 (citation omitted).

In *Iorio*, the court found the *Big Lots Stores* reasoning persuasive and concluded that "Rule 45 does not expand the Court's subpoena power beyond the 100-mile radius for party officers." 2009 WL 3415689, at *3. The court explained that "[t]he use of the phrase 'subject to' has routinely been used by Congress to limit the scope of legislation, not expand it" and "[t]here [wa]s no persuasive rationale for why 'subject to' would be used differently in this context and inversely serve to expand the court's subpoena power." *Id.* The court noted that the legislative history supported its view because the 1991 advisory committee's notes "clarified the amendments in subdivision (c) and stated that the only expansion of subpoena power was that the court may now subpoena a witness outside the 100 mile radius so long as the witness was located within the State of the district." *Id.* at *4

(footnote omitted). The court held: "Rule 45 does not give the Court the power to serve subpoenas to appear at trial on party officers outside the 100-mile radius, absent any other state or federal law providing otherwise . . . ." *Id.* The court also quashed subpoenas issued to former employees because the subpoenas required the witnesses to travel more than 100 miles to attend trial and none were traveling from within the state. *Id.* at *5. To resolve the inequity that would result if the defendant produced any of the subpoenaed witnesses for its own case, the court held that "if Plaintiffs are forced to show the videotaped depositions or read the transcript into the record of any of the movants in this action because Defendants have failed to produce them, Defendants will thereafter be precluded from producing the same witnesses in person." *Id.* at *6.

In *Chao*, the court recognized that the "majority of courts have held that Rule 45(b)(2)'s 100-mile rule does not apply to a party," but concluded that the language of the rule supported the minority position. 255 F.R.D. at 558, 559 (citations omitted). The court explained

> Rule 45(b)(2)'s use of the phrase "subject to" in cross-referencing Rule 45(c)(3)(A)(ii) indicates that it is only intended to limit the court's power, not expand it. It is also too tenuous an inference to conclude that because a court is not required to quash a subpoena issued to a party or a party's officer under Rule 45(c)(3)(A)(ii), it therefore has the power to compel the attendance of a party witness who was served beyond the explicit geographical limitations of Rule 45(b)(2) and that service of a subpoena is valid on a nationwide basis whenever the person served is a party or the officer of a party. Thus, the Court rejects the position accepted by a majority of district courts holding that Rule 45(c)(3)(A)(ii) supports the "inverse inference that parties and their officers are subject to compulsion to attend trials that occur outside the 100 mile limit otherwise available to non-parties." *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664, 666 (E.D. La. 2006). The Court cannot compel persons, whether or not "parties" or officers of Tyson, to appear in court when they have not been properly served with a trial subpoena.

Id. at 559.

In *Dolezal*, the court considered a subpoena issued by the District of Arizona and served on the defendants in Colorado that required the defendants to appear for depositions and document production in Phoenix. 2009 WL 764542, at *1. The plaintiff argued that service was proper because the defendants were parties to the litigation and the *Vioxx* case allowed service on parties outside the district and more than 100 miles from the place for appearance and production. *Id.* The court cited *Big Lots Stores*, and noted that "[o]ther courts have disagreed with *Vioxx*, holding that Rule 45(b)(2) specifies where subpoenas may be served and Rule 45(c)(3)(A)(ii) merely makes clear that nonparties cannot be required to travel more than 100 miles except for trial within the district where they are served." *Id.* The court agreed with the analysis in *Big Lots Stores*:

> The Court has read *Vioxx*, [*Big Lots Stores*], and related cases, and finds [*Big Lots Stores*] to be persuasive. The clear language of Rule 45(b)(2) states that a subpoena issued by this Court may be served only within this district or outside of the district but within 100 miles of where the event for which the subpoena is issued will occur, unless state or federal law provide otherwise (they do not in this case). Rule 45(c)(3)(A)(ii) creates a limitation on this scope of service, stating that nonparties may not be required to travel more than 100 miles for a nontrial event, and not even for trial if undue expense would be incurred. Thus, for example, even though the scope of service in Rule 45(b)(2) would permit a party before this Court to serve a subpoena for a deposition or document production on a nonparty witness in Page, Arizona, which is within this district but more than 100 miles from Phoenix, the limitation in Rule 45(c)(3)(A)(ii) would make clear that the witness could not be required to travel to Phoenix for the deposition or production. The witness could be compelled by the subpoena to appear in Page, or within 100 miles of Page, but not in areas of the district beyond a 100-mile radius. Rule 45(c)(3)(A)(ii) also makes clear that the nonparty could be required to attend trial in Phoenix only if undue expense would not be incurred. A party residing in Page, by contrast, is not protected by Rule 45(c)(3)(A)(ii) and could be required by subpoena to travel to Phoenix for a deposition, production, or trial.

Id. at *2. The court noted that its construction was supported by another provision in Rule 45:

> That Rule 45(c)(3)(A)(ii) seeks to protect nonparties from inconvenience that might arise from the Rule 45(b)(2) scope-of-service provision—rather than to expand that scope of service—is supported by the contempt provision of the rule. Rule 45(e) provides that a person who fails to comply with a properly served subpoena may be held in contempt, and then contains this exception: "[a] nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii)." This provision makes clear that the intent of Rule 45(c)(3)(A)(ii) is to protect[] nonparties, even if the subpoena otherwise complies with the scope-of-service provision in Rule 45(b)(2). Rule 45(c)(3)(A)(ii) constitutes a limitation on the scope-of-service provision for the benefit of nonparties, not a negatively implied expansion of that provision for parties. As [*Big Lots Stores*] notes, this interpretation comports with the 1991 amendments to Rule 45 (which added Rule 45(c)(3)(A)(ii)) and the advisory committee notes that accompanied those amendments. 251 F.R.D. at 220–21.

Id.

In *Square D*, the defendant had served trial subpoenas on two employees of the plaintiff, and the plaintiff sought to quash the subpoenas because the employees lived and worked more than 100 miles from the trial location. 2009 WL 1702078, at *1. The court found that the plaintiff had no standing to challenge the subpoenas, and denied the motion to quash on that basis, but noted that if the subpoenaed employees moved to quash, "their motions would be well-taken and, in fact, the granting of those motions would be mandatory under Federal Rule of Civil Procedure 45(c)(3)(A)(ii)." *Id.* The court explained that because the employees had been designated by the plaintiff as Rule 30(b)(6) witnesses, the defendant was "seeking to call Square D itself to testify through the two individuals that Square D has designated to speak for it on the witness stand in this case." *Id.* The court defined the issue as "whether a party may be compelled to attend trial and testify if that party is not subject to being subpoenaed under Rule 45." *Id.* The court acknowledged "the split among courts with regard to the interplay between Rule 45(b)(2)(B), which limits service

of a subpoena to within 100 miles of the place of trial, and Rule 45(c)(3)(A)(ii), which requires the quashing of a subpoena that requires a 'person who is neither a party nor a party's officer to travel more than 100 miles,'" but did "not believe that Rule 45—or any other Federal Rule of Civil Procedure—provide[d] the last word regarding the situation . . . ." *Id.* The court relied on the commentary by David Siegel (quoted earlier in this memorandum in connection with the *Ames Department Stores* case), and concluded that while the witnesses were not subject to the court's subpoena power under Rule 45, and the court had no jurisdiction over them, the court did have jurisdiction over the plaintiff. *Id.* at *1–2. The court found that it had "inherent authority that extends beyond the authority provided by the Federal Rules of Civil Procedure." *Square D*, 2009 WL 1702078, at *2. The court held: "In this case, the rules do not expressly provide that attendance at trial can be secured only by a subpoena, and the notion that the Court has the inherent authority to order a party to appear and testify—or, in the case of a corporation, to order it to produce a witness on its behalf—seems rather uncontroversial." *Id.* The court noted that an order compelling a corporate witness would sometimes be inappropriate, such as if the Rule 30(b)(6) designee is no longer employed by the party, if it would impose an undue burden on the witness beyond the imposition of travel, or if live testimony would not add anything to the proceedings. *See id.* The court ordered the defendant to file a notice explaining what testimony it sought from the witnesses and its relevance to the case. *Id.* at *3.

In *Maryland Marine*, the court considered a transfer under section 1404(a). The plaintiff opposed transfer and argued that two of its former employees could be compelled to attend a trial in the original district—the Southern District of Texas—under Rule 45(c)(3)(A)(ii) because they lived in Texas. 2008 WL 2944877, at *4. The court held that "[w]hile Rule 45(c)(3)(A)(ii) provides

specific circumstances under which a court must quash a subpoena, 'it does not alter the requirements for proper service of a subpoena.'" *Id.* at *5 (citing *Big Lots Stores*, 2008 WL 1977507, at *5; *JamSports*, 2005 WL 14917, at *1). The court explained that "[t]o compel a person to attend trial, the person must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection in Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers." *Id.* at *6. The court found it unclear whether the nonparty witnesses could be compelled to attend trial in the Southern District of Texas because each lived in Texas but outside the district and more than 100 miles from the courthouse. *Id.* But the court concluded that "the fact that many of the nonparty witnesses knowledgeable about the [relevant issues] [we]re subject to compulsory process in the Northern District of Alabama, while the few witnesses in Texas could challenge any trial subpoena requiring them to attend trial in the Southern District of Texas, weigh[ed] in favor of transfer." *Id.*

IV. Conclusion

Many courts have concluded that Rule 45 permits nationwide service of trial subpoenas to parties and party officers, as the *Vioxx* court held, and the cases describe the *Vioxx* view as the majority rule. However, the *Big Lots Stores* court is far from being alone in its holding that Rule 45 does not permit nationwide service of trial subpoenas on parties and party officers. A number of cases, including some recent decisions, have agreed with the interpretation in *Big Lots Stores* of the interplay between Rule 45(c)(3)(A)(ii) and Rule 45(b)(2). In addition, many of the cases noting that a majority of courts have found that Rule 45 permits compelling parties or officers of parties to travel more than 100 miles for trial cite cases that do not specifically address the issue of whether service must be made within the limits of Rule 45(b)(2). In sum, while the *Vioxx* interpretation of Rule 45

has been described by many courts as the “majority” rule, many cases that have closely examined the language in Rule 45(b)(2) and Rule 45(c)(3)(A)(ii) have disagreed with the *Vioxx* court’s interpretation.