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6 **IN THE UNITED STATES DISTRICT COURT**
 7
 8 **FOR THE DISTRICT OF ARIZONA**

9 Ramada Worldwide, Inc., a
 10 Delaware corporation,
 11
 12 Plaintiff,

No. 06CV0045-TUC-JMR

11 vs.

**RESPONSE IN OPPOSITION TO
 MOTION TO COMPEL PRODUCTION
 OF 30(B)(6) WITNESS**

12 Starbound Tucson Hotel, LLC, an
 13 Arizona limited liability company;
 14 Lee-Tzong Chen and Jane Doe,
 15 husband and wife; Palo Verde
 16 Property, LLC, a California limited
 17 liability company,
 18 Defendants.

HON. JOHN M. ROLL

18 In response to Defendants’ Motion for Protective Order, Plaintiff filed a
 19 consolidated Response and a Motion to Compel. For 18 pages, Ramada
 20 Worldwide, Inc. (“RWI”) attempts to paint Starbound Tucson Hotel (“STH”) as an
 21 obstructionist defendant who has struggled to prevent RWI from discovering
 22 information from a witness. Nothing could be further from the truth.
 23

24 RWI demands that STH, a bankrupt company with no assets or employees,
 25 fly a **former** manager from Florida to Tucson to appear and attend a 30(b)(6)
 26

1 deposition.

2 **I. RWI IS AFFIRMATIVELY MISLEADING AS TO THE NATURE OF THIS**
3 **DISPUTE.**

4 This dispute revolves around whether a defunct defending company has any
5 power to compel a non-resident former manager and minority owner to appear as a
6 30(b)(6) witness in Tucson. As can be seen from RWI's Motion, though they have
7 called it a 30(b)(6) deposition, what they are actually seeking is a Tucson
8 deposition of Wayne Mitchell, a Florida resident. Mitchell has not been involved
9 with STH in any capacity since the company's bankruptcy terminated in 2003. The
10 company has not conducted business since the bankruptcy. By improperly serving
11 a 30(b)(6) notice, and arguing that the only person who can testify is Mitchell, RWI
12 hopes to impose additional costs and burdens on a defunct company.
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16 RWI knows that former employees cannot be compelled to testify as 30(b)(6)
17 witnesses. Rule 30(b)(6) provides in relevant part,
18

19 "The organization so named shall designate **one or more**
20 **officers, directors, or managing agents or other**
21 **persons who consent to testify on its behalf** and may
22 set forth, for each person designated, the matters on
23 which that person will testify."

24 RWI will likely try to argue that even though STH has not been in business
25 since 2003, Mitchell is a managing agent, because he was the manager and had a
26 5% interest in the company prior to the bankruptcy. *Sugarhill Records Ltd. v.*

1 *Motown Record Corp.* 105 F.R.D. 166, 170 (DCNY 1985) sets forth factors to
2 consider in determining whether Mitchell can be deemed a managing agent:
3

4 Several factors have been enunciated which must be
5 examined in determining whether a person is a
6 "managing agent." Those are as follows: 1) whether the
7 individual is invested with general powers allowing him
8 to exercise judgment and discretion in corporate matters;
9 2) whether the individual can be relied upon to give
10 testimony, at his employer's request, in response to the
11 demand of the examining party; 3) whether any person or
12 persons are employed by the corporate employer in
13 positions of higher authority than the individual
14 designated in the area regarding which information is
15 sought by the examination; 4) the general responsibilities
16 of the individual "*respecting the matters involved in the*
17 *litigation,*" *Kolb v. A.H. Bull Steamship Co.*, 31 F.R.D.
18 252, 254 (E.D.N.Y.1962) (emphasis in original); and 5)
19 whether the individual can be expected to identify with
20 the interests of the corporation. *See, e.g., Tomingas v.*
21 *Douglas Aircraft Co.*, 45 F.R.D. 94, 96 (S.D.N.Y.1968).
22 The burden of proving that she is a managing agent rests
23 on Sugarhill. *See, e.g., Proseus*, 26 F.R.D. at 167.

24 These factors militate against Mitchell being a current managing agent for
25 STH. First, he has no power or authority over the defunct entity (which is currently
26 facing judicial dissolution). Second, Mitchell has indicated that he does not want to
be involved in flying to Tucson for a deposition. Third, he has no responsibilities
to STH respecting any matter, related to the litigation or otherwise. Finally,
Mitchell does not identify with any STH interest, except insofar as it was a money-
losing venture that went bankrupt. Here, it is RWI's burden to prove that he is

1 currently a managing agent subject to being compelled to testify in Tucson pursuant
2 to a 30(b)(6) deposition notice.

3
4 RWI cannot meet that burden. Mitchell is not an officer, director, or
5 managing agent for STH. He is a former manager who had a minority interest in
6 the company but has no interest in these proceedings. Mitchell is not under STH's
7 control as STH is a defunct company with no assets or employees.¹

8
9 It is not common for parties to seek 30(b)(6) depositions of former
10 employees or defunct companies. In *Martin Engineering Co. v. Vibrators, Inc.* 20
11 FR Serv. 2d 486 (ED Ark. 1975) the Court noted, "With regard to Mr. Fisher, the
12 Court acknowledges that pursuant to Rule 30(b)(6) of the Federal Rules of Civil
13 Procedure a corporation may not be examined through one who is no longer in its
14 employ at the time set for taking of the deposition."² Likewise, in *Colonial Capital*
15 *Co. v. General Motors Corp.* 29 F.R.D. 514, 515-516 (D. Conn. 1961), the Court,
16 in denying a deposition of a former Vice President of General Motors noted,
17
18

19
20 [I]t appears that William F. Hufstadter retired from
21 General Motors on June 30, 1960 when he was a Vice
22 President of the corporation. Since that time he has not

23
24 ¹ It is believed that a strategic decision was made by Plaintiffs to name STH in
25 hopes of obtaining a default and then claiming it was an alter ego of Dr. Chen.
26 Under such circumstances, RWI could then try to make an argument for collateral
estoppel on damages. The *pro forma* representation of STH is simply to protect
against such tactics.

² The *Martin Engineering* Court subsequently found that Mr. Fisher was still
subject to control as he had moved his employ to a fully owned subsidiary. That is
inapplicable here as Mitchell has no current connection to any entity still in
business and party to this lawsuit.

1 been an officer, employee, or agent of the defendant, nor
2 is he presently a director of the corporation. Though the
3 general rule appears to be that the deposition of a party
4 may not be taken through one no longer employed by the
5 party, *Park & Tilford Distillers Corp. v. Distillers Co.*, 19
6 F.R.D. 169 (S.D.N.Y.1956), the plaintiff contends that
7 the primary consideration in ruling on the question of
8 who is a 'managing agent' for purposes of deposing a
9 corporate party is whether the individual can be expected
10 to identify himself with the interests of the corporation or
11 with those of the adverse party. Viewed in this light,
12 plaintiff argues, a former employee may be considered a
13 'managing agent' for purposes of F.R.Civ.P. Rule 26, 28
14 U.S.C.A.; and, since there has been no showing that Mr.
15 Hufstadter is no longer loyal to the defendant or does not
16 still identify himself with its interests, the deposition of
17 the defendant may be taken through him. . . **This court**
18 **concludes that there is no authority for taking the**
19 **deposition of General Motors through William F.**
20 **Hufstadter on the basis of his relationship to the**
21 **company as a past employee.** The motion [to vacate the
22 notice of deposition] as to him is therefore granted.

23 Apparently to get around this long standing prohibition, RWI misleadingly
24 presented on Page 9 of its Exhibit 6 a short exchange from Defendant Lee-Tzong
25 Chen's deposition. The testimony was taken out of context, to give the impression
26 that Mitchell is a currently active owner and manager of STH. In support of its
27 attempted argument, RWI quotes the following brief passage of transcript
28 testimony:

29 Q. When was the last time Wayne Mitchell worked as a
30 general manager for you for any of your hotels?

1 A. He was a general manager for my hotels in Tampa from
2 '92 to about 2002.

3
4 Q. And what about Tucson?

5 A. Tucson, he involved after the property bought the hotel.

6 Q. He's still the general manager now?

7
8 A. He's the managing partner.

9 That is where RWI ends the quote. However, the testimony following the section
10 belies RWI's false meaning:

11
12 Q. He is a manager now?

13 A. Before.

14 Q. He had an ownership interest in it?

15
16 A. Yes.

17 Q. Did he leave the hotel when Palo Verde took over?

18 A. He's not involved in the hotel.

19
20 Q. Do you do any business with him at all now?

21 A. No.

22
23 Chen Deposition 87:7-88:1. (Exhibit A)

24 Dr. Chen speaks English as a second language. The deposition included
25 several instances in which follow up questions clarified his positions. Here, the
26 follow up questions show that the truncated exchange set forth in Plaintiff's Exhibit

1 6, Page 9 was misleading. Chen did not testify, as set forth in RWI's motion, that
2 Mitchell is currently the managing partner of the hotel property or STH. Instead,
3 the follow up questions show the exact opposite, that Chen and Mitchell are not in
4 business together at all now.

5
6 Further, Chen testified that he had not seen Mitchell face-to-face since 2005,
7 and that the last time he had spoken with Mitchell on the phone was several months
8 before the deposition. (Chen Deposition 88:2-5; 89:12-14)

9
10 **II. DEFENDANTS DO NOT OPPOSE THE DEPOSITION OF WAYNE MITCHELL.**

11
12 RWI implies in its Motion that STH is obstructing RWI from obtaining vital
13 testimony from Mitchell. That is patently false. STH agrees that Mitchell is a
14 witness with relevant information, and STH disclosed him as such. The problem is
15 he has not worked for the company since 2003, and does not reside in Arizona. A
16 defunct company simply does not have any power to compel the appearance of a
17 former employee. Mitchell has informed counsel that his wife has recently had a
18 baby and he doesn't want to leave her alone at home to travel to Tucson.
19

20
21 Defendants' Counsel has, at various times, agreed to a deposition in Florida³
22 (after drafting, but before serving the Rule 30(b)(6) Notice of Deposition) or a
23 conference call.⁴ In the end, RWI decided to reject those options and try to compel
24

25
26 ³ "We will be happy to depose him in Florida but we need to get it scheduled now.
Thank you, Janet Weinstein" *Weinstein e-mail to Laird 2/22/07*. (Exhibit B)

⁴ In response to a suggestion from Mr. Laird, Ms. Weinstein wrote, "Please provide

1 a deposition of this former employee at its counsel's Tucson office location. (See
2 Exhibit A to Motion for Protective Order).

3
4 **III. RULE 1, FEDERAL RULES OF CIVIL PROCEDURE REQUIRES THE RULES**
5 **TO BE INTERPRETED TO SECURE THE JUST, SPEEDY, AND INEXPENSIVE**
6 **DETERMINATION OF EVERY ACTION.**

7 This case, as with every case in the federal district courts is governed by the
8 Rules of Federal Procedure. Rule 1 provides,

9 These rules govern the procedure in the United States
10 district courts in all suits of a civil nature whether
11 cognizable as cases at law or in equity or in admiralty,
12 with the exceptions stated in Rule 81. **They shall be**
13 **construed and administered to secure the just, speedy,**
14 **and inexpensive determination of every action.**

15 The dispute, at its heart, is over whether a defunct business entity,
16 represented *pro forma*, can be compelled to produce a 30(b)(6) witness when it no
17 longer has any employees. Here, RWI wants to compel a non-party, former
18 manager of a bankrupt company to fly to Tucson to attend a Rule 30(b)(6)
19 deposition when other reasonable alternatives have been proposed.

20 Defendants agree that Mitchell has relevant information, and do not object to
21 his deposition. Defendants offered the following reasonable alternatives to
22 imposing this burden on Mitchell and the defunct company:
23

24
25
26 his phone number.” *Weinstein email to Laird 2/26/07*. Mr. Laird supplied the
phone numbers requested, only asking to participate in the conversation, “I would
like to be present telephonically during any substantive conversation.” *Laird e-mail*
to Weinstein 2/26/07. (Exhibit C).

- 1 1. A deposition in Florida with STH's counsel appearing telephonically, or
- 2 2. A conference call between RWI's counsel and Mitchell with STH's
- 3 counsel permitted to listen in on the call.
- 4

5 RWI, at various times indicated that they would accept either option. Only
6 when RWI subsequently noticed the Rule 30(b)(6) Deposition Notice in Tucson,
7 was it necessary to seek a protective order.
8

9 RWI has not provided any basis for an award of attorneys fees. Defendants
10 have not objected to Mitchell's deposition. Defendants only asserted that STH, a
11 defunct company in the process of judicial dissolution, is unable to compel Mitchell
12 to appear for a 30(b)(6) deposition in Tucson. Accordingly, the Court should deny
13 the request for attorneys fees.
14

15 **CONCLUSION**

16
17 For all of the foregoing reasons, the Court should deny RWI's Motion to
18 Compel, grant defendants' Motion for Protective Order, Deny RWI's request for
19 attorneys fees, and order that RWI is free to subpoena Mitchell for deposition in
20 Florida.
21

22 DATED April 10, 2007.

23
24 **WEEKS & LAIRD, PLLC**
25 **/s/ Brian A. Laird**

26

Brian A. Laird
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2 by ECF Notice Delivery to:

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EXHIBIT A

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EXHIBIT B

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EXHIBIT C