IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-00236-REB-MEH

THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, on behalf of its members, and MARGARET DENNY, on behalf of herself and a proposed class of similarly situated persons,

Plaintiffs,

v.

SAGE HOSPITALITY RESOURCES LLC, SAGE OXFORD, INC., WALTER ISENBERG and JOHN DOES 1-5,

Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANT SAGE HOSPITALITY RESOURCES LLC'S MOTION TO QUASH SUBPOENAS AND STRIKE UNAUTHORIZED DISCOVERY (DKT. NO. 47, FILED MAY 29, 2015)

Plaintiffs, the Civil Rights Education and Enforcement Center and Margaret Denny, by and through counsel, submit the following Plaintiffs' Response to Defendant Sage Hospitality Resources LLC's Motion to Quash Subpoenas and Strike Unauthorized Discovery [Dkt. No. 47, filed May 29, 2015] and in support thereof state as follows:

INTRODUCTION

This class action arises out of Defendant(s)' alleged failure to provide accessible transportation to persons with disabilities at its hotels in violation of the Americans with Disabilities Act. The ADA covers, among other entities, owners and operators of places of public accommodation, and Defendant Sage Hospitality Resources ("SHR") has

moved to dismiss on the grounds that it does not own or operate the two Colorado hotels tested by the named plaintiff: the TownePlace Suites by Marriott Boulder Broomfield ("TownePlace Suites") and The Oxford Hotel ("The Oxford").[1] The question at the heart of SHR's motion to dismiss is clear: does it own or operate these two hotels, and if not, which of its closely affiliated entities does? The discovery Plaintiffs seek focuses precisely on this issue.

This discovery is far from SHR's characterization of it as "overreaching and abusive." As set forth below, each of the four closely affiliated Sage entities from which Plaintiffs seek discovery is specifically identified as being an owner and/or manager of the two hotels in documents *submitted by SHR* in support of its motions to dismiss. Further, Plaintiffs were forced to subpoena each of these affiliates independently because SHR has refused to produce information or documents relevant to these affiliates, notwithstanding that it clearly has "control" over the information and documents for purposes of the Federal Rules. Plaintiffs request that this Court permit the discovery at issue so the parties can get to the "realities" of who owns what hotels, and this case can proceed on its merits. *See* Ex. 1, Transcript of May 11, 2015 Status Conference ("5/11/15 Tr."), 12:21-22.

[1] Plaintiffs have brought a putative class action covering hotels across the country. First Amended Complaint [Dkt. No. 29, filed Apr. 14, 2015] ("FAC") ¶¶ 37-48. Defendants allege that this action should be limited to the two Colorado hotels that Plaintiff Margaret Denny tested. While Plaintiffs disagree with this limitation, for purposes of resolving the jurisdictional discovery issues, they are limiting discovery and their arguments to these two hotels.

BACKGROUND

I. There Is Substantial Evidence That Each of the Four Entities Subpoenaed by Plaintiffs Own, Manage And/or Operate the Two Hotels.

Plaintiffs served identical subpoenas and document requests on four closely affiliated entities: SHR; Sage Oxford, Inc. ("Sage Oxford"); Sage TPS, LLC ("Sage TPS") and Oxford 2005 Holdings, LLC ("Oxford 2005"). As set forth below, there is a substantial basis – including documents submitted by SHR in support of its motion to dismiss – to believe that each of these entities owns and/or operates the two hotels.

SHR: SHR is named as a defendant based on its website, in which it represents that it manages or owns more than 75 hotels, including the 12 hotels identified in Plaintiffs' Complaint (including The Oxford and the TownePlace Suites). FAC ¶¶ 12-13, 38-39. Although SHR suggests in its most recent motion to dismiss that SHR has nothing to do with that website,[2] it omits that three months ago, it filed with the Colorado Secretary of State a renewal of its trademark protection of that very same website, and indeed included a screenshot of the first page of that website. Ex. 2, SHR Statement of Renewal of Trademark Registration of a Reporting Entity dated Mar. 17, 2015. Further, Walter Isenberg, the Co-Founder, President and Chief Executive Officer of SHR, signed an affidavit filed with the U.S. District Court for the Northern District of Illinois stating that SHR is "generally in the business of managing hotels for others." FAC ¶¶ 14, 21.

[2] Dkt. No. 43, filed May 1, 2015, at 5; *see also* SHR's Mot. to Dismiss Pls.' Complaint [Dkt. No. 23, filed Mar. 24, 2015] (moving to dismiss original complaint).

Sage Oxford: According to the most recent amendment to the management agreement for The Oxford, submitted by SHR in support of its motion to dismiss, Sage Oxford manages that hotel. FAC ¶ 17; Dkt. No. 43-2, at 4.

Sage TPS: According to the management agreement for the TownePlace Suites, which SHR submitted to this Court in support of its motion to dismiss, Sage TPS manages that hotel. Dkt. No. 43-5, at 3.

Oxford 2005: According to that same document, Oxford 2005 is a part owner of The Oxford. *Id.*

II. The Four Subpoenaed Sage Entities Are Close Affiliates.

SHR, Sage TPS, Sage Oxford and Oxford 2005 are closely related entities. For example, all of these entities share the same address. Exs. 3A-D, Colo. Sec'y of State Periodic Reports. They also share key personnel, in particular Walter Isenberg, who exerts significant control over all of the four Sage affiliates at play. For example:

- Mr. Isenberg is the Co-Founder, President and Chief Executive Officer of **SHR**, and according to its website, he "directs all company operations, including property management, development and finance." Ex. 4, SHR Biography for Walter Isenberg, http://www.sagehospitality.com/leadership/walter-isenberg (accessed June 22, 2015).
    - Mr. Isenberg is the President and a director of **Sage Oxford**, and according to a loan document submitted to the Securities and Exchange Commission, he "directs all company operations, hotel development, asset management, and property management." Ex. 5, Excerpts from

SEC Submission from Morgan Stanley Capital I Trust, at T-47 (page 5 of exhibit), *available at* https://www.sec.gov/Archives/edgar/data/762153/000095013606005694/0000950136-06-005694.txt (accessed June 22, 2015).

- As shown in documents submitted to the Colorado Secretary of State, Mr. Isenberg is a director and officer of Sage Management Services, the entity that manages **Sage TPS.** Ex. 6, Sage Management Services Biennial Report; Ex. 7, Sage TPS Amendment to the Articles of Organization.
- Mr. Isenberg signed the management agreement for The Oxford on behalf of both **Sage Oxford** (the managing company) and **Oxford 2005** (the part owner of the hotel). Ex. 8, Signature Pages of Management Contract.

III. Plaintiffs' Previous Efforts to Obtain Information and Documents from SHR.

SHR moved to dismiss and also to stay all discovery, in part on the grounds that Plaintiffs had named the wrong entity because SHR contends that it does not own or operate the two hotels. [Dkt. Nos. 23 and 25, filed Mar. 24 and 31, 2015.]

At the scheduling conference on April 7, 2015, the Court preliminarily granted in part and denied in part SHR's motion to stay and permitted Plaintiffs to serve four requests for production regarding jurisdictional issues. [Dkt. No. 28.] Plaintiffs did so, seeking full copies of the exhibits to the motion to dismiss and documents showing any management or ownership interest in any hotel with transportation services with regard to SHR, Sage Oxford, and Mr. Isenberg. Ex. 9, Pls.' Jurisdictional Disc. The latter two were added as Defendants in Plaintiffs' First Amended Complaint filed shortly

thereafter, which contains allegations regarding the ownership and control and the roles that those two new Defendants and the original Defendant SHR play as to the relevant hotels and entities. FAC ¶¶ 15-26. Counsel for SHR accepted and waived service for those two new Defendants. [Dkt. Nos. 50-51, filed June 2, 2015.]

SHR responded to the discovery, but in an artificially limited fashion. *See* Ex. 10, SHR's Resp. to Pls.' Jurisdictional Disc. Its production consisted only of full copies of the documents attached to its motion to dismiss and three pages of Colorado Secretary of State records of Sage Oxford's articles of incorporation. As to the rest of Plaintiffs' discovery, SHR mostly averred that *it* possessed no responsive documents and did not *itself* manage or own the two hotels. SHR thus took the position that it was only obligated to produce documents directly in its possession, and it would not produce clearly relevant documents in its control relating to its close affiliates. SHR's responses are absurd. For example, Plaintiffs requested "documents showing: . . . (2) with respect to such companies in which Mr. Isenberg is an officer, his job title(s) and job duties." Ex. 9, Pls.' Jurisdictional Disc., Req. for Produc. #4(2). Even though, as detailed in the Background Section above, (1) Mr. Isenberg is Co-Founder, President and CEO of SHR, and President and a director of Sage Oxford, (2) both companies have the same address, and (3) Sage Oxford manages The Oxford, SHR responded, "SHR has no documents responsive to this request showing Walter Isenberg's job duties for any company that owns or operates the Oxford Hotel." Ex. 10, SHR's Resp. to Pls'. Jurisdictional Disc., Resp. to #4(2)(a). As explained in Argument Section (I) below, SHR

thus improperly, and far too narrowly, construed its duty under FRCP 34 to produce documents within its "possession, custody, and control."

The parties had a status conference, on May 11, 2015. There, the Court stated its desire for this case to be based on the merits of who operates what. Ex. 1, 5/11/15 Tr. 12:21-13:8. The Court authorized certain 30(b)(6) deposition topics, including the production of documents. *Id.* 12:6-13:8, 14:25-15:1.

Because of – and seeking to avoid a repeat of – SHR's improperly narrow response to Plaintiffs' first discovery, Plaintiffs then propounded discovery as follows:

- a Rule 30(b)(6) Notice and four Requests for Production ("RFPs") to SHR;
- three sets of two identical subpoenas, one for documents and one for depositions, directly to the following three Sage entities: (1) Sage Oxford (a named defendant); (2) Oxford 2005 (not a party); and (3) Sage TPS (not a party).

Ex. 11, Rule 30(b)(6) Notice to Defendant SHR; Ex. 12, Pls.' Second Set of Jurisdictional Disc.; Ex. 13, Subpoenas to Sage Oxford; Ex. 14, Subpoenas to Oxford 2005; Ex. 15, Subpoenas to Sage TPS. The discovery sought identical information – a deposition and the same documents – from a total of four affiliated Sage entities, two of which are named Defendants and as to all of which, as set forth above, there exists substantial evidence that each owns and/or operates the two hotels. The substance of the requests was identical, and the only reason for requesting identical information from four entities was SHR's prior, improperly narrow view of its discovery obligations.

Plaintiffs' initial deposition notices tracked the meaning, but did not use the exact words, of the topics identified by Plaintiffs' counsel at the May 11 hearing. Defendant objected, so Plaintiffs reissued (or offered to reissue) the notices using the precise language from the May 11 hearing. Ex. 16, Email from S. Fanning to T. Fox dated May 22, 2015; Ex. 17, Email from T. Fox to S. Fanning dated May 26, 2015 and attached Rule 30(b)(6) Notices dated May 26, 2015. Tellingly, SHR entirely omits the reissued discovery from its motion.

SHR now seeks to quash the Rule 30(b)(6) notices to Sage Oxford, Oxford 2005 and Sage TPS, notwithstanding that the documents it submitted to the Court and relied on for its motion to dismiss all identified these three Sage entities as owners and/or managers of the two hotels. It also seeks to quash Plaintiffs' document requests to SHR. Further, since the filing of its motion, SHR has objected to the Rule 30(b)(6) notice, the one piece of discovery it had not sought to squash or strike. Via its objections, SHR sought to severely limit the relevant time period and the definition of control of an organization and also refused to produce any documents whatsoever – contravening the document exchange contemplated and authorized at the May 11 hearing, *see* Ex. 1, 5/11/15 Tr. 12:10-13:8, 14:25-15:1. Ex. 18, Objections to Pls.' Am. Rule 30(b)(6) Notice of Dep. Directed to SHR. Because a deposition in light of these objections and without any documents would be fruitless, Plaintiffs have been forced to cancel even this one deposition. Ex. 19, Email from S. Morris to S. Fanning dated June 10, 2015. Thus, this case is again at a standstill.

ARGUMENT

Plaintiffs' discovery seeks nothing more than to "to try and, at the outset, find out who operates what and so we can have this case postured appropriately and give the plaintiff the best opportunity that the law would allow to respond to a motion to dismiss." Ex. 1, 5/11/15 Tr. 12:24-13:3. The identical requests for depositions and documents are nothing more than straightforward jurisdictional discovery aimed at determining which entities are the proper defendants to this important civil rights suit. Further, each of the subpoenaed entities is identified as an owner or manager of the two hotels in documents on which SHR based its motion to dismiss. Because all this discovery falls within the confines of the simple jurisdictional discovery the Court authorized, and is otherwise proper under the Federal Rules of Civil Procedure, none of Plaintiffs' discovery should be quashed or stricken.

I. SHR's Constricted View of "Possession, Custody, or Control" Cannot Be Used to Justify Restricting Discovery.

This discovery dispute, which concerns Plaintiffs' second set of discovery, must be considered in light of SHR's response to Plaintiff's first set of discovery. That history informs the reasons why Plaintiffs' second set of discovery is proper.

Federal Rule of Civil Procedure 34 requires a party served with a request for documents to produce documents in its "possession, custody, or control." "Control" within the meaning of this rule also "comprehends not only possession but also the right, authority, or ability to obtain the documents." *Super Film of Am., Inc. v. UCB Films, Inc.*, 219 F.R.D. 649, 651 (D. Kan. 2004) (citations omitted). This rule also "require[s] production of documents beyond the actual possession of the opposing party

if such party has retained any right or ability to influence the person in whose possession the documents lie." *Id.* (citation and internal quotation marks omitted).

> Absent such expanded scope of production, a third party with a substantial interest in the litigation may be allowed to frustrate the rules of discovery to the disadvantage of the party seeking production and, ultimately, of the court. The purposes of discovery in the federal courts are to disclose the real points of dispute between the parties and to afford an adequate factual basis in preparation for trial.

Id. at 654 (citations and internal quotation marks omitted).

Thus, for purposes of Rule 34, "[c]ontrol may be established where the corporations in question share a common ownership or management structure," or in an alter ego situation. *Id.* (citations omitted). Applying these principles, courts have ordered production where "the parties' history, association, and assignments and transactions together show sufficient mutuality." *Id.* at 654-55 (citation omitted).

> Among the factors used by the courts to determine whether one corporation may be deemed under control of another corporation are: (a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (3) involvement of the non-party corporation in the litigation. These factors focus on the other corporation's actual control or inferred control, including any 'complicity' in the storing or withholding documents.

Id. at 655 (citations and internal quotations omitted); *see also Tomlinson v. El Paso Corp.*, 245 F.R.D. 474, 476-77 (D. Colo. 2007) (ordering production of documents in possession of a third party).

SHR's responses contradict these clear principles. SHR asserted that it "has" next to zero documents relating to Plaintiffs' requests. Ex. 10, SHR's Resp. to Pls'. Jurisdictional Disc. At best, this is a literal reading of "possession" or "custody," which

ignores SHR's duty to produce documents within its "control." This is because even the evidence adduced at this early stage shows that SHR has control over other entities sufficient to trigger the duty to provide responsive documents under Rule 34. As outlined in Background Section (I) above, Plaintiffs have already found documents that establish the following facts (which admittedly themselves contain contradictions—further evidencing the need for additional discovery in this case). SHR claims on its own website to manage the two hotels (The Oxford and the TownePlace Suites). FAC, ¶¶ 12-13, 38-39. According to the management agreement submitted by SHR, Sage Oxford also manages The Oxford*. Id.* ¶ 17; Dkt. No. 43-2, at 4. Oxford 2005 is a part owner of The Oxford. Dkt. No. 43-2, at 4. Sage TPS manages the second hotel at issue, the TownePlace Suites. Dkt. No. 43-5, at 3. And as outlined in more detail in the Background Section (II) above, Walter Isenberg exerts significant control over all of these four Sage entities. Finally, providing further proof of their commonality, all three defendants (SHR, Sage Oxford, and Mr. Isenberg) are represented by the same lawyers in this action. [Dkt Nos. 15, 19, 20, 50, 51.]

Defendant's constricted reading of "possession" or "custody" in the face of this commonality and overlapping control is exactly what Rule 34 is meant to address—and prevent. *See Super Film of Am.*, 219 F.R.D. at 654. The Court should not endorse this frustration of Rule 34 and allow SHR to evade further basic jurisdictional discovery.

II. Plaintiffs' Second Set of Discovery Accords with this Court's May 11 Order.

Because of – and seeking to avoid a repeat of – SHR's constricted view of possession, custody, and control, Plaintiffs issued the requests for depositions and

documents to the four Sage entities as described above.[3] All discovery was identical, and all was aimed at the straightforward, jurisdictional question presented at this stage of the case: which entities control the two hotels. *See* Ex. 1, 5/11/15 Tr. 3:12-6:22 (describing nature of discovery sought).

At the May 11, 2015 hearing, Plaintiffs made clear that they sought, and understood the Court to authorize, Rule 30(b)(6) deposition topics "to find out which companies own and operate these two hotels, which entities and persons control those companies, and what are the relevant documents showing these relationships." *See id.* 10:4-7; *see generally id.* 9:16-13:8. Plaintiffs also understood the Court to authorize the production of documents. *Id.* 12:10-13:8, 14:25-15:1. The substance of the discovery propounded is identical to the deposition topics, including document production, authorized. The only question is whether Plaintiffs were authorized to propound that discovery, in light of SHR's inadequate responses to the first discovery, to four, all affiliated, Sage entities.

The answer to that question is yes. Two of those four affiliated entities are named defendants, and all of those four entities have been shown to have some ownership or operation interest in the two hotels as shown in Plaintiffs' FAC. Propounding discovery to four entities was solely intended to shortcut any further erroneous arguments by SHR that documents or deponents were not within its control. In fact, in light of the commonalities and overlap among the three named defendants and the two hotels

[3] And also as outlined above and as relevant here, this case is nevertheless again at a standstill in light of Defendant SHR's objections to the Rule 30(b)(6) deposition notice and its refusal to provide any documents to Plaintiffs whatsoever.

already shown, Plaintiffs anticipated overlap in the Rule 30(b)(6) designees and in the document productions from each entity. Plaintiffs also expected that SHR would not object to this discovery because the discovery is directed to entities that SHR has repeatedly argued to the Court own and manage the two hotels.[4] Indeed, this is simple jurisdictional discovery aimed at the issue on which SHR bases its motion to dismiss, and as the Court stated on May 11, it is only just for the parties to get to the bottom of this issue so that the motion to dismiss can be considered on its merits. Ex. 1, 5/11/15 Tr. 12:21-13:8. Propounding that discovery to four affiliates already shown to be relevant to this case will help the parties do just that. Such discovery is therefore proper.

III. Plaintiffs' Second Set of Discovery Was Otherwise Appropriate.

In addition to being consistent with this Court's May 11, 2015 order, Plaintiffs' discovery was consistent with the Federal Rules. At a bare minimum, all three named defendants (SHR, Sage Oxford, Inc., and Walter Isenberg) are the proper subject of discovery under Rule 26(d). Plaintiffs and SHR have already had their Rule 26(f) conference, and it is black letter law that "[s]ince there is no requirement for a second Rule 26(f) conference if new parties are added after the conference has occurred, . . . discovery from new parties is not subject to a moratorium" on discovery under Rule

[4] *See* Ex. 1, 5/11/15 Tr. 7:9-8:1 (urging court to look to operating agreement for TownePlace Suites [which identifies Sage TPS as manager] and to Mr. Isenberg or the other entities affiliated with the two Colorado hotels [which are Sage Oxford, Oxford 2005, and Sage TPS]); SHR's Mot. to Dismiss [Dkt. No. 23, filed Mar. 23, 2015], at 5-6 (pointing to the operating agreements, deeds, business licenses, and vehicle leases as identifying the proper owner and/or operator of each hotel [which in turn point to Sage Oxford as the manager of The Oxford; Oxford 2005 as the owner of The Oxford; and Sage TPS as the manager of the TownePlace Suites]); SHR's Mot. to Dismiss FAC [Dkt. No. 43, filed May 1, 2015], at 4 (same).

26(d). 8A Fed. Prac. & Proc. Civ. § 2046.1 (3d ed.). More generally, the jurisdictional discovery sought is necessary to respond to SHR's motion to dismiss – and is therefore not only proper, but it would be an abuse of discretion to grant SHR's motion without giving Plaintiffs an opportunity to conduct discovery on the jurisdictional issues raised. *See, e.g.*, *Sizova v. Nat Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) (citations and internal quotations omitted) ("When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion. . . . [A] refusal to grant discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant . . .").

Thus, Plaintiffs' discovery was proper and should be answered, in order to resolve the straightforward question presented at this stage of the case: which entities exercise control over the two hotels.

CONCLUSION

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Court (1) deny Defendant SHR's motion, (2) order depositions and documents in accordance with the discovery propounded by Plaintiffs, and (3) award any other relief it deems just and proper. In accordance with this Court's offer at the May 11 status conference to assist with issues that arise before the next status conference on July 23, 2015, *see* Ex. 1, 5/11/15 Tr. 14:5-6, Plaintiffs are also open to convening a status conference on this issue before July 23, 2015.

Respectfully Submitted,

/s/ Sarah M. Morris

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Dated: June 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to the following:

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