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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

MELVIN DUMMAR, Plaintiff, vs. WILLIAM RICE LUMMIS and FRANK WILLIAM GAY, Defendants.	**DEFENDANT LUMMIS'S MEMORANDUM IN OPPOSITION TO PLAINTIFF DUMMAR'S MOTION FOR DEPOSITIONS PENDING APPEAL UNDER RULE 27(b)** Case No. 1:06CV00066 Judge Bruce S. Jenkins

Defendant William Lummis ("Lummis") respectfully submits the following Memorandum in Opposition to Plaintiff Melvin Dummar's ("Dummar") Motion for Depositions Pending Appeal Under Rule 27(b). This Court should deny Dummar's Motion.

INTRODUCTION

This Court has entered two detailed orders holding that all of Dummar's claims against both defendants in this case are barred under the doctrine of issue preclusion due to a final

Nevada State Court judgment entered almost thirty years ago, after exhaustive litigation, based on a jury finding that the purported holographic will naming Dummar as a beneficiary was not the valid will of Howard Hughes. *See* Docket Nos. 43 and 53. Accordingly, the Court has dismissed Dummar's action in its entirety, with prejudice (*id.*), and Dummar has appealed the Court's final judgment to the Tenth Circuit Court of Appeals. *See* Docket No. 54.

Despite the fact that this Court has terminated Dummar's litigation on the merits and held that he had his day in court almost thirty years ago, Dummar now asks the Court essentially to throw open the doors of discovery and permit him to take the depositions of eighteen witnesses who reside in four different states, from California to Florida, in order to perpetuate their testimony pending appeal under Fed. R. Civ. P. 27(b). This is nearly twice the number of depositions a party is ordinarily permitted to take during regular discovery in an entire case under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 30(a)(2)(A) (limiting depositions in a civil action to ten per side absent leave of court or stipulation of the parties). Dummar bases this extraordinary request on an unverified,[1] blanket contention that the witnesses in question are elderly, that some of them may be in questionable health, and that he desires to preserve the testimony of this sizable contingent of witnesses in the unlikely event the Tenth Circuit reverses this Court's ironclad application of the issue preclusion doctrine.

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[1] Rule 27(a) of the Federal Rules of Civil Procedure, which permits an application to take depositions to preserve testimony before an action is filed, expressly requires the applicant to furnish a verified petition establishing the need to perpetuate the testimony. Courts have held that the verification requirement applies to motions seeking depositions to perpetuate testimony pending appeal under Rule 27(b) as well. For example, in *Ash v. Cort*, a case cited by Dummar, the court held that "[a]lthough Rule 27(b) would seem to require some verification for a claim that testimony would be lost if unrecorded, none was supplied in the instant case. In dicta, the Fifth Circuit states that some verification must accompany a Rule 27 motion. We agree." 512 F.2d 909, 913 n.16 (3d Cir. 1975) (citation omitted). Dummar has submitted no verification to this Court supporting his speculation concerning the age and physical health of the eighteen witnesses he desires to depose, nor has he verified the content of the testimony he expects to perpetuate.

As Dummar himself acknowledges, Rule 27 is not a substitute for the discovery ordinarily permitted in civil litigation. If it were, final judgments would end nothing and parties would routinely engage in discovery in cases that have been dismissed and are on appeal. Instead, Rule 27(b) permits depositions pending appeal only when the moving party makes a specific showing that perpetuation is necessary "to avoid a failure or delay of justice." Fed. R. Civ. P. 27(b). This requires the moving party, in verified form, to set forth specific, ***known*** testimony requiring preservation, but Dummar has merely listed topics to explore in discovery. There must be a showing that the testimony is relevant, material, competent, and admissible in the action and is not merely cumulative of other information. But Dummar does not even ***mention*** defendants Mr. Lummis and Mr. Gay anywhere in the descriptions of the eighteen depositions he desires, and the testimony he seeks is rife with hearsay and other defects. Finally, Dummar has failed to make the required particularized showing that the evidence he seeks is likely to be lost in the absence of the deposition. The Court should deny Dummar's motion.

ARGUMENT

I. DUMMAR'S CURSORY DESCRIPTIONS OF THE TOPICS HE WISHES TO EXPLORE THROUGH THE EIGHTEEN DEPOSITIONS HE HAS REQUESTED SHOW THAT HE DESIRES TO CONDUCT WIDE-RANGING DISCOVERY, NOT TO PERPETUATE KNOWN TESTIMONY.

Absent extraordinary circumstances, when defendants such as Mr. Lummis and Mr. Gay successfully demonstrate that a plaintiff's claims against them lack merit and should be dismissed with prejudice, the Court's final judgment ends the matter, and an important consequence is that the expense and inconvenience of further discovery are avoided. Rule 27(b) of the Federal Rules of Civil Procedure provides a narrow exception permitting depositions pending appeal, but only when the party desiring such depositions makes a rigorous showing that

there is real danger that the testimony will be lost otherwise, and that depositions to perpetuate testimony are necessary "to avoid a failure or delay of justice." Fed. R. Civ. P. 27(b).

Importantly, Rule 27 is ***not*** a discovery rule. It is instead a procedure that a party may invoke in exceptional circumstances to perpetuate in admissible form testimonial facts that the moving party ***already knows***, which therefore do not need to be "discovered," only preserved. *See, e.g., State of Nevada v. O'Leary*, 63 F.3d 932, 936 (9th Cir. 1995) (Rule 27 "requires that that the testimony to be perpetuated must be 'known testimony.'") (citation omitted); *Ash v. Cort*, 512 F.2d 909, 912 (3d Cir. 1975) ("We reiterate that Rule 27 is not a substitute for discovery. It is available in special circumstances to preserve testimony which could otherwise be lost."); *In the Matter of the Petition of Allegretti*, 229 F.R.D. 93, 96 (S.D.N.Y. 2005) ("It is well-established in case law that perpetuation means the perpetuation of *known* testimony. In other words, Rule 27 may not be used as a vehicle for discovery prior to filing a complaint.") (emphasis in original); *19th Street Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 347 (E.D. Penn. 2000) (Rule 27 is to perpetuate "known testimony." "A rule 27 deposition is not to be used as a substitute for pretrial discovery, and does not license a prospective plaintiff to engage in a 'wholesale fishing expedition.'") (citation omitted).[2] Dummar himself acknowledges in his supporting memorandum that all cases reviewed by his counsel "agree that any Rule 27 deposition is solely to preserve testimony and not as a substitute for normal discovery." Docket No. 57 at 1-2.

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[2] Some of these cases involve petitions to take depositions to perpetuate testimony before the filing of an action under Rule 27(a), rather than pending appeal under Rule 27(b). However, "[t]he same policy considerations that inform the court's judgment under Rule 27(a) also govern the court's discretion under Rule 27(b)." *19th Street Baptist Church*, 190 F.R.D. at 348.

Rule 27 thus requires the petitioner seeking depositions not merely to set forth the areas or topics of intended inquiry, but rather to set forth "the substance of the testimony which the party expects to elicit from each" person to be examined. Fed. R. Civ. P. 27(b). The Ninth Circuit in *O'Leary* accordingly held that the trial court properly had refused to allow Rule 27 depositions requested to elicit the "thoughts, thought processes, knowledge, and scientific sources utilized by scientists who were involved in reports and studies pertaining to the suitability of Yucca Mountain as a site for a radioactive waste repository," 63 F.3d at 934, because these were merely topics of desired inquiry, and the requesting party could not "set forth the substance of the testimony" to be elicited, nor could it "show that it would be admissible in any later litigation." *Id.* at 936. *See also Allegretti*, 229 F.R.D. at 96-97 (denying Rule 27 petition because although petitioners alleged that witness "possesse[d] invaluable knowledge about the facts of the expected litigation and other facts surrounding Petitioners' claims," they "[did] not go further to state what that invaluable knowledge is," and the desired testimony thus "appear[ed] to be more aspirational than known").

Despite Dummar's acknowledgment that Rule 27 is not a substitute for discovery, the descriptions of the testimony he hopes to elicit show that he contemplates a discovery process, rather than the preservation of known testimony. For many of the eighteen witnesses, Dummar merely identifies subjects for intended inquiry, but he does not state ***the*** testimony each witness will provide. For example, Dummar seeks to depose two of his former attorneys, Roger Dutson (#4)[3] and George Handy (#7), to inquire about "the investigation and due diligence surrounding the question of Howard Hughes leaving the Desert Inn during the time period of Christmas to

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[3] For the convenience of the Court, we will use the numbering system employed by Dummar in his motion when referring to the witnesses he desires to depose.

New Year's Eve of 1967." Merely describing this subject of inquiry is insufficient under Rule 27. Similarly, Dummar expects Jim Cain (#2) will testify that "[h]e helped out at the Cottontail Brothel and knew Sonny, a prostitute who worked there, and Beverly Harrell, the owner of the brothel and her husband James Howard Harrell." No disclosure is made of what Mr. Cain will say about his relationship with Sonny or the other individuals, or how it bears on the case. Kay G. Glenn (#15) allegedly will "testify as to the inner workings of the Hughes organization," but we are not told what his testimony will be regarding this topic. Helen Holland (#16) will testify that "[s]he was the secretary to Guido Deiro and took calls from Howard Hughes connected through and to Deiro," but Dummar does not state what she will say about these calls. James Rickard (#18) "can testify as to Hughes' flight from Las Vegas and his death upon leaving Mexico," but we are not told what he will say or why it will bear on Dummar's claims.

Even in those areas where Dummar does describe specific facts he believes witnesses will testify to, his descriptions of their expected testimony are so vague and abbreviated that it is unclear what the basis is for his expectation. For example, Dummar claims George C. Francom (#5) "will testify that all the aides to Howard Hughes met prior to the trial in Nevada and agreed to testify that Howard Hughes never left his penthouse at the Desert Inn during his years in Las Vegas. . . ." Dummar furnishes no basis at all for his speculation that Francom will provide this testimony. He does not state that he has spoken to Francom or explain why he believes Francom will provide this testimony. Moreover, as noted elsewhere herein, Dummar provides no verification to support his expectation that Francom will offer this testimony. In the absence of more detail and appropriate verification, the most one can infer is that Dummar simply hopes Francom and the other witnesses will provide the testimony he describes, and he wishes to

conduct discovery to find out. This is not a proper use of Rule 27, and the same problem exists with respect to all eighteen of the witnesses Dummar seeks to depose.

II. DUMMAR'S DESCRIPTIONS OF THE TESTIMONY HE HOPES TO PRESERVE FAIL TO SHOW THAT THE TESTIMONY WOULD BE MATERIAL, COMPETENT, ADMISSIBLE EVIDENCE IN THE EVENT THE APPELLATE COURT PERMITTED HIS CLAIMS TO PROCEED.

Another important requirement that prevents abuse of the Rule 27 procedure is that the petitioner must show that the testimony sought to be preserved is relevant, material, competent, admissible, and non-cumulative of other available evidence. The Advisory Committee Notes for Rule 27 indicate that the purpose of the rule was to codify a bill of equity procedure to perpetuate testimony that the U.S. Supreme Court recognized in *Arizona v. California*, 292 U.S. 341 (1934). There, the Supreme Court confirmed the importance of these requirements:

> The sole purpose of such a suit is to perpetuate the testimony. To sustain a bill of this character, *it must appear that the facts which the plaintiff expects to prove by the testimony of the witnesses sought to be examined will be material in the determination of the matter in controversy; that the testimony will be competent evidence*; that depositions of the witnesses cannot be taken and perpetuated in the ordinary methods prescribed by law, because the then condition of the suit (if one is pending) renders it impossible, or (if no suit is then pending) because the plaintiff is not in a position to start one in which the issue may be determined; and that taking of the testimony on bill in equity is made necessary by the danger that it may be lost by delay.

Id. at 347-48 (emphasis added). Although the Court held the plaintiff had adequately shown that the testimony in question was in danger of being lost and could not be established by other means, *id.* at 384, it nevertheless refused to permit the depositions because the plaintiff "failed to show that the testimony which she seeks to have perpetuated could conceivably be material or competent evidence. . . ." *Id.* at 742.

Lower courts addressing this issue have, of course, heeded the Supreme Court's mandate: "Those courts that have considered the issue have all found that Rule 27 allows for the perpetuation of evidence only when the petitioner shows that the evidence sought is material and competent." *In re Hopson Marine Transportation, Inc.*, 168 F.R.D. 560, 564 (E.D. La. 1996). *See also Louisville Builders Supply Company v. Commissioner of Internal Revenue*, 294 F.2d 333, 335 (6th Cir. 1961) ("one seeking to perpetuate testimony [under Rule 27] must, by his application for leave to do so, demonstrate that the testimony sought will be material in the determination of the matter in controversy. . . ."). "[E]vidence is material where it is relevant *and* goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision. . . ." *Hopson*, 168 F.R.D. at 566 (emphasis in original; citation omitted). Moreover,

> [f]or Rule 27 to apply, a petitioner must demonstrate a need for [the testimony or evidence] that cannot easily be accommodated by other potential witnesses, must show that the testimony is relevant, not simply cumulative, and must convince the court that the evidence sought throws a different, greater, or additional light on a key issue.

19th Street Baptist Church, 190 F.R.D. at 347 (citations and quotation marks omitted).

A. <u>None of the Expected Testimony Dummar Describes Has Anything To Do With Defendants Lummis and Gay or With Dummar's Claims Against Them</u>.

Dummar has failed to demonstrate that any of the testimony he seeks to perpetuate is material to his claims on appeal against Mr. Lummis and Mr. Gay. Dummar's own justification for needing to perpetuate testimony his pending appeal is that

> *[t]he underlying gravamen of the First Amended Complaint is the fraud that was perpetrated by the Defendants on the Nevada Court and Plaintiff Dummar.* They orchestrated the perjury, and suppression of evidence contrary to the point, that Howard Hughes never left his penthouse residence during the years he lived at the Desert Inn Hotel in Las Vegas, NV. . . .

Docket No. 56 at 6 (emphasis added). But Dummar does not contend that ***even one*** of the eighteen witnesses he desires to depose will have anything whatsoever to say about either Mr. Lummis or Mr. Gay. Indeed, Dummar does not mention either Mr. Lummis or Mr. Gay a single time anywhere in his descriptions of the hoped-for testimony. The testimony he seeks would be neither material nor competent evidence.

The majority of the expected testimony Dummar seeks would merely be additional evidence suggesting that Howard Hughes may have left the Desert Inn during the time that he lived there, or otherwise showing that it was possible that Hughes might have been in the desert at the time Dummar claims he picked him up. Such evidence would merely be cumulative of any evidence to that effect that was presented at the Nevada trial decades ago, such as Dummar's own testimony, which the jury rejected. Such evidence does not further Dummar's claims against Mr. Lummis and Mr. Gay. Even if Howard Hughes did leave the Desert Inn and was in the Nevada desert in December 1967, that does even begin to show that anyone committed fraud, let alone Mr. Lummis or Mr. Gay. Nothing Dummar hopes to perpetuate would further his claims on appeal in any fashion.

B. Much of the Testimony Dummar Hopes to Perpetuate Would Be Hearsay, Would Be Speculation Lacking Foundation, or Would Otherwise Be Inadmissible.

In addition to being immaterial and irrelevant, much of the testimony Dummar seeks to perpetuate would be pure, inadmissible hearsay. For example, Dummar claims that Johnathon Garnford Ford (#6) "will testify that his wife's relative Kay Glenn – an aide to Howard Hughes – ***told him*** that Howard Hughes left the Desert Inn during the time he was living at a hotel and prior to Howard Hughes leaving Nevada permanently" (emphasis added). This is inadmissible hearsay not subject to any exception. Fed. R. Evid. 801(c), 802. Dummar claims James Howard

Harrell (#8) will testify that "[h]is late wife owned the Cottontail Brothel and she ***told him*** of Howard Hughes coming there to see Sonny, a prostitute working there and was afraid to come forward and offer testimony at the Nevada trial" (emphasis added). This too is pure, inadmissible hearsay. Other witnesses whose expected testimony would clearly constitute inadmissible hearsay are Ken Kellingsworth (#12) (will testify that "Mr. Deiro ***told him*** that he flew Howard Hughes . . . to legal brothels in Nevada") (emphasis added) and John Boyer (#14) (will testify that "[h]e ***was told*** by a close Hughes associate that Plaintiff Dummar had picked up Mr. Hughes in the desert") (emphasis added). Certain other witnesses likely also would offer hearsay testimony, although the descriptions of their testimony are more vague. For example, both Karen Anderson (#1) and Jim Cain (#2) allegedly will testify that they "knew Sonny, the prostitute that Howard Hughes visited." Either Dummar expects them to provide hearsay testimony of what Sonny told them, or the mere fact that they knew her is entirely irrelevant.[4]

Some of the other witnesses' testimony is inadmissible for other reasons. Dummar asserts that Lowell M. Sylvester (#11) "was a juror in the Nevada trial and will testify about the jury deliberations and how the testimony of Mr. Deiro, Ms. Holland and others would have changed the jury verdict." Such testimony is the very definition of evidence that is inadmissible under Rule 606 of the Federal Rules of Evidence, which provides that

> a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.

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[4] The subject areas Dummar lists for witnesses Robert Maheu (#9), Lowell Sylvester (#11), Kay Glenn (#15), and Helen Holland (#16), suggest much of their testimony will be hearsay as well, in addition to being inadmissible for other reasons discussed herein.

Fed. R. Evid. 606(b). Mr. Sylvester's testimony would also constitute inadmissible speculation concerning the state of mind of the other jurors, and would likely include hearsay as well. Other witnesses would similarly offer testimony constituting inadmissible speculation without adequate foundation, such as Robert Maheu (#9) and Gordon Margulis (#17).

C. Much of the Testimony Dummar Hopes to Perpetuate Appears to Consist of Irrelevant Background Details Rather Than Important, Material Evidence.

With respect to many of the depositions Dummar desires, he cannot demonstrate the materiality and competency of the testimony he hopes to perpetuate because it consists of trivial background details or otherwise has no bearing on his claims on appeal. The mere fact that Karen Anderson (#1) and Jim Cain (#2) "knew" some of the people who worked at the Cottontail Brothel does not justify Rule 27 depositions. It is similarly inconsequential if the wife of James Howard Harrell (#8) "kept newspaper clippings about Howard Hughes." The expected testimony of Mel G. Stewart (#10) that he was told to bury empty cocaine vials in the desert has no bearing on Dummar's fraud claims, and James Rickard's (#18) expected testimony "as to Hughes' flight from Las Vegas and his death upon leaving Mexico" has no bearing on any matters at issue.

III. DUMMAR HAS NOT MADE AN ADEQUATE SHOWING THAT THE TESTIMONY HE DESIRES TO PERPETUATE WOULD BE LOST IF THE COURT DID NOT ALLOW DEPOSITIONS UNDER RULE 27(b).

Even apart from Dummar's failure to show that he seeks to perpetuate known testimony rather than engage in a discovery fishing expedition, as well as his failure to show that the testimony he hopes to establish would constitute relevant, material, competent, admissible evidence, Dummar's references to the ages of the various witnesses and his speculation concerning their physical health is not enough to establish the need to perpetuate their testimony

pending appeal. Although Dummar correctly notes that age and health can bear on this analysis, Dummar's abbreviated submission is insufficient to show that perpetuation of testimony is necessary to prevent the failure or delay of justice. "Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost." *Ash*, 512 F.2d at 911. Although age "may be a relevant factor in showing that testimony must be perpetuated to avoid loss," a petitioner must offer more than "conclusory remarks" concerning the deponents' age and the passage of time to "show that evidence is likely to be lost while the appeal is pending." *Id.* at 913. *See also Lombard's, Inc. v. Prince Manufacturing, Inc.*, 753 F.2d 974, 976 (11th Cir. 1985) (holding that a motion to perpetuate testimony is inadequate where movant "alleged only that the two witnesses were not 'immune from the uncertainties of life (and death)' . . .").

Here, Dummar has furnished no verification affirming that the various witnesses he desires to depose are excessively aged or facing dire health emergencies, although courts have held that such verification is required. *See, e.g., Ash*, 512 F.2d at 913 n.16 (holding that verification is required for a Rule 27(b) motion). Although Dummar's brief descriptions suggest that some of the witnesses may be old and/or in ill health, reliable details and foundation for these assertions are lacking, and many of the witnesses do not appear to be extremely elderly or infirm. For example, Roger Dutson (#4) is currently a full-time active judge who maintains a full caseload in the Second Judicial District Court for the State of Utah. There appears to be no danger that his testimony will be lost during the relatively brief time it takes to process an appeal in the Tenth Circuit, and the same is true of many of the other witnesses Dummar desires to depose. Dummar's showing of potential lost testimony is inadequate.

CONCLUSION

As explained above, Dummar has failed in numerous respects to make the showings he is required to make under Rule 27(b) for an order permitting depositions to perpetuate testimony pending appeal. The Court should decline Dummar's invitation to embark on a wide-ranging discovery expedition in a case that has been dismissed with prejudice, and should deny the present motion. The issues relating to Dummar's motion are clear and have been thoroughly presented to the Court through the parties' memoranda. We respectfully suggest that oral argument would not materially assist in the disposition of the motion and urge the Court to decide the motion on the papers, without oral argument.

DATED this 2nd day of April, 2007.

/s/ James T. Blanch

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2007, I electronically filed a true and correct copy of the foregoing DEFENDANT LUMMIS'S MEMORANDUM IN OPPOSITION TO PLAINTIFF DUMMAR'S MOTION FOR DEPOSITIONS PENDING APPEAL UNDER RULE 27(B) with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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