IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

HILTON HOTELS CORPORATION and PROMUS HOTEL CORPORATION,	)	
Plaintiffs,	)	
vs.	)	No. 00-2852-GV
LISA DUNNET, JAMES EVANS, JACK FERGUSON, JOHN LAVIN, STEPHEN PLETCHER, MARGARET ANN RHOADES, DICK TRUEBLOOD, and TERRY RAYMOND,	)	
Defendants.	)	

ORDER GRANTING IN PART DEFENDANTS' MOTION TO MODIFY SCHEDULING ORDER AND TO COMPEL PLAINTIFFS TO REDESIGNATE, PREPARE, AND PRODUCE FOR DEPOSITIONS THEIR RULE 30(b)(6) WITNESSES

This is a declaratory judgment action brought by Hilton Hotels Corporation and Promus Hotel Corporation to determine the validity of the cancellation of certain "underwater" stock options held by the defendants, eight former executives of Promus. The options were canceled as a condition of Promus' merger with Hilton on November 30, 1999. The defendants have counterclaimed for the value of the options.

Presently before the court is the January 28, 2002 motion of the defendants to compel Hilton to comply with Rule 30(b)(6) of the Federal Rules of Civil Procedure and produce corporate witnesses prepared to testify about designated matters. In addition, the

defendants request an extension of the discovery deadline to complete the 30(b)(6) depositions.[1] It is the position of the defendants that Hilton failed to comply with Rule 30(b)(6) by restricting the time and place of the depositions, by failing to designate persons knowledgeable about the topics listed in the deposition notice, and by failing to adequately prepare the designated deponents. This motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is granted in part and denied in part.

As part of the discovery in this case, the defendants, on August 10, 2001, noticed a Rule 30(b)(6) deposition of Hilton. The deposition notice identified seven specific areas of inquiry to be delved into at the 30(b)(6) deposition. In accordance with Rule 30(b)(6), Hilton designated seven individuals as persons who would testify on behalf of Hilton as to the specified topics. The specific topics which the defendants enumerated for deposition and the corresponding witnesses designated by Hilton are as follows:

> (1) The substance and circumstances of the Promus Hotels Corporations Compensation Committee meetings that led to the proposal of a three-year extension of stock options for specified employees.

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[1] In their motion, the defendants also requested an extension of the dispositive motion deadline. On February 21, 2002, the district court granted an extension through March 15, 2002, and therefore the request for an extension is moot. Any further extensions must be obtained from the district court.

Dale F. Frey and Ronald Terry

(2) The substance and circumstances of the Board of Directors meetings that led to the ratification of the three-year extension of stock options proposed by the Compensation Committee.

Kevin Kern

(3) The factors utilized by Hilton and Promus in extinguishing the stock options that were subject to the 3-year extension granted by Promus Hotels Corporation,

Norman Blake and J. Kendall Huber

(4) The policies, procedures, opinions and practices that Hilton relied upon to support the contention that Hilton was free to terminate all outstanding "underwater" options without compensating for them.

Norman Blake and J. Kendall Huber

(5) Hilton's policies, procedures, and practices with respect to non-party underwater option-holders delineated in the memoranda of 3/26/99 and 3/30/99, after the merger of PHC and Hilton.

Molly McKenzie Swarts

(6) The identification of all oral or written communications that the corporations, through their officers, engaged in with regard to cancellation of underwater options upon the merger of PHC & Hilton.

Stephen Bollenbach and J. Kendall Huber

(7) All other circumstances that relate in any way to the existence and cancellation of underwater stock options.

J. Kendall Huber

(Defs.' Point and Authorities, Exs. 1 and 2; Pls.' Mem. in Opp. at 5-6.) In summary, Huber was designated to testify on topics 3, 4, 6, and 7, Blake on topics 3 and 4, Bollenbach on topic 6, Frey and

Terry on topic 1, Kern on topic 2, and Swarts on topic 5.

Before filing the present motion to compel on January 28, 2002, the defendants scheduled and took Huber's deposition on October 5, 2001, Bollenbach's deposition on October 18, 2001, and Frey's deposition on December 18, 2001. At the time the motion was filed, three more depositions of the designated 30(b)(6) witnesses - Blake, Frey, and Terry - were scheduled for January 29, 2002, and February 1, 2002. Blake canceled his deposition on the eve of the February 1, 2002 discovery cutoff because of a conflict.

Hilton does not oppose a brief extension of the discovery deadline to allow the defendants to complete the 30(b)(6) depositions of Frey and Terry whose schedules did not permit the defendants the full seven hours of deposition as permitted under the rules. (Pls. Mem. in Opp. at 2-3.) In addition, Hilton does not oppose an extension to permit the defendants to depose Blake who canceled his deposition at the last minute. (*Id.*) Therefore, to the extent the motion pertains to the 30(b)(6) depositions of Frey, Terry, and Blake, the motion to extend the discovery deadline to take and/or complete the depositions of these designees is granted.

In their motion, the defendants make no mention of any problems with Hilton's 30(b)(6) designees Kevin Kern and Molly McKenzie Swarts. In its response, Hilton points out that Kern was

deposed and testified fully as to the topic for which he was offered. (Pls. Mem. in Opp. at 11.) There is nothing in the record to indicate that his testimony was inadequate. Hilton further points out that the defendants elected not to depose Swarts. (Id. at 12.) Therefore, to the extent the motion pertains to these two designees, it is denied.

Thus, the only issues before the court concern the 30(b)(6) deposition testimony of Huber, Bollenbach, and Frey. Huber was deposed by the defendants on October 5, 2001, for seven hours; Bollenbach was deposed on October 18, 2001 for nearly seven hours; and Frey was deposed on December 18, 2001, for several hours.

The defendants first insist that Huber's deposition was taken solely as a fact witness and further insist that they should be allowed to depose Huber again as a 30(b)(6) witness. In opposition, Hilton argues that another deposition of Huber would be duplicative in that his testimony would be identical to that already given. Hilton offered Huber as a 30(b)(6) deponent at the same time Huber was deposed as a fact witness.

A Rule 30(b)(6) deponent testifies as to the knowledge of the corporation and the corporations' subjective beliefs and opinions and interpretation of documents and events. *U.S. v. Taylor*, 166 F.R. D. 356, 360 (M.D.N.C. 1996). A fact witness, on the other hand, testifies as to his individual knowledge and gives his

personal opinions. The 30(b)(6) deponent's "testimony must be distinguished from that of a 'mere corporate employee' whose deposition is not considered that of the corporation and whose presence must be obtained by subpoena." *Id.* (citing 8A Wright, Miller & Marcus § 2103 at 36-37). While the two are similar in many respects, they differ in others. A person can be both a fact witness and a 30(b)(6) witness. Rule 30(b)(6) expressly states that it does not preclude a deposition by any other procedure. "Thus, a party who wishes the deposition of specific officer . . . may still obtain it . . . ." 8A Wright, Miller & Marcus § 2103 at 36.) Moreover, the 30(b)(6) deposition only counts as one deposition even though more than one person may testify. Fed. R. Civ. P. 30(a)(2)(A) Advisory Committee Comments, 1993 Amendments. Based on the record before the court, the court does not find that a fact witness deposition of Huber would be duplicative. Accordingly, the defendants are entitled to conduct separate depositions of Huber, one as a fact witness, which they have already completed, and one as a 30(b)(6) witness.

Additionally, based on questions asked during the depositions, the defendants are concerned that Huber, Bollenbach, and Frey were improperly designated as 30(b)(6) witnesses and were unprepared to answer questions on the topics for which they were offered as witnesses. Hilton does not deny that it has an obligation to

provide knowledgeable persons, adequately prepared to testify as to the topics specified by the defendants in the 30(b)(6) deposition notice. (Pls. Mem. in Opp. at 8). ***See FDIC v. Butcher*****, 116 F.R.D. 196, 199 (E.D. Tenn. 1986)(holding that a corporation must make a good-faith effort to designate persons having knowledge of the matter sought and to prepare those persons);** ***Marker v. Union Fidelity Life Ins. Co.*****, 125 F.R.D. 121, 128 (M.D.N.C. 1989)(recognizing that Rule 30(b)(6) requires a corporation not only to produce persons to testify with respect to the designated matters, but also to prepare them so that they may give complete, knowledgeable, and binding answers on behalf of the corporation). Hilton maintains that it has satisfied its obligations under Rule 30(b)(6) by offering the former General Counsel of Promus who participated in the negotiations regarding cancellation of the options, the CEO of Hilton who negotiated the deal in which the options were canceled, and one of the directors of Promus who chaired the Compensation Committee and signed the resolution extending the exercise of underwater options, and that all were adequately prepared.**

As former general counsel of Promus, Huber negotiated the merger on behalf of Promus directly with Bollenbach, the CEO of Hilton, and he communicated directly with Bollenbach about the cancellation of the stock options. Clearly, Huber is knowledgeable

about the factors, policies, procedures, and practices which Promus and Hilton relied on in cancelling the stock options, the circumstances surrounding the cancellation, and communications concerning the cancellation, the topics for which he has been offered as a witness. Indeed, the court cannot fathom a more appropriate witness on these topics. According to the affidavit of John Golwen, attorney for Hilton, he met and conferred with Huber for four hours before his deposition, provided Huber four to five boxes of documents to review, and conferred with Huber by telephone on two other occasions to prepare Huber for his deposition. In light of the time spent preparing and Huber's answers during his fact deposition, the court finds Huber was properly designated and adequately prepared.

Similarly, as CEO of Hilton at the time of the negotiations for the merger and the actual merger, Bollenbach would be the person most knowledgeable on behalf of Hilton about communications with respect to the cancellation of the underwater options upon the merger. He was the person on behalf of Hilton that actually made the oral communications. Bollenbach candidly admitted in his deposition, however, that he did not make an adequate search for and review of written communications on the subject. Even though Bollenbach was not completely prepared, Huber may be. Huber was offered as an additional witness on this topic and his Rule

30(b)(6) deposition has not been taken. Thus, Bollenbach's partial unpreparedness is not sanctionable.

Frey was formerly a member of the Board of Directors of Promus and the former Chairman of the Compensation Committee of the Board of Directors of Promus. As Chairman, he signed the Committee resolution which granted the CEO of Promus the right to extend the time to exercise options. He actually attended the meetings that led to the extension of the option exercise period. Again, it is difficult to imagine anyone more appropriate to testify about the committee meetings which led to the proposal of the three-year extension of the options. Frey testified that he spent thirty minutes preparing for the deposition and reviewed two documents. Given the limited scope of the subject for which his testimony was offered and the completeness of his answers, the court finds his preparation to be adequate.

Having reviewed the depositions of Huber, Bollenbach, and Frey in their entirety and having considered the arguments of counsel, the court finds that Huber, Bollenbach, and Frey have been appropriately designated as 30(b)(6) deponents for Hilton for the areas of inquiry set forth in the notice and that Huber and Frey were adequately prepared. Accordingly, the defendants' request to compel Hilton to redesignate is denied. Because Bollenbach, according to his own admissions, had not adequately searched for

and reviewed written communications, the defendants will be allowed to redepose Bollenbach for three more hours.

IT IS THEREFORE ORDERED that the discovery deadline is extended to March 29, 2002, for the sole purpose of completing the depositions of Frey and Terry, deposing Blake, deposing Huber as a 30(b)(6) witness, and redeposing Bollenbach as a 30(b)(6) witness for three more hours. Hilton is cautioned to adequately prepare Bollenbach. The defendants are cautioned not to exceed the duration lengths imposed by the rules and this order. Sanctions are denied.

IT IS SO ORDERED this 15th day of March, 2002.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE