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 PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

Presently before the court is the August 15, 2001 motion of the plaintiffs, Hilton Hotels Corporation and Promus Hotel Corporation pursuant to Federal Rules of Civil Procedure 26(c) for a protective order. The plantiffs seek to limit the testimony of J. Kendall Huber, former general counsel of Promus Hotel Corporation, during his pending deposition to specific, delineated areas of inquiry and tp prohibit the defendants from inquiring about communications between Huber and Promus protected by the attorney-client privilege. In the alternative, the plaintiffs ask that the defendants be required to identify their proposed areas of inquiry and questions for Huber prior to his deposition in order

that the plaintiffs may lodge objections in advance of the deposition. This motion was referred to the United States Magistrate Judge for determination.

An overview of this case is set forth in this court's order of August 13, 2001, but will be summarized here for purposes of this motion. This is a declaratory judgment action brought by Hilton and Promus to determine the validity of the cancellation of certain "underwater"[1] stock options held by the defendants, eight former executives of Promus. The underwater stock options were canceled as a condition of Promus' merger with Hilton on November 30, 1999. After the merger, the defendants challenged the cancellation of their Promus underwater stock options, which led Hilton and Promus to file this declaratory judgment action seeking a judicial resolution of the dispute. The defendants have all counterclaimed for breach of contract, and defendant Stephen Pletcher also counterclaimed for fraud.

All the defendants received their stock options as benefits during their employment with Promus and/or Doubletree Corporation[2] pursuant to either the 1997 Promus Hotel Equity Plan ("PHC Plan")

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[1] An "underwater" option is one in which the option's exercise price exceeds the current market price of the company's stock.

[2] Doubletree merged with Promus on December 19, 1997, with Promus being the surviving entity.

or the 1994 Equity Participation Plan of Doubletree Corporation ("DT Plan"). Both the PHC Plan and the DT Plan provided that the stock options would terminate six months after the termination of the holder's employment with the company. On November 28, 1998, the Human Resources Committee of the Board of Directors of Promus passed a resolution allowing certain employees up to three years, instead of six months, after the date of their termination of employment to exercise their underwater options. On March 28, 1999, Norman Blake, then Chief Executive Officer of Promus, approved seven of the eight defendants as employees who were eligible for the extended three-year underwater option exercise period. The remaining defendant, Stephen Pletcher, entered into a letter agreement with Promus on June 30, 1999, the date of his termination from employment at Promus, extending his exercise period for underwater options to three years.

On September 3, 1999, an Agreement and Plan of Merger was entered into by Promus and Hilton. The merger agreement specifically provided for the cancellation of the underwater stock options at issue in this case. The merger of Promus with Hilton was effective on November 30, 1999. When the merger took place, holders of options, including employees who had already terminated their employment, received cash for non-underwater options, while the remaining underwater options were canceled. The plaintiffs

insist that Promus was entitled to cancel the defendants' underwater stock options – even though the exercise period for the options had been extended by Norman Blake – because the language of the PHC Plan and DT Plan granted Promus the right to cancel the options in the event of a change in control of the company, such as a merger. The defendants deny that the plans gave Promus this right.

The defendants have noticed the deposition of J. Kendall Huber, a licensed, practicing attorney. From February 1999 through January 2000, Huber served as general counsel for Promus. According to the affidavit of Huber submitted in support of the plaintiffs' motion for protective order, as general counsel, Huber provided legal advice to Promus regarding the language in the PHC and DT Plans and its effect; the November 1998 resolution extending the period for exercise of the underwater options; and the March 1999 memorandum granting the extension of the option period to certain defendants. (Huber Aff. ¶¶ 4, 5, and 6.) He was also involved in negotiations of the merger between Promus and Hilton, and he advised Promus in the negotiation and drafting of the merger agreement between Promus and Hilton. (*Id.* ¶ 3.) Huber avows that all these communications were on behalf of his client Promus without the presence of strangers for the purpose of securing primarily either an opinion on law or legal services, and not for

the purpose of committing a crime or tort, and that the privilege has not been waived by his client Promus. (*Id.* ¶ 7.) In his affidavit, Huber admits that while serving as general counsel he also engaged in purely business, non-privileged communications with executives and employees of Promus, many of which communications were intertwined with privileged communications. (*Id.* ¶ 8.)

In their response, the defendants disclaim any intent to ask Huber to reveal privileged communications during his deposition. Rather, they insist that they intend to inquire only about business and non-privileged communications.

The attorney-client privilege is one of the oldest and most respected privileges, the fundamental purpose of which is to "encourage full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In a diversity case in federal court, the applicability of a testimonial privilege such as the attorney-client privilege is determined by reference to state law. The attorney-client privilege in Tennessee has been codified as follows:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

Tenn. Code Ann. § 23-3-15 (1994). The Tennessee Supreme Court has

held the privilege "excludes all communications, and all facts that come to the attorney in the confidence of the relationship." *Johnson v. Patterson*, 81 Tenn. 626, 649 (1884). The requirements for the privilege to apply are:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Humphreys, Hucheson & Moseley v. Donovan, 568 F. Supp. 161, 175 (M.D.TN. 1983)(construing the Tennessee statute). Based on Huber's affidavit which is uncontroverted, certain communications he made are clearly protected by the attorney-client privilege.

There is no express prohibition against deposing an opposing party's attorney under the Federal Rules of Civil Procedure. *Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. 208, 209 (D. Puerto Rico 1998). Rule 26(c) of the Federal Rules of Civil Procedure provides, however, that a court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" with respect to a discovery request, including depositions. Generally, the party moving for a protective order has the burden of establishing

good cause for the protection. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). "Because deposition of a party's attorney is usually both burdensome and disruptive, the mere request to depose a party's attorney constitutes good cause for obtaining a Rule 26(c), Fed. R. Civ. P., protective order unless the party seeking the deposition can show both the propriety and need for the deposition." *N.F.A. Corp. v. Riverview Narrow Fabrics*, 117 F.R.D. 83, 85 (M.D. N.C. 1987).

The majority of federal courts have adopted a three-prong test first enunciated by the Eighth Circuit and limit depositions of opposing counsel to situations where the requesting party shows: (1) no other means exist to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial and the need for the deposition outweighs its inherent disadvantages. *Shelton v. American Motors Corp.,* 805 F.2d 1323, 1327 (8th Cir. 1986). *See also Dunkin' Donuts, Inc. v. Mandorico, Inc.*, 181 F.R.D. at 210 (listing cases); *Harriston v. Chicago Tribune Co.*, 134 F.R.D. 232, 233 (N.D. Ill. 1990); *N.F.A. Corp. v. Riverview Narrow Fabrics*, 117 F.R.D. 83, 85 (M.D. N.C. 1987). Under the three-prong *Shelton* test, the burden is on the party seeking the deposition of opposing counsel to demonstrate its propriety and need. *Shelton*, 805 F.2d at 1327.

Here, Huber is not opposing trial counsel of record for Promus

and has not entered an appearance of record as counsel in this case, but instead he is a former in-house counsel for Promus. As former in-house counsel, the rationale behind the *Shelton* burden-shifting approach is not necessarily applicable. A deposition of the former general counsel would not disrupt the adversarial system nor detract opposing counsel from their business of preparing for trial. *But see Southern Film Extruders, Inc. v. Coca-Cola Co.*, 117 F.R.D. 559, 561 (M.D.N.C. 1987) (finding the rationale of *Shelton* applicable to the deposition of a party's former attorney and placing burden on deposing party to show the propriety and need for the deposition). Furthermore, Huber has testified by affidavit that in his role as former in-house counsel some of his communications were solely for the purpose of rendering business advice and not privileged. He also communicated with the defendants and with officers, directors, and employees of Hilton prior to the merger. In this regard, he is potentially a fact witness whom defendants are entitled to depose, and it would therefore be inappropriate to preclude his deposition in the entirety. *The Davis Companies, Inc. v. Emerald Casino*, No. 99C 6822, 2000 Lexis 7867 (N.D. Ill., June 2, 2000) (recognizing that role of in-house or general counsel differs from trial counsel). Nevertheless, because the plaintiffs have satisfied their burden of establishing good cause for a protective order, some protection is

warranted.

Accordingly, the plaintiffs' motion is granted in part. During the deposition of Huber, the defendants are restricted from inquiry into:

1. Any and all communications between Huber and officers, directors, and employees of Promus, including specifically Norman Blake, former CEO of Promus, relating to legal advice provided by Huber regarding the proposed merger of Promus and Hilton;

2. Any and all communications between Huber and the Board of Directors of Promus relating to legal advice provided by Huber regarding any aspect of the merger of Promus and Hilton;

3. Any documents that are protected as work product or otherwise privileged relating to any aspect of the merger of Promus and Hilton;

4. Any and all communications between Huber and officers, directors, or employees of Promus regarding legal advice concerning potential litigation involving the Stock Option Plans.

These limitations do not affect the plaintiffs' ability to object to any other topic on the basis of privilege. Additionally, Huber is permitted to make privilege determinations and objections himself.

Notwithstanding the foregoing, the defendants may inquire about:

1. Communications between Huber and any of the defendants

regarding the effect of the merger on their extended stock options;

2. Statements made by Hilton officers, directors and employees, and statements made by Huber to Hilton officers, directors and employees during the negotiation of the merger;

3. Statements made by Promus in public filings, including specifically SEC filings;

4. Business advice provided by or to Huber regarding the merger and the decision to cancel the extended stock options; and

5. Any matter, not privileged, that is relevant to any claim or defense of any party.

IT IS SO ORDERED this 5th day of September, 2001.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE