Sprint

James B. Wright
Senior Attorney

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May 6, 2002

TO TRA BY FAX AND BY AIR EXPRESS

Mr. K. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: *Docket No. 01-00964; Complaint of KMC against United Telephone*
United Telephone-Southeast Motion to Quash

Dear Mr. Waddell:

Enclosed for filing are an original and thirteen copies of United Telephone-Southeast, Inc.'s Motion to Quash and for Protective Order regarding KMC's Notice of Deposition of Mike Fuller. A copy is being served on counsel for KMC.

Please contact me if you have any questions.

Sincerely,

James B. Wright

James B. Wright

Enclosure

cc: Don Baltimore (with enclosures)
Gordon D. Polozola (with enclosures)
Laura Sykora
Kaye Odum

CERTIFICATE OF SERVICE
Docket No. 01-00964

The undersigned hereby certifies that a copy of United Telephone-Southeast, Inc.'s Motion to Quash and Memorandum in Support was served upon the following parties of record by depositing a copy thereof in the U.S mail addressed as follows:

H. LaDon Baltimore
Farrar & Bates, LLP
211 Seventh Avenue North, Suite 420
Nashville, Tennessee 37219

Gordon D. Polozola
Kean, Miller, Hawthorne
One American Place, 22nd Floor
Post Office Box 3513
Baton Rouge, Louisiana 70821

Dated: May 6, 2002

James B. Wright

James B. Wright

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: Complaint of KMC Telecom III, Inc. and KMC Telecom V, Inc. against United Telephone Southeast, Inc.

Docket No. 01-00964

UNITED TELEPHONE-SOUTHEAST, INC.
MOTION TO QUASH AND FOR PROTECTIVE ORDER REGARDING
KMC NOTICE OF DEPOSTION OF MIKE FULLER

1. United Telephone-Southeast, Inc. ("United") hereby files this motion pursuant to Section 26.03 of the Tennessee Rules of Civil Procedure and pursuant to Section 1220-1-2-8 of the Rules of the Tennessee Regulatory Authority to quash the notice to depose Mr. Mike Fuller filed by KMC Telecom III, Inc. and KMC Telecom V, Inc. ("KMC") and for the issuance of a protective order directing that discovery not be had. In support of this Motion United states as follows.

2. On April 30, 2002, United received by mail a letter dated April 25, 2002, in which KMC gave notice that it wished to depose by oral examination Mr. Mike Fuller, President of the Local Telecommunications Division and Mr. Bill Cheek, Vice President of Sales and Account Management."(See Exhibit A). United worked with KMC to determine a mutually agreeable time and place to depose Mr. Cheek. However, United objects to the request to depose Mr. Fuller and asks that said request be quashed.

3. KMC should not be permitted to take the deposition of Mr. Fuller. KMC's complaint is based on allegations regarding lack of security at central offices in Tennessee, poor provisioning of service to KMC in Tennessee, retail and wholesale rates for Tennessee CLECs, access to Tennessee performance data and disparagement by United representatives with respect to KMC's customers in Tennessee. As evidenced by Mr. Fuller's affidavit, attached as Exhibit B, Mr. Fuller

has no personal knowledge relevant to this action and requiring his deposition would serve only to annoy and harass Mr. Fuller and would impose an undue burden.

4. Mr. Fuller is President of the telephone companies that comprise the local telecommunications division of Sprint Corporation ("Sprint") that operate in eighteen states. Mr. Fuller is located outside the state of Tennessee and his duties include the development and implementation of strategic planning affecting all of the Sprint telephone companies and how those strategies impact or interface with the other divisions of Sprint. However his activities do not include review and management of all aspects of the day to day operations of these companies. As noted above, KMC's complaint in this case is derived from the day to day operational aspects of United in the state of Tennessee as they relate to provisioning of services to KMC in its capacity as a competitive local exchange carrier. Mr. Fuller is not the person who is knowledgeable of the events alleged by KMC in its complaint. As further evidenced by United's responses to KMC's first set of discovery, nothing provided by United indicates Mr. Fuller is personally familiar with any of the alleged facts surrounding KMC's complaint. Accordingly, the deposition of Mr. Fuller does not appear to be reasonably calculated to lead to the discovery of admissible evidence (TRCP 26.02(1)).

5. In addition, United believes it is premature for KMC to seek the deposition of a person who at this point in time is not shown to have any information regarding its claims. Such action appears to be for the purpose of annoyance or oppression and contrary to the concepts underlying reasonable discovery (TRCP 26.03). Further evidence that this deposition notice is nothing more than a harassment tactic is that pursuant to the currently effective procedural schedule, testimony has not yet been filed by United in this case. United will provide other witnesses who will prefile testimony in this case that are knowledgeable about the policies, facts and circumstances

regarding the complained of matters. Even if it were assumed that Mr. Fuller had some direct knowledge of the allegations, the deposition of Mr. Fuller would at best be duplicative of the testimony of other more knowledgeable witnesses. In any event, information regarding KMC's complaint with United is obtainable from such other witnesses in a more convenient and less burdensome and expensive manner and KMC should be required first to exhaust less intrusive means of discovery.

6. The undersigned counsel for United, in accordance with TRAP 26.06 (5) states that I have made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in this motion.

7. A Memorandum in Support of this Motion has been filed contemporaneously with this Motion.

For the foregoing reasons and for the reasons in the accompanying Memorandum in Support of this Motion, United asks that its Motion be granted, that the notice to depose Mr. Fuller be quashed and that a protective order be issued stating discovery not be had with respect to Mr. Fuller.

Respectfully submitted,
United Telephone-Southeast, Inc.

By: James B. Wright

James B. Wright
Senior Attorney
14111 Capital Blvd
Wake Forest, NC 27587
Telephone 919-554-7587

This 6th day of May, 2002

EXHIBIT A

KEAN, MILLER, HAWTHORNE, D'ARMOND, McCOWAN & JARMAN, L.L.P.

ATTORNEYS AT LAW

BATON ROUGE
NEW ORLEANS
COVINGTON
LAKE CHARLES
PLAQUEMINE

TWENTY-SECOND FLOOR
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GORDON D. POLOZOLA
PARTNER
Direct Dial: (225) 382-3440
Gordon.Polozola@KeanMiller.com

April 25, 2002

Via Federal Express

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Complaint of KMC Telecom III, Inc. and KMC Telecom V, Inc. against United Telephone Southeast, Inc.; Docket No. 01-00964
Our File No. 13620-16

Dear Mr. Waddell:

Enclosed is an original and two copies of a Notice of Deposition. Please file the original in the above-captioned matter and return a date-stamped copy to our office. A postage prepaid envelope has been provided for this purpose.

Thank you for assistance. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Gordon D. Polozola

GDP/jmp
Enclosures
cc: Mr. James Wright
Mr. H. LaDon Baltimore
Mr. John D. McLaughlin, Jr.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	DOCKET NO. 01-00964
	)	
COMPLAINT OF KMC TELECOM III, INC. AND KMC TELECOM V, INC.	)	
	)	
Against	)	
	)	
UNITED TELEPHONE SOUTHEAST, INC.	)	

NOTICE OF DEPOSITION

PLEASE TAKE NOTICE THAT pursuant to the Tennessee Rules of Civil Procedure and the ruling of the Hearing Officer at the January 28, 2002 pre-hearing conference, the Complainants, KMC Telecom III, Inc. and KMC Telecom V, Inc., will take the depositions by oral examination of the following individuals before a notary public or other person authorized by law to administer oaths. The depositions will continue from day to day, subject to adjournments as may be agreed upon by counsel.

1. Mike Fuller, President, Local Telecommunications Division.

2. Bill Cheek, Vice-President, Sales and Account Management.

The depositions will take place at 9:00 a.m. on May 14, 2002 at the offices of United Telephone-Southeast, Inc., 14111 Capitol Blvd., Wake Forest, North Carolina 27587-5900.

All counsel of record are invited to attend and examine the deponents in accordance with the governing rules.

Respectfully submitted,

J. Randy Young (La. Bar # 21958)
Gordon D. Polozola (La. Bar # 23900)
KEAN, MILLER, HAWTHORNE,
D'ARMOND, McCOWAN & JARMAN, L.L.P.
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(615) 254-3060
(615) 254-9835 FAX

Counsel to KMC Telecom

John D. McLaughlin, Jr.
Marva Brown Johnson, Esq.
Scott A. Kassman, Esq.
David Sered
KMC TELECOM HOLDINGS, INC.
1755 North Brown Road
Lawrenceville, GA 30043
(678) 985-7900
(678) 985-6213 FAX

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been forwarded via U. S. Mail, first class postage prepaid, to the following, this 25th day of April, 2002.

James Wright, Esq.
United Telephone Southeast, Inc.
14111 Capitol Blvd.
Wake Forest, NC 27587-5900

Gordon D. Polozola

EXHIBIT B

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: Complaint of KMC Telecom III, Inc. and KMC Telecom V, Inc. against United Telephone Southeast, Inc.

Docket No. 01-00964

AFFIDAVIT OF MICHAEL B. FULLER

I, Michael B. Fuller, being first duly sworn upon oath, state as follows:

1. I am President-Local Telecommunications Division of Sprint Corporation (Sprint). My business address is Sprint World Headquarters, 6200 Sprint Parkway, Overland Park, Kansas. My duties include overseeing the operations and activities of the local exchange telephone company operations of Sprint, which consists mainly of regulated local phone companies serving approximately 8.2 million access lines in 18 states, as well as the product distribution and directory publishing business.

2. I have been made aware of the present above-referenced complaint pending against Sprint by KMC Telecom III, Inc. and KMC Telecom V, Inc. (KMC).

3. I have no personal knowledge concerning the particular claims made by KMC, including alleged security violations in central offices in Tennessee, specific instances of poor service provisioning in Tennessee, inappropriate Tennessee rates for wholesale and resale services, lack of training of employees in Tennessee, alleged violations of particular provisions of an interconnection agreement among the parties, deployment of specific network configurations in Tennessee, or disparagement of KMC customers in Tennessee.

4. I do not recall ever having met any of the principals of KMC.

5. In my position at Sprint, my schedule is extremely busy and submitting to a deposition in this case would impose a significant burden on me and on Sprint, especially in light of my lack of any knowledge concerning KMC's claims.

6. I am scheduled to be at Sprint World Headquarters in Overland Park, Kansas on the deposition notice date of May 14, 2002 addressing important matters of strategic and financial value in connection with my duties as President of the Local Telecommunications Division of Sprint Corporation. These activities would conflict with my attendance at a deposition in Wake Forest, North Carolina.

Michael B. Fuller

Michael B. Fuller

COUNTY OF JOHNSON)
) ss
STATE OF KANSAS)

Subscribed and sworn before me this 6th day of May, 2002.

Notary Public

My appointment expires:
Feb 25, 2004

RITA M. HOWARD
State of Kansas
Notary Public
Expires Feb. 25, 2004

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: Complaint of KMC Telecom III, Inc. and KMC Telecom V, Inc. against United Telephone Southeast, Inc.

Docket No. 01-00964

MEMORANDUM IN SUPPORT OF UNITED TELEPHONE-SOUTHEAST, INC.'S MOTION TO QUASH AND FOR PROTECTIVE ORDER

I. Introduction

KMC Telecom III, Inc. and KMC Telecom V, Inc. (KMC or plaintiffs) have sought the deposition of Michael B. Fuller, President-Local Telecommunications Division, Sprint Corporation. This high-ranking corporate official has had no involvement with KMC's complaint against United Telephone-Southeast, Inc. (United), and he has no personal knowledge relevant to plaintiffs' claims. In addition, plaintiffs have not availed themselves of less intrusive means of obtaining discovery, such as deposing other, knowledgeable persons of Sprint who are familiar with the facts and circumstances surrounding KMC's claims. Therefore, in order to protect Sprint and this executive from annoyance, harassment, and undue burden, the Tennessee Regulatory Authority (TRA) should prohibit his deposition.

II. Standards Regarding Depositions

Under provisions identical to Section 26.03 of the Tennessee Rules of Civil Procedure,[1] Fed. R. Civ. P. 26(c) authorizes a court to issue a protective order that certain requested discovery not be had or be had only on specified terms or by specified methods, in order to protect a party from

[1] Reliance on federal court decisions as support for United's position is appropriate since "... the Tennessee Rules of Civil Procedure are patterned from the Federal Rules of Civil Procedure, decisions under the federal rules are **persuasive authority**..." *Continental Cheshire v. AGS Cheshire* 186 WL 14444, at *2 (attached as Exhibit 1).

annoyance, oppression, or undue burden. Courts have granted protective orders regarding the depositions of high-level corporate officers who are unlikely to have personal familiarity with the facts of the particular case. See 8 Charles A. Wright, et al., Federal Practice and Procedure § 2037 (2d ed. 1994).

In Thomas v. International Business Machines, 48 F.3d 478 (10th Cir. 1995), an age discrimination case, the Tenth Circuit upheld a protective order protecting IBM's chairman from a deposition. Id. at 482-84. The chairman had submitted an affidavit stating that he had no personal knowledge of the relevant facts, including knowledge of the plaintiff, her age, or her performance. Id. at 483. The court also noted that there was no indication that IBM had failed to make available for deposition the plaintiff's direct supervisors, who had made the employment decisions at issue. Id. Finally, the court rejected the plaintiff's argument that the chairman's deposition was needed because he had authored a policy that allegedly resulted in discrimination. Id. The court further noted that the plaintiff had made no attempt to demonstrate that the information sought could not have been gathered from other IBM personnel. Id. Thus, the Tenth Circuit upheld the protective order.

In Thomas, the Tenth Circuit cited two other circuit court opinions with approval. Id. In Salter v. Upjohn Co., 593 F.2d 649 (5th Cir. 1979), the Fifth Circuit upheld a protective order regarding the deposition of the president of Upjohn. The court agreed that the witness's assertion that he had no direct knowledge of the facts was reasonable, and it approved of the trial court's requirement that the plaintiff first take the depositions of other employees with more knowledge. Id. at 651. Similarly, in Lewelling v. Farmers Insurance of Columbus, 879 F.2d 212 (6th Cir. 1989),

the Sixth Circuit upheld an order protecting from deposition a party's chairman and CEO who had represented that he had no knowledge of pertinent facts. Id. at 218.

The opinion in Baine v. General Motors Corp., 879 F.R.D. 332 (M.D. Ala. 1991), in which the court granted a motion to quash the deposition of a vice-president of GM, is especially instructive here. The court reviewed several cases involving requests for depositions of high-level executives, including cases focusing on the personal knowledge of the witness whose deposition was sought, and found that "[t]he legal authority is fairly unequivocal in circumstances such as these." Id. at 334. In particular, the Baine court pointed to cases in which protection had been granted where the high-level executive had not been shown to have any unique personal knowledge and alternative means of discovery, such as depositions of designated spokespersons or interrogatories, had not been first employed. Id. at 334-35. After reviewing this case law, the court concluded as follows:

> Applying the teaching of all of these authorities to the instant case, the court concludes that it would be inappropriate to grant permission to depose [the vice-president] at this time. The defendant here has shown good cause why [the vice-president] should not be deposed at this time. The court finds that deposing [the vice-president] at this time would be oppressive, inconvenient, and burdensome inasmuch as it has not been established that the information necessary cannot be had from [other witnesses], interrogatories, or the corporate deposition. The corporate deposition has not yet been taken, and it could satisfy some of plaintiffs' needs. At the very least, it would aid in developing and refining a line of questioning. These avenues have not yet been exhausted or even pursued. It has also not been demonstrated that [the vice-president] has any superior or unique personal knowledge of the [particular subjects of the case].

Id. at 335. The court then agreed to issue the protective order quashing the deposition out of concern for the possibility of duplication, inconvenience, and burdensomeness. Id.

Also instructive is the Missouri Supreme Court's very recent decision prohibiting the plaintiffs' attempt to depose high-ranking executives of Ford Motor Company. State ex rel. Ford

Motor Co. v. Messina, Slip Op. No. SC 83933 (Mo. Banc. April 9, 2002). There the court held that the plaintiffs "have not sought the information through less intrusive means, plaintiffs' need for the discovery is slight, and there is a significant burden, expense, annoyance, and oppression to Ford and these top-level officers." Id. at slip op. p. 5.

United's position is further supported by the decision of the Texas Supreme Court in In re Alcatel USA, Inc., 11 S.W.2d 173 (Tex. 2000). In that case, the court held that the trial court had abused its discretion in denying a motion to quash the depositions of two high-level executives of Samsung. Id. at 181. In Alcatel, the plaintiff alleged that Samsung had acted on a plan at the highest levels of the executive structure to steal the plaintiff's technology. Id. at *2. The court reaffirmed its deposition guidelines that apply "when a party seeks to depose a corporate president or other high level corporate official." Id. at 175. Under these guidelines, if a party moves for protection based on the executive's affidavit denying knowledge of relevant facts, the party seeking the discovery must show that the executive has "unique or superior" knowledge of discoverable information. Id. at 175-76. If no such showing is made, the deposition may not go forward "without a showing, after a good faith effort to obtain the discovery through less intrusive means, (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate." Id. at 176.

Applying the guidelines, the court in Alcatel concluded that the plaintiff who sought the depositions had not shown that the executives had unique or superior knowledge of discoverable information. Id. at 176-79. The court noted that the evidence arguably showed that one executive had discoverable information, but such knowledge was not sufficient--the guideline required that the executive have unique or superior knowledge in comparison to lower-level employees. Id. at 179. In addition, the court rejected the plaintiff's attempt to distinguish business-related cases from tort-related cases. Id. The court held that the same guidelines apply even if the suit concerns a business dispute rather than a tort claim, and regardless of "whether high-level executives would be expected to participate in a decision relevant to the dispute." Id. (emphasis deleted). Finally, the court held that, although the plaintiff had taken depositions of lower-level employees, it had not taken advantage of that opportunity to seek from those employees the information it desired from the high-level executives; thus plaintiff had failed to pursue less intrusive means of discovery, and the depositions should have been quashed. Id. at 180-81.

The decision in Liberty Mutual Ins. Co. v. Superior Court of San Mateo County, 13 Cal. Rptr. 2d 363 (Cal. Ct. App. 1992), also supports the protective order sought in this case. There the court held that the trial court had abused its discretion in denying a protective order preventing the deposition of a high-level executive. In Liberty Mutual, the plaintiff sought the deposition of the defendant insurance company's CEO, who had also been named as a defendant in the suit, and who had submitted a declaration stating that he had no relevant knowledge. Id. at 363-64. The plaintiff had not deposed lower-level employees or the corporation itself. Id. at 365. The court concluded that "it amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to

depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less intrusive discovery methods." Id. The court found it sensible "to prevent a plaintiff from leap-frogging to the apex of the corporate hierarchy in the first instance, without the intermediate steps of seeking discovery from lower level employees more involved in everyday corporate operations." Id. at 366. The court further noted that "apex" depositions, "when conducted before less intrusive discovery methods are exhausted, raise a tremendous potential for discovery abuse and harassment." Id.

The court also noted that "federal decisions recognize the potential for abuse and generally do not allow a plaintiff's deposition power to automatically reach the pinnacle of the corporate structure." Id. After reviewing various federal cases (including the Salter and Baine cases discussed above), id. at 366-67, the court concluded as follows:

> Consistent with these federal decisions, we hold that when a plaintiff seeks to depose a corporate president or other official at the highest level of corporate management, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information.

Id. at 367. If the plaintiff cannot make such a showing, the trial court should issue the protective order and require the plaintiff to obtain the discovery through less intrusive means, such as interrogatories or a deposition of the corporation itself. Id. According to the Liberty Mutual court, such a procedure "will prevent undue harassment and oppression of high-level officials while still providing a plaintiff with several less intrusive mechanisms to obtain the necessary discovery, and allowing for the possibility of conducting the high-level deposition if warranted." Id. at 367-68.

Thus, the case law establishes that, in order compel the deposition of a high-ranking executive, a plaintiff must show that the executive possesses unique or superior knowledge of relevant facts, or that less intrusive means, including interrogatories, depositions of other employees, or a deposition of the corporation itself, have been exhausted and have proven inadequate.

III. Deposition of Mr. Fuller

Application of the above standards to the present case compels the conclusion that KMC should not be permitted to depose Mr. Fuller. As required by the cases discussed above, KMC cannot show that Mr. Fuller possesses any unique or superior knowledge relevant to their claims. Moreover, given the present posture of the case (prior to the filing of testimony and before KMC has attempted to obtain discovery by less intrusive means including a corporate deposition), KMC's need for the deposition of Mr. Fuller is slight, and it would involve significant burden, expense, annoyance, and oppression.

Plaintiffs have brought claims by which they alleged numerous errors in the manner in which they have been provided telecommunications services in Northeast Tennessee by United. As shown by his affidavit, Mr. Fuller has no knowledge relevant to those claims. Mr. Fuller was not involved in any way with--and has no personal knowledge of--United's day to day operational provisioning of telecommunications services to specific parties, including these particular plaintiffs, or any efforts by these plaintiffs to obtain services from Sprint. Any decisions relating to plaintiffs' claims were made by other Sprint employees.

Nor can plaintiffs establish that they have exhausted less intrusive means of obtaining the discovery they seek from Mr. Fuller. As explained above, any discoverable information held by Mr.

Fuller may be obtained from other Sprint employees who were actually involved in and made any decisions regarding United's provisioning of services to plaintiffs--all of whom will be made available by United for deposition. As the courts have made clear, plaintiffs must first exhaust such means to obtain the information they seek. Plaintiffs may not simply leap to the top of the corporate hierarchy without first testing the knowledge of lower-ranking employees. Rather, to the extent plaintiffs still seek discovery on topics other than those most appropriately addressed by Sprint's employees whose depositions have already been taken or are noticed, plaintiff should request a TRCP 30.02(6) deposition. As noted in the cases discussed above, such a deposition notice would allow United and the TRA to evaluate the proposed topics for discovery and determine the most appropriate persons to provide testimony. Moreover, United will present the prefiled testimony of witnesses most knowledgeable about the facts of this case. KMC will have every opportunity to test the competency of their testimony at the hearing.

Thus, as in the cases discussed above, the lack of unique or superior knowledge held by Mr. Fuller and plaintiffs' failure to exhaust less intrusive means of discovery require that the TRA issue the protective order requested. As in Thomas and the other cases cited by United in support of its motion, the executive here has submitted an affidavit stating that he has no relevant personal knowledge relating to decisions regarding plaintiffs; other employees directly related to plaintiffs' claims will be made available for deposition; plaintiffs cannot demonstrate that the information sought cannot be obtained from other employees; and in fact no corporate deposition has been sought. Under the standards enunciated in the body of the case law, United is entitled to the protective order it seeks.

As the Liberty Mutual court noted, apex depositions raise a significant potential for discovery abuse and harassment. That threat is especially real here. In light of this potential for abuse, plaintiffs should be required to show a particular need for these depositions, and plaintiffs cannot meet that burden in this case. The TRA should issue the requested protective order.

IV. Conflict on Date Noticed; Location

In the event that the TRA permits plaintiffs to take the deposition of Mr. Fuller, it should also require plaintiffs to reschedule the deposition for a date and location where the deponent is available. As set forth in his affidavit, Mr. Fuller is scheduled to be in Overland Park, Kansas on the date noticed for his deposition attending to important financial and strategic matters related to his duties as President of the Local Telephone Division of Sprint Corporation. In addition, if Mr. Fuller is required to be deposed, his deposition should occur in the city where the witness is located. The legal validity of this position under both Tennessee and federal law is overwhelming. See *Dunn v. Standard Fire Ins. Co.* 92 FRD 31 (E.D. Tenn 1981); Pivnik, Tenn. Circuit Court Practice, Secti0n 18-5; *Salter v. Upjohn Co.*, 593 F.2d, 649, 651 (5th Cir 1979); *Thompson v. Sun Oil Co.* 523 F. 2d 647, 650 (8th Cir 1975).

V. Time Limitations

Finally, in the event the TRA permits this deposition to go forward, the TRA should limit the duration of the deposition to two hours pursuant to TRCP 26.03. Such a limitation is appropriate in light of the deponents' lack of knowledge, the availability of less intrusive means of discovery, and the potential for harassment given the deponents' positions within Sprint.

VI. Conclusion

Plaintiffs should not be permitted to take the depositions of Mr. Fuller, a high-ranking executive at Sprint. Plaintiffs cannot meet the standards set forth in the case law, which require a showing that the executive possesses unique or superior knowledge relevant to their claims and that less intrusive means of discovery have been exhausted and have proven inadequate. The deposition of this executive would only serve to harass and impose an undue burden on Sprint and one of its officers. Accordingly, the TRA should issue a protective order prohibiting the deposition of Mr. Fuller.

Respectfully submitted,
UNITED TELEPHONE-SOUTHEAST, INC.

May 6, 2002

James B. Wright

James B. Wright
14111 Capital Blvd
Wake Forest, NC 27587
919-554-7587

1986 WL 14444
(Cite as: 1986 WL 14444 (Tenn.Ct.App.))

Court of Appeals of Tennessee, Western Section, at Jackson.

CONTINENTAL CHESHIRE ASSOCIATES, et al., Plaintiffs,
v.
AGS CHESHIRE ASSOCIATES, et al., Defendant and Cross-Plaintiff/Appellees,
v.
John H. VAN HOUTEN, II, Trustee, et al., Defendants to Cross-Complaint and Counter-Complainants/Appellants,
v.
WIEN, LANE & MALKIN, et al., Defendants to Counter-Complaint/Appellees.

Dec. 22, 1986.

Shelby Equity No. 34

Hon. D.J. Alissandratos, Chancellor

Richard E. Charlton, III and Jeffrey D. Germany, of The Winchester Law Firm, Memphis, for appellants, John H. Van Houten, II, et al.

Ronald M. Harkavy of Harkavy, Shainberg, Kosten & Pinstein, Memphis, for appellees Wien, Lane And Malkin, et al.

TOMLIN, Presiding Judge, Western Section.

*1 John H. Van Houten II, et al, intervenors in the case of Continental Cheshire Associates v. AGS Cheshire Associates, (hereafter "Intervenors") have appealed from the decree of the Chancery Court of Shelby County denying their Motion for Relief from Judgment under Rule 60.02(4), T.R.C.P. The issue presented by their appeal is whether the chancellor erred in denying their motion. We hold that he did not and affirm.

The opening statement of the last and most recent opinion in this case written by this Court reads: "This litigation has a long history." History is still being made, as we have another aspect of this case before us. Just as we tried in the prior case to limit our review of the facts and pleadings to the issue under consideration, we will attempt to do so once again. In 1982 after being allowed to intervene in a pending action in the Chancery Court of Shelby County styled Continental Cheshire Associates v. AGS Cheshire Associates, the intervenors filed a complaint later designated as a counterclaim against (among others) the New York law firm of Wien, Lane & Malkin and one of its partners (hereinafter referred to as "Defendants"). Certain acts of misfeasance were alleged against these defendants. Defendants filed a Motion to Dismiss supported by affidavits for lack of in personam jurisdiction. The chancellor ruled that in personam jurisdiction did not exist and dismissed the action as to these defendants. Intervenors utlimately perfected their appeal to this Court. The action of the chancellor dismissing Intervenors' counterclaim against defendants was affirmed by an Opinion and Order of this Court filed in January, 1985. Intervenors' application for permission to appeal to the Supreme Court was denied in May, 1985.

In August, 1985 the Supreme Court of this state handed down its opinion in Masada Investment Corp. v. Allen, 697 S.W.2d 332 (Tenn.1985). The principal issue in Masada involved claims against a nonresident attorney. The trial court dismissed the suit as to the nonresident attorney for lack of in personam jurisdiction. In an opinion filed in April, 1984 this Court affirmed the action of the chancellor in Masada holding that the Tennessee courts lacked in personam jurisdiction over a Texas attorney who had rendered legal services involving certain transactions between a Tennessee limited partnership and a California limited partnership. Masada was under consideration by the Supreme Court when it denied certiorari in Continental Cheshire. Later, the Supreme Court reversed this Court's decision in Masada by holding that the Tennessee courts did have in personam jurisdiction over the Texas attorney.

Obviously motivated by the Supreme Court's opinion in Masada, Intervenors filed their motion in the Chancery Court of Shelby County pursuant to Rule 60.02, T.R.C.P., seeking to have the final judgment entered in the cause before us set aside, the effect of which would be to reinstate their counterclaim against the defendants. Intervenors' Motion for Relief from Judgment reads in part as follows:

*2 2. The Tennessee Court of Appeals based its ruling upon the case of Masada Investment Corp. v. Allen, which was decided by that Court on April 18, 1984, which was nine months before it decided this case. The Masada case also originated in this trial

court.

....

5. Movants rely upon T.R.C.P. 60.02 which states in pertinent part as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: ... (4) ... a prior judgment upon which it is based has been reversed or otherwise vacated, ... or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time...."

Both in the Statement of the Issues presented for review and in the text of their brief before this Court, Intervenors have based their motion solely upon subsection (4) of T.R.C.P. 60.02, stating:

The Appellants brought their motion for relief from the said judgment under Rule 60.02(4) of the Tennessee Rules of Civil Procedure which provides that on motion and upon such terms as are just the Court may relieve a party or his legal representative from a final judgment, order, or proceeding if a prior judgment upon which the said judgment was based has been reversed or otherwise vacated.

As already noted, they contend that this Court's decision in Continental Cheshire was "based upon" the earlier decision of this Court in Masada. They also assert that the facts of Masada were very similar to the facts of Continental Cheshire and that in Continental Cheshire this Court used language, reasoning and conclusions identical to some found in Masada. While the latter assertion is true, the former is not. Addressing the latter assertion first, it is not unusual for a court when faced with similar factual situations to rely upon the same points and authorities previously relied upon in another case.

As for "basing" our decision in Continental Cheshire upon Masada, there is nothing in our Continental Cheshire opinion which in any way reflects that our decision therein was based specifically upon Masada. See Berryhill v. United States, 199 F.2d 217, 219 (6th Cir.1952) (applying Rule 60(b)(5), F.R.C.P.). No reference is ever made in Continental Cheshire to Masada. Our decision in Continental Cheshire was based upon a general application of the law as it existed at that time. None of the cases which this Court relied upon in deciding Continental Cheshire has been reversed subsequently by our Supreme Court.

Our research has uncovered no Tennessee case interpreting and applying Rule 60.02(4), nor have we been furnished with any by counsel for either party to this appeal. However, it is to be noted that Rule 60(b) of the Federal Rules of Civil Procedure is identical insofar as the provisions thereof pertinent to this litigation are concerned. Because the Tennessee Rules of Civil Procedure are patterned from the Federal Rules of Civil Procedure, decisions under the Federal Rules are persuasive in the construction and interpretation of our rules. See Moredock v. McMurry, 527 S.W.2d 462 (Tenn.1975); Hixson v. Stickley, 493 S.W.2d 471 (Tenn.1973).

*3 Our research in the federal system reveals that both the text writers and the cases interpreting and applying Rule 60(b)(5), F.R.C.P., unswervingly support the action of the chancellor below and are completely contrary to the position taken by Intervenors. As will be shown hereafter, the one federal case relied upon by Intervenors has no application to the issue as presented by this appeal. Keeping in mind that the language in 60.02(4), T.R.C.P. is identical to that used in 60(b)(5), F.R.C.P., we now examine the cases and text writers in the federal system that address this rule.

In Title v. United States of America, 263 F.2d 28, (9th Cir.1959), affirming the action of the district court denying a motion to set aside a judgment under Rule 60(b)(5), the court stated:

Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal [citing cases]. Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change [citing cases].

Id. at 31.

Berryhill v. United States, 199 F.2d 217 (6th Cir.1952) reviewed a case on appeal involving the denial of a Rule 60(b)(5) motion. That court stated:

It appears to be the settled rule that a change in the judicial view of the applicable law, after a final judgment, is not a basis for vacating a judgment entered before announcement of the change. Sunal v. Large, 332 U.S. 174 67 S.Ct. 1588, 91 L.Ed. 1982; Scotten v. Littlefield, 235 U.S. 407, 35 S.Ct. 125, 59 L.Ed. 289; United States v. Kunz, 2 Cir., 163

F.2d 344; Lehman Co. v. Appleton Toy & Furniture Co., 7 Cir., 148 F.2d 988.

Id. at 219.

In Wallace Clark & Co. v. Acheson Industries, Inc., 394 F.Supp. 393, 395 n. 4 (S.D.N.Y.1975), it was stated:

Rule 60(b)(5) contemplates relief from a judgment as a result of a later change in the law such as when a statute is amended or when a prior judgment is reversed or modified. See, e.g., Class v. Norton, 507 F.2d 1058, 1061-62 (2d Cir.1974). Moreover, relief from a judgment on the latter grounds is restricted to situations where the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. Rule 60(b)(5) does not apply where a case relied on as precedent by the court in rendering the present judgment has since been reversed. Title v. United States, 263 F.2d 28, 31 (9th Cir.), cert. denied, 359 U.S. 989; 79 S.Ct. 1118, 3 L.Ed.2d 978 (1959); Berryhill v. United States, 199 F.2d 217, 219 (6th Cir.1952); Loucke v. United States, 21 F.R.D. 305 (S.D.N.Y.1957). See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2863 (1973).

A case in point is that of Collins v. City of Wichita, 254 F.2d 837 (10th Cir.1958). In that case the notice provisions of a Kansas condemnation statute had been upheld by the Supreme Court of the United States. Subsequently in another case between different parties but involving the same statute, the U.S. Supreme Court held that the notice provisions of the statute did not measure up to the requirements of the due process clause of the Fourteenth Amendment. Thereafter, the losing parties in the prior case filed a motion in the district court seeking relief under Rule 60, F.R.C.P. The trial court overruled the motion. In affirming the lower court, the Tenth Circuit said:

*4 Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside [citing cases].

Id. at 839.

The case of Lubben v. Selective Service System Local Board No. 27, 453 F.2d 645, 650 (1st Cir.1972), provides an analysis of Rule 60(b)(5), F.R.C.P. that addresses the "based on" concept:

For a decision to be "based on" a prior judgment within the meaning of Rule 60(b)(5), the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense.... It is not sufficient that the prior judgment provides only precedent for the decision.

"It should be noted that while 60(b)(5) authorizes relief from a judgment on the ground that the prior judgment upon which it is based has been reversed or otherwise vacated it does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding." 7 Moore's Federal Practice ¶ 60.26 [3] at 325.

....

[A] change in applicable law does not provide sufficient basis for relief under Rule 60(b)(5). See Title v. United States, 263 F.2d 28 (9th Cir.), cert. denied, U.S. 989, 79 S.Ct. 1118, 3 L.Ed.2d 978 (1959); Collins v. City of Wichita, 254 F.2d 837 (10th Cir.1958); Berryhill v. United States, 199 F.2d 217 (6th Cir.1952).

Wright and Miller, Federal Practice and Procedure: Civil § 2863, at 203-04, has this to say about Rule 60(b)(5):

The second ground, that a prior judgment upon which the present judgment is based has been revised or otherwise vacated, obviously is sound but also has had very little application. This ground is limited to cases in which the present judgment is based on the prior judgment in the sense of res judicata or collateral estoppel. It does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed.

Intervenors cite but two federal cases as authority for their position. The first is Bailey v. Ryan Stevedoring Co., 443 F.Supp. 899 (M.D.La.1978) and the other, Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538 (2d Cir.1963), which was also cited by the District Court in Bailey. A reading of these cases reveals that neither supports in any way the position of Intervenors. Bailey, as the citation in Intervenors' brief reveals, was reversed by the Fifth Circuit. Although it might technically be

said that it was "reversed on other grounds," it was reversed because the trial judge disregarded the Court of Appeals' mandate and charted the course reflected in his opinion. Not only was the course he charted erroneous, but the route that he took was erroneous as well.

In Bailey the District Court clearly decided the case on the basis of subsection (6) of Rule 60(b). This is evident from the fact that subsection (6) is referred to at least twice in the opinion. Furthermore, the quotation utilized in the observation--"But this Court feels that 'this is not an exorable rule, as indeed the Supreme Court has recognized,' " Id. at 900 (citing Wright and Miller, Federal Practice and Procedure: Civil § 2864)-- specifically refers to subsection (6) of Rule 60(b). Furthermore, all three cases cited by the District Court in its opinion deal with subsection (6), including Radack, supra, also relied upon by Intervenors.

*5 There is yet another reason for our questioning the applicability of 60.02(4), T.R.C.P., to the case under consideration. As we view it, the Supreme Court's decision in Masada did not reverse prior law. It merely extended or liberalized the application of existing law to the facts presented to it. The constitutional test of due process as proscribed in International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), cannot be converted into a litmus test to be mechanically applied to every in personam jurisdiction case. Each case must be decided on its own facts. See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 413 (1952). At the time the Supreme Court denied the application for permission to appeal in Cheshire, it had heard arguments in Masada and had the case under advisement. It is apparent that a factual distinction was drawn between the two cases. Accordingly, the decree of the chancellor is affirmed.

Defendants have filed a separate motion seeking to have this Court declare Intervenors' appeal to be frivolous, and to have damages awarded them pursuant to T.C.A. § 27-1-122. After giving this motion serious consideration, this Court is of the opinion that this appeal is frivolous. Our Supreme Court has held that where it appears that the appeal has no reasonable chance of success it is frivolous. In Liberty Mutual Insurance Co. v. Taylor, 590 S.W.2d 920, 922-23 (Tenn.1979), our Supreme Court held an appeal to be frivolous when "[t]he material issues raised by the appeal were issues of fact and there clearly was material evidence to support the trial judge's findings on those issues."

While here we are dealing with a question of law, all the viable authorities, both text writers and case law, are contrary to the position taken by the Intervenors. This cause is thus remanded to the Chancery Court of Shelby County for the fixing of damages pursuant to the above-cited statute, which will consist of court costs and all of defendants' reasonable expenses, including attorneys' fees incident to this appeal.

CRAWFORD, J., concurs.

Nearn, Judge, dissents in part.

I dissent from so much of the majority opinion that declares this appeal to be frivolous. In all else I concur.

END OF DOCUMENT