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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

COREY LAMAR SMITH, et al.,
Plaintiffs,
v.
ARNOLD SCHWARZENEGGER, et al.,
Defendants.

Case No. 1:14-cv-00060-LJO-SAB
ORDER VACATING JUNE 14, 2016 HEARING
AND GRANTING EMERGENCY MOTION TO
PERPETUATE GARLAND BAKER
TESTIMONY
(ECF Nos. 198, 200, 201, 202, 203, 208, 209, 210)

Currently this action has been dismissed and the order of dismissal is on appeal to the Ninth Circuit. On May 24, 2016, Plaintiff Garland Baker filed an emergency motion to perpetuate his testimony. On May 31, 2016, Defendants filed an opposition to the motion to perpetuate testimony and Plaintiffs filed a reply.

Oral argument on Plaintiff Baker’s motion to perpetuate testimony was heard on June 1, 2016. Benjamin Pavone appeared telephonically for Plaintiff Baker and Jon Allin and Maureen Onyeagbako appeared telephonically for Defendants at the June 1, 2016 hearing. Following the hearing an order was filed providing the parties with the opportunity to offer supplemental briefing. On June 10, 2016, Plaintiff Baker filed supplemental briefing in support of his motion to perpetuate his testimony. On June 13, 2016, Defendants filed a supplemental opposition to the motion. The Court finds the matter suitable for decision without additional oral argument. Accordingly, the June 14, 2016 hearing is vacated. Having considered the moving papers and

1 argument at the June 1, 2016 hearing, the Court shall grant Plaintiff Baker’s motion to perpetuate
2 his testimony.

3 The Federal Rules of Civil Procedure provide that “[t]he court where a judgment has been
4 rendered may, if an appeal has been taken or may still be taken, permit a party to depose
5 witnesses to perpetuate their testimony for use in the event of further proceedings in that court.”
6 Fed. R. Civ. P. 27(b)(1). “If the court finds that perpetuating the testimony may prevent a failure
7 or delay of justice, the court may permit the depositions to be taken and may issue orders like
8 those authorized by Rules 34 and 35. The depositions may be taken and used as any other
9 deposition taken in a pending district-court action.” Fed. R. Civ. P. 27(b)(3).

10 Rule 27 is available in limited situations where testimony might be lost to a litigant unless
11 it is taken immediately. Ash v. Cort, 512 F.2d 909, 912 (3d Cir. 1975). It is within the discretion
12 of the court to order the taking of the deposition “if it is satisfied that a failure or a delay of justice
13 may thereby be prevented.” In re Yamaha Motor Corp., U.S.A., 251 F.R.D. 97, 98-99 (N.D.N.Y.
14 2008) (quoting Mosseller v. United States, 158 F.2d 380, 382 (2d Cir.1946)).

15 Under Rule 27, the party seeking to perpetuate testimony “must demonstrate a need for
16 the testimony or evidence that cannot easily be accommodated by other potential witnesses, must
17 show that the testimony is relevant, not simply cumulative, and must convince the court that the
18 evidence sought throws a different, greater, or additional light on a key issue.” 19th St. Baptist
19 Church v. St. Peters Episcopal Church, 190 F.R.D. 345, 347 (E.D. Pa. 2000) (internal punctuation
20 and citation omitted). Courts are most likely to permit discovery under Rule 27 where there are
21 special circumstances that makes the need to perpetuate testimony particularly urgent. Tennison
22 v. Henry, 203 F.R.D. 435, 440-41 (N.D. Cal. 2001). “Among the factors that courts have found
23 to be persuasive in justifying the need to perpetuate testimony are: 1) advanced age or infirmity of
24 witness; 2) the possibility that the witness will not be willing to testify if discovery is delayed;
25 and 3) the uniqueness of the information at issue.” Tennison, 203 F.R.D. at 441.

26 Plaintiff Baker is one of a number of plaintiffs who filed a complaint alleging reckless
27 exposure to dangerous conditions and deliberate indifference to serious medical needs in violation
28 of the Eighth Amendment and negligence under California law due to their exposure to Valley

1 Fever. It is undisputed that Plaintiff Garland Baker has contracted Valley Fever which has
2 progressed to the disseminated form of the disease and has a shunt inside his brain. Plaintiff's
3 counsel submits a declaration in which he states that he was informed that on April 20, 2016,
4 Plaintiff Baker was hospitalized and was not expected to survive. Counsel further contends that
5 Plaintiff Baker has survived and requests that his deposition be taken due to the uncertainty of his
6 health. Plaintiff Baker seeks to preserve his testimony regarding the background of his life, his
7 prison experience, contraction of Valley Fever, treatment, and injuries.

8 In Plaintiff's supplemental memorandum, Plaintiff presents portions of Plaintiff's medical
9 records which show that he has a history of central nervous system coccidioidomycosis and has
10 underwent a shunt revision due to a malfunction. Defendants proffer the declaration of Dr. Chen
11 who has been treating Plaintiff for the past year and a half. Dr. Chen states that Plaintiff Baker
12 has Valley Fever and hydrocephalus which is a complication that can occur in patients with
13 Valley Fever. Mr. Baker has had a ventriculoperitoneal shunt placed to take excess fluid from his
14 brain to relieve the pressure. Mr. Baker began having symptoms of confusion and an unsteady
15 gait and required a shunt revision. His condition has improved. On March 28, 2016, Plaintiff
16 was seen by an infectious disease physician and was found to be confused. Testing was done and
17 he was found to have signs of coccidioides immitis in the cerebral spinal fluid. This resulted in
18 the procedure for a revision of his shunt. Plaintiff Baker has progressively improved and is
19 requesting to return to the general prison yard. Dr. Chen opines that Plaintiff Baker is stable and
20 has returned to his baseline for treating his chronic medical conditions.

21 The evidence before the Court demonstrates that Plaintiff Baker's Valley Fever has
22 progressed to the point in which his brain has been affected. While Dr. Chen states that Plaintiff
23 has currently returned to his baseline, there is a significant risk due to Plaintiff Baker's current
24 medical condition that his testimony will be lost if the Court denies the current motion. The
25 Court notes that this action is currently on appeal and is still at the briefing stage. Therefore, no
26 decision from the appellate court can be expected for quite some time.

27 Plaintiff is seeking to perpetuate his testimony regarding his background, prison
28 experience, contraction of Valley Fever, treatment and injuries. If Plaintiff Baker's health

1 condition deteriorates further the testimony he seeks to preserve may be lost and such testimony
2 is relevant to the damages he suffered based on the claims brought in this action. The Court finds
3 good cause to grant the motion to perpetuate Plaintiff Baker's testimony.

4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. The hearing set for June 14, 2016 at 3:45 p.m. is VACATED; and
- 6 2. Plaintiff Baker's motion to perpetuate his testimony is GRANTED.

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8 IT IS SO ORDERED.

9 Dated: June 14, 2016


UNITED STATES MAGISTRATE JUDGE

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