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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL HOLEN,

11 Plaintiff,

12 v.

13 SASA JOZIC, et al.,

14 Defendants.

CASE NO. C17-1147JLR

ORDER GRANTING MOTION
TO TAKE *DE BENE ESSE*
DEPOSITIONS

15 Before the court is Plaintiff Michael Holen's motion to take *de bene esse*
16 depositions of medical witnesses. (Mot. (Dkt. # 34).) Defendants do not oppose Mr.
17 Holen's requested relief. (*See id.* at 8 ("Counsel for Defendants have agreed to Plaintiff's
18 request").) The court has considered the motion, the relevant portions of the record, and
19 the applicable law. Being fully advised, the court GRANTS the motion as specified
20 below.

21 Mr. Holen requests that the court allow him to take *de bene esse* depositions of
22 five medical providers in lieu of trial testimony. (Mot. at 1.) In addition, Mr. Holen

1 requests that he be allowed to take these depositions after the parties attempt mediation,
2 but before December 31, 2018, which is less one month before the January 28, 2019,
3 trial. (*Id.* at 2; *see also* Min. Order (Dkt. # 16) at 1.)

4 Federal Rule of Civil Procedure 32(a)(4)(A) allows a party to use a deposition at
5 trial when the witness is unavailable. *See* Fed. R. Civ. P. 32(a)(4). Perpetuation
6 depositions—also known as *de bene esse* depositions—preserve testimony for use at trial
7 where the witness may be unavailable to attend trial. *See, e.g., Steven Cohen Prods., Ltd.*
8 *v. Lucky Star, Inc.*, No. 2:12-cv-01995-GMN-CWH, 2016 WL 1170985, at *5 n.4 (D.
9 Nev. Mar. 23, 2016) (“*De bene esse* depositions are essentially trial depositions used in
10 place of a witness’s live testimony pursuant to Federal Rule of Civil Procedure
11 32(a)(4).”); *Patterson v. W. Carolina Univ.*, No. 2:12CV3, 2013 WL 1629132, at *1
12 (W.D.N.C. April 16, 2013) (“[T]he purpose of *de bene esse* depositions is to preserve
13 testimony for trial.”); *Christians of Cal., Inc. v. Clive Christian N.Y., LLP*, No. 13-cv-275
14 (KBF), 2014 WL 6467254, at *4 n.2 (S.D.N.Y. Nov. 10, 2014) (“[I]t is well established
15 that depositions under Rule 32 may be used *both* for discovery purposes and for use at
16 trial.”). The prominent view among courts is that preservation and discovery depositions
17 are subject to the same rules because the Federal Rules of Civil Procedure make no
18 distinction between the two kinds of depositions. *See Peoples Bank v. Bluewater*
19 *Cruising, LLC*, No. C12-0939RSL, 2014 WL 30038, at *1 (W.D. Wash. Jan. 3, 2014)
20 (“[T]he Court finds more persuasive the cases holding that these depositions are subject
21 to the limits in the Rules because the Rules do not distinguish between discovery and
22 perpetuation depositions for trial.”) (collecting cases). The admission of deposition

1 testimony is subject to the sound discretion of the trial court. *See McMann v. Crane Co.*,
2 C14-5429BHS, 2015 WL 3649180, at *2 (W.D. Wash. June 11, 2015) (quoting *Coletti v.*
3 *Cudd Pressure Control*, 165 F.3d 767, 773 (10th Cir. 1999)).

4 Here, Mr. Holen requests the *de bene esse* depositions because “exceptional
5 circumstances make it desirable—in the interest of justice and with due regard to the
6 importance of live testimony in open court—to permit the deposition to be used.” (Mot.
7 at 7 (citing Fed. R. Civ. P. 32(a)(4)(E)).) According to Mr. Holen, these exceptional
8 circumstances include the disruption to the medical witnesses’ medical practices if they
9 have to appear in court, and the significant expense to pay these witnesses to travel to
10 Seattle and take a full day away from their medical practices, as opposed to performing
11 one- or two-hour depositions at their places of work. (Mot. at 7-8.) Mr. Holen notes that
12 “[m]edical doctors generally charge between \$500.00 and \$1,000.00 per hour to testify.”
13 (*Id.* at 4.) Because these medical witnesses are located outside of Seattle, the cost of their
14 travel along with waiting in court to testify far exceeds the expense of *de bene esse*
15 depositions that can be scheduled at the witnesses’ convenience. (*Id.*)

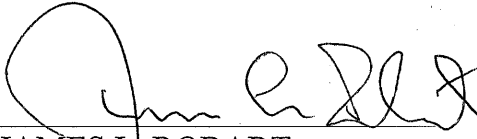
16 The court finds that under these circumstances, especially in light of Defendants’
17 stipulation, Mr. Holen may take *de bene esse* depositions of the five medical witnesses
18 named in his motion. (*See id.* at 1.) The court recognizes the cost savings of having the
19 witnesses testify through perpetuation depositions as opposed to in-person at trial. *See*
20 *Borchardt v. United States*, 133 F.R.D. 547, 548 (E.D. Wis. 1991) (finding that a cost
21 differential of \$625 to \$875 justified the use of a perpetuation deposition). Moreover,
22 Defendants’ stipulation satisfies the court that Defendants will not be prejudiced by the

1 use of these depositions. *See* Fed. R. Civ. P. 32(a)(4)(E) (use of a deposition at trial must
2 be “in the interest of justice and with due regard to the importance of live testimony in
3 open court.”).

4 Mr. Holen also represents that all Defendants have agreed to his request to take the
5 *de bene esse* depositions after the parties’ mediation. (Mot. at 8.) Defendant Blue Land
6 Transportation, Inc., however, “requested that the deadline for taking the perpetuation
7 depositions be not less than 30 days before the trial.” (*Id.*) Mr. Holen asked the court
8 that the *de bene esse* depositions occur no later than December 31, 2018 (*id.* at 2.), but
9 that date is only 28 days before the January 28, 2019, trial. The court therefore sets the
10 deadline for these depositions at December 28, 2018.

11 In sum, the court GRANTS Mr. Holen’s request to take *de bene esse* depositions
12 of the five medical witnesses that he identified in his motion. (*See id.* at 1.) In addition,
13 the court ORDERS the parties to complete all of these depositions no later than
14 December 28, 2018. Any deposition that has not taken place by that time will not be
15 considered as a *de bene esse* deposition.

16 Dated this th 20 day of September, 2018.

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18 JAMES L. ROBART
19 United States District Judge
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