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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

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**MELVIN DUMMAR,**

**Plaintiff,**

**WILLIAM FRANK LUMMIS and  
FRANK WILLIAM GAY,**

**Defendants.**

**: PLAINTIFF DUMMAR'S**  
**: MEMORANDUM IN SUPPORT**  
**: OF MOTION FOR DEPOSITIONS**  
**: PENDING APPEAL UNDER**  
**: RULE 27(b)**  
**:**  
**:**  
**: CIVIL NO. 1:06CV00066 BSJ**  
**: JUDGE: Bruce S. Jenkins**

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**ORAL ARGUMENT REQUESTED**

## I - INTRODUCTION

Plaintiff has been unable to find any reported Tenth Circuit cases applying Rule 27(b) for depositions pending appeal. This memorandum will provide the authority upon which the Court should grant the relief requested since similar factual circumstances have been reviewed by other federal courts - both trial and appellate - around the country.

## II - FACTUAL ARGUMENT

All of the witnesses listed in the motion are over the age of 70 years but for Mr. Deiro and Mr. Boyer. Both of them are suffering from ongoing, chronic medical conditions.

## III - LEGAL ARGUMENT

The Rules of Civil Procedure were adopted by Order of the Supreme Court of the United States on December 20, 1937. See, Thompson/West Federal Civil Judicial Procedure and Rules, pg. 25, 2006 Revised Edition. Prior to the adoption of the Rules of Civil Procedure, an independent action to perpetuate testimony was allowed. See, Rule 27.(c) and State of Arizona v. State of California, 292 U.S. 341, 54 S.Ct. 735, 78 L.Ed. 1298 (1934). The purpose of the independent action is that there is no other way for the testimony to be taken and preserved for a ultimate trial on the merits. Id., 292 U.S. at 347-348. Although an independent action is still available to preserve testimony under Rule 27(c), it seems to be the better practice to use Rule 27(b) before the court from which an appeal was taken to seek this relief.

All cases discussing the issue found by the undersigned counsel agree that any Rule 27 deposition is solely to preserve testimony and not as a substitute for normal discovery:

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We reiterate that Rule 27 is not a substitute for discovery. It is available in special circumstances to preserve testimony which **could** otherwise be lost. . . The Rule states that the trial court "may allow the taking of the depositions of witnesses to perpetuate their testimony . . . (i)f the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice. . ." (Emphasis added) F.R.C.P. 27(b).

Ash v. Cort, 512 F.2d 909 at 912 (3rd Cir. 1975)(emphasis added). See, also, 19th Street Baptist Church v. St. Peters Episcopal Church, 190 F.R.D. 345 at 348 (E.D.Penna. 2000)(rule not a substitution for discovery). Many of the witnesses whose testimony is sought by Plaintiff are over seventy years of age and will testify about matters that occurring more than 30 years ago. Ash, supra., at 913 affirmed a denial of a Rule 27(b) motion based on the conclusion that the witnesses' testimony sought to be preserved were over fifty years old. However, the same court allowed deemed relevant the preservation of the testimony of a 71 year old witness because of advanced age. Id., footnote 15, citing Texaco v. Borda, 383 F.2d 607, 609 (3rd Cir. 1967). Borda is instructive. As pointed out by the court:

What has been said brings us to our expressed view that Judge Augelli abused his discretion in denying leave to Texaco to take Borda's deposition on his reasoning that 'age standing alone is meaningless' and that 'it is meaningless to say to me that Mr. Borda is 71 years old.'

The circumstance that 'Mr. Borda is 71 years' is quite meaningful. It would be ignoring the facts of life to say that a 71-year old witness will be available, to give his deposition or testimony, at an undeterminable future date. . . It is a fact of life, too, that the memory of events already dating back some eleven years grow dim with the inexorable march of time even on the part of one on the sunny side of the proverbial three score and ten years.

Borda, 383 F.2d at 609, footnote omitted. See, also, DeWagenknecht v. Stinnes, 102 U.S.App.D.C. 89, 250 F.2d 414 (1957)(allowing perpetuation of testimony by deposition of 74 year old.) In Lombards, Inc. v. Prince Manufacturing, Inc., 753 F.2d 974 (11th Cir. 1985)

the court upheld a denial of depositions of non-party witnesses when the only reason presented was the witnesses were not "immune for the uncertainties of life (and death)". Id. at 976. The court compared, with approval, the Borda case where age and time frame from the cause of action were adequate as to why the testimony must be perpetuated. Id. at 976.

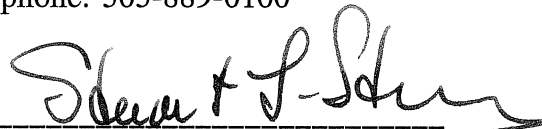
#### IV - CONCLUSION

There is no way to estimate the time required for the appeal in this matter. All of the witnesses sought to be deposed to preserve testimony by Plaintiff Dummar are over 70 years of age and/or have current medical issues for which Rule 29(b) was intended to cover.

**WHEREFORE**, Plaintiff Melvin Dummar prays that the Court allow the requested depositions.

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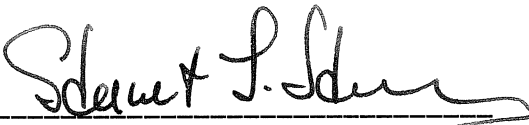
Stuart L. Stein

**I HEREBY CERTIFY** that a true copy of the foregoing was sent by electronic filing/email and regular mail to the following attorneys of record this March 13, 2007:

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