IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: ASBESTOS PRODUCTS	:	
LIABILITY LITIGATION (No. VI)	:	Civil Action No:
	:	MDL 875
This Document Relates to	:	
COLLINS v. AC&S INC et al.	:	Pa. E.D. No. 10-64567

ORDER

AND NOW, this 20th day of November, 2012, upon consideration of "Plaintiff's Motion To Perpetuate the Testimony of Co-Worker Witness Harold Hoopengarner" (Doc. 130), the response (Doc. 134), and the reply (Doc. 141), it is hereby **ORDERED** that the motion is **GRANTED** and the parties may take the trial deposition of Harold Hoopengarner in order to preserve his testimony for use at the trial in this case but for no other purpose.[1]

[1] Plaintiff seeks to depose Mr. Hoopengarner, who is reportedly elderly and infirm, in order to preserve his testimony for the trial in this case. In support of her motion, Plaintiff attaches, *inter alia*, over 200 pages of medical records establishing Mr. Hoopengarner's serious medical conditions (Doc. 130 Ex. 6) and a declaration from Mr. Hoopengarner providing the basic content of his proposed testimony (Doc. 130 Ex. 4). The most recent treatment notes found among these 200 pages date back to February 2012. There is nothing within these notes that indicates the progression of his disease condition from that time to the close of discovery or to the present time. While we accept that Mr. Hoopengarner, who has been a client of Plaintiffs' counsel for many years, could have been deposed during the discovery period, we will permit this deposition to go forward given the serious nature of his illnesses and the relevance of his testimony.

Although the Federal Rules of Civil Procedure do not distinguish between depositions taken for discovery purposes and those taken strictly to perpetuate testimony for presentation at trial, courts routinely recognize the distinction. See e.g. Charles v. F.W. Wade, 665 F.2d 661, 663-64 (5th Cir. 1982); In re Groggel, 333 B.R. 261, 303 (Bankr. W.D. Pa. 2005); Estenfelder v. Gates Corp., 199 F.R.D. 351, 354-55 (D. Colo. 2001); Spangler v. Sears, Roebuck & Co., 138 F.R.D. 122, 124 (S.D. Ind. 1991); RLS Associates, LLC v. United Bank of Kuwait PLC, 01-1290, 2005 WL 578917, at *6-7 (S.D.N.Y. Mar. 11, 2005).

Defendants contend that Plaintiff is improperly attempting to re-open discovery. We acknowledge that concern. However, we further acknowledge and accept Plaintiff's representation that she seeks to take this deposition to preserve the testimony for trial and not for discovery purposes. We will grant her the right to do so in this case. We are certain that Plaintiff

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

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appreciates that in granting this request we do not give her permission to reopen discovery or to use the deposition for any purpose other than as trial testimony - including to support a response to any Defendant's motion for summary judgment.

Defendants also assert that Mr. Hoopengarner was not properly disclosed as a witness. We make no ruling regarding the ultimate admissibility of the testimony or whether he was adequately disclosed as a witness in a timely manner. We deem it inappropriate to make such a determination at this time.