

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**IN RE: LISA BURRAGE**

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**No. 2:12-mc-235-JHR**

**ORDER ON PETITION TO PERPETUATE TESTIMONY**

Lisa Burrage, who anticipates bringing an action in this court against her former employer, Beacon Hospice, Inc., once her currently-pending charge against it has been resolved by the Maine Human Rights Commission, seeks leave under Fed. R. Civ. P. 27(a) to take the video deposition of a fact witness, who is terminally ill. Petition of Lisa Burrage to Perpetuate Testimony (Petition”) (ECF No. 1). Burrage is effectively prevented from bringing an action arising out of the same operative facts giving rise to the administrative charge until that remedy has been exhausted. 42 U.S.C. § 12117(a); 5 M.R.S.A. § 4662. For the following reasons, I grant the petition provisionally.

Beacon Hospice, Inc., the potential defendant, opposes the petition, but only upon procedural grounds. It notes, correctly, that Rule 27(a)(1) requires such a petition to be verified, and the petition in this case is not. Opposition of Beacon Hospice, Inc. to Petition by Lisa Burrage to Perpetuate Testimony (ECF No. 3) at 1. The petitioner is hereby ordered to submit a verified petition no later than five business days from the date of this order. If no verified petition is submitted by that date, the petition will be deemed denied.

Beacon Hospice, Inc., also argues that the petition should be dismissed because “Rule 27(a)(2) requires that the Petitioner request a hearing on the matter,” and it has not been served with notice of any “proposed” hearing date. *Id.* While Rule 27, in language unchanged since 1937, does appear to contemplate a hearing on the petition, it cannot reasonably be construed to require a hearing. Any hearing would be superfluous if a verified petition is filed, as Beacon Hospice, Inc., has not taken issue with any of the petition’s factual assertions. *See generally In re McCulloch Env. Issues*, No. CV 07-8118-PHX-MHM, 2007 WL 4150276, at \*2 (D. Ariz. Nov. 19, 2007) (vacating scheduled hearing on petition, observing that “it appears the 20 days required pursuant to Rule 27 refers to the notice required before the deposition is taken”).

Finally, Beacon Hospice, Inc., contends that Burrage should be required to submit a consent form signed by the proposed deponent “ensuring that she has knowingly and voluntarily consented to said deposition and the waiver of her right to privacy under HIPAA.” *Id.* at 2. I see no need to impose this requirement, which would not be imposed were the deponent to testify in person at trial, upon either Burrage or the proposed deponent. Burrage is not asking the court, as I read the petition, to order an unwilling witness to submit to deposition. To the contrary, she represents that the deponent is “willing and able” to participate in a video deposition. Petition at 3. If that is in fact not the case, I expect that counsel for Burrage will so notify the court immediately. Under that circumstance, an evidentiary hearing may well be necessary. In addition, should the deponent express a desire that her testimony be kept confidential, I am certain that the experienced counsel on both sides of this petition can jointly submit a proposed confidentiality order for the court’s approval.

If Burrage submits a timely verified petition, the court will review it promptly and, in the absence of significant unexplained changes to the substance of the petition as it was initially

submitted, will issue the detailed order permitting the deposition that is contemplated by Rule 27(a)(3).

**NOTICE**

*In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.*

*Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.*

Dated this 11<sup>th</sup> day of December, 2012.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

**In Re**

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