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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON

TRANSCRIPT OF PROCEEDINGS

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IN RE: AMERICAN MEDICAL SYSTEMS, INC., MDL NO.  
PELVIC REPAIR SYSTEM PRODUCTS 2:12-MD-2325  
LIABILITY LITIGATION

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MOTIONS HEARING

January 24, 2014

**BEFORE THE HONORABLE CHERYL A. EIFERT  
MAGISTRATE JUDGE**

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P R O C E E D I N G S

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THE COURT: Hello.

MS. ESKIN: Good afternoon. Amy Eskin for the plaintiffs.

MS. FITZPATRICK: Fidelma Fitzpatrick for the plaintiffs.

MS. BINIS: Good afternoon, Your Honor. It's Barbara Binis for AMS and Tracy Weiss for AMS.

THE COURT: Thank you. Let's start, then, with the plaintiffs' emergency motion. And I realize -- I've read through the paperwork, that being defendant's response and motion for protective order are combined. So, we'll take up both of those at the same time. But let's, let me go ahead and have the plaintiff get started.

MS. ESKIN: Thank you, Your Honor.

We're here because, again, we've been placed in the position of not being able to accomplish discovery despite complying with all the applicable rules. And that's happened really because of AMS's failure to timely produce witnesses.

We've requested a 30(b)(6) deposition under the rules, timely requested such a deposition. It's clear that we're entitled to this; that there's a difference between a 30(b)(6) and a fact witness. And we have the absolute right to take this deposition.

1           And I might say that, you know, Your Honor's ruling in  
2 the *Bard* case can't be read nearly as broadly as AMS would  
3 like to read it, which is that we are not entitled to take a  
4 30(b)(6) deposition as we first learned in this  
5 meet-and-confer process, Your Honor.

6           And I want to say that at the outset because I know the  
7 Court is aware -- we're certainly aware of the Court's  
8 directive that we all try to get along. But it was  
9 plaintiffs actually who initiated the meet-and-confer  
10 regarding this deposition.

11           And after AMS (recording inaudible) and continued to  
12 contact AMS (recording inaudible) long periods of silence  
13 and nonresponsiveness in order to try to get this issue  
14 resolved. And the meet-and-confer process ended, in our  
15 view, far too long and (recording inaudible). That's a  
16 tactic that AMS has employed.

17           And I think if Your Honor has reviewed, as you have,  
18 the motion for protective order, you'll see that one of  
19 AMS's requests is a stay on all discovery which would  
20 further (recording inaudible).

21           And the Court also, I believe, recalls that the same  
22 thing happened with the clinical and regulatory witnesses  
23 that led to extensive motion practice after plaintiffs  
24 waited months and months for depositions, for documents to  
25 be produced, for outside-United States documents to be

1 produced.

2 We had to file a motion. We had to have sanctions  
3 ordered because AMS wouldn't let us take the deposition  
4 (recording inaudible). And the machinations that have  
5 surrounded it is very consistent with AMS (recording  
6 inaudible).

7 Now, this is an Elevate 30(b)(6) deposition, Your  
8 Honor. Elevate is one of the POP products, obviously. And  
9 Elevate cases comprise all of AMS's bellwether submissions.

10 Now, the Court hasn't yet selected the bellwether  
11 picks, but the briefing has been completed on that and we do  
12 not know yet whether Judge Goodwin will pick an Elevate  
13 case.

14 But the tactical advantage that AMS has gained here by  
15 not producing (recording inaudible) and developing expert  
16 witness reports which are due on February 7th without  
17 anything close to adequate deposition discovery, and we  
18 think (recording inaudible) making the ultimate trial pick  
19 selection.

20 This isn't a question of whether an Elevate case would  
21 ever go to trial or not. It's simply that we have one trial  
22 date set August 19th. We have six possible options. And  
23 non-Elevate cases are the cases that are prepared and ready  
24 to go to trial. The Elevate case is not because of the  
25 delay by AMS.

1           So, what we did, Your Honor, was having learned in the  
2 SUI discovery that AMS was going to present witnesses who  
3 very, very much limited their testimony to exactly a  
4 document that they had looked at, read, or been copied on  
5 and only (recording inaudible) their direct personal  
6 experience on it or conversation (recording inaudible).

7           What we decided we wanted to do was get discovery  
8 accomplished by a 30(b)(6) deposition which would allow the  
9 overall Elevate story to be told, and thereby identify  
10 additional witnesses and documents that might be necessary  
11 (recording inaudible).

12           That was a choice that (recording inaudible) more than  
13 adequate time for us to have had this witness testify  
14 (recording inaudible) by myself and, and Ms. Weiss.

15           And, so, what we wanted was someone who would have to  
16 educate themselves as required by the rules to give us the  
17 overall story. And that's why we requested the witness in  
18 the way that we did.

19           Now, AMS has said that they can't have a witness ready  
20 before the end of February. And they go to great lengths to  
21 talk about the timing of the service of the notice. But,  
22 Your Honor, we have a DCL in place that does not allow for  
23 companies that are involved in this litigation to shut down  
24 and not be able to produce witnesses that are timely  
25 noticed.

1           And, in fact, AMS conducted discovery during the month  
2 of December and took bellwether plaintiffs' depositions on  
3 December 23rd. So, we really believe that we engaged in the  
4 process in good faith and noticed the deposition in a timely  
5 way.

6           Now, in terms of the scope of (recording audible) there  
7 is a universe of Elevate cases that we are entitled to  
8 discover from a 30(b)(6) witness. We've identified those  
9 categories of deposition testimonies (recording inaudible)  
10 that the categories weren't appropriate (recording  
11 inaudible).

12           And what came out of the meet-and-confer was that AMS  
13 asked us to tell them what the holes were in the Elevate  
14 story that we wanted to fill.

15           And based on their evaluation of their fact witness  
16 testimony (recording inaudible) testimony on some sales and  
17 marketing and some design verifications and maybe (recording  
18 inaudible).

19           Your Honor, under the law they're really not permitted  
20 to limit a 30(b)(6) deposition in that way, particularly  
21 here where the fact witness depositions that we took  
22 previously (recording inaudible) had experience with  
23 Elevate. Those witnesses -- the SUI witnesses didn't know  
24 enough (recording inaudible) on behalf of the corporation.

25           In fact, as we cited in our brief, (recording

1 inaudible), "These were cases that (recording inaudible) my  
2 area. You'd have to ask somebody else. I'm not familiar  
3 with the Elevate. I don't know. I don't know. I don't  
4 know."

5 So, for AMS to designate deposition testimony  
6 (recording inaudible) witnesses and then say we (recording  
7 inaudible) that is really inappropriate. (Recording  
8 inaudible) said he had no idea what product the LPP that he  
9 worked on (recording inaudible) its specifications  
10 (recording inaudible). He didn't know anything about  
11 regulatory. He didn't know anything about the development  
12 of Elevate.

13 Ms. Hess -- or, excuse me, Ms. (recording inaudible)  
14 testified that she wasn't familiar with the Elevate  
15 procedure. She had nothing to do with the (recording  
16 inaudible) Elevate.

17 She wasn't sure whether a document entitled Regulatory  
18 Project Plan for Next Generation referred to Elevate. She  
19 didn't know anything about the Elevate regulatory  
20 submission.

21 And then, of course, we have Mr. Staples who said he  
22 didn't know what a national sales manager was. He didn't  
23 know what sales (recording inaudible). He had no  
24 information about whether AMS hired physicians by AMS before  
25 they implanted the Elevate product.

1           So, on this record, Your Honor, (recording inaudible)  
2 AMS indicated in their last response to the 30(b)(6) notice  
3 constitute (recording inaudible) time for them to designate  
4 it. (Recording inaudible) operate as a shield (recording  
5 inaudible) tested categories and not only the categories  
6 that AMS gains to (recording inaudible).

7           And we did conduct an extensive review of those  
8 depositions, Your Honor, (recording inaudible) on what AMS  
9 provided to us as potential designated (recording  
10 inaudible).

11           So, you know, we haven't delayed in taking these  
12 depositions. We are (recording inaudible) timely noticed  
13 them. We want to proceed with it. We feel that the scope  
14 is appropriate given the fact that this is one of the  
15 (recording inaudible) that we are obligated to conduct  
16 discovery on (recording inaudible).

17           And, so, we would like to take that deposition within  
18 the next (recording inaudible) statement that they can't  
19 produce any witnesses under any circumstances until  
20 February 24th. Your Honor, that's (recording inaudible).  
21 And the, you know, they're obligated to have a witness who  
22 can testify.

23           They've known since November that we wanted a witness  
24 to testify on that topic. We're already at January 24th.  
25 That's two months they've had to get a witness ready. And

1 now they want an additional month to be able to do that.

2 Under the current scheduling order, under the situation  
3 with the bellwether (recording inaudible) impossible  
4 situation for the plaintiffs. It ends up placing us on the  
5 back end in terms of having discovery completed. And I  
6 might say, Your Honor, that AMS is certainly capable of  
7 conducting discovery in the interim.

8 In fact, they've noticed depositions for several of the  
9 players in the funding company (recording inaudible)  
10 discovery that's been going on. They have two or three of  
11 those set within the next two weeks. They certainly can get  
12 a witness earlier than February 24th for us to examine.

13 Finally, Your Honor, as to the stay on the POP  
14 discovery that they want until this 30(b)(6) deposition can  
15 go forward, I'm really sort of astonished by that request.

16 First of all, that position is premised on the fact  
17 that we need to be sure that we (recording inaudible), Your  
18 Honor. The decision to proceed with those POP depositions  
19 is made at our peril. If we end up taking those depositions  
20 and having 30(b)(6) depositions and being at our limit, then  
21 that's something that we're going to have to live with.

22 But there's absolutely no reason other than delay  
23 (recording inaudible) to have to wait until (recording  
24 inaudible) other POP witness discovery.

25 So, on the record and based upon (recording inaudible),

1 based upon (recording inaudible), what we're entitled to.  
2 Actually, we wanted it yesterday, but we will take it  
3 (recording inaudible).

4 THE COURT: Thank you, Ms. Eskin.

5 And I don't know if I, if I reminded you all to  
6 identify yourselves before you speak so that the court  
7 reporter will know who to attribute the argument to, but  
8 please do that.

9 MS. ESKIN: Sorry if I failed to do that, Your  
10 Honor.

11 THE COURT: You may have done that. I just -- I  
12 don't, I don't recall if you did or not.

13 MS. ESKIN: Okay. Thank you.

14 THE COURT: Thank you.

15 Who would like to speak, then, on behalf of the  
16 defendant?

17 And before you start, let me say this. I want everyone  
18 to understand that my ruling in the *Bard* case was very  
19 specific to the circumstances facing *Bard* at that time. It  
20 was on the eve of trial, I think just a couple of weeks  
21 before the first trial was supposed to start.

22 And that was also a large factor in why I decided to do  
23 what I did in that order. I don't think there's a lot that  
24 you can transfer from that order to the individual MDLs and  
25 issues that are arising in those. So, I want to make that

1 clear.

2 Go ahead, Ms. Binis or Ms. Weiss. Who's going to  
3 speak?

4 MS. BINIS: Thank you, Your Honor. Barbara Binis.  
5 Can you hear me well?

6 THE COURT: Yes.

7 MS. BINIS: I first want to say I agree with  
8 almost nothing of what Ms. Eskin has said. And I'm sure you  
9 understand that. I don't agree with the way she  
10 characterized the negotiations. I don't agree with the way  
11 she characterized our, I think, pretty reasonable response  
12 to a notice of a 30(b)(6) deposition that covers 68  
13 different categories as broad as Number 30 which says "all  
14 communication between (recording inaudible) regarding  
15 Elevate." Those are extremely broad categories.

16 And the idea that this is the beginning of their  
17 Elevate testimony is absolutely incorrect. In fact, they  
18 have asked questions of 27 witnesses about Elevate to date,  
19 and many more about the overall design policies and  
20 procedures, sales and marketing policies and procedures that  
21 are asked about in this notice that will affect Elevate as  
22 well as all of AMS's products.

23 All we want to do is try to figure out what, what's the  
24 best way to respond to this notice. Okay? We get this  
25 notice of 68 different topics ranging from -- all the way

1 from the beginning of the product through the policies and  
2 procedures of the company, through the quality system,  
3 through the regulatory system, the sales and marketing, and  
4 the clinical.

5 And what is the best way -- because if you remember,  
6 Your Honor, 85 percent of our witnesses are no longer with  
7 this company. And we have to find an officer, director, or  
8 managing agent of this company or someone who will agree to  
9 be our 30(b)(6) witness and cannot bring back ex-employees  
10 who do not want to be deposed again, of which I can pretty  
11 much assure Your Honor is about 100 percent of our  
12 ex-employees.

13 And, furthermore, the people that we have identified to  
14 speak to this -- and this tells you everything you need to  
15 know. We have designated Charlie Khamis who the plaintiffs  
16 have already deposed without asking him some of these  
17 questions in this 30(b)(6) notice.

18 His deposition was specifically focused on the Elevate  
19 product because he was the principal engineer that worked on  
20 the Elevate product. And we've designated John Nealon for  
21 whom plaintiffs have already deposed for two days.

22 Those are not people who are not knowledgeable. Those  
23 are the people who are most knowledgeable. And plaintiffs  
24 have already, have already deposed him.

25 All we're asking is that in response to questions like,

1 "What are your policies and procedures regarding," I don't  
2 know, "design and development of the product," that we be  
3 able to designate testimony that's already been given as the  
4 testimony that the company would want to give as the  
5 company's testimony. It just seems to me that we're just  
6 asking to streamline the process.

7 And plaintiffs' complete unwillingness to work with us  
8 in any way actually astonishes me because I thought this  
9 would be a reasonable way to work through this notice. And  
10 it's not the only notice they've given us, as you know. All  
11 we're trying to do, as the rules require, is to make the  
12 depositions more easy. We all have an obligation to do  
13 that.

14 And AMS wants to say, "Here's our policies and  
15 procedures. We've already produced them to you. Here's the  
16 testimony on that." And that's what we, the company, take  
17 as our answer.

18 I don't understand why we're fighting. I don't  
19 understand why that is a big deal because undoubtedly a  
20 30(b)(6) witness who doesn't have personal knowledge of all  
21 of this will just go to that testimony and say, "I'm going  
22 to just tell you what Carla Stark-Parrish said on this, and  
23 this is the company's position on this, and this is how it  
24 works."

25 The other thing about the timing is that Charlie Khamis

1 gave his deposition. He moved his family to California. We  
2 had six -- we had six weeks to try to reach him.

3 John Nealon started a new job. I haven't even been  
4 able to get him to return my phone call until just recently.

5 And (recording inaudible) familiarize herself with all  
6 these areas of testimony that she's going to be asked about.

7 I, I just -- this is -- this idea that we were supposed  
8 to produce somebody by February 8th, the first time I ever  
9 heard that was the day plaintiffs filed their motion. The  
10 day they filed their motion was the first time Ms. Eskin  
11 ever said anything about that.

12 In fact, when they filed their motion, they immediately  
13 called us and said, "This is not the date we want a witness.  
14 This is just a place-holder. We know we're going to have to  
15 discuss it with you."

16 And I know that Ms. Weiss who's sitting here thought  
17 that she was having adequate and good discussions and that  
18 they were making progress. And she was floored and  
19 flabbergasted when they filed an emergency motion.

20 I don't understand why this is an emergency motion.  
21 Discovery closes mid April. I thought we were doing  
22 everything truly to the best that we could do with an eye  
23 towards doing it in the most (recording inaudible).

24 And this idea that the 68 limit doesn't count also  
25 flabbergasts me. How can you notice 68 depositions and then

1 say, "Oh, and I want a 30(b)(6) witness on six different  
2 categories for six different products in addition." When we  
3 negotiated that 68 limit, 30(b)(6) witnesses were  
4 specifically made a part of that.

5 Your Honor might remember. We had a whole discussion  
6 about how many witnesses count -- you know, how many angels  
7 can dance on the head of a pin? How do you, how do you  
8 count 30(b)(6)? And we worked out what I thought was a  
9 pretty good agreement that every seven hours of 30(b)(6)  
10 testimony counts as a deposition.

11 So, it's inconsistent to say it's all, it's all on us.  
12 If we run out to the 68, then that's our problem because  
13 basically they're asking for at least three witnesses on the  
14 Elevate notice, and there may be need for a fourth and a  
15 fifth. And on the cadaver notice, they're asking for five  
16 witnesses on six or seven products.

17 So, even if the witness doesn't take a whole day, we're  
18 talking, we're talking at least 10 depositions. Now, how do  
19 you justify that with the fact that we're already bumped up  
20 to 68? I don't understand that.

21 I do think that that's something that we need to talk  
22 about right now. I understand the plaintiffs are not  
23 willing to talk to us about that. And they're only willing  
24 to say, "We'll deal with that when we get to the 68." But  
25 we've never, ever, ever said we will not produce a 30(b)(6).

1 We know that's our obligation. All I'm trying to do is make  
2 that as streamlined as we possibly can.

3 THE COURT: Thank you. I think I --

4 MS. BINIS: By the way, this February 24th date, I  
5 don't know where Ms. Eskin comes up with that. In my papers  
6 I say we will make a witness available the week of  
7 February 17th, which is the earliest I could get this  
8 California witness out. John Nealon cannot do it before the  
9 third week in March, nor can Sharon Steig.

10 And, so, I'm working with employees and ex-employees  
11 and I'm trying to do the best that I can with their  
12 availability.

13 THE COURT: All right. Thank you.

14 My understanding is that you have 13 seven-hour  
15 depositions left. Is that right?

16 MS. BINIS: Yes.

17 THE COURT: So, a total of 91 hours.

18 MS. BINIS: A total of what?

19 THE COURT: 91 hours. Right?

20 MS. ESKIN: That sounds right, Your Honor. This  
21 is Amy Eskin.

22 THE COURT: 91 hours.

23 MS. ESKIN: Yes.

24 THE COURT: Thirteen -- either 13 individuals or  
25 less than that, but no more than 91 hours.

1 MS. BINIS: That's right.

2 THE COURT: All right. So, I'm going to allow the  
3 plaintiffs to take those 13 depositions in any way they want  
4 to take them. If they want to take 30(b)(6) depositions,  
5 they can take 30(b)(6) depositions. But they're going to be  
6 bound by the 13 individuals and, you know, no more than the  
7 91 hours just as you've agreed.

8 So, you can take them any way you want to, Ms. Eskin.  
9 If you want to take a 30(b)(6) deposition and it involves 25  
10 hours, then that's 25 hours out of your 91 hours. And you  
11 may not have time left to take some of the other people you  
12 want to depose. But I'm not going to tell you what order  
13 you have to do those in. I'll leave that up to you.

14 MS. ESKIN: Yes, Your Honor.

15 THE COURT: This time I'm not going to, I'm not  
16 going to order, as I did in *Bard*, the designation of  
17 testimony.

18 It seems to me, Ms. Binis, that they don't have that  
19 much time left and they ought to be wise enough not to abuse  
20 the time they have left by asking questions that you've  
21 already designated testimony for because what will happen is  
22 that your witness will just recite that testimony. So, it  
23 will be a waste of everybody's time.

24 MS. BINIS: I understand.

25 THE COURT: Now, as far as getting the depositions

1 taken, I think March is way too long to wait for someone to  
2 testify, a 30(b)(6) witness. You have the power to select  
3 who you want to select as your 30(b)(6) witness. So, you're  
4 going to have to find someone who can be available.

5 I think I agree with the plaintiffs. You were first  
6 put on notice back in November. It's now January. No  
7 deposition has been taken of a 30(b)(6) witness on Elevate  
8 as far as I understand. I don't think you need another  
9 month and a half to get somebody prepared. So, you're going  
10 to have to have somebody ready to do that in 20 days.

11 MS. BINIS: I'll do my absolute best, Your Honor.  
12 I, I know I cannot produce John Nealon before that time  
13 because he is just not available to me. And as an  
14 ex-employee, I have no power to, you know, --

15 THE COURT: I understand that. You'll have to  
16 pick someone else then.

17 MS. BINIS: All right.

18 THE COURT: Now, I think that essentially covers  
19 the plaintiffs' motion. Let's talk a little bit about the  
20 defendant's motion for protective order.

21 First of all, there's this cadaver notice. No, wait,  
22 no. Stop. Let me go back. Let me talk about the notice of  
23 deposition for the 30(b)(6) witness.

24 I agree with the defendants that is a horribly broad  
25 deposition notice. And I don't know how you can expect any

1 witness to be prepared to fully testify about those  
2 subjects. They're so, so broad.

3 So, even though AMS is going to have the obligation to  
4 adequately prepare someone, you better understand, Ms.  
5 Eskin, that your, your categories are so broad that I don't  
6 think anybody really reasonably would be able to answer  
7 every question, every aspect of those categories.

8 So, I would hope that you would find a way to narrow  
9 those a little bit because they're awfully broad. I  
10 understand what you're trying to do. I appreciate that. I  
11 understand you're trying to get sort of a framework for this  
12 product. And I think that's a wise thing to do.

13 But the way that this notice is, is phrased, I don't  
14 know how to improve it. But it's so broad, I think it's  
15 going to create difficulties in, in Ms. Binis trying to get  
16 a witness fully prepared. So, you might want to give that a  
17 little thought.

18 The other thing was the attachment, the document  
19 production. I'm not going to require AMS to bring to those  
20 depositions documents they've already produced to you. So,  
21 if you've already got documents, if you've already gotten  
22 all of those notebooks and everything else that you've  
23 listed there, I'm not going to have them bring them again.

24 If there is anything, however, you've listed on that  
25 document production list that hasn't been produced, then the

1 witness will have to bring that information.

2 MS. ESKIN: This is Amy Eskin. Thank you, Your  
3 Honor.

4 THE COURT: You're welcome.

5 Now, the second issue had to do with this cadaver  
6 notice. And I think the main issue, as I understand it, is  
7 that in that notice of deposition, there are categories for  
8 SUI products or SUI information. And I understand the  
9 defendant is saying that discovery has already closed for  
10 the SUI products. Is that correct?

11 MS. BINIS: That's correct, Your Honor.

12 THE COURT: Ms. Eskin, what do you say about that?

13 MS. ESKIN: Your Honor, I think, I think that that  
14 was noticed timely. I also think that -- back to the  
15 cadaver notice that was, is actually the subject of an  
16 on-going meet-and-confer (recording inaudible).

17 And, to my knowledge, (recording inaudible) not a  
18 subject of dispute and that it was really which witnesses  
19 were going to be produced on which matters. That's my  
20 understanding of the (recording inaudible) discussions.

21 And I think according to the (recording inaudible) that  
22 AMS is still involved (recording inaudible) actually filed  
23 the motion for protective order as to the cadaver studies  
24 not as a place-holder, but just to ensure they were filed  
25 because they were continuing to (recording inaudible)

1 Mr. Wallace about that. And I think (recording inaudible)  
2 which, you know, between (recording inaudible).

3 MS. BINIS: The notice of the motion for 30(b)(6)  
4 for cadaver lab was filed on December 9th. Discovery  
5 closed, I believe, on December 10th. So, technically Ms.  
6 Eskin may be correct that the notice was filed.

7 But my understanding of the close of discovery is that  
8 depositions are taken by the close of discovery, not that  
9 notices of depositions are filed. So, I still take the  
10 position that this notice as to the SUI products is --  
11 should, should be stricken.

12 THE COURT: Well, I agree with your understanding  
13 of the close of discovery. I don't think that means that  
14 the day before discovery closes you can file a notice of  
15 deposition. You might be able to file one ten days before  
16 the date it closes, but I don't think you can wait and at  
17 the very last minute because that's not reasonable notice.  
18 You'd have to have the deposition finished on the 10th. And  
19 if you noticed it on the 9th, that's not going to be  
20 sufficient notice.

21 So, if those dates are correct, then I would agree with  
22 you. I think that notice was too late.

23 MS. ESKIN: Well, Your Honor, let me -- I will  
24 check that right now while we're on the phone. I think that  
25 the, the discovery close that we're talking about is the

1 close of (recording inaudible) contention that it's a  
2 timeliness issue (recording inaudible).

3 THE COURT: Well, why don't you do this on the  
4 cadaver notice. Why don't you check what the deadlines are.  
5 And if, in fact, you did issue the notice a day before the  
6 close of discovery, that's too late. If that, if that's not  
7 the correct time frame, then why don't you see what you can  
8 work out on the cadaver notice.

9 MS. BINIS: Your Honor, I'm going to take that  
10 back. The notice was filed on the 9th, which was Monday.  
11 And discovery closed on Friday, the 13th of December.

12 THE COURT: I still don't think that's enough time  
13 under the rules. I think under the rules you have to give  
14 someone seven days notice.

15 MS. BINIS: Especially of a notice that has 33  
16 witnesses and extra sub parts I would argue.

17 THE COURT: But, you know, there again, Ms. Binis,  
18 I mean, they're going to be running the meter on their 91  
19 hours. So, I don't know how important this cadaver stuff  
20 is. I don't know that it's worth it.

21 But I think what you need to do is look at the date.  
22 And if there wasn't a sufficient notice, then I don't think  
23 you -- I do think you're beyond the deadline to ask for it.  
24 So, look at that aspect of it.

25 If there was sufficient notice or you can agree on

1 something, then see what you can agree to. If you can't  
2 agree on it, then we can talk about this next week. All  
3 right.

4 So, just to recap, because I'm likely not going to be  
5 able to get your order out until close, probably the end of  
6 next week since I've got some other things I have to do  
7 before that, I am going to grant the plaintiffs' motion to  
8 compel the production of a 30(b)(6) witness on Elevate. And  
9 the witness or witnesses need to be available within 20 days  
10 unless you can agree to something else. But that would be  
11 my order.

12 I am going to, as I said -- I don't know that AMS  
13 specifically requested this, but they sort of implied it.  
14 But I'm going to grant their motion for protective order as  
15 it applies to the documents. I'm not going to require them  
16 to reproduce documents that they've already produced.

17 The only thing they'll be required to produce with the  
18 30(b)(6) deposition are documents that have, that are  
19 requested but haven't been produced in the past.

20 And I think that probably covers -- I'm not going to  
21 grant their motion to stay depositions. There's no staying  
22 of depositions that's going to occur in this case. This  
23 case is moving forward. So, I'll deny that request.

24 And I think you're going to talk about the cadaver  
25 notice. Correct?

1 MS. ESKIN: Your Honor, that's correct.

2 THE COURT: Once again, you know, I feel that you  
3 need to be bound by your agreement for the 68 depositions.  
4 That's enough depositions and you've only got the 13 left,  
5 at most 91 hours. So, I suggest that you not replot ground  
6 that you already have deposition testimony to cover.

7 MS. BINIS: And, Your Honor, could I ask for just  
8 one clarification on that?

9 THE COURT: Yes.

10 MS. BINIS: If they choose to go forward with the  
11 individual depositions that are scheduled -- and there have  
12 been very few that have gone less than seven hours. But  
13 let's say there is one that goes less than seven hours.  
14 That does not count as five hours. That counts as a  
15 deposition because that's --

16 THE COURT: Yes. That's what your, that's what  
17 your order -- your agreement was that it's up to seven  
18 hours. But if you take someone's deposition and it's less  
19 than seven, it still counts as one.

20 MS. BINIS: Yes. Thank you.

21 THE COURT: That's why I said it's 91 hours at  
22 most.

23 MS. BINIS: Thank you.

24 MS. ESKIN: Your Honor, may I also ask for  
25 clarification or a request? And, that is, I have the draft

1 response to deposition notice in terms of the testimony that  
2 AMS is going to designate. Is that the final designation of  
3 the 30(b)(6) testimony (recording inaudible) going to be  
4 provided?

5 MS. BINIS: I understood the Judge to say we  
6 cannot designate.

7 THE COURT: No, I -- what I'm saying is I'm not  
8 going to force the plaintiff to accept designations. If  
9 you, if you can agree to designate some testimony and you  
10 both want to do that, then feel free to do that.

11 And I'd suggest you do that formally so that there's no  
12 dispute later on as to what was designated and what was  
13 accepted as designated testimony. And once you've accepted  
14 designated testimony, then you're not to ask those same  
15 questions of the 30(b)(6) witness.

16 MS. ESKIN: Agreed. I understand. I'm sorry,  
17 Your Honor. Amy Eskin. I understand. Thank you.

18 THE COURT: Anything else we can do today?

19 MS. ESKIN: I don't think so, Your Honor. Thank  
20 you.

21 THE COURT: Thank you. Good-bye.

22 (Proceedings concluded)

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1 I, Lisa A. Cook, Official Reporter of the United  
2 States District Court for the Southern District of West  
3 Virginia, do hereby certify that the foregoing is a true and  
4 correct transcript, to the best of my ability, from the  
5 record of proceedings in the above-entitled matter.

6

7

8 s\Lisa A. Cook

February 4, 2014

9 Reporter

Date

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