

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

IN RE: AMERICAN MEDICAL SYSTEMS, INC.
PELVIC REPAIR SYSTEMS
PRODUCT LIABILITY LITIGATION

MDL No. 2325

THIS DOCUMENT RELATES TO ALL CASES

PRETRIAL ORDER # 236
(Defendant's Motion to Compel the Production of Patient Records)

Pending before the court is the motion of American Medical Systems, Inc. ("AMS") to compel Broward Outpatient Medical Center ("BOMC") and Beth Israel Surgical Center ("BOC") to produce medical records and other documents pertaining to 32 plaintiffs in the above-referenced multidistrict litigation ("MDL"). (ECF No. 3566). AMS served subpoenas duces tecum on BOMC and BOC on or about November 23, 2016, requesting the production of plaintiffs' documents on December 16, 2016. To date, BOMC and BOC have not complied with the subpoenas.

BOMC and BOC make clear in their responses to the motion to compel that they do not object to producing the subpoenaed documents. Instead, they seek additional time to collect, review, and copy the materials, and they demand a pre-production agreement from AMS to pay certain expenses incurred in providing the materials to AMS. In furtherance of their demands, BOMC and BOC move the court for a protective order, granting additional time to comply with the subpoenas and shifting the costs of compliance to AMS. (ECF Nos. 3615, 3616). For the reasons that follow, the court

GRANTS AMS's motion to compel and **GRANTS**, in part, BOMC's and BOC's motions for protective order.

BOMC and BOC represent that they have collected and prepared the medical records of 32 plaintiffs, as requested, and are ready to provide them to AMS. BOMC and BOC have withheld the documents, because AMS will not agree to pay the costs incurred in copying the medical records, as well as expenses associated with staff/administrative time to search for and produce the remaining requested documents. Therefore, the court **ORDERS** as follows:

1. BOMC and BOC shall provide AMS with copies of all of the medical records no later than **March 10, 2017**.

2. Within **twenty-one (21) days** after receiving the medical records, AMS shall reimburse BOMC and BOC the *actual costs* incurred by them in copying the records and mailing them, including the staff time involved in *making the copies*. See Fla. Stat. § 456.057(17).

3. Given that the Florida statute does not provide for staff expenses in locating, collecting, and preparing medical records for copying, AMS shall not be required to pay staff/administrative time for those activities in relation to production of the medical records; and

4. The total fee charged by BOMC and BOC for copying the medical records may not exceed \$1.00 per page. Fla. Stat. § 395.3025(1). BOMC and BOC must provide AMS with an itemized invoice for each set of records, making it clear in the invoice how the fee was calculated.

As for the remaining responsive materials, BOMC and BOC are **ORDERED** to produce all documents currently prepared for production no later than **March 10, 2017**

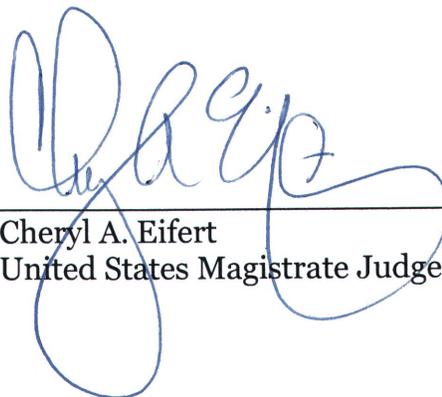
and shall continue to supplement the production on a rolling basis (with a production made at least once per week) until **March 31, 2017**, by which time all responsive materials shall be produced. The motions to shift the costs incurred in producing these additional documents are premature at this time, because BOMC and BOC have failed to provide any definitive data in support of their requests. In order for the court to assess all of the factors set forth in *Bell Inc. v. GE Lighting, LLC*, No. 6:14-CV-00012, 2014 WL 1630754, at *12 (W.D. Va. Apr. 23, 2014), BOMC and BOC must provide information regarding the search methods they employed in locating the materials; the steps involved in collecting, reviewing and producing the materials; the amount of time spent on each activity; and the hourly rates of the employees involved.

BOMC, BOC, and AMS should bear in mind that cost-shifting is not typical in discovery; nevertheless, the court may take reasonable steps to avoid placing an “undue burden” on a nonparty responding to a subpoena. Fed. R. Civ. P. 26(c)(1); 45(d)(1). “That is not to say, however, that any burden or expense is excessive; only where a nonparty is subjected to ‘significant expense’ should the burden of cost shift to the requesting party.” *Keaton v. Hannum*, No. 1:12-CV-00641-SEB, 2013 WL 4481889, at *1 (S.D. Ind. Aug. 19, 2013) A nonparty may, under some circumstances, be entitled to reasonable expenses; however, a nonparty is not entitled to costs that are “disproportionate to the demands made,” or that exceed the costs that similarly situated individuals would incur in complying with the subpoena. *Bell Inc.* 2014 WL 1630754, at *15 (citing *Bailey Indus., Inc. v. CLJP, Inc.*, 270 F.R.D. 662, 672–73 (N.D. Fla.2010)). Consequently, BOMC and BOC must provide relevant information regarding the burden placed upon them and the specific costs they seek to recover, before their requests are ripe for resolution.

The court **DIRECTS** the Clerk to file a copy of this order in 2:12-md-2325 and it shall apply to each member related case previously transferred to, removed to, or filed in this district, which includes counsel in all member cases up to and including civil action number 2:17-cv-01528. In cases subsequently filed in this district, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action at the time of filing of the complaint. In cases subsequently removed or transferred to this court, a copy of the most recent pretrial order will be provided by the Clerk to counsel appearing in each new action upon removal or transfer. It shall be the responsibility of the parties to review and abide by all pretrial orders previously entered by the court. The orders may be accessed through the CM/ECF system or the court's website at <http://www.wvsc.uscourts.gov>.

The Clerk is also directed to provide a copy of this Order to counsel for the nonparties.

ENTERED: March 6, 2017



Cheryl A. Eifert
United States Magistrate Judge