IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BONDPRO CORPORATION,

Plaintiff, ORDER

v. 04-C-0026-C

SIEMENS WESTINGHOUSE POWER CORPORATION,

Defendant.

Defendant Siemens Westinghouse Power Corporation has requested an expedited hearing on its motion for leave to take a trial preservation deposition of Mechanical Dynamics & Analysis, LLC, ("MDA") a witness who defendant asserts has relevant evidence but is unavailable to testify at trial because it is located more than 100 miles away. The motion relates to a January 19, 2005 notice of deposition that was served on MDA on January 20, 2005 and that was one of the subjects of an omnibus order on discovery entered on January 25, 2005 by Magistrate Judge Stephen Crocker. The deposition of MDA was noticed for February 1, 2005. The magistrate judge ruled that defendant's subpoena for the taking of MDA's deposition was untimely because it was beyond the discovery cutoff of January 7, 2005, as set forth in the preliminary pretrial conference order. In their motion, defendant asks this court to reconsider that ruling and allow the deposition to go forward as scheduled. Defendant asserts that it seeks to take MDA's deposition for the purpose of

"trial preservation," not discovery, and therefore the matter falls outside the scope of the January 7, 2005 discovery cutoff.

Defendant's motion will be denied. I agree with those courts that have held that, absent exceptional circumstances, a party who wishes to introduce deposition testimony at trial should procure that testimony during the time set by the court to conduct discovery. See, e.g., Integra Lifesciences I, Ltd., v. Merck KgaA, 190 F.R.D. 556, 559 (S.D. Cal. 1999); Henkel v. XIM Products, Inc., 133 F.R.D. 556, 557 (D. Minn. 1991). Otherwise, "nothing would keep the parties from waiting until after the close of discovery to take all these 'trial' depositions," meaning that there would be no motivation to conduct discovery of "unavailable" witnesses during the discovery period. Integra Lifesciences, 190 F.R.D. at 559.

No compelling circumstances exist to allow defendant to depose MDA at this late juncture in this case. Defendant has long known that MDA has relevant information and that it is outside the subpoena power of the court. In fact, it had scheduled a deposition of MDA to occur before the discovery cut-off, but cancelled that deposition in exchange for a declaration from MDA that MDA signed on the condition that no future deposition or trial testimony would be sought. When defendant abandoned its previous attempt to depose MDA, it took the risk that it would not be able to procure its appearance at trial and that it would not be able to present MDA's testimony. If defendant was unsure whether it would later be able to take MDA's trial preservation depositions after the discovery cutoff set forth

in the pretrial conference order, it could have sought guidance from the court before the cutoff.

ORDER

Accordingly, defendant's motion for leave to take a trial preservation deposition of MDA and its request for an expedited hearing on that motion are both DENIED.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge