

1 Aidini has not sustained his burden of demonstrating that Costco intentionally or negligently
2 failed to preserve the box, he is not entitled to an adverse inference jury instruction. Aidini may
3 argue to the jury that Costco could or should have preserved the box and that the jury can make
4 inferences from its failure to do so. But the court will not bolster such an argument with a jury
5 instruction.

6 **Use of depositions of Le and Ramsey**

7 Aidini next argues that he should be allowed to use the depositions of Michael Le and
8 Ryan Ramsey during his opening statement. ECF No. 108 at 14. “An adverse party may use for
9 any purpose the deposition of a party or anyone who, when deposed, was the party’s officer,
10 director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).” Fed. R. Civ. P. 30(b)(3).
11 Costco objects because Le and Ramsey were not deposed under Rule 30(b)(6). True, but that
12 ignores the prior phrase of Rule 30(b)(3), which focuses on whether the deponent “was the
13 party’s officer, director, [or] managing agent”

14 “The test for a managing agent is not formulaic but is answered pragmatically on a fact-
15 specific basis.” *Redd v. N.Y. State Div. of Parole*, 923 F. Supp. 2d 393, 409 (E.D.N.Y. 2013)
16 (quotations omitted). In making that determination, courts consistently consider the following
17 factors:

18 (1) whether the individual is invested with general powers allowing him to exercise
19 judgment and discretion in corporate matters; (2) whether the individual can be relied
20 upon to give testimony, at his employer’s request, in response to the demand of the
21 examining party; (3) whether any person or persons are employed by the corporate
22 employer in positions of higher authority than the individual designated in the area
23 regarding which information is sought by the examination; (4) the general responsibilities
24 of the individual respecting the matters involved in the litigation.

25 *Calderon v. Experian Info. Sols., Inc.*, 290 F.R.D. 508, 517–18 (D. Idaho 2013) (citations
26 omitted).¹

27 ¹ See also *In re Honda Am. Motor Co., Inc. Dealership Relations Litig.*, 168 F.R.D. 535, 540 (D.
28 Md. 1996) (“These factors include: (1) whether the corporation has invested the person with
discretion to exercise his judgment, (2) whether the employee can be depended upon to carry out
the employer’s directions, and (3) whether the individual can be expected to identify him or
herself with the interests of the corporation as opposed to the interests of the adverse party.”).

1 At the time of his deposition, Le was an administrative manager for Costco. ECF No. 108-
2 2 at 15:14-17. He held the same position at the time of the accident, and was responsible for the
3 entire store. *Id.* at 17:1-18:5. At the time of his deposition, Ramsey was an assistant general
4 manager for Costco. ECF No. 108-1 at 14:17-22. At the time of the accident, Ramsey was the
5 front-end manager, overseeing operations of the front end of the store, which includes the area
6 where the accident occurred. *Id.* at 17:9-18:13.

7 There is no evidence that Le and Ramsey had authority to exercise judgment and
8 discretion on Costco corporate matters, as opposed to matters regarding the particular store. It
9 appears they could be relied upon to give testimony, at Costco's request, in response to Aidini's
10 demand, and they could be expected to identify themselves with Costco's interests as opposed to
11 Aidini's interests. *Honda Am.*, 168 F.R.D. at 540. Given their various job duties, it appears that
12 they had significant responsibilities for the store—and the specific location within the store where
13 the accident happened. Thus, I grant Aidini's request to use the depositions of Michael Le and
14 Ryan Ramsey during his opening statement.

15 **Demonstrative exhibits**

16 Costco objects to Aidini's attempt to use a photograph of the hardware used in his
17 surgery. ECF No. 111 at 1. Provided proper foundation is laid for this photograph, Aidini will be
18 permitted to use it at trial.

19 Costco also objects to Aidini's attempt to use two photographs of his ankles, showing how
20 they look before and after he goes to work. *Id.* at 2. Provided proper foundation is laid for these
21 photographs, Aidini will be permitted to use them at trial.

22 DATED this 4th day of May, 2017.

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26 ANDREW P. GORDON
27 UNITED STATES DISTRICT JUDGE
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