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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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10 IN RE: Bard IVC Filters Products Liability
11 Litigation,

No. MDL 15-02641-PHX DGC

ORDER

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15 This multidistrict litigation (“MDL”) involves thousands of personal injury cases
16 related to inferior vena cava (“IVC”) filters manufactured and marketed by Defendants
17 C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively, “Bard”). Bard has
18 filed a motion to disqualify four medical experts: Drs. Scott Resnick, Robert Vogelzang,
19 Kush Desai, and Robert Lewandowski. Doc. 6678. The motion is fully briefed, and the
20 Court heard oral arguments on December 15, 2017. The motion is moot with respect to
21 Dr. Resnick, and will be denied for the other doctors.

22 **I. Background.**

23 Each Plaintiff in this MDL received an implant of a Bard IVC filter and claims
24 that the filter is defective and has caused serious injury or death. Plaintiffs allege that
25 Bard filters tilt, perforate the IVC, or fracture and migrate to neighboring organs.
26 Plaintiffs claim that Bard filters are more dangerous than other IVC filters, and that Bard
27 failed to warn about the higher risks. Plaintiffs assert a host of state law claims, including
28 manufacturing and design defects, failure to warn, breach of warranty, and consumer

1 fraud and unfair trade practices. Doc. 303-1. Bard disputes Plaintiffs' allegations,
2 contending that overall complication rates for Bard filters are comparable to those of
3 other IVC filters, and the medical community is aware of the risks associated with IVC
4 filters.

5 The parties intend to use various expert witnesses at trial, including medical
6 professionals. The doctors subject to the present motion are colleagues at Northwestern
7 University's interventional radiology department. The doctors formed a consulting
8 group, SBBK Consultants, LLC ("SBBK"), for purposes of IVC filter litigation.
9 Plaintiffs retained SBBK in this MDL, and Drs. Vogelzang and Desai have provided
10 three expert reports concerning medical problems caused by alleged defects in Bard IVC
11 filters. Plaintiffs have listed Drs. Vogelzang and Desai as testifying experts.¹

12 Defendants seek to disqualify each doctor, and SBBK as a whole, because
13 Dr. Resnick served as a consultant to Bard and previously worked for Bard as an expert
14 in IVC filter litigation. Doc. 6678. Given this prior relationship and Dr. Resnick's
15 involvement in drafting the expert reports, Defendants contend that each SBBK expert
16 effectively has engaged in impermissible "side switching." *Id.* at 8.²

17 Plaintiffs do not oppose Dr. Resnick's disqualification. They contend, however,
18 that his colleagues should not be disqualified because they had no confidential
19 relationship with Bard and received no Bard confidential information from Dr. Resnick.
20 Doc. 7029 at 1-3 & n.2. Plaintiffs further contend that disqualification of Drs. Vogelzang
21 and Desai as testifying experts would be unfair. *Id.* at 12-14.

22 **II. Disqualification Standard.**

23 "Courts have inherent power to disqualify an expert witness to protect the integrity
24 of the adversary process, protect privileges that otherwise may be breached, and promote
25 public confidence in the legal system." *In re Incretin Mimetics Prods. Liab. Litig.*, MDL

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27 ¹ Drs. Resnick and Lewandowski participated in drafting the expert reports, but
Plaintiffs do not intend to use them as testifying experts.

28 ² Page citations are to numbers placed at the top of each page by the Court's
electronic filing system rather than the document's original page numbers.

1 No. 13-md-2452 AJB, 2015 WL 1499167, at *2 (S.D. Cal. Apr. 1, 2015) (citing
2 *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir.1980)). Courts have developed
3 two tests for the exercise of this power, a bright-line rule and a two-part test.

4 The bright-line rule applies where it is undisputed that the expert was retained by,
5 and received confidential information from, one party and then switched sides in the
6 same litigation. *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248 (E.D. Va.
7 1991). Where the parties disagree on whether the expert had a confidential relationship
8 or received confidential information, courts apply a two-part test that asks whether the
9 party seeking disqualification has shown (1) it was reasonable for the party to believe that
10 a confidential relationship existed, and (2) the expert received or had reasonable access to
11 confidential information relevant to the current litigation. *Id.*; see *In re C. R. Bard, Inc.*
12 *Pelvic Repair Sys. Prods. Liab. Litig.*, MDL No. 2187, 2014 WL 6960396, at *7 (S.D. W.
13 Va. Dec. 8, 2014). Courts also consider public policy factors, including whether
14 disqualification would be fair and promote confidence in the legal system. *Wang*, 762 F.
15 Supp. at 1248; *Rhodes v. E.I. Du Pont de Nemours & Co.*, 558 F. Supp. 2d 660, 667-68
16 (S.D. W. Va. 2008).³

17 **III. Dr. Resnick.**

18 Plaintiffs' response to Defendants' motion includes this statement:

19 Plaintiffs' Counsel did not know of Dr. Resnick's past relationship
20 consulting with Bard when they hired him as a non-testifying consultant,
21 and since learning of such, as a result of Bard's motion (July 12, 2017),
22 Plaintiffs' Counsel represents that he has instructed Doctors Vogelzang and
23 Desai not to consult in any manner with Dr. Resnick on this case going
24 forward, and they have agreed and complied. Thus, Dr. Resnick will not
25 have any future role in this case, and that aspect of the motion is moot.

26 Doc. 7029 at 2. In light of this avowal, the Court concludes that the motion is moot with
27 respect to Dr. Resnick.

28 ³ The Ninth Circuit has not adopted a specific approach, but has recognized in
dicta that district courts can disqualify "an expert who is initially retained by one party,
dismissed, and employed by the opposing party in the same or related litigation."
Erickson v. Newmar Corp., 87 F.3d 298, 300 (9th Cir. 1996).

1 **IV. Drs. Vogelzang and Desai and Their Expert Reports.**

2 Drs. Vogelzang and Desai have provided three expert reports. Plaintiffs argue that
3 the doctors should not be disqualified as testifying experts under either the bright-line
4 rule or the two-part test because they had no confidential relationship with Bard and
5 received no confidential Bard information. Doc. 7029 at 2-3. Plaintiffs contend that no
6 information Bard provided to Dr. Resnick had any influence on the reports and opinions
7 of his colleagues. *Id.* at 9; *see* Docs. 7029-1, 7029-2 ¶ 4.

8 Defendants do not claim that Drs. Vogelzang and Desai had confidential
9 relationships with Bard, nor that they personally received confidential information from
10 Bard. As a result, neither doctor would be disqualified under a traditional application of
11 the bright-line rule or the two-part test. Defendants' argument is based on the fact that
12 Dr. Resnick worked with Drs. Vogelzang and Desai in the creation of their expert reports.
13 Defendants argue that the sharing of confidential information in such a setting is
14 unavoidable, and that any claim to the contrary "does not seem credible." Doc. 7058 at 4.
15 Defendants also argue that the entity SBBK, which includes Drs. Vogelzang and Desai,
16 should be disqualified from this litigation. *Id.* (citing *Kane v. Chobani, Inc.*, No. 12-CV-
17 02425-LHK, 2013 WL 3991107, at *5 (N.D. Cal. Aug. 2, 2013)).

18 The Court concludes that disqualification would be warranted in this circumstance
19 only if Defendants presented evidence that Drs. Vogelzang and Desai actually received
20 Bard confidences. Disqualification is a drastic measure that should be used sparingly.
21 *Hewlett-Packard Co. v. EMC Corp.*, 330 F. Supp. 2d 1087, 1092 (N.D. Cal. 2004).
22 "Cases granting disqualification are rare because courts are generally reluctant to
23 disqualify expert witnesses, especially those . . . who possess useful specialized
24 knowledge." *Rhodes*, 558 F. Supp. 2d at 664 (quotation marks and citations omitted).
25 "Accordingly, the party seeking disqualification bears a 'high standard of proof' to show
26 that disqualification is warranted." *Id.* (quotation marks and citations omitted).

27 Defendants have not satisfied this high standard. Drs. Vogelzang, Desai, and
28 Resnick have provided sworn declarations stating that Dr. Resnick never shared

1 confidential Bard information with the other doctors. Docs. 7029-1, 7029-2, 7029-3.
2 Defendants provide no evidence to the contrary. Defendants offer no declaration
3 concerning the nature or extent of the confidential information shared with Dr. Resnick.
4 They deposed Drs. Vogelzang and Desai after they knew of their collaboration with
5 Dr. Resnick, and yet never asked them about their communications with Dr. Resnick or
6 the sharing of any Bard-related information. Defendants make no effort to identify Bard
7 confidential information found in the expert reports of the doctors. And although
8 Defendants complain that such efforts would require them to reveal the very confidences
9 they seek to protect, Defendants are well aware of *in camera* procedures and have made
10 no request to submit confidential information to the Court that would identify the
11 confidences that have been compromised.

12 In short, Defendants ask the Court to disqualify Drs. Vogelzang and Resnick on
13 the *assumption* that they received confidential Bard information from Dr. Resnick. The
14 Court concludes that the drastic step of expert disqualification cannot be based on an
15 assumption. *See Williams v. Old Faithful Tours, Inc.*, No. 11-CV-287-F, 2012 WL
16 9490902, at *4 (D. Wy. Sept. 25, 2012) (denying motion to disqualify where the expert
17 affirmed under oath that he neither received nor used any confidential information
18 provided by the adverse party in developing his report); *Sarl v. Sprint Nextel Corp.*, No.
19 09-2269-CM/DJW, 2013 WL 501783, at *7 (D. Kan. Feb. 8, 2013) (requiring receipt of
20 confidential information concerning legal strategies to warrant disqualification where the
21 expert had no prior relationship with the moving party); *In re Incretin-Based Therapies*
22 *Prods. Liab. Litig.*, No. 15-56997, 2017 WL 6030735, at *3 (9th Cir. Dec. 6, 2017)
23 (suggesting that disqualification of an expert should not occur unless the court has
24 “specific and unambiguous” evidence that the expert received confidential information).⁴

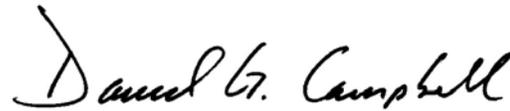
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26 ⁴ In order to protect the highly sensitive attorney-client relationship, attorney
27 disqualification rules permit courts to assume that confidences were received. *See Trone*
28 *v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980) (“As we have stated, the underlying
concern is the possibility, or appearance of the possibility, that the attorney may have
received confidential information during the prior representation that would be relevant
to the subsequent matter in which disqualification is sought. The test does not require
the former client to show that actual confidences were disclosed.”). But expert

1 Disqualification of Drs. Vogelzang and Desai would also seriously prejudice
 2 Plaintiffs at this late stage of the litigation. Discovery has closed, expert motions have
 3 been filed, and the parties are preparing to begin bellwether trials. Disqualifying Drs.
 4 Vogelzang and Desai now would mean that Plaintiffs must proceed without their area of
 5 expertise, something the Court is not willing to require in the absence of evidence that
 6 Defendants have been disadvantaged in some way. *See Williams*, 2012 WL 9490902,
 7 at *4 (declining to disqualify expert because doing so would leave the proponent of his
 8 testimony “scrambling to find a liability expert on the eve of trial”).⁵

9 Defendants’ reliance on *Kane v. Chobani*, 2013 WL 3991107, at *5, is misplaced.
 10 The court in that case was presented with sworn declarations from defense counsel that
 11 they discussed litigation strategy with the consulting group and a particular consultant
 12 who switched sides. *Id.* at *6. Defendants have presented no such evidence in this case.
 13 Moreover, the court in *Kane* found no prejudice from disqualification because the case
 14 was still in its initial stages. *Id.* at *7.

15 **IT IS ORDERED** that Defendants’ motion to disqualify experts (Doc. 6678) is
 16 moot with respect to Dr. Resnick and is otherwise **denied**. The Court enters this order in
 17 reliance on Plaintiffs’ avowal that Dr. Resnick will have no further involvement in this
 18 case.

19 Dated this 21st day of December, 2017.

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23 _____
 24 David G. Campbell
 United States District Judge

25 disqualification cases have declined to adopt such an approach. *See, e.g., Hewlett-*
 26 *Packard Co.*, 330 F. Supp. 2d at 1092; *U.S. ex rel. Cherry Hill Convalescent, Ctr., Inc. v.*
 27 *Healthcare Rehab Sys., Inc.*, 994 F. Supp. 244, 249 (D.N.J. 1997); *Formosa Plastics*
Corp. v. Kajima Int’l, Inc., 216 S.W.3d 436, 451 (Tex. Ct. App. 2006).

28 ⁵ The fourth member of SBBK, Dr. Lewandowski, has no prior relationship with
 Bard and is not a testifying expert in this case. The Court therefore also concludes that
 his disqualification is unnecessary.