

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 IN RE: Bard IVC Filters Products Liability
10 Litigation,

No. MDL 15-02641-PHX-DGC

11 Sherr-Una Booker, an individual,
12 Plaintiff,

No. CV-16-00474-PHX-DGC

13 v.

ORDER

14 C. R. Bard, Inc., a New Jersey corporation;
15 and Bard Peripheral Vascular, Inc., an
16 Arizona corporation,
17 Defendants.

18
19 In the parties' proposed pretrial order, Defendants objected to Plaintiffs' use at
20 trial of the depositions of three defense expert witnesses, Drs. Moritz, Rogers, and Stein,
21 who originally were retained by Defendants but have since been withdrawn. Doc. 10255
22 at 2. Defendants assert that the depositions constitute hearsay and are not admissible as
23 admissions of a party-opponent. *Id.* (citing Fed. R. Evid. 801(d)(2)(C); *Glendale Fed.*
24 *Bank, FSB v. United States*, 39 Fed. Cl. 422, 425 (1997); *In re Hanford Nuclear Res.*
25 *Litig.*, 534 F.3d 986, 1016 (9th Cir. 2008)). Plaintiffs counter that once a party has
26 offered opinions through deposition or expert reports, those opinions do not belong to
27 that party alone, but rather are available for all parties to use at trial. *Id.* at 26 (citing
28 *NetAirus Techs., LLC v. Apple, Inc.*, No. LA CV10-03257 JAK, 2013 WL 9570686, at *3

1 (C.D. Cal. Nov. 11, 2013)).

2 At the final pretrial conference, the Court directed the parties to file memoranda
3 addressing the issue of whether the depositions are admissible under Federal Rule of
4 Civil Procedure 32(a)(4) and Federal Rule of Evidence 804(b)(1). *See* Doc. 10323 at 3.
5 The parties have now done so. Docs. 10343, 10345.

6 Plaintiffs contend that depositions of the withdrawn experts are admissible
7 because a party may use “for any purpose” the depositions of unavailable witnesses under
8 Rule 32(a)(4), and the depositions fall within the “former testimony” exception to the
9 hearsay rule set forth in Rule 804(b)(1). *Id.* at 1-2 (citing *Tatman v. Collins*, 938 F.2d
10 509, 511 (4th Cir. 1991)). Defendants acknowledge that several courts have held that a
11 withdrawn expert’s deposition may be used at trial under Rule 32(a)(4). Doc. 10343
12 at 2-3. Defendants assert that the depositions nonetheless should be excluded under Rule
13 804 unless Plaintiffs have used reasonable but unsuccessful means to procure live
14 testimony from the experts, and unless Defendants had a “similar motive” to develop the
15 testimony during the deposition. *Id.* at 2. But Defendants do not dispute that the
16 withdrawn experts are unavailable for purposes of Rule 804(a)(5) and that any attempt by
17 Plaintiffs to subpoena them would be futile. Nor do Defendants explain why they did not
18 have a similar motive to develop the experts’ testimony during the depositions. Once it
19 was clear that the experts were giving answers helpful to Plaintiffs, Defendants had
20 sufficient incentive to clarify or cross-examine on those answers. Defendants have not
21 shown that the depositions are inadmissible on hearsay grounds.

22 Defendants argue that even if the depositions can be used at trial, it would be
23 unfairly prejudicial under Rule 403 to disclose to the jury that the experts originally were
24 retained by Defendants. Several courts have recognized “the significant potential
25 prejudice of informing the jury that the expert presently testifying for one party was
26 originally designated, retained, or consulted by the opposing party.” *House v. Combined*
27 *Ins. Co. of Am.*, 168 F.R.D. 236, 243 (N.D. Iowa 1996) (citing *Peterson v. Willie*, 81 F.3d
28 1033, 1037 (11th Cir. 1996) (collecting cases)); *Healy v. Counts*, 100 F.R.D. 493, 496 (D.

1 Colo. 1984); *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458, 460 (S.D.N.Y. 1996) (noting that
2 one leading commentator “aptly has characterized the fact of the prior retention by the
3 adversary as ‘explosive’” (quoting 8 Wright, Miller & Marcus, *Federal Practice &*
4 *Procedure* § 2032, at 447 (1994)). As one court explained:

5 The admission of this evidence . . . would only serve to unfairly prejudice
6 the [opposing party]. Jurors unfamiliar with the role of counsel in
7 adversary proceedings might well assume that . . . counsel had suppressed
8 evidence which he had an obligation to offer. Such a reaction could destroy
counsel’s credibility in the eyes of the jury.

9 *Granger v. Wisner*, 656 P.2d 1238, 1242-43 (Ariz. 1982).

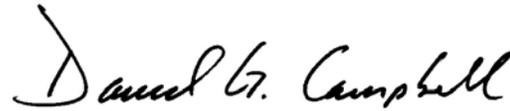
10 Plaintiffs contend that Defendants should not be able to “hide” their experts’
11 unfavorable opinions from the jury. Doc. 10345 at 2. But disclosing the fact that
12 Defendants have withdrawn the experts could be unfairly prejudicial, leading the jury to
13 speculate as to why the experts were withdrawn and, potentially, to conclude that
14 Defendants or their counsel attempted to engage in dishonest or unethical behavior. And
15 such information has little relevance to the substance of the experts’ opinions on any
16 claim or defense in this case. *See Granger*, 656 P.2d at 381 (finding the fact of the prior
17 consultation irrelevant to the issue of negligence); *House*, 168 F.R.D. at 243 (“House has
18 asserted as an argument for permitting her to offer [the expert’s] testimony the assertion
19 that [the defendant] is trying to hide [the] opinion from House and the jury. However, the
20 court in *Peterson* recognized the prejudice that results from informing the jury that an
21 expert had originally been consulted by the opposing party.”).

22 The Court concludes that Plaintiffs may use portions of the experts’ depositions
23 that support Plaintiffs’ case, but may not disclose to the jury, through argument or
24 deposition excerpts, that the experts originally were retained by Defendants. The Court
25 concludes that the probative value of such arguments or deposition excerpts would be
26 substantially outweighed by the danger of unfair prejudice. Fed. R. Ev. 403.

27 The Court is also concerned about the presentation of cumulative evidence. The
28 Court has made clear that it will not permit either side to use multiple experts at trial to

1 address the same issue. Thus, before the deposition of any withdrawn expert may be
2 used at trial, “there should be some showing . . . that no other expert of similar
3 qualifications is available or that the unavailable expert has some unique testimony to
4 contribute.” *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529, 536-37 (2d Cir. 1972). If
5 Plaintiffs make this showing for any of the withdrawn experts, the Court will allow the
6 expert’s deposition to be used at trial subject to the Rule 403 decision above and any
7 other evidentiary objections Defendants may assert. *See* Doc. 10343 at 3. Defendants
8 will be permitted to counter-designate other relevant portions of the deposition transcript.
9 *See* Doc. 10255 at 25.

10 Dated this 9th day of March, 2018.

11
12
13 

14 _____
15 David G. Campbell
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28