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

No. MDL 15-02641-PHX-DGC

11 \_\_\_\_\_  
12 Lisa Hyde and Mark E. Hyde, a married  
couple,

No. CV-16-00893-PHX-DGC

13 Plaintiffs,

**ORDER**

14 v.

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

17 Defendants.  
18

19 The case brought by Plaintiffs Lisa and Mark Hyde is set for a bellwether trial on  
20 September 18, 2018. Defendants seek to admit testimony that Dr. Murray Asch – their  
21 former consultant in a study of Bard filters – gave in the Booker and Jones trials earlier  
22 this year. Doc. 12388 at 46. Plaintiffs object, arguing that the previous trial testimony is  
23 hearsay and Defendants cannot satisfy the requirements of Rule 804. The Court agrees.

24 Dr. Asch’s testimony in the Booker and Jones trials constitutes hearsay because it  
25 consists of statements Dr. Asch made while not testifying in the current trial, offered for  
26 the truth of the matters asserted. Fed. R. Evid. 801(c). Defendants contend that the  
27 testimony is admissible as “former testimony” under Rule 804(b)(1). Doc. 12388 at 46.  
28 To satisfy this hearsay exception, Defendants must show, among other things, that

1 Dr. Asch is unavailable as a trial witness because they have “not been able, by process or  
2 other reasonable means, to procure . . . [his] attendance[.]” Fed. R. Evid. 804(a)(5).  
3 Defendants bear the burden of showing that Dr. Asch is unavailable under this standard.  
4 *See United States v. Eufrazio-Torres*, 890 F.2d 266, 269 (10th Cir. 1989) (“the proponent  
5 of the evidence bears the burden of demonstrating the unavailability of [the] declarant”)  
6 (citing *Roberts*, 448 U.S. at 65); *see Kirk*, 61 F.3d at 165 (same); *Moore v. Miss. Valley*  
7 *State Univ.*, 871 F.2d 545, 552 (5th Cir. 1989) (“the burden is on the offering party” to  
8 satisfy Rule 408(a)(5)).

9 Dr. Asch lives and works in Canada. He is beyond the Court’s subpoena power.  
10 *See* Fed. R. Civ. P. 45(c)(1)(A). This portion of the Rule 804(a)(5) standard is satisfied.  
11 The key question, then, is whether Defendants attempted to procure his attendance at trial  
12 through “other reasonable means.” Fed. R. Evid. 804(a)(5). Defendants argue that  
13 Dr. Asch has appeared at previous trials as Plaintiffs’ witness; Defendants asked  
14 Plaintiffs to make Dr. Asch available for this trial and Plaintiffs declined; Dr. Asch  
15 charges \$5,000 a day to testify; and Plaintiffs themselves are asserting that Dr. Asch is  
16 unavailable for purposes of using his deposition under Federal Rule of Civil Procedure  
17 32(a)(4). After considering each of these arguments, the Court concludes that Defendants  
18 have not met their burden.

19 Rule 804(a)(5) “places the duty on the proponent of the hearsay statement to  
20 attempt to secure the attendance of the person making the statement.” *United States v.*  
21 *Vasquez-Ramirez*, 629 F.2d 1295, 1297 (9th Cir. 1980) (rejecting the government’s  
22 assertion that the witness was unavailable for trial because the defendant could have  
23 subpoenaed the witnesses but did not). Defendants made no attempt to contact Dr. Asch  
24 directly and request his attendance at trial. Defendants contend that any attempt on their  
25 part to secure his presence at trial would have been futile, but the Supreme Court has  
26 instructed that “the possibility of a refusal is not the equivalent of asking and receiving a  
27 rebuff.” *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (citation omitted). “The advisory  
28 committee’s note to Rule 804(a)(5) refers to *Barber* . . . as the standard for the

1 reasonably of efforts to obtain non-resident witnesses, and *Barber* holds that a  
2 [proponent] may not omit making a request just because the answer is not a sure thing.”  
3 *United States v. Kehm*, 799 F.2d 354, 360 (7th Cir. 1986); *see Ohio v. Roberts*, 448 U.S.  
4 56, 74 (1980) (noting that the law does not require the doing of a futile act, such as  
5 attempting to procure the attendance of a witness who has died, but if there is a  
6 possibility, albeit remote, that affirmative measures might produce the declarant, then  
7 good faith efforts may be required), *abrogated on other grounds by Crawford v.*  
8 *Washington*, 541 U.S. 36 (2004).

9 Defendants note that Dr. Asch charges \$5,000 a day to testify, but Defendants do  
10 not claim that this amount is unreasonable or unaffordable, and many other witnesses  
11 have been paid comparable amounts in this case. Nor have Defendants otherwise shown  
12 that the fee is a basis for finding Dr. Asch unavailable under Rule 804(a)(5). *See Kirk*, 61  
13 F.3d at 165 (“Kirk made no independent attempt to contact Dr. Burgher, offer him his  
14 usual expert witness fee, and request his attendance at trial. Because Dr. Burgher was  
15 never even as much as contacted, Kirk has failed to prove that she used ‘reasonable  
16 means’ to enlist his services.”).

17 Plaintiffs intend to present Dr. Asch’s deposition testimony at trial under Rule 32  
18 of the Federal Rules of Civil Procedure, which they can do only if he is unavailable.  
19 Defendants argue that if Dr. Asch is unavailable to Plaintiffs under Rule 32(a)(4), then he  
20 likewise is unavailable to Defendants under Rule 804(a)(5). But the standards of the two  
21 rules are not the same. Rule 32 is an “independent exception” to the hearsay rule; it does  
22 not rely on Rule 804. *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 914 (9th Cir.  
23 2008) (citing Fed. R. Evid. 802 advisory committee’s note (identifying Rule 32(a) as one  
24 of the “other rules” that allows for the admission of hearsay); *Fletcher*, 895 F.3d at 1020  
25 (citing *Nationwide* and noting that decisions from around the country have concluded that  
26 Rule 32(a) operates as an independent exception to the hearsay rule). A witness is  
27 unavailable under Rule 32(a)(4) simply if he is more than 100 miles from the place of  
28 trial or outside the United States. Fed. R. Civ. P. 32(a)(4)(B), (D). Unlike Rule

1 804(a)(5), Rule 32(a)(4) “does not require ‘the party seeking to admit the deposition  
2 testimony to show that it was unable to procure the attendance of the [witness] through  
3 ‘process or other reasonable means.’” *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204  
4 n.2 (1st Cir. 1988); *see Nationwide*, 541 F.3d at 914 (“[B]ecause [the deposition]  
5 testimony properly was admitted under Rule 32(a)(4)(B), it need not also meet the  
6 requirements for admissibility set forth in Rule 804[.]”); *Fletcher v. Tomlinson*, 895 F.3d  
7 1010, 1020 (8th Cir. 2018) (same). Thus, the fact Dr. Asch is unavailable for purposes of  
8 Rule 32(a)(4) does not mean that he is unavailable for purposes of Rule 804(a)(5).<sup>1</sup>

9 In short, Defendants have not shown that Dr. Asch is unavailable under Rule 804.  
10 Many other cases have reached similar conclusions. *See United States v. Pena-Gutierrez*,  
11 222 F.3d 1080, 1086 (9th Cir. 2000) (holding that a foreign witness was not unavailable  
12 where the government had his name and address but made no effort to contact him in his  
13 native country); *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002) (the  
14 proponent failed to show that the witness was unavailable where he proffered no  
15 evidence that the witness refused or was unable to testify); *Kirk*, 61 F.3d at 165 (district  
16 court abused its discretion in admitting prior trial testimony where there was no evidence  
17 of reasonable means employed by the proponent to procure the witness’s attendance);  
18 *Glob. Med. Sols., Ltd. v. Simon*, No. CV-12-04686-MMM-JCX, 2013 WL 12065418, at  
19 \*12 n.114 (C.D. Cal. Sept. 24, 2013) (finding Rule 804 not applicable where the  
20 proponents did not try to obtain the witness’s attendance); *see also Rodriguez v. Hayman*,  
21 No. CIV. 08-4239 RBK/KMW, 2013 WL 1222644, at \*2 (D.N.J. Mar. 25, 2013) (noting  
22 that whether a party used reasonable means to locate a witness is generally left to the  
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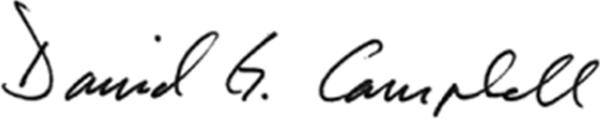
24 <sup>1</sup> Defendants suggested at the final pretrial conference that Plaintiffs’ failure to  
25 arrange for Dr. Asch’s attendance at trial means that his absence “was procured by the  
26 party offering the deposition” within the meaning of Rule 32(a)(4). If true, this would  
27 prevent Plaintiffs from using Dr. Asch’s deposition at trial, but it would not authorize  
28 Defendants’ use of his prior trial testimony under Rule 804. In addition, the Court cannot  
conclude that Plaintiffs “procured” Dr. Asch’s absence simply by not arranging for him  
to attend trial. Cases have held that “procuring absence” requires active steps and not just  
“doing nothing to facilitate presence.” *See Carey*, 864 F.2d at 204; *Wal-Mart Stores, Inc.*  
*v. Cuker Interactive, LLC*, No. 5:14-CV-5262, 2017 WL 1312968, at \*2 (W.D. Ark. Apr.  
5, 2017) (citing cases).

1 district court's discretion and "the touchstones of 'reasonable means' under Rule  
2 804(a)(5) are variation and repetition") (citations omitted).<sup>2</sup>

3 At the final pretrial conference, Defendants also argued that Dr. Asch's trial  
4 testimony is admissible under Rule 807, the residual hearsay exception. That rule  
5 requires, however, that the offered evidence be "more probative on the point for which it  
6 is offered than any other evidence that the proponent can obtain through reasonable  
7 efforts." Fed. R. Evid. 807(a)(3). Defendants asserted that this requirement is satisfied,  
8 but they did not explain why, and the Court cannot conclude that Dr. Asch's previous  
9 trial testimony is more probative than other reasonably available evidence. Dr. Asch was  
10 deposed by Defendants and Plaintiffs before trial, and his deposition spans more than 200  
11 pages. Additionally, his deposition testimony was videotaped and would permit the jury  
12 to view and assess his demeanor, unlike the prior trial testimony that would be available  
13 only through a written transcript to be read to the jury. What is more, various other  
14 witnesses and documents concern the study Dr. Asch conducted of Bard filters and could  
15 be presented in support of positions Defendants wish to make. The Court accordingly  
16 cannot conclude that Defendants have satisfied the requirement of Rule 807(a)(3).

17 **IT IS ORDERED** that Dr. Asch's prior trial testimony is inadmissible hearsay in  
18 the Hyde trial.

19 Dated this 13th day of September, 2018.

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22  
23 David G. Campbell  
24 David G. Campbell  
25 Senior United States District Judge  
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<sup>2</sup> Given this ruling, the Court need not decide whether Booker and Jones were predecessors in interest who had an opportunity and similar motive to develop Dr. Asch's testimony. *See* Fed. R. Evid. 804(b)(1)(B).