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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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14 Defendants have filed a motion to enforce a protective order over certain trial
15 exhibits. Doc. 13126. The motion is fully briefed (Docs. 13433, 13494), and oral
16 argument has not been requested. The Court will deny the motion.

17 **I. Background.**

18 Early in this case, the Court entered a stipulated protective order treating certain
19 information produced by the parties during discovery as confidential pursuant to Federal
20 Rule of Civil Procedure 26(c)(1)(G). Doc. 269.¹ The protective order imposes various
21 limitations on the use of confidential information produced pursuant to the order
22 (*id.* ¶¶ 12-20), but does not apply to the use of such information at trial (*id.* ¶ 28).

23 Following the Booker trial in May 2018, Defendants moved for an order sealing
24 certain exhibits that had been admitted into evidence during the trial. Doc. 11010 at 2.
25 The Court denied the motion because Defendants had failed to satisfy the compelling
26 reasons standard for sealing judicial records, *see Kamakana v. City & Cty. of Honolulu*,

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28 ¹ The rule provides that a party from whom discovery is sought may move for a protective order “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way[.]”

1 447 F.3d 1172, 1178-79 (9th Cir. 2006), and had waived the right to have the exhibits
2 sealed. Doc. 11642. Because Defendants obtained no order sealing the exhibits before
3 they were admitted into evidence at trial, the Court found the exhibits to be part of the
4 public record and no longer confidential or subject to being sealed. *Id.* at 2 (citing
5 *Phillips v. C. R. Bard, Inc.*, No. 3:12-cv-00344-RCJ-WGC, 2015 WL 3485039, at *2 (D.
6 Nev. June 1, 2015) (finding waiver where Bard “made no motion to seal the exhibits or
7 testimony at the public trial”); *Littlejohn v. Bic Corp.*, 851 F.2d 673, 677-78 (3d Cir.
8 1988) (“It is well established that the release of information in open court ‘is a
9 publication of that information and, if no effort is made to limit its disclosure, operates as
10 a waiver of any rights a party had to restrict its future use.’” (citation omitted)); *Carnegie*
11 *Mellon Univ. v. Marvell Tech. Grp., Ltd.*, No. CIV.A. 09-290, 2013 WL 1336204, at *5
12 (W.D. Pa. Mar. 29, 2013) (same)). The Court noted that this finding was consistent with
13 the provision in the protective order that information deemed publicly available “includes
14 documents that have been . . . entered as an exhibit during trial not under seal.” *Id.*
15 (quoting Doc. 269 ¶ 34).

16 Defendants sought reconsideration, arguing that the protective order remained in
17 effect and precluded Plaintiffs from disclosing to the public any exhibit admitted into
18 evidence but not openly disclosed during trial or made part of the Court’s electronic
19 docket. Doc. 11766 at 5-6. The Court agreed that Defendants had preserved their right
20 to file a post-trial motion to seal, but otherwise denied their request for relief. Defendants
21 failed to show that the Court erred in finding a waiver of the right to seal trial exhibits.
22 Defendants also failed to identify specific exhibits that were admitted into evidence but
23 not published in open court. Doc. 12069 at 3-4 & n.1.

24 Defendants now identify 80 exhibits admitted into evidence in the Jones and Hyde
25 trials that they claim were not fully disclosed during trial. Doc. 13126-1 at 9-11.
26 Defendants contend that the “unused” portions of these exhibits never became publicly
27 available and therefore remain confidential and subject to the protective order.
28 Doc. 13126 at 2. Plaintiffs counter that the protective order has no application because

1 once an unredacted exhibit is admitted into evidence at a public trial and not sealed, the
2 entire exhibit – regardless of which pages were actually displayed or discussed in open
3 court – becomes a judicial record to which the public has a right of access. Doc. 13433
4 at 2-8.

5 **II. Discussion.**

6 The Court must answer several questions. First, are the exhibits and portions of
7 exhibits addressed in Defendants’ motion judicial records subject to the public’s interest
8 in judicial proceedings? Second, are the exhibits subject to the parties’ stipulated
9 protective order? Third, did Defendants waive any right to have the documents sealed by
10 permitting them to be admitted into evidence? Fourth, if no such waiver occurred, have
11 Defendants shown compelling reasons to seal the exhibits now?

12 **A. Exhibits Admitted into Evidence at Trial Are Judicial Records.**

13 “Historically, courts have recognized a ‘general right to inspect and copy public
14 records and documents, including judicial records and documents.’” *Kamakana*, 447
15 F.3d at 1178 (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n. 7
16 (1978)). This common law right is based in part on the strong “public interest in
17 understanding the judicial process.” *Id.* at 1178-79 (citations omitted). “[T]he resolution
18 of a dispute on the merits, whether by trial or summary judgment, is at the heart of [this]
19 interest[.]” *Id.* at 1179; see *Nat’l Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d
20 418, 421-23 (6th Cir. 1981) (discussing the line of Supreme Court cases emphasizing the
21 importance of public trials to our system of justice and recognizing the right to publish
22 information made part of the record in a judicial proceeding); *Siedle v. Putnam Inv., Inc.*,
23 147 F.3d 7, 10 (1st Cir. 1998) (“Courts long have recognized ‘that public monitoring of
24 the judicial system fosters the important values of quality, honesty and respect for our
25 legal system,” and this “recognition has given rise to a presumption that the public has a
26 common-law right of access to judicial documents” (quoting *Nixon*, 435 U.S. at 597)).

27 “[W]hat makes a document a judicial record and subjects it to the common law
28 right of access is the role it plays in the adjudicatory process.” *United States v. El-*

1 *Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997); *see Kamakana*, 447 F.3d at 1179 (explaining
2 that “the public has less of a need for access to court records attached only to non-
3 dispositive motions because those documents are often unrelated, or only tangentially
4 related, to the underlying cause of action”) (citations omitted).² Case law clearly
5 recognizes that transcripts of court proceedings and exhibits presented in open court
6 constitute judicial records for purposes of the public right of access.³

7 While exhibits that are not openly displayed or discussed in court, but are admitted
8 into evidence, may “present a somewhat closer question,” *Benedict v. Hankook Tire Co.*,
9 323 F. Supp. 3d 747, 760 & n.14 (E.D. Va. 2018), courts have found that such exhibits
10 become, “simply by virtue of that event,” judicial records subject to the public right of
11 access. *Level 3 Commc’ns, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 589
12 (E.D. Va. 2009) (citing cases); *see Certusview Techs., LLC v. S&N Locating Servs., LLC*,
13 198 F. Supp. 3d 568, 588 n.12 (E.D. Va. 2016) (“[T]o the extent that the parties . . . have
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15 ² *See also In re Application for an Order Pursuant to 18 U.S.C. Section 2703(D)*,
16 707 F.3d 283, 290 (4th Cir. 2013) (holding that “documents filed with the court are
17 ‘judicial records’ if they play a role in the adjudicative process”); *In re Providence*
18 *Journal Co.*, 293 F.3d 1, 9 (1st Cir. 2002) (holding that the “presumptive right of access
19 attaches to those materials ‘which properly come before the court in the course of an
20 adjudicatory proceeding’”) (citation omitted); *In re Cendant Corp.*, 260 F.3d 183, 192
21 (3d Cir. 2001) (“The status of a document as a ‘judicial record[]’ . . . depends on whether
22 a document has been filed with the court, or otherwise somehow incorporated or
23 integrated into a district court’s adjudicatory proceedings.”).

24 ³ *See Carnegie Mellon*, 2013 WL 1336204, at *5-6 (denying motion to seal
25 Powerpoint slides because the court made evidentiary rulings on the slides and the
26 presenting attorney “walked the [c]ourt, counsel, and anyone who wished to listen
27 through each of [the] slides”); *Warner Chilcott Co. v. Mylan Inc.*, 2014 U.S. Dist. LEXIS
28 1811576, at *3 (D.N.J. Dec. 10, 2014) (noting that courts have denied requests to seal a
“transcript of a proceeding that was held in open court”); *In re Google Inc. Gmail Litig.*,
2014 U.S. Dist. LEXIS 136420, at *34 (N.D. Cal. Aug. 6, 2014) (rejecting ex post facto
redactions of statements “made in open court in the transcript”); *Fleming v. Escort, Inc.*,
No. CV 09-105-S-BLW, 2013 WL 1290418, at *4 (D. Idaho Mar. 27, 2013) (declining to
seal portions of the transcript where the “matters were discussed on the record during the
public trial”); *TriQuint Semiconductor, Inc. v. Avago Techs. Ltd.*, No. CV-09-1531-PHX-
JAT, 2012 WL 1432519, at *2 (D. Ariz. Apr. 25, 2012) (denying motion to seal “portions
of a transcript from a proceeding held in open court”); *Pfizer, Inc. v. Teva Pharms. USA,*
Inc., No. CIV.A. 08-1331 (DMC), 2010 WL 2710566, at *3 (D.N.J. July 7, 2010)
(denying motion for redactions made “after the hearing was held in open court and the
record transcribed”).

1 entered such documents into evidence, the Court considers the parties' arguments
2 regarding the need for such information to be sealed to have been waived."); *Dees v. Cty.*
3 *of San Diego*, 302 F. Supp. 3d 1168, 1173 n.1 (S.D. Cal. 2017) (denying post-trial
4 motions to seal because the information in the documents became part of the public
5 record when the exhibits were admitted into evidence during trial).

6 Defendants argue that the public has no interest in confidential information
7 contained in the trial exhibits because the information has only minimal relevance to
8 claims in the Jones and Hyde trials. Doc. 13126 at 2, 7-8. But the Court's orders
9 admitting the exhibits into evidence have legal significance. As one court has explained,
10 the public right of access to exhibits "sprang into existence upon their being offered into
11 evidence for the jury's consideration at trial[.]" *Level 3 Commc'ns*, 611 F. Supp. at 588;
12 *see Benedict*, 323 F. Supp. 3d at 760 & n.14 (finding that "trial exhibits admitted into
13 evidence constitute judicial records," and noting that the principles concerning the right
14 of public access to such records, "particularly those relating to waiver, . . . counsel
15 against sealing the unused exhibits").

16 Furthermore, the jurors in the Jones and Hyde cases were specifically instructed
17 that the evidence they were to consider included the exhibits admitted into evidence.
18 Docs. 11411 at 21, 13115 at 12. Those exhibits were provided to the jurors in the jury
19 room during deliberations. *Id.* at 42, 30-31. Except for some portions of the exhibits that
20 the parties jointly redacted with the Court's approval before the exhibits were provided to
21 the jury (portions not at issue in this order), jurors were free to review and consider all
22 information contained in the exhibits, including information not displayed or discussed in
23 the courtroom. *See Baugh v. Cuprum S.A. de C.V.*, 730 F.3d 701, 708 (7th Cir. 2013)
24 (explaining that admitting documents as substantive evidence "sends an important signal"
25 because "[i]t alerts parties to the fact that the exhibit will become part of the actual
26 evidence and therefore may well be available to the jury during deliberation"). The Court
27 has no reliable basis for concluding that all or portions of exhibits admitted into evidence
28 and submitted to the jury were not considered by the jury in reaching its verdict.

1 Defendants further argue that the trial exhibits at issue are not judicial records
2 because they were not filed with the Court or made part of its electronic docket.
3 Doc. 13126 at 2, 5. As explained above, however, the exhibits became judicial records
4 when they were admitted into evidence at trial. The exhibits are now subject to being
5 made part of the record on appeal. *See* Docs. 12071, 13480; 9th Cir. R. 27-14, Advisory
6 Committee Note (noting that the parties may include in the excerpts of record trial
7 exhibits not filed with the district court); 9th Cir. R. 30-1.4(a)(x) (the excerpts of record
8 shall include portions of the exhibits necessary to resolve the issues on appeal).

9 **B. The Exhibits Are Not Subject to the Protective Order.**

10 The parties' stipulated protective order in this case "do[es] not preclude, limit,
11 restrict, or otherwise apply to the use of [c]onfidential [i]nformation at trial." Doc. 269
12 ¶ 28. Instead, the use of confidential information at trial was to be "addressed in a later
13 agreement between the parties, or . . . by further order of the Court." *Id.* The parties
14 reached no such agreement, and Defendants sought no court order during or in advance
15 of trial. In fact, Defendants themselves asked the Court to admit many of the exhibits
16 containing allegedly confidential information.

17 And even in cases where protective orders arguably could apply to trial exhibits,
18 courts hold that admission of the exhibits into evidence waives coverage of the protective
19 order. *See Littlejohn*, 851 F.2d at 680 ("failure to object to the admission into evidence
20 of the documents, absent a sealing of the record, constituted a waiver of whatever
21 confidentiality interests might have been preserved under the protective order"); *Rushford*
22 *v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (noting that "if the case
23 had gone to trial and the documents were thereby submitted to the court as evidence, such
24 documents would have been revealed to the public and not protected under the
25 [protective order]"); *Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1301 (E.D.N.C.
26 1996) (finding that admission of documents containing trade secrets without sealing the
27 documents rendered them matters of public record and "nullifie[d] any confidentiality
28 interests in those exhibits and the information they contain"); *Biovail Labs., Inc. v.*

1 *Anchen Pharms., Inc.*, 463 F. Supp. 2d 1073, 1081 (C.D. Cal. 2006) (finding that public
2 policy required the exclusion of documents offered into evidence not under seal from the
3 confidentiality protection of a protective order); *Weiss v. Allstate Ins. Co.*, No. CIV.A.
4 06-3774, 2007 WL 2377119, at *3 (E.D. La. Aug. 16, 2007) (“Other courts have likewise
5 concluded that admission into evidence of confidential documents precludes an *ex post*
6 invocation of confidentiality provisions set forth in a previously entered protective
7 order.”) (citations omitted).

8 Defendants’ reliance on *Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473 (D.
9 Mont. 1995), is misplaced. Doc. 13126 at 10. The exhibits in *Livingston* were produced
10 pursuant to a protective order which contemplated the use of such documents at trial
11 without a loss of confidentiality, and, during trial, the documents were regarded by all
12 parties as protected confidential information. 910 F. Supp. at 1480. In this case,
13 Defendants reached no such agreement with Plaintiffs regarding the use of confidential
14 information at trial and obtained no order from the Court sealing all or part of any exhibit
15 before it was admitted into evidence. And as previously explained (Doc. 11642 at 3-4),
16 the Court does not agree with *Livingston*’s conclusion that the trial exhibits did not enter
17 the public record because they ultimately were returned to the parties.⁴

18 **C. Defendants Have Waived Their Right to Have the Exhibits Sealed.**

19 As the Court previously found (Doc. 11642 at 2), by permitting the exhibits to
20 become public judicial records through their admission into evidence at trial, Defendants
21 waived their right to have the exhibits sealed now. *See Littlejohn*, 851 F.2d at 677-78;
22 *Carnegie Mellon*, 2013 WL 1336204, at *5. Defendants may believe this to be a harsh
23 result when they raised the issue of sealing exhibits before the Booker trial (Doc. 10255
24 at 62), but Defendants sought only to preserve the right to file a *post-trial* motion to seal,
25 and they have been granted that opportunity.

26 _____
27 ⁴ Defendants claim that information in the trial exhibits might be used to gratify
28 spite or promote public scandal if the protective order is not enforced. Doc. 13126 at 15.
Plaintiffs make clear, however, that they have no intent of using the information for such
improper purposes. Doc. 13433 at 3 n.1. The Court takes Plaintiffs at their word.

1 In the parties' proposed pretrial order, Defendants noted that the protective order
2 does not cover the use of documents as exhibits at trial and asked the Court to set a
3 "post-trial briefing schedule on a motion to seal." *Id.* When the Court inquired about the
4 issue of sealing exhibits at the pretrial conference, Defendants made clear that they
5 sought "to preserve [their] right to move to seal exhibits . . . *after the trial.*" Doc. 10482
6 at 81 (emphasis added). As the Court explained in denying the request for
7 reconsideration (Doc. 12069 at 3), Defendants proposed a post-trial process for the
8 sealing of exhibits despite knowing at the time that Plaintiffs opposed the request because
9 exhibits become public judicial records "at the time admitted into evidence" (Doc. 10255
10 at 63 (citing *Kamakana*, 447 F.3d at 1178)).

11 Indeed, Defendants – represented by some of the same attorneys appearing in this
12 MDL – litigated and lost this very issue in the *Phillips* case several years before the Jones
13 and Hyde trials. After the parties settled while the *Phillips* trial was underway,
14 Defendants moved to seal certain trial exhibits. *See Phillips*, 2015 WL 3485039, at *1.
15 The district court denied the request in part because Defendants had made no motion to
16 seal the exhibits at trial. *Id.* at 2 (citing *Littlejohn*, 851 F.2d at 680; *Level 3 Commc'ns*,
17 611 F. Supp. at 588). In fact, because of this ruling, exhibits entered into evidence in the
18 *Phillips* trial were excluded from the protective order in this case. Doc. 269 ¶ 5. Thus,
19 Defendants were well aware before the bellwether trials that the proper time for asking
20 the Court to address a motion to seal exhibits "would have been prior to trial, or at trial –
21 at the time when they were offered into evidence." *Level 3 Commc'ns*, 611 F. Supp. 2d
22 at 588.⁵

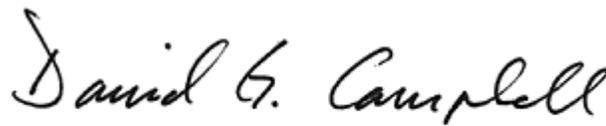
23 Because the Court finds that Defendants have waived their right to seal the
24 exhibits admitted in evidence during the public trials in Jones and Hyde, it need not
25 address the fourth question identified above – whether sealing would be appropriate
26 under Ninth Circuit law.

27
28 ⁵ Even after the Court ruled that Defendants had waived the right to have trial
exhibits sealed (Docs. 11642 at 2, 12069 at 3-4), Defendants still sought a *post-trial*
briefing schedule on a motion to seal in the Hyde case (Doc. 12388 at 70).

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IT IS ORDERED that Defendants' motion to enforce the protective order over certain trial exhibits (Doc. 13126) is **denied**.

Dated this 11th day of January, 2019.



David G. Campbell
Senior United States District Judge