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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 TSI Incorporated,

10 Plaintiff,

11 v.

12 Azbil BioVigilant Incorporated,

13 Defendant.

No. CV-12-00083-PHX-DGC

ORDER

14
15 **I. Motions for Leave to File DVD.**

16 TSI has filed two motions for leave to file a DVD (Docs. 187, 206). Both DVDs
17 contain video footage that is relevant to this case. The Court will grant both motions.

18 **II. Motion to Strike.**

19 TSI has moved to strike exhibits attached to BioVigilant's reply brief in support of
20 its motion for summary judgment. (Doc. 198). The motion is fully briefed and no party
21 has requested oral argument. The Court will deny the motion.

22 A party moving for summary judgment may not introduce new facts or exhibits in
23 its reply. *See Parker v. Arizona*, No. CV 08-656-TUC-AWT, 2013 WL 3286414, at *8
24 (D. Ariz. June 28, 2013) ("District courts in Arizona have uniformly held that the Local
25 Rules of Civil Procedure do not permit a party moving for summary judgment to file a
26 supplemental statement of facts or attached exhibits with its reply.") (citations omitted).
27 Although a party may object to facts introduced by the non-moving party in its
28 opposition, the reply "*may not introduce new facts or evidence.*" *EEOC v. Swissport*

1 *Fueling, Inc.*, 916 F. Supp. 2d 1005, 1016 (D. Ariz. Jan 7, 2013) (citation omitted)
2 (emphasis in original).

3 TSI argues that BioVigilant violated the local rules by introducing 11 new exhibits
4 in its reply and making new arguments relating to the 11 new exhibits. Doc. 198 at 3.
5 TSI asserts that it would be prejudiced if the new evidence or arguments were considered
6 because it has not been given an opportunity to address them. *Id.* TSI insists that
7 BioVigilant has engaged in a strategy of “lying in the weeds” by “strategically
8 withhold[ing] evidence that contradicts its arguments from its opening papers, wait[ing]
9 to see if [TSI] responds by citing that contradictory evidence, and then, with its reply,
10 rais[ing] arguments and evidence regarding that contradictory evidence so as to prevent
11 [TSI] from having an opportunity to reply.” Doc. 218 at 6. BioVigilant rejoins that it
12 merely attached the exhibits to “rebut or controvert arguments raised in TSI’s voluminous
13 opposition” and that this practice is permitted in the District of Arizona. Doc. 211 at 3;
14 *Saguaro Med. Assocs., P.C. v. Banner Health*, No. CV-08-1386 PHX-DGC, 2009 U.S.
15 Dist. LEXIS 103432, at *23-24 n.9 (D. Ariz. Nov. 6, 2009) (noting that a declaration
16 submitted for the first time in the reply was permitted because it was “rebuttal evidence”
17 that responded to allegations made in the opposition).

18 While a party may not file “new” evidence with a reply, it may file “rebuttal”
19 evidence to contravene arguments first raised by the non-moving party in its opposition.
20 *E.E.O.C. v. Creative Networks, LLC*, No. CV-05-3032-PHX-SMM, 2008 WL 5225807,
21 at *2 (D. Ariz. Dec. 15, 2008). After examining the challenged exhibits, the Court
22 concludes that they constitute rebuttal evidence, not new evidence. TSI makes much of
23 the fact that BioVigilant possessed all 11 exhibits at the time it originally filed its motion
24 for summary judgment and that it could have included these exhibits with its motion.
25 District of Arizona precedent is clear, however, that it is immaterial that BioVigilant
26 already had this evidence in its possession at the time it filed its motion for summary
27 judgment, so long as it is rebuttal evidence. *Id.* The Court will therefore deny TSI’s
28 motion.

1 **III. Motions to Seal.**

2 Pursuant to the Court’s February 3, 2014 order (Doc. 200), the parties have filed
3 two motions to seal. Docs. 201, 212. The Court will address both motions below.

4 **A. Legal Standard.**

5 Two standards generally govern requests to seal documents. “First, a ‘compelling
6 reasons’ standard applies to most judicial records.” *Pintos v. Pac. Creditors Ass’n*, 504
7 F.3d 792, 801 (9th Cir. 2007) (citing *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d
8 1172, 1178 (9th Cir. 2006). “This standard derives from the common law right ‘to
9 inspect and copy public records and documents, including judicial records and
10 documents.’” *Id.* (quoting *Kamakana*, 447 F.3d at 1178) (alteration and internal citations
11 omitted).

12 The second standard applies to discovery materials. “‘Private materials unearthed
13 during discovery’ are not part of the judicial record.” *Id.* (quoting *Kamakana*, 447 F.3d
14 at 1189) (alteration omitted). The “good cause” standard set forth in Rule 26(c) of the
15 Federal Rules of Civil Procedure applies to this category of documents. *See id.*; *San Jose*
16 *Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999). This standard
17 also applies to documents attached to non-dispositive motions because those documents
18 are often “‘unrelated, or only tangentially related, to the underlying cause of action.’”
19 *Phillips v. G.M. Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002); *see Pintos*, 504 F.3d at 802.

20 Documents attached to dispositive motions are governed by the compelling
21 reasons standard. *See San Jose Mercury News*, 187 F.3d at 1102; *Foltz v. State Farm*
22 *Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003). This standard applies because
23 the resolution of a dispute on the merits “is at the heart of the interest in ensuring the
24 ‘public’s understanding of the judicial process and of significant public events.’”
25 *Kamakana*, 447 F.3d at 1179 (citation omitted).

26 **B. Analysis.**

27 The Court will grant in part and deny in part the parties’ joint stipulation to file
28 under seal (Doc. 201). The parties have stipulated that all of the documents listed in

1 subpart (a) through (q) under heading I.A. have been designated as “Confidential—
2 Attorneys’ Eyes Only” pursuant to the Court’s protective order (Doc. 76). *Id.* at 4-5.
3 This assertion, coupled with TSI’s stipulation, satisfies the requirements for sealing
4 documents set forth in Local Rule of Civil Procedure 5.6(d), but it does not satisfy the
5 “compelling reasons” standard set forth in *Pintos*. The parties also assert that the
6 documents listed in subparts (a)-(f), (h)-(j), (l)-(n), and (p)-(q) contain EAR controlled¹
7 information. The Court finds this to be a compelling reason to justify sealing these
8 documents. Because the parties have not identified a compelling reason to seal
9 documents listed in subparts (g), (k), and (o), the Court will deny the motion as to these
10 three documents.

11 The parties have also stipulated that the documents listed from subpart (a) through
12 (aaa) under heading I.B. have been designated as “Confidential—Attorneys’ Eyes Only”
13 pursuant to the protective order. *Id.* at 5-9. This stipulation satisfies the requirements for
14 sealing documents set forth in Rule 5.6(d), but it fails on its own to satisfy the
15 “compelling reasons” standard set forth in *Pintos*. The parties assert that the documents
16 listed in subparts (a)-(n), (r)-(s), (u)-(x), (dd)-(ee), (ii)-(ll), (nn)-(ss), (vv)-(xx), (zz)-(aaa)
17 contain EAR controlled information. *Id.* at 9. The Court finds this to be a compelling
18 reason to justify sealing these documents. Because the parties have not identified a
19 compelling reason to seal documents listed in subparts (o)-(q), (t), (y)-(cc), (ff)-(hh),
20 (mm), (tt)-(uu), (yy) the Court will deny the motion as to these 16 documents.²

21 The parties have also stipulated that the documents listed from subpart (a) through
22 subpart (d) under heading II.A have been designated as “Confidential—Attorneys’ Eyes
23

24 ¹ The Export Administration Regulations (“EAR”) apply to documents marked
25 “Ear Notice” or otherwise EAR controlled. These documents contain information which
26 the designating party has identified as falling under the scope of the EAR, 15 C.F.R.
27 §§ 730-74, and must be controlled accordingly. Transfer of EAR controlled documents
(in whole or in part) or the information contained in them to any person who is not a U.S.
28 citizen, a lawful permanent resident of the United States, or a protected individual under
U.S. laws is generally not permitted.

² The documents listed at subparts (a) and (n) are not lodged on the docket.
Therefore, they also cannot be sealed at this time.

1 Only” pursuant to the protective order. *Id.* at 9-10. The parties assert that all of these
2 documents contain EAR controlled information. *Id.* The Court finds this to be a
3 compelling reason to justify sealing these documents.³

4 The parties have also stipulated that the documents listed from subpart (a) through
5 (e) under heading II.B have been designated as “Confidential—Attorneys’ Eyes Only”
6 pursuant to the protective order and that they are each contain EAR controlled. *Id.* at 11.
7 The fact that all of these documents contain EAR controlled information is a compelling
8 reason to justify sealing the documents.⁴

9 The parties have requested that the Court seal their unredacted briefs and
10 respective statements of fact submitted pursuant to BioVigilant’s motion for summary
11 judgment (Doc. 170). Doc. 201. The parties have not, however, demonstrated a
12 compelling reason why their briefs or statements of fact should be sealed in their entirety.
13 Although it may be true that portions of the documents contain ITAR⁵ and EAR
14 controlled information, that fact is not a compelling reason to seal the documents in their
15 entirety. The Court will grant the motions to seal the unredacted briefs and statements of
16 fact, but will require the parties to redact sensitive information from their briefs and
17 additional statements of fact and file the redacted briefs and statements of fact in the
18 public record.⁶

19 The Court will grant in part and deny in part BioVigilant’s motion to file

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21 ³ The documents listed at subparts (a) and (c) are not lodged on the docket.
Therefore, they cannot be sealed at this time.

22 ⁴ The documents listed at subparts (b), (d), and (e) are not lodged on the docket.
23 Therefore, they cannot be sealed at this time.

24 ⁵ The International Traffic in Arms Regulations (“ITAR”) apply to documents
25 marked “ITAR Notice” or otherwise ITAR controlled. These documents contain
26 information which the designating party has identified as falling under the scope of the
27 ITAR, 22 C.F.R. §§ 120-30, and must be controlled accordingly. Transfer of ITAR
controlled documents (in whole or in part) or the information contained in them to any
person who is not a U.S. citizen, a lawful permanent resident of the United States, or a
protected individual under U.S. laws is generally not permitted.

28 ⁶ The parties should coordinate their filing of the redacted motions, briefs, and
statements of fact so that they appear in order in the public record and minimize
confusion for those viewing the public record.

1 documents under seal (Doc. 212), but with directions to file additional documents in the
2 public record. BioVigilant asserts that the documents listed from subpart (a) to subpart
3 (g) “contain, include, quote from, summarize, constitute, or otherwise disclose materials”
4 that it has previously designated as ‘Confidential—Attorneys’ Eyes Only.’ *Id.* at 3.
5 Local Rule of Civil Procedure 5.6(d) requires more than a prior designation of
6 confidentiality to justify sealing documents. Therefore, the Court will not seal the
7 documents on this basis. In addition, BioVigilant asserts that the documents listed from
8 subpart a to subpart g contain trade secrets or other confidential and proprietary research
9 or commercial information. *Id.* at 4. BioVigilant has not, however, made any showing to
10 substantiate this assertion. Therefore, the Court will not seal the documents on this basis.
11 BioVigilant has also asserted that the documents listed from subpart a to subpart g
12 contain, include, quote from, summarize, constitute, or otherwise disclose EAR
13 controlled materials. *Id.* at 3. The Court will seal the documents on this basis.⁷

14 The Court will grant BioVigilant’s motion as to its reply brief and additional
15 statement of facts, but, as explained above, will require BioVigilant to redact sensitive
16 information from the reply and statement of facts and file the redacted brief and statement
17 of facts in the public record.

18 BioVigilant has also requested that the Court enter an order (1) permitting
19 BioVigilant to file sealed documents pursuant to the protective order and (2) restricting
20 access to sealed documents pursuant to the protective order. The Court will not enter a
21 separate order authorizing BioVigilant to file sealed documents because BioVigilant may
22 do so under this order. Nor will the Court enter an order sealing documents in the
23 manner BioVigilant requests. In this district, documents can be sealed in one of two
24 ways: they can be sealed so that only court employees – but not the opposing party or the
25 public – can access the sealed documents, or they can be sealed so that only court
26 employees and the opposing party – but not the public – can access the sealed documents.

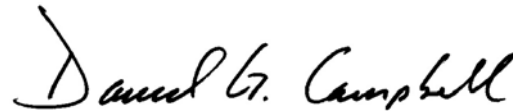
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28 ⁷ The document listed at subpart (f) is not lodged on the docket. Therefore, it
cannot be sealed at this time.

1 There is no method for the Court to designate which court employees can or cannot
2 access sealed documents, but all paid employees of the district are U.S. Citizens, and only
3 paid employees can access sealed documents.

4 **IT IS ORDERED:**

- 5 1. TSI's motions for leave to file a DVD (Docs. 187, 206) are **granted**.
- 6 2. TSI's motion to strike exhibits attached to BioVigilant's reply brief in
7 support of its motion for summary judgment (Doc. 198) is **denied**.
- 8 3. The parties' joint stipulation to file documents under seal (Doc. 201) is
9 **granted in part** and **denied in part** as set forth above. The Clerk is
10 directed to accept for filing under seal the documents lodged at Docs. 202,
11 203, 204, 205, 207, 208, 209, 210.
- 12 4. BioVigilant's motion to file documents under seal (Doc. 212) is **granted in**
13 **part** and **denied in part** as set forth above. The Clerk is directed to accept
14 for filing under seal the documents lodged at Docs. 213, 214, 215.

15 Dated this 5th day of March, 2014.

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David G. Campbell
United States District Judge