IN THE SUPREME COURT OF THE STATE OF MISSOURI

STATE OF MISSOURI, EX REL. CITY OF ST. LOUIS, ET AL.
Relators,

v.

THE HONORABLE JOHN J. RILEY, JUDGE,
TWENTY-SECOND JUDICIAL CIRCUIT, CITY OF ST. LOUIS
Respondent.

SC87245

On a Petition for Writ of Prohibition

BRIEF OF RELATORS THE CITY OF ST. LOUIS, et al.

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JURISDICTIONAL STATEMENT

This Petition for Writ involves the question of whether Respondent, the Honorable John J. Riley, abused his discretion when he entered two related discovery orders[1] requiring Relators to first review and then produce hundreds of thousands of patient medical and billing files. Relators believe Respondent abused his discretion because these Orders needlessly inflict irreparable harm and burden on Relators while providing Defendants with minimal, if any, offsetting benefit. Allowing Respondent to enter discovery Orders so onerous and burdensome as to effectively force Relators to end this litigation prevents them from exercising their fundamental right to a trial and disregards the principles of fairness and equity underlying the American judicial system.

This Court granted Relators' Petition for Writ of Prohibition and issued a Preliminary Writ of Prohibition on November 21, 2005. Respondent, through Defendants, filed his Answer on December 20, 2005. Relators pray that this Court make the Preliminary Writ permanent and direct Respondent to modify his Order

[1] *See* June 27, 2005 Order denying Relators' Motion for Protective Order, attached as Exhibit 1 to Volume 1 of Appendix, and September 27, 2005 Order Affirming Special Master's Findings, Rulings and Recommendations Dated May 23, 2005 Regarding Certain Defendants' Motion for Sanctions for Failure to Comply with Patient Records Orders, attached as Exhibit 2 to Volume 1 of Appendix.

of September 27, 2005 to relieve Relators from having to produce any additional medical and financial records of individual patients. Alternatively, if this Court believes Defendants are entitled to review additional patient medical and financial files, order that Relators only be required to produce a statistically significant sample of such files, rather than all such files.

The jurisdiction of this Court to grant original remedial writs derives from Article V, Section 4.1 of the Constitution of Missouri.

STATEMENT OF FACTS

Background

Relators are the City of St. Louis and approximately fifty hospitals located throughout Missouri ("Relators" or "Hospitals"). These Hospitals are mostly public or not-for-profit hospitals that provide substantial uncompensated care to tobacco users for harm caused or exacerbated by Defendants'[2] actions and

[2] American Tobacco Company, Inc.; Brown & Williamson Holdings, Inc. (f/k/a Brown & Williamson Tobacco Corporation); British American Tobacco Company (Investments) Limited; Liggett & Myers, Inc.; Liggett Group, Inc.; Vector Group Ltd. (f/k/a The Brooke Group, Ltd.); Lorillard Tobacco Company; Lorillard Inc.; Philip Morris U.S.A. (f/k/a Philip Morris Inc.); Altria Group, Inc. (f/k/a Philip Morris Companies Inc.); R.J. Reynolds Tobacco Company; U.S. Smokeless Tobacco Company (f/k/a United States Tobacco Co.); The Council for Tobacco Research - U.S.A., Inc.; The Tobacco Institute, Inc.; Smokeless Tobacco Council,

products. The tobacco industry knows, and has known for a very long time, that people who smoke or use smokeless tobacco will suffer significant illnesses as a result. The tobacco industry also knows, and has known for many years, that hospitals will have to care for these smokers and smokeless tobacco users, regardless of their ability to pay for any care received. Relators' suit seeks compensation and restitution from Tobacco for their uncompensated costs resulting from treating indigent tobacco users, including costs incurred in treating their tobacco related illnesses.

Substantial discovery has occurred in this case. In the course of discovery, Tobacco has deposed hundreds of Hospital representatives, propounded thousands of interrogatories and asked for innumerable records and documents,[3] including

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Inc.; and Hill and Knowlton, Inc. (hereinafter collectively referred to as "Defendants," "Tobacco" or the "tobacco industry").

[3] At last count, Tobacco served nine different sets of Interrogatories. **Each** Hospital received at least **245** Interrogatories with **122** subparts. Numerous Hospitals received over **320** Interrogatories with **138** subparts. Tobacco served three sets of Requests for Production. Each Hospital received at least **120** Requests with **159** subparts and numerous Hospitals received **148** Requests with **159** subparts. Tobacco served numerous Requests for Admissions. Each Hospital received at least **124** Requests for Admission and some have received **150** Requests for Admissions. In total, Relators received over **15,000** Interrogatories

individual patient records. Which "patient records" were to be produced apparently has been unclear (to the Hospitals) for a long time. Because of a less than clear Order, the Hospitals originally believed they were to produce the records of all patients for whom they are seeking to recover some portion of their unreimbursed costs. Since Relators are seeking to recover a statistical portion of the costs of all bad debt and charity care patients, they provided Tobacco with a list of all charity care and bad debt patients. Before producing any individual patient records, the Hospitals sought to limit the number of patient records to be produced because at that point, they thought production would be incredibly burdensome. Their motion was denied and the Hospitals began producing individual patient records. After attempting to comply with the court's patient record production Order, Relators realized the task was for all practical purposes impossible and they again sought to limit the number of "patient records" required to be produced.

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containing over **7,700** subparts; **7,700** Requests for Production containing over **10,000** subparts; and over **11,000** Requests for Admissions. Excluding documents from individual patient files, Relators have produced approximately ***5,000,000 pages*** of documents in response to Defendants' requests. (Exhibit 16 at Volume 4 of Appendix 587-88) (hereinafter "Exhibit __ at Vol. __, A __").

The trial court, in its September 27th Order, expresses great frustration with both the Hospitals' inability to understand its previous patient record Order and the Hospitals' attempts to have the trial court reconsider the issue. The trial court severely criticizes Relators for including all bad debt and charity care patients on their lists of patients for whom they are seeking to recover costs, stating such lists are over-inclusive. The trial court goes so far as to say that Relators were "flatly wrong in arguing … that this Court has not previously ordered [Relators] to identify and produce the records of **only** those patients whose injuries were likely caused or worsened by tobacco use… ." (Exhibit 2 at Vol. 1, A9-A10) (emphasis in original). However, in the very same September 27th Order the trial court acknowledges the deficiency of its previous Order by including – for the first time – a detailed definition of the term "caused or worsened by tobacco use." (Exhibit 2 at Vol. 1, A11).

In the September 27th Order, the court for the first time defines the files to be produced to only those 1) coded with certain ICD-9 codes medically recognized by the Center for Disease Control (CDC) as sometimes being directly caused by or closely related to smoking **and** 2) containing some history of smoking. (Exhibit 2 at Vol. 1, A11). Neither of these two criteria is mentioned in any previous Order and appears to be the trial court's reaction to Relators' argument that it is impossible to determine on a case by case basis (where there are millions of patients involved) whether a particular patient's illness was "caused or worsened by tobacco use."

While the definition given the phrase "caused or worsened by tobacco use" clarifies the previous Order and appears to reduce the number of medical and financial files to be produced from approximately 13 million to approximately 1 - 1 ½ million,[4] for many Hospitals compliance is still impossible in that the Order now requires Relators to first review those files for smoking history. Moreover, a list of patients meeting the court's recently established criteria is not representative of the patients for whom Relators are seeking to recover some portion of their unreimbursed costs. A procedural history is necessary for a complete understanding of this subject.

[4] Relators' expert analyzed the bad debt and charity care data from November 16, 1993 through the date he had electronic data and determined there were approximately 700,000 patient admissions having medical diagnosis codes (ICD-9 codes) recognized as being directly caused by smoking. The ICD-9 codes used by Relators' expert and the ICD-9 codes that the CDC recognizes as sometimes being directly caused by or closely related to smoking are not identical. Consequently, the number of files to be pulled using the codes recognized by the CDC will not be identical to the approximately 700,000 admissions identified by Relators' expert.

Procedural History

This case was filed on November 16, 1998. It has been stayed several times and has survived multiple challenges by Defendants, including a Motion to Dismiss[5] and a Motion for Judgment on the Pleadings. (Exhibit 3 at Vol. 1, A19-A56).

Motion for Judgment on the Pleadings

The notion that Relators need to provide Tobacco with some sort of information for those patients whose unreimbursed costs they seek to recover in this lawsuit surfaced in response to Defendants' Motion for Judgment on the Pleadings. In their motion, Defendants argued that all such patients should be joined in this lawsuit because they are necessary and indispensable parties and that if not joined, Defendants run the risk of double liability.[6] On May 22, 2003, in

[5] The court held the Hospitals have seven direct causes of action against Defendants which were cognizable and survived a motion to dismiss. (*See* May 22, 2003 Order denying Defendants' Motion for Judgment on the Pleadings, attached hereto as Exhibit 3 to Volume 1 of Appendix, A20). Defendants sought but were denied a Writ of Prohibition from that Order by both the Missouri Court of Appeals and this Court.

[6] In ruling that individual patients were not necessary and indispensable parties, the trial court found there was relatively little actual likelihood and risk that

the course of denying that motion, the court concluded that any potential for prejudice and double recovery Defendants claim they would otherwise face, could be significantly lessened simply by requiring the Hospitals to "provide reasonably specific identifying information with respect to each such patient." (Exhibit 3 at

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Defendants will ultimately incur double liability. (Exhibit 3 at Vol. 1, A43). Explaining this belief the court stated:

> [N]otwithstanding the collateral source rule, in equity and good conscience [the bad debt and charity patients] simply do not have any legitimate claim to the recovery of medical care expenses for which they have paid nothing.

(Exhibit 3 at Vol. 1, A36). The court expressed its belief "especially in view of the increasing climate of judicial and legislative hostility toward the collateral source rule" that if the Hospitals are successful here and if an individual smoker subsequently sues Defendants, then courts would likely "interpret and apply the collateral source rule to allow admission of evidence that the patient received free medical care from the hospital." (Exhibit 3 at Vol. 1, A44 and A51). It concluded that "[a]ny other interpretation would not serve the underlying purposes of the collateral source rule, since in equity and good conscience the patients could not be entitled to recovery of medical care expenses for which they themselves incurred no expense or real liability and for which the hospital care providers had, in fact, already been compensated." (Exhibit 3 at Vol. 1, A51-A52).

Vol. 1, A52) (emphasis in original). The court did not define what it meant by "reasonably specific identifying information."[7] Id.

Tobacco's Motion to Discover Individual Patient Records

Before the court ruled on Defendants' Motion for Judgment on the Pleadings, both parties submitted briefs to the Special Master (for discovery matters) regarding whether individual patient records should be produced.

On July 31, 2003, the Special Master, citing the court's Order on Defendants' Motion for Judgment on the Pleadings, recommended Defendants' Motion to Discover Individual Patient Records be granted, stating:

> The Court has ruled that '… [Relators] must, within the context of this lawsuit, even though not joining the individual patients for whose costs of care they seek to recover provide reasonably specific identifying information with respect to each such patient.' The Court further ruled that '… the requirement of reasonable 'individualized identification and proof,' with respect to the patients for whose costs of care [Relators] seek recovery, … shall govern all further proceedings in this case.

[7] The Hospitals have since identified patients for whom they are seeking to recover some portion of their unreimbursed costs and provided Tobacco with their names and other detailed identifying and relevant data. *See* Section I(C), *infra*.

> WHEREFORE, the undersigned master … rules and recommends that Defendants' motion be sustained only as to those individual medical records that relate to issues raised under the pleadings.

(Exhibit 4 at Vol. 1, A58). No further explanation or description was given. Id.

December 29, 2003 Order

Relators objected to the Special Master's Recommendation regarding the production of individual medical records. The court overruled these objections and on December 29, 2003, the trial court approved the Master's July 31, 2003 Findings, Rulings and Recommendations. (*See* December 29, 2003 Order, attached hereto as Exhibit 5A at Vol. 1, A92-A94). That Order states, in pertinent part, the following:

> The Court finds that the Discovery Master's findings and recommendations of July 31, 2003, allowing discovery of individual patient records in the case within certain parameters, were correct and proper. The Court finds that [the Discovery Master's] ruling was fully consistent with this Court's order of May 22, 2003, which held in part that: '[Relators] must, within the context of this lawsuit, even though not joining the individual patients for whose costs of care they seek to recover, provide reasonably specific identifying information with respect to each such patient.'
>
> . . .

> The Court acknowledges [Relators'] concerns that such discovery may be burdensome for them. However, and as already alluded to by the Court in its order of May 22, 2003, even if burdensome, **Defendants are entitled to such reasonably specific individualized patient information as is necessary in order for Defendants have [sic] a fair opportunity to defend the claims brought against them by [Relator] hospitals …**
>
> WHEREFORE, it is the order of this Court that the MASTER'S FINDINGS, RULINGS AND RECOMMENDATIONS entered in this case … on July 31, 2003 are now hereby approved by the Court, and likewise that [Relators'] OBJECTION thereto is overruled.

(Exhibit 5A at Vol. 1, A93-A94) (emphasis added). No further clarification was given regarding the records to be produced[8] and nothing in this Order suggested Relators should only produce files of patients whose treatment was coded with certain ICD-9 codes or that Relators should first review the files to see if they contained any indication of tobacco use. Id.

[8] In response to this Order Relators filed a Motion for Protective Order, ultimately culminating in the issuance of a Production Order. The Production Order, setting forth the details of and safe guards for the production of individual patient records, was not issued until December 1, 2004. *See infra* pp. 28-33.

January 22, 2004 Order

On January 22, 2004, the parties appeared before Judge David on Defendants' Motion to Enforce the Master's April 3, 2003 Rulings and Recommendations pertaining to Defendants' First Request for Production of Documents. (Exhibit 6 at Vol. 1, A173). Judge David's January 22nd Order required the Hospitals to produce certain documents responsive to Defendants' First Request for Production of Documents and the following:

> Those documents required to be produced in accordance with the Court's December 29, 2003 Order, **namely reasonably specific individualized patient information for each such patient for whose costs of care plaintiffs (except the City of St. Louis at this time) seek to recover.**

(Exhibit 7 at Vol. 2, A181-82) (emphasis added). The January 22nd Order states nothing more about which records were to be produced. Id. It required production within 60 days, or by March 22, 2004. Id.

First Motion for Protective Order

Because of the sheer volume of patient records the December 29, 2003 and January 22, 2004 Orders required Relators to produce, on February 23, 2004, the Hospitals filed a Motion for Protective Order ("First Motion for Protective Order") requesting, among other things, that a statistically meaningful sample of the records, rather than all of the records, be produced. (Exhibit 5B at Vol. 1, A95-A99). Relators advised the court that compliance with the December 29, 2003 and

January 22, 2004 Orders required the production of more than 5 million medical records. (Exhibit 5B at Vol. 1, A95).[9] Relators informed the court that for each patient included in their damage model they had already given Defendants the following:

> [a]n encrypted patient ID number, an encrypted patient name, gender, race, zip code, smoking history (if any had been [electronically] recorded), admission date, discharge date, primary ICD-9 codes, up to ten secondary ICD-9 codes, financial class code, patient type (in-patient, out-patient or Emergency), total charges, payments received, amount of charitable care provided by the

[9] The number of medical files to be produced is greater than 5 million. Upon further examination, the lists were supplemented to include some patients originally overlooked and patients for whom expenses for care were written off after the initial data was collected years earlier. The total number, last calculated at 6.5 million, continues to change as additional bad debt and charity care treatment is written off. The number of files to be produced is double the number of patients on the patient lists (or 13 million total files) because Relators have been ordered to produce both medical and billing files, which are kept separately.

> hospital, any bad-debt written off by the hospital, and any amount of payment recovered.

(Exhibit 5B at Vol. 1, A98). Relators moved that they be allowed to produce unencrypted lists of patient names and file numbers and a statistically significant number of medical files from the patient lists. (Exhibit 5B at Vol. 1, A99). On March 8, 2004, a hearing was held on the Hospitals' First Motion for Protective Order.

First Patient Record Order

On July 23, 2004, the trial court entered an Order on the Hospitals' First Motion for Protective Order. (This Order, hereinafter referred to as the "First Patient Record Order," is attached as Exhibit 5C to Volume 1 of Appendix). The court began its discussion by recognizing that previous Orders "may not have sufficiently clarified or spelled out what was exactly meant by the phrases 'reasonably specific' 'identifying' and 'individualized' patient information" and indicated the First Patient Record Order would address that concern. (Exhibit 5C at Vol. 1, A110).

The First Patient Record Order summarizes Relators' argument as follows:

> [Relators] argue, the Court should enter a protective order which spells out that, in lieu of the previous orders requiring the [Relators] to (1) produce a list identifying all patients for whose costs of care they seek recovery and then (2) permit Defendants access to the hospital records of all such patients, [Relators] will instead now only

> be required to (a) produce a list of all patients 'used in the calculation of [Relators'] first pathway damages' (whatever that means), and then (b) only make available to Defendants 'a statistically significant sample" of those records… .

(Exhibit 5C at Vol. 1, A109). The Court rejected this proposal stating:

> The Court finds again, as it has several times in the past, that Defendants are entitled to have [Relators] provide them with reasonably specific identifying and individualized information for each patient whose costs of care (whether in whole or in part) [Relators] seek to recover from Defendants in this lawsuit.

(Exhibit 5C at Vol. 1, A109). The First Patient Record Order specifically provided the following:

> [A]fter providing Defendants such an identifying list of all patients for whom costs are sought, [Relators] shall, **under a process that is reasonable as to time, place and manner,** produce … the hospital's individual patient medical records **for each such patient whose costs of care [Relators] (except the City of St. Louis at this time) seek to recover in this action**. … Additionally, within the same time frame, [Relators] shall produce all financial records previously ordered by this Court or the Special Master containing patient-specific information.

(Exhibit 5C at Vol. 1, A126) (emphasis added). The Court further stated:

> The Court notes that it would seem to be **incredibly burdensome** and difficult for Defendants to literally copy and inspect two million or so individual patient hospital files -- in some ways, far more burdensome and difficult than it would be for [Relators] to simply 'produce' the records by making them available for inspection and copying as they are kept in the usual course of business. … and the Court is uncertain whether Defendants perhaps might of their own accord be willing to accept a truly random sample of patient records if they were given a truly representative list of such patients … Nevertheless, for the reasons previously stated, all individual patient records of the relevant patient population must be made available, if that is what Defendants continue to request.

(Exhibit 5C at Vol. 1, A124, n. 15) (emphasis added).

The court did not understand Relators' damage model when it issued the First Patient Record Order. The Order states "[t]he Court is uncertain exactly what [Relators] mean by the … phrase, 'the exacerbated medical costs from tobacco use.'" (Exhibit 5C at Vol. 1, A115, n. 10). At another point in the Order, the court acknowledges it does not understand what is meant by Relators' "first pathway damages." (Exhibit 5C at Vol. 1, A109).

At several places in the First Patient Record Order the court makes it clear that the Hospitals were to provide Tobacco with a list of patients "whose costs of care (whether in whole or in part) [Relators] seek to recover from Defendants in

this action." (Exhibit 5C at Vol. 1, A109); *see also* Exhibit 5C at Vol. 1, A123 ("[Relators] must provide Defendants with an essentially complete list identifying **each individual patient** -- and **only** those patients--whose costs of care and treatment (or any part thereof) [Relators] seek to recover in this lawsuit.") (emphasis in original); and Exhibit 5C at Vol. 1, A125 ("[Relators] shall, consistent with the requirements discussed more fully hereinabove, provide to Defendants a reasonably complete unencrypted list identifying each individual patient whose costs of care (or any part thereof) [Relators] seek to recover in this lawsuit.")

In the First Patient Record Order the court acknowledges that its January 22, 2004 Order did not outline the production process for the patient records. (Exhibit 5C at Vol. 1, A124). It recognized, "that **the 'time, place and manner' requirements of production should be realistic**" and that "[Relators] should be granted an as-yet undetermined additional amount of time in which to (a) provide the required identifying list of patient names, and then (b) to 'produce' and disclose … the individual hospital medical and financial records for all such patients on the list." (Exhibit 5C at Vol. 1, A125) (emphasis added).

The First Patient Record Order provided that "within three weeks of the date of this Order" or by August 13, 2004, Relators and Defendants were to each present proposed orders specifying in detail the proposed manner, place, process and timetable for producing: (a) the list of patient names and (b) the individual patient records. The court would then set a date to "hear and consider the parties'

respective views on the matter… .” (Exhibit 5C at Vol. 1, A127).

Production Order

On August 11, 2004, the parties submitted, and the court signed, a Consent Order granting Relators until August 13, 2004 and Tobacco additional time, up to August 20, 2004, to file their proposed orders regarding the details of the production process. (Exhibit 8 at Vol. 2, A183). Both sides filed their proposed orders and on September 10, 2004, a hearing was held to discuss the differences between the two proposals. (*See* September 10, 2004 hearing transcript attached as Exhibit 9 to Volume 2 of Appendix).

At this hearing, Tobacco’s counsel argued they wanted and thought they were entitled to the “records of the patients who are the ones who [Tobacco] supposedly injured by [their] wrongful conduct.” (Exhibit 9 at Vol. 2, A187). Counsel for Relators stated that the 2.7 million patients on the initial Patient Lists provided to Tobacco were those patients “we can identify that we’ve included whose costs, either in whole or in part, form the basis of the damage model.” (Exhibit 9 at Vol. 2, A187). The following exchange occurred at this hearing:

Mr. Brostron (Counsel for Relators): The overinclusive number is 5 million something. We have identified out of that number the patients whose ICD-9 codes are related to tobacco-related illnesses and have limited the list to those people that we are including as costs that were incurred to the hospital, which I think is responsive to the Court.

… [T]he damage model then takes that number and projects costs incurred for other patients who we can't identify, who are long gone. … [W]e're giving them all of the patients who are bad debt charity care for all of the hospitals where … the lists are available for as long as we've got the lists for tobacco-related illnesses. And they're either all of the costs or part of the costs.

For example, if … I come in for lung cancer and I've got a lung cancer ICD-9 code. Then I break my leg and I come back in. I'm going to have an ICD-9 code for lung cancer and I'm going to have one for breaking my leg.

They're going to get … the record for the lung cancer treatment, but we're including the cost for that patient for the lung cancer and there may be an attributable factor for the leg if we can put them together and we're identifying that patient for that, too, because there may [be] a tobacco-related illness cost to the hospital for the treatment of something other than a tobacco-related illness ….

…

The Court: Here's the way I see it. Whatever list plaintiff gives you is the list that --whatever list the plaintiff should be giving you is any list, is the list of people for whom they are seeking recovery. And if the person's on that list, that means that they're seeking recovery. If they're not on the list, they're not.

Now specific questions with respect as to why are you seeking recovery of this or under what theory you're seeking recovery of that, I do think are other issues or involve issues related to other discovery. … (emphasis added).

Mr. Parsigian (Counsel for Tobacco): See, if there are people in his list who came into the hospital with flu, who have never--

The Court: And he's seeking recovery.

Mr. Parsigian: If he is seeking recovery for them, but he's not seeking it in the sense that your order talks abut. **He's seeking it in the sense that he says they're going to do a damage model that's going to take a percentage of everybody's care**, but not in the sense that you're identifying the people who you say we injured. … (emphasis added).

….

Mr. Brostron: Well, I guess I am beating a dead horse. These are the costs, the damages. It's not the costs of the patient. He keeps saying that he wants to make this a claim for all the patients. These are the hospital's damages ….We are calculating the damages in the manner in which we are, we have a list of patients where we incurred costs that we believe they're responsible for and we're providing them … access to all of those medical records that the court ordered us to do.

…

Mr. Brostron: **… And the 2.7 are the bad debt and charity care and we're**

claiming all or part of the costs of those and we've got an expert who will explain how and they already know how because they've already looked at it before. … (emphasis added).

…

The Court: Here. The list plaintiff provides has to comply with the order or else there are potential consequences. … I think let him give them to you and these other issues we're going to have -- I mean I suspect we will never go away form this case no matter what we say here.

Mr. Parsigian: Let me just go back to the order. Because I'm not trying to go beyond the order.

The Court: **All he can do is do what he can do.** … (emphasis added).

…

Mr. Parsigian: … [W]e have to be able to cross-examine those experts with the real facts about the real patients, **not with a subset of the real facts**. But with the real facts about the real patients, about the whole set. (emphasis added).

…

Mr. Brostron: **I'm giving them what I believe is responsive to the Court's order. … all the patients that are in whole or in part are part of our damage calculation we're giving them to them. …** (emphasis added).

Mr. Parsigian: There it is again. The exact same wording that was rejected the last time. The records of the people who are part of our damage calculation.

That's what they offered before and that's what your order said wasn't enough.

The Court: But he's already said that to my direct question whether he was seeking any damages or damages for anything other than the costs of patient care.

Mr. Parsigian: No, but he's seeking it for patients other than the patients whose records he's giving us.

(Exhibit 9 at Vol. 2, A187-92).

No Order setting forth the details of production ("Production Order") was entered until December 1, 2004. (Exhibit 10 at Vol. 2, A215-21). Prior to December 1, 2004, Relators were under no obligation and could not, without risking violation of federal medical record privacy laws (HIPAA), produce any individual patient records. (Exhibit 10, Vol. 2).

The Production Order ultimately provided that retroactive to October 8, 2004, Relators were to produce to Defendants a "reasonably complete unencrypted list identifying each individual patient whose costs of care (or any part thereof) [Relators] seek to recover in this lawsuit."[10] (Exhibit 10 at Vol. 2, A215). No

[10] Relators agreed to the October 8, 2004 date, even though the Order was not signed until December 1, 2004, because by October 8, 2004, they had already given Defendants a copy of their initial patient lists and the Production Order specifically provided for the supplementation of these lists. (Exhibit 10 at Vol. 2,

specific date was given in the Production Order regarding when actual record production was to commence. The Order provided only that Defendants would give ten days notice as to when they would go to a particular location for the purposes of inspecting and copying/scanning documents. (Exhibit 10 at Vol. 2, A219). No notice was given until after December 1, 2004, the date the Production Order was signed.

The Hospitals' Interpretation of and Their Attempts to Comply With the First Patient Record Order

Recognizing the court did not understand their damage model[11] and

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A215).

[11] Under Relators' damage model there is a smoking attributable fraction ("SAF") for all diseases or conditions requiring hospitalization. The SAF is very high for some diseases (90% for lung cancers) and very low for others (appendectomy). For example, lung cancer, an individual lung cancer patient may never have smoked, but because medical science and statistics have shown that approximately 90% of all lung cancers are caused by cigarette smoke Relators seek to recover 90% of the costs of **all** lung cancer patients. Tobacco repeatedly has said they do not want the files of all lung cancer cases. Defendants demand **only** the files of the 90% actually caused by smoking. In the course of arguing the motions leading up to the Orders that are the subject of this Writ, Relators told the court they cannot individually segregate patients whose illnesses can be shown to be actually

believing the court did not understand they were seeking to recover a statistical portion of the costs of all bad debt and charity care patients, the Hospitals interpreted the First Patient Record Order to require them to provide Tobacco with a list identifying each individual patient "whose costs of care (**or any part thereof**)" the Hospitals sought to recover in the lawsuit.[12] (Exhibit 5C at Vol. 1, A125) (emphasis added). Acting in accordance with their understanding of the First Patient Record Order and damage model, the Hospitals provided Tobacco with lists of the patients, whose costs of care they sought to recover, for those years they could gather electronic claims data ("Patient Lists").[13] With relatively

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caused or worsened by tobacco use and that it is not feasible for them to identify the specific cases where the patients' lung cancer was caused by smoking. The court was informed that the Hospitals do not intend to prove such causation on a case by case basis but will rely upon statistics to prove the cost of care caused by tobacco use. (Exhibit 16 at Vol. 4, A576-77).

[12] These lists, as most recently supplemented, contain some 6.5 million names. This number continues to grow as charity care and bad debt treatment is written off. The Patient Lists, with some exceptions, also provide the patient's admission and discharge dates, the patient's birth date and the patient's identification number.

[13] A handful of Hospitals included on their Patient Lists some charity care and bad debt patients they determined through manual review of records.

few exceptions and for relatively few years within those exceptions, the specific patients and/or records identified by Relators in these Patient Lists do not begin until the early or mid 1990s. Relators included all bad debt and charity care patients on these Patient Lists because Relators seek to recover a statistical portion of the costs incurred in treating all bad debt and charity care patients. Again, Relators produced these broad lists because the First Patient Record Order required Relators to provide a list of all patients whose cost of care (or some part thereof) they seek to recover. (Exhibit 5C at Vol. 1, A109, A123 and A125).

Shortly after the Production Order was signed certain Hospitals began producing the medical and financial records of their listed patients. (Exhibit 5 at Vol. 1, A138-43). Tobacco was given access to tens of thousands of individual patient medical and patient accounting records. (Exhibit 16 at Vol. 4, A586). Defendants reviewed and scanned medical records and downloaded patient accounting records. (Exhibit 5 at Vol. 1, A138-43, A171-72). While attempting to comply with the First Patient Record Order and after producing tens of thousands of patient medical and financial records, it became apparent that production required under the First Patient Record Order was, for all practicable purposes, impossible for most Hospitals. (Exhibit 5 at Vol. 1, A59-A60).

It was equally apparent that production was too much for Tobacco. (Exhibit 5G at Vol. 1, A138-39). Saint Louis University Hospital (SLU Hospital) began producing patient medical records on December 15, 2004, only 2 weeks after the Production Order was entered. (Exhibit 5G at Vol. 1, A138). Until

January 31, 2005, charts were pulled at a rate of approximately 200 charts a day, five days a week. (Exhibit 5G at Vol. 1, A138). Defendants set up copying/scanning equipment at the production site on or about January 10, 2005. (Exhibit 5G at Vol. 1, A139). On January 26, 2005, after expressing concern on several occasions about how long it was taking to copy the reviewed documents, counsel for Relators advised Defendants that additional files would not be pulled until the copying backlog was rectified. (Exhibit 5I at Vol. 1, A144). Counsel for Defendants agreed to the production suspension indicating they wanted time to reflect on the documents they reviewed and determine how to proceed. (Exhibit 5J at Vol. 1, A146). On January 31, 2005, after 3 weeks of copying/scanning, only 200 of the 4,800 produced files had been scanned/copied. (Exhibits 5G, 5H and 5I at Vol. 1, A138-40, A141-43 and A144-45). The backlog of patient medical charts waiting to be copied by Defendants disrupted the operation of SLU Hospital's medical records department and negatively impacted the Hospital's ability to have patient medical charts, needed for patient care, retrieved on a timely basis. (Exhibit 5G at Vol. 1, A139). The disruption caused by such discovery and the threat such disruption posed to patients' medical care was significant. Id.

Second Motion for Protective Order

Having attempted to comply with the First Patient Record Order and finding it simply didn't work; Relators filed another Motion for Protective Order ("Second Motion for Protective Order"). (Exhibit 5 at Vol. 1, A59-A172). The Second Motion for Protective Order was filed on March 30, 2005, four months

after the Production Order was entered. In this Motion, the Hospitals informed the court of details and difficulties learned during the preceding four months of actual record production. (Exhibit 5, Vol. 1). It advised the court that compliance with the First Patient Record Order required production of over 6.5 million patient medical charts and over 6.5 million patient billing files.[14] (Exhibit 5 at Vol. 1, A60). More importantly, the Hospitals advised the court that production of over 13 million patient files was not "realistic" in that it could not be completed in a reasonable period of time or in a reasonable manner, as contemplated by the court when the First Patient Record Order was issued and that the case would be eternally delayed if relief was not granted. (Exhibit 5 at Vol. 1, A59-A60). The Hospitals attached affidavits to their Second Motion for Protective Order illustrating the practical impossibility of the task as ordered. (Exhibits 5D, 5G, 5H, and 5K-5R at Vol. 1, A128-29, A138-40, A141-43 and A148-65). The Motion and supporting affidavits revealed that in many cases it would take years to produce the files and in some cases **decades.**[15] The magnitude of the

[14] With few exceptions, these 13 million records span the time frame from the early to mid 1990s through 2003 or 2004.

[15] For example, Relators advised the trial court that St. John's Mercy Medical Center ("St. John's"), had to produce 610,644 patient medical charts and the same number of patient account files (totaling over 1.2 million individual patient files); and that except for the most recent, these charts are stored at a warehouse in Earth

City, Missouri. (Exhibits 5 and 5D at Vol. 1, A71 and A128). Relators provided the trial court with photographs of this warehouse and a CD showing an employee pulling two patient files. (Exhibit 5E at Vol. 1, A130-36). Relators advised the court that over 87,000 boxes (136,323 cubic feet) of documents are stored in this warehouse; that approximately 498,644 hard-copy medical charts to be produced by St. John's are stored in these boxes; that these boxes are stored on shelving units that are eight shelves high; that the top shelf is approximately 23 feet off the ground; that full size banker boxes are piled three high and three deep on the shelves; that to find a particular chart, a person must determine what box the chart is stored in and where that box is located in the warehouse; that a lift must be moved to the box location so that a trained employee can be raised to the appropriate shelf to look for and find the box, and then look in the box for the indicated chart; that because of the height involved, individuals retrieving charts must be attached to a harness in order to avoid injury; and that the number of lifts available for such a project is limited for safety reasons. (Exhibits 5 and 5D at Vol. 1, A71-A72 and A128-29). The court was advised that St. John's had conducted a time study to determine approximately how many paper charts can be pulled in one hour and determined it would take 61 years for one person to pull and replace all 498,644 hard-copy charts designated to be produced. (Exhibits 5 and 5D at Vol. 1, A72 and A129).

production ordered by the trial court was not known at the time the First Motion for Protective Order was filed.

Relators' Second Motion for Protective Order repeated their request that the Hospitals be permitted to produce a statistically significant number of patient files, arguing Defendants did not need to review each and every file to have a fair opportunity to defend the claims brought against them in this lawsuit. (Exhibit 5 at Vol. 1, A61 and A69). They explained that William D. Shannon, Ph.D., a tenured Associate Professor of Biostatistics in Medicine at Washington University School of Medicine in St. Louis, determined that sampling 5,000 medical/hospital charts from each Hospital is a huge sample in any type study and in essence will look indistinguishable from all the charts for a given Hospital in almost all relevant areas. (Exhibit 5 at Vol. 1, A69 and A84-A85). Relators argued that Defendants review of a sample of records would accomplish the same result as a review of the whole. (Exhibit 5 at Vol. 1, A69). Relators advised the trial court that "[w]ithout an order providing for a statistical sample of records, [they would] be denied their day in Court." (Exhibit 5 at Vol. 1, A59-A60).

On June 27, 2005, the trial court entered its Order denying the Hospitals' Second Motion for Protective Order. (Exhibit 1 at Vol. 1, A1-A3). It seems this Order may have been granted on the mistaken belief that a Statute of Limitations Order entered on the same day (June 27, 2005), substantially reduced the Hospitals' burden. The Order denying the Hospitals' Second Motion for Protective Order states that "[t]he Court believes that the scope of discovery in this

case has been significantly changed in light of the ruling on the limitations issue." (Exhibit 1 at Vol. 1, A2-A3). The June 27, 2005 Statute of Limitations Order ("Statute of Limitations Order") bars claims accruing prior to November 16, 1993. A copy of the Statute of Limitations Order is attached as Exhibit 11 to Volume 2 of Appendix. While the Statute of Limitations Order eliminates almost 40 years of damages for many hospitals, it **does not** eliminate the need to review and produce very many of the identified patient records. With relatively few exceptions and for relatively few years within those exceptions, the specific patients and/or records identified by Relators in the Patient Lists do not start until the early or mid 1990s. Consequently, the Statute of Limitations Order did not significantly reduce the burden of producing patient records for any Hospital.[16]

Tobacco's Motion for Sanctions

On April 7, 2005, little more than one week after Relators filed their Second Motion for Protective Order; Defendants filed their Motion for Sanctions alleging the Hospitals violated the First Patient Record Order. (Exhibit 13, Vol.

[16] The Hospitals filed a Motion to Reconsider the Motion for Protective Order explaining why the Statute of Limitations Order does not substantially lessen the production burden under the First Patient Record Order. (Exhibit 12 at Vol. 2, A232-38). This Motion was never specifically ruled on, but appears moot in light of the language of the Second Patient Record Order.

2). They argued, among other things, that the Patient Lists provided by the Hospitals were over-inclusive because all charity care and bad debt patients were included. Tobacco sought sanctions for Relators' failure to limit the patient records they produced to only those patients suffering from tobacco-related diseases. The Hospitals responded that their lists were not over-inclusive because they were ordered to produce a list "identifying each individual patient whose costs of care (or any part thereof) [Relators] seek to recover in this lawsuit" and that they are seeking to recover a statistical portion of the costs of **all** charity care and bad debt patients. (Exhibit 16 at Vol. 4, A576) (*See* footnote 11, *supra*). Relators explained that they seek reimbursement not merely for smokers suffering from smoking-related diseases, but also a portion of the costs Relators incurred in treating all charity and bad debt patients that is attributable, either in whole or in part, to tobacco use. (Exhibit 16 at Vol. 4, A577-80).

On May 23, 2005, the Special Master issued Findings, Rulings and Recommendations on Tobacco's Motion for Sanctions. (Exhibit 14 at Vol. 4, A561-63). The Special Master found the Hospitals' Patient Lists were "over-inclusive, under-inclusive, and fail to provide reasonably specific identifying information, all in violation of this Court's prior orders." (Exhibit 14 at Vol. 4, A562). He recommended that the Hospitals provide Tobacco a "corrected patient list consisting only of patients selected from the existing patient list **whose costs of care were caused or worsened by tobacco use**" and "further produce medical

and financial records for the patients whose names are on the corrected patient list." (Exhibit 14 at Vol. 4, A563).

This finding transformed Relators' task from producing patient lists (and corresponding files) consisting of "patients whose costs of care (whether in whole or in part) [Relators] seek to recover from Defendants in this lawsuit" (Exhibit 5C, Vol.1 - First Patient Record Order) **to** producing lists and files for patients "**whose costs of care were caused or worsened by tobacco use.**" (Exhibit 14, Vol. 4). On its face, this language seemed to require Relators to individually determine on a case by case basis whether someone's illness was caused by tobacco use; e.g. it seemed to require individual determinations as to whether a patient's heart attack was caused by smoking.

Relators, recognizing that proof of individual medical causation for millions of patients was impossible, objected to the Special Master's Recommendation, arguing they had produced the names and began producing records of patients whose cost of care they seek to recover and thus did not violate the First Patient Record Order. (Exhibit 16 at Vol. 4, A576). Relators further argued that the Patient Lists provided to Tobacco were not over-inclusive because the Hospitals' damages are measured by using a statistically calculated portion of the costs the Hospitals incurred in treating **all** bad debt and charity care patients. (Exhibit 16 at Vol. 4, A576). Relators urged the trial court to deny the Special Master's Findings and Recommendations because 1) they were overly burdensome, to the point of being impossible to comply with in any realistic time

frame; and 2) the Hospitals could not determine on a case by case basis which patients had illnesses "caused or worsened by tobacco use." (Exhibit 17 at Vol. 5, A758).

There was discussion at the hearings and in the briefs regarding the production of only the files of patients treated for diseases identified by certain medical diagnosis or "ICD-9" codes that are considered directly related to smoking. (Exhibit 17 at Vol. 5, A761-65). Relators noted that, while limiting record production to only those files coded for certain diseases directly associated with smoking reduces the burden for many Hospitals, it would still be too burdensome for some.[17] For example, Relators noted it would take St. John's

[17] Based on Patient Lists provided to date and using the smoking related ICD-9 codes used by Relators' experts, Truman Medical Center would still have to produce over 160,000 patient medical records; St John's Mercy Medical Center would have to produce over 55,000 patient medical records; St. John's Regional Health Center over 55,000; St. Luke's Hospital of Kansas City over 33,000; St. John's Regional Medial Center over 30,000; Heartland Regional Medical Center over 24,000; St. Anthony's Medical Center over 23,000; DePaul Health Center over 22,000; St. John's Mercy Hospital approximately 20,000; and St. Joseph Health Center approximately 20,000. These numbers do not include the records of bad debt and charity care patients treated up to the time of trial. In addition, these numbers must be doubled because patient account files must also be produced for

Mercy Medical Center over 850 man days (2 + years) just to pull, much less copy,[18] every patient record from November 1993 through the date provided on its patient list for patient admissions with one of the identified ICD-9 codes. (Exhibit 17 at Vol. 5, A764).

The time projected for St. John's to pull its patient medical records did not include locating, pulling and producing the financial records. Production will take much longer than solely the time needed to pull the medical records.

Just as importantly, the Hospitals advised the court that limiting production to only certain identified ICD-9 codes did not satisfy the broad Special Master's Findings and Recommendations because such a list would not identify all patients whose "cost of care was caused or worsened by tobacco use." (Exhibit 17 at Vol. 5, A764-65). For example, such a list would include all lung cancer patients, not just the 90% caused by smoking. In addition, such a list would not capture costs

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each patient. (Exhibit 17 at Vol. 5, A764, n. 11).

[18] It will take far longer to comply with the court's current order. Under the current Order, once the files are pulled they need to be reviewed by the Hospital for smoking history, produced and then copied by Tobacco; and as demonstrated by the earlier failed SLU Hospital production, copying can be the longest part of the process.

caused by tobacco use, if such costs were incurred in treating diseases or conditions not recognized as being directly caused by smoking. Similarly, it would not capture increased costs incurred when Hospitals perform surgery on a smoker as opposed to a non-smoker or increased costs resulting from complications routinely experienced by smokers.

Second Patient Record Order

On September 27, 2005, Respondent entered an Order affirming the Special Master's Findings and Recommendations of May 23, 2005 (hereinafter referred to as "Second Patient Record Order" and attached as Exhibit 2 to Volume 1 of Appendix). The trial court, using the strongest language, firmly asserts the Hospitals' interpretation of the First Patient Record Order was completely wrong and that the Patient Lists required pursuant to the First Patient Record Order were limited only to those patients whose medical problems were "directly caused or worsened by tobacco use." (Exhibit 2 at Vol. 1, A9-A10). Nevertheless, the trial court indirectly acknowledges the ambiguity of its previous Order by defining the term "caused or worsened by tobacco use" to mean the following:

> all uncompensated care patients receiving treatment within the applicable statutory limitations period who, as indicated by their hospital records, **both** (a) had some history of smoking, **and** (b) had one or more of the twenty-three ICD-9 code diagnoses that are medically recognized by the Centers for Disease Control as sometimes being directly caused by or closely related to smoking.

(Exhibit 2 at Vol. 1, A11) (emphasis in original).

The court chastises Relators on their efforts to comply with the First Patient Record Order yet proceeds to **substantially clarify** a "clear" Order by explaining, in terms never previously used, what Relators are required to produce. (Exhibit 2 at Vol. 1, A11).

The court's clarification that it's First Patient Record Order applied only to patients whose illnesses were "caused or worsened by tobacco use" and its definition of that term in its Second Patient Record Order does reduce the total number of patient medical charts at issue**.** However, for many (if not most) Hospitals it will be far more burdensome than the First Patient Record Order because it requires Relator Hospitals not only to produce a still very large number of patient medical and billing files, but it also requires Relators to first manually review patient medical charts to determine whether there is any indication anywhere in the chart that the patient ever smoked. (Exhibit 2 at Vol. 1, A11). Compliance with the Second Patient Record Order is virtually impossible for most Hospitals.

The Hospitals do not, in the normal course of business, maintain patient smoking status in any computer or electronically searchable form.[19] Relators

[19] In recent years, some Hospitals have coded for tobacco use/abuse if such use/abuse is noted in the medical chart. The code is not uniformly, routinely or consistently used by the Hospitals. If the code was used and recorded as the

cannot run electronic searches to determine, with any degree of certainty, which patients reported they smoked. Rather, each chart (excluding the small percentage coded for tobacco use) must be manually reviewed to determine if there is mention anywhere in the numerous pages of a patient's medical record of the patient's smoking history.[20]

On October 20, 2005, Relators filed a Petition for Writ of Mandamus and/or Prohibition with the Missouri Court of Appeals, Eastern District. Respondent was ordered to file his Suggestions in Opposition and did so on October 31, 2005. On November 3, 2005, the Court of Appeals, without opinion, denied Relators' Petition.

On November 9, 2005, Relators filed a Petition for Writ of Mandamus and/or Prohibition with this Court. A Preliminary Writ of Prohibition was issued on November 21, 2005.

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primary or one of the top ten secondary ICD-9 codes, then that data (to the extent it was available and given to Relators' expert) was provided to Tobacco.

[20] Even if the charts can be reviewed for smoking status, this is not a reliable indicator of a patient's smoking history. A patient might not be asked about smoking. A patient who smoked for years but quit before being treated by Relators, may report he is not a smoker. Others, due to the stigma attached to smoking, may deny they smoke even if they are currently a smoker.

Relators ask this Court to make the Preliminary Writ permanent and provide relief from the Second Patient Record Order and Respondent's Order denying the Hospitals' Motion for Protective Order.

POINTS RELIED ON

I. Relators Are Entitled to an Order Prohibiting Respondent from Requiring Relators to Produce Any Additional Patient Medical or Financial Records Because Respondent Abused His Discretion by Ordering Such Crippling Discovery When There Was No Need or No Sufficient Need For Such Discovery, in that (A) a Trial Court's Discovery Orders Should Balance the Needs of the Interrogator in Seeking the Information, With the Burden on the Responding Party in Providing Such Information. In this Case, the Burden on Relators in Complying with Respondent's Orders Far Outweigh Any Need Tobacco Has for the Discovery; (B) Other Than Eternal Delay, Tobacco Will Gain Little or Nothing, that Relators Do Not Readily Concede, by Reviewing Individual Patient Medical and Financial Records, because Relators Do Not Intend to Prove Any Particular Patient Ever Smoked or Ever Suffered Illness as a Result of Tobacco Use; (C) This Information is Cumulative because Tobacco Has Already Received More than Sufficient Information With Which to Defend These Claims and Protect Itself From Any Potential Risk of Double Recovery.

State ex rel. Anheuser v. Nolan, 692 S.W.2d 325 (Mo. Ct. App. E.D. 1985)

Misischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848 (Mo. Ct. App. E.D. 2000)

State ex rel. Lichtor v. Clark, 845 S.W.2d 55 (Mo. Ct. App. W.D. 1992)

Kyriazi v. Western Electric Co., 74 F.R.D. 468 (D.N.J. 1997)

II. Alternatively, If This Court Believes Defendants Have a Legitimate Need for Additional Patient Records, then Relators Are Entitled to an Order Prohibiting Respondent from Requiring Relators to Produce Anything More than a Statistically Significant Random Sample of Patient Medical and Financial Records Because Respondent Abused His Discretion by Ordering Such Crippling Discovery When a Reasonable Alternative, That Would Satisfy All Legitimate Needs of Defendants, Is Available.

State ex rel. Anheuser v. Nolan, 692 S.W.2d 325 (Mo. Ct. App. E.D. 1985)

Elam v. Alcolac, Inc., 765 S.W.2d 42 (Mo. Ct. App. W.D. 1988)

Rosado v. Wyman, 322 F.Supp. 1173 (E.D.N.Y. 1970)

MANUAL FOR COMPLEX LITIGATION (Third), §§21.422, 33.27 (1995)

ARGUMENT

Summary of Argument

This Court should issue a permanent writ of prohibition barring further production of patient records or alternatively require only the production of a statistically significant random sample of files.

After years of discovery, during which Relators produced nearly five million pages of documents, answered over fifteen thousand interrogatories, responded to more than eleven thousand Requests for Admissions and approximately eight thousand Requests to Produce, and produced tens of thousands of patient files, the court entered two discovery orders requiring Relators to now review hundreds of thousands of patient medical records for any indication of smoking history and to then produce all medical charts and corresponding financial records for every patient where smoking history is found. These Orders are so burdensome as to render it impossible[21] for many Relators to proceed and will effectively end this lawsuit unless relief is given now.

[21] It is impossible for many Hospitals to comply with the September 27, 2005 Order within any reasonable time frame. As used herein, the term "impossible" means there is no practical way the task can be accomplished within any reasonable time frame; not that the task (regardless of the number of years and amount of resources devoted to the task) could never be accomplished.

Relators brought this suit as a result of a public health disaster, an epidemic.[22] Relators will show the harm caused by Tobacco to the Hospitals, not the patients, using epidemiology. Tobacco acknowledges that Relators are not proving their case through individual patients. Nevertheless, they seek to convert this suit, as they have at every step along the way, into a collection of individual cases in order to bog down this case in eternal discovery and hide proximate

[22] Missouri has the third highest adult smoking rate in the nation. *See* Missouri Partnership on Smoking or Health at www.smokingorhealth.org/smokefree/facts/adults (last visited December 29, 2005). Every month, an estimated 1,500 youth become regular, daily smokers in Missouri. *See* Homan, S.G (2002), Clearing the Air: The Burden of Tobacco Use in Missouri: Missouri Department of Health and Senior Services, Division of Chronic Disease Prevention and Health Promotion at www.dhss.state.mo.us/SmokingAndTobacco/Clearing_The_Air.pdf (last visited January 3, 2006). Each year over 10,000 Missourians die from tobacco use, more than from car crashes, AIDS, illegal drugs, suicides, fires and homicides combined. This translates into 28 people each day or about one Missourian each hour, dying from tobacco use. Id. In 1998, medical costs in Missouri related to smoking were estimated at $1.66 billion. Id.

causation of injury to Hospitals in the vagaries of individual cases. Tobacco created this unnecessary burden, not Relators.

It is unreasonable for Defendants to ask Relators to individually identify those patients, and only those patients, whose conditions were "caused or worsened by tobacco use." Relators do not intend to prove their case on a patient by patient basis. The Hospitals use a statistical model because it is more reliable and because it would be impossible, in any of our lifetimes, to determine medical causation for each patient, who Relator Hospitals treated, on a patient by patient basis. While Defendants will undoubtedly argue otherwise, the trial court never ruled Relators must prove causation on an individual by individual basis. In fact the Second Patient Record Order appears to recognize that Relators cannot make such determinations on an individual basis.

The court's definition of "caused or worsened by tobacco use" may be its attempt to craft a solution to this untenable dilemma. Unfortunately, patients meeting the court's criteria are not representative of the patients for whom Relators are seeking to recover some portion of their costs of care. The court's list would omit a) patients harmed by secondhand smoke; b) patients receiving treatment for conditions or diseases not caused by tobacco use, but who suffer medical complications as a direct result of smoking; and c) patients treated for diseases exacerbated by smoking but not directly caused by smoking. In addition, such a list would include some patients whose medical conditions were not

"caused or worsened by tobacco use," i.e. the 10% of the lung cancer patient population who contracted the disease for reasons other than smoking.

The patient records, i.e. the minute details, for only those patients who meet the court's limiting criteria are not probative of issues in this suit because what Tobacco could learn from such detail will neither test nor disprove Relators' claims. Relators seek to recover a statistical portion of the costs of treating all charity care and bad debt patients, not the costs of some limited subset of this group. Details about this limited patient subset are not probative of Relators' claims. Production of such detail, if Relators could produce the records, would totally waste Relators' time and resources. Since most Hospitals cannot produce the records they were ordered to turn over, the Second Patient Record Order (unless amended) will allow Defendants to once again avoid any responsibility for the harm caused by smoking. This Court can help the Hospitals to finally call Defendants to account for the harm they have caused.

In the ordinary course of business, Relators do not maintain patient records by smoking history. Most patient medical records are still paper records. Few Hospitals can press a button or run a query on their computers to determine, with any degree of certainty, which patient ever reported smoking.[23] Compliance with

[23] Smoking status of the patients is not likely captured electronically. In his deposition, Mr. Tim Herberts testified that "the one [data] field that most hospitals were not able to fill out was the smoking—smoking field." (Exhibit 13S at Vol. 4,

the court's discovery Orders means most Hospitals must manually review most individual medical records (meeting the court's other criteria)[24] for any reference to smoking. The Orders also require the Hospitals to produce both the corresponding medical and financial records of each patient whose chart indicates any history of tobacco use. This is not simply an incredibly burdensome discovery chore; for many hospitals it is so onerous as to be impossible. There is no adequate future remedy by way of appeal because, unless relief is given now, this matter is not likely to survive past this point to be heard on the merits. Discovery should not impose a burden so great that it prevents a party from seeking judicial recourse or eliminates the fundamental right to a trial by jury. That is precisely what these Orders threaten.

A533). Two ICD-9 codes related to tobacco use (305.1 and V15.82) are available and sometimes used by medical record coding personnel. These codes are not consistently, regularly or uniformly used and those records coded with these ICD-9 codes represent a small percentage of the files.

[24] Relators will have to review records where the patient's care was provided by the Hospital on or after November 16, 1993; and the patient's bill was written off as charity care or bad debt; and the patient's diagnosis included one or more of the ICD-9 codes recognized by the CDC as sometimes being directly caused by or closely related to smoking. (Exhibit 2 at Vol. 1, A11).

Tobacco has everything regarding individual patients needed to defend this case. Relators, to the extent available, have provided Tobacco with the following information on each identifiable patient whose cost of care, or some part thereof, Relators seek to recover in this action: Name, Admission and Discharge Dates, Birth Date, Identification Number, Gender, Race, Zip Code of Patient, smoking history (if any had been electronically recorded), Primary ICD-9 Code, Secondary ICD-9 Codes, DRG, Financial Class Code, Patient Type (Inpatient, Outpatient, Emergency), Total Charges, Payments Received, Bad Debt Write-Off, Charity Write-Off, and Recoveries. Additional detailed information contained in individual records is cumulative of what has already been provided and of what Relators readily concede.

Production of the foregoing data, patient lists and thousands of patient records was Relators' attempt to comply with the trial court's previous discovery Orders. Relators made a vast amount of data and a substantial number of patient medical and financial records available. This is more than sufficient for any reasonable defense need. If this information is not sufficient, which Relators deny, then Tobacco can get everything they may need from a statistical sample of patient files.

Defendants' assertions (in earlier briefs and in their affirmative defenses to Relators' Petition for Writ) that Relators somehow waived or lost their right to challenge the court's action either because of alleged wrongdoing or the passage of time is another instance of Defendants' unabated effort to deflect the attention

of the Court from the central issue in this case. Tobacco wants to argue Relators' alleged non-compliance with seven orders rather than whether Defendants legitimately need to review any additional patient files or whether a statistically significant sampling meets all defense needs while relieving the Hospitals of a crippling burden.

Their claim that Relators have for two years defied the court's Orders is not only a diversionary tactic, it is a false diversionary tactic. Their argument ignores facts, the clear progression of the language contained in the Orders and the language of the Orders themselves.

In the First Patient Record Order the court held that "[Relators] should be granted an as-yet undetermined additional amount of time" in which to produce the lists and patient records. (Exhibit 5C at Vol. 1, A125). It required the parties each to prepare and file proposed orders "specifying in detail the proposed manner, place, process and timetable" for producing the lists and records and required a hearing to address differences between the proposals. (Exhibit 5C at Vol. 1, A127). The Production Order, setting forth details of production, was entered on December 1, 2004, a little over one year ago. (Exhibit 10 at Vol. 2, A215-21). Plainly, Relators were under no final court order and could not have started production until after the issuance of the Production Order, thus Defendants' assertion that Relators have been defying court Orders for two years is a blatant misrepresentation.

Relators did not ignore the First Patient Record Order or the Production Order. Relators provided initial patient lists before December 1, 2004 and began producing patient records almost immediately thereafter. Hospitals tried to comply, but soon realized the Orders called for the impossible. On March 30, 2005, only four months after the Production Order was entered, Relators filed their Second Motion for Protective Order. Defendants' Motion for Sanctions was filed a week later. The intertwined issues raised in these two closely related motions were not resolved until September 27, 2005 when the Second Patient Record Order was issued.

In that Order, the court found that Relators' interpretation of the First Patient Record Order was incorrect and that when read in context, it clearly required Relators to produce the names and files of only those patients "whose medical problems were caused or worsened by tobacco." (Exhibit 2 at Vol. 1, A9). Relators respectfully disagree. The First Patient Record Order was not clear, particularly in light of comments made at the hearing on the Production Order.

Relators, never intending to misinterpret the First Patient Record Order, identified all charity care and bad debt patients because they are seeking to recover a statistical portion of the costs of all such patients. Giving the First Patient Record Order the interpretation the court says should have been given would have required Relators to identify which of millions of patients' medical problems were

actually caused or worsened by tobacco use.[25] Proof of medical causation for millions of patients is unrealistic and could not be accomplished in any of our lifetimes. The court, at the Hearing on September 10, 2004, acknowledged Relators could only do what they could do. (Exhibit 9 at Vol. 2, A190).

Despite the massive discovery already completed and the existence of a reasonable alternate method of discovery that protects all legitimate interests of Defendants, *i.e.* statistical sampling, Respondent entered "unrealistic" discovery Orders requiring Relator Hospitals to review hundreds of thousands of patient medical records, involving millions of pages, to ascertain if anything, anywhere in each and every one of those records indicates whether a patient ever smoked. Respondent abused his discretion by requiring crippling discovery where no compelling need for such discovery exists and where, if such a need exists, an alternate method, that meets all legitimate needs of Defendants, was available.

[25] At the time Relators produced patient lists and files they did not know that "caused or worsened by tobacco use" should be interpreted to mean those patients whose medical files both 1) were coded with certain ICD-9 codes that the CDC recognizes as sometimes caused by tobacco use; and 2) contained some history of tobacco use. This definition (which is not consistent with Relators' claims and does not result in a list of patients for whom Relators are seeking to recover costs) was not given until the Second Patient Record Order.

This Court is empowered to relieve Relators of this insupportable burden and in law and equity should act accordingly.

I. Relators Are Entitled to an Order Prohibiting Respondent from Requiring Relators to Produce Any Additional Patient Medical or Financial Records Because Respondent Abused His Discretion by Ordering Such Crippling Discovery When There Was No Need or No Sufficient Need For Such Discovery, in that: (A) a Trial Court's discovery Orders Should Balance the Needs of the Interrogator in Seeking the Information, With the Burden on the Responding Party in Providing Such Information. In this Case, the Burden on Relators in Complying with Respondent's Orders Far Outweigh Any Need Tobacco Has for the Discovery; (B) Other Than Eternal Delay, Tobacco Will Gain Little or Nothing, that Relators Do Not Readily Concede, by Reviewing Individual Patient Medical and Financial Records, because Relators Do Not Intend To Prove Any Particular Patient Ever Smoked or Ever Suffered Illness as a Result of Tobacco Use; (C) This Information is Cumulative because Tobacco Has Already Received More than Sufficient Information

With Which to Defend These Claims and Protect Itself From Any Potential Risk of Double Recovery.

Standard of Review

A writ of prohibition is an extraordinary remedy to be applied when: (1) it is necessary to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) there is a need to remedy an excess of jurisdiction or an abuse of discretion when the trial court lacks the power to act as intended; or (3) a party may suffer irreparable harm if relief is not made available in response to the trial court's order. State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. 2003) (en banc); State ex rel. MacDonald v. Franklin, 149 S.W.3d 595, 597 (Mo. Ct. App. S.D. 2004).

While the trial court is entitled to broad discretion in its management of discovery, MacDonald, 149 S.W.3d at 597 (*citing* State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 59 (Mo. Ct. App. W.D. 1992)), a writ of prohibition is appropriate when the trial court abuses its discretion during discovery. State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. 2002) (en banc). *See also* State ex rel. White v. Gray, 141 S.W.3d 460, 463 (Mo. Ct. App. W.D. 2004) (quoting State ex rel. Atchison, Topeka & Santa Fe R.R. v. O'Malley, 888 S.W.2d 760, 761 (Mo. Ct. App. W.D. 1994)) ("A writ of prohibition [or] mandamus is the proper remedy for curing discovery rulings that exceed a court's jurisdiction or constitute an abuse of the court's discretion"); State ex rel. Williams v. Lohmar, 162 S.W.3d

131, 133 (Mo. Ct. App. E.D. 2005); and State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 327 (Mo. Ct. App. E.D. 1985).

A judge abuses his discretion when his ruling is "clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." MacDonald, 149 S.W.3d at 597 (quoting Lichtor, 845 S.W.2d at 59). An abuse of discretion occurs if the trial court "imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or society at large." Klay v. Humana, Inc., 382 F.3d 1241, 1251 (11th Cir. 2004).

A writ of prohibition also will issue "when an 'absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order.'" Ferrellgas, L.P. v. Williamson, 24 S.W.3d 171, 175 (Mo. Ct. App. W.D. 2000), *citing* State ex rel. Richardson v. Randall, 660 S.W.2d 699, 701 (Mo. 1983) (en banc).

Respondent's patient record discovery Orders demonstrate an abuse of discretion because they are onerous, unbalanced, and unnecessarily cause irreparable and devastating harm to Relators.

A. A Trial Court's Discovery Orders Should Balance the Needs of the Interrogator in Seeking the Information, With the Burden on the Responding Party in Providing Such Information. In this

Case, the Burden on Relators in Complying with Respondent's Orders Far Outweigh Any Need Tobacco Has for the Discovery.

Rule 56.01(b) of the Missouri Rules of Civil Procedure provides in part that "[u]nless otherwise limited by order of the Court … [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action … It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Mo. R. Civ. P. 56.01(b). This Rule is not without limitation. Rule 56.01(c) states that the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense… ." Mo. R. Civ. P. 56.01(c).

Missouri courts long ago determined that "trial judges must consider not only questions of privilege, work product, relevance and tendency to lead to the discovery of admissible evidence, but they should also balance the need of the interrogator to obtain information against the respondent's burden in furnishing it." State ex rel. Blue Cross and Blue Shield v. Anderson, 897 S.W.2d 167, 169 (Mo. Ct. App. S.D. 1995). *See also* State ex rel. Coffman Group, L.L.C. v. Sweeney, --- S.W.3d ----, 2005 WL 2786661 (Mo. Ct. App. S.D. 2005) (The boundaries of discovery are to be determined by balancing the conflicting interests of the interrogator and the respondent).

The articulated purpose of pretrial discovery is to aid in the ascertainment

of the truth, eliminate surprise, narrow issues, facilitate trial preparation, and obtain relevant information. State ex rel. Kawasaki Motors Corp. U.S.A. v. Ryan, 777 S.W.2d 247, 251 (Mo. Ct. App. E.D. 1989). Achievement of these purposes is the fulcrum upon which the need for discovery is to be balanced against the burden and intrusiveness involved in furnishing the information. Nolan, 692 S.W.2d at 328.

Determining the "appropriate scope of discovery involves 'the pragmatic task of weighing the conflicting interests of interrogator and the respondent.'" Edwards v. Missouri State Bd. of Chiropractic Examiners, 85 S.W.3d 10, 22 (Mo. Ct. App. W.D. 2002) (*citing* State ex rel. LaBarge v. Clifford, 979 S.W.2d 206 (Mo. Ct. App. E.D. 1998)). Missouri courts have recognized:

> [E]ven though the information sought is properly discoverable, upon objection the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome or less expensive than that designated by the requesting party.

Nolan, 692 S.W.2d at 328.[26]

[26] Rule 56.01(b)(1) of the Missouri Rules of Civil Procedure states "The party seeking discovery shall bear the burden of establishing relevance." Given the breadth and depth of the discovery demanded, Defendants must come forward to show the relevance of reviewing each individual patient file when the court has already held this is not an individual patient case.

Rules never anticipate all circumstances that may require limitations on discovery or the kinds of limitations that may be needed. Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2036. A court may be as inventive as the necessities of a particular case require to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." Id. These principles are especially compelling in complex litigation, where some discovery necessarily must be foregone or structured if massive cases are to be expeditiously resolved. In re Simon II Litig., 211 F.R.D. 86, 148 (E.D.N.Y. 2002) (rev'd on other grounds).

Missouri courts have long cautioned that "[s]ubversion of pre-trial discovery into a 'war of paper,' whether to force an adversary to capitulate under economic pressure or to inflate billable hours, is approaching the point of being a national disgrace to the honor of the legal profession. It is the affirmative duty and obligation of trial judges to prevent such subversion." Nolan, 692 S.W.2d at 328. *See also* Misischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848, 864 (Mo. Ct. App. E.D. 2000) ("The discovery provisions were not designed or intended for untrammeled use of a factual dragnet or fishing expedition. It is the affirmative duty and obligation of the trial judge to prevent subversion of pre-trial discovery into a 'war of paper' for whatever reason."); Lichtor, 845 S.W.2d at 64 ("[G]reat care must be exercised by the courts to avoid allowing parties to engage in a new form of 'overreaching' pretrial discovery and in activities which may 'subvert the proceedings into a war of paper,' which would unnecessarily burden the litigants

with excessive expense.") (*citing* State ex rel. Whitacre v. Ladd, 701 S.W.2d 796, 799 (Mo. Ct. App. E.D. 1985)); Kawasaki Motors Corp., 777 S.W.2d at 252.

In State ex rel. Whitacre, the Court of Appeals found a subpoena requiring an expert go through his records for a 2 ½ year period to segregate the requested information and compile the requested statistics was unreasonable, oppressive and intrusive and therefore made its preliminary writ absolute. 701 S.W.2d at 798-99. The court found the plaintiffs' need for the information was clearly outweighed by the burden of furnishing the requested documents, Id. at 799, and cited this case as an example of a party's overreaching in pretrial discovery proceedings and subverting the proceedings into a "war of paper." *Citing* Nolan, 692 S.W.2d at 328. It recognized that it "is the affirmative duty and obligation of trial judges to prevent such subversion," Id. and added it "is also the duty of trial counsel to exercise judgment in formulating discovery requests by realizing there is a limit to the paperwork burden which may be saddled upon the other party or his witnesses." Whitacre, 701 S.W.2d at 799.

In deciding motions to compel discovery, the Federal courts (like Missouri courts) conduct a balancing test. Anker v. G.D. Searle & Co., 126 F.R.D. 515, 518 (M.D.N.C. 1989). They weigh the need for discovery by the requesting party and the relevance of the discovery to the case against the harm, prejudice or burden to the other party. Id. Application of the balancing test as addressed by the Federal Rules of Civil Procedure and federal courts is instructive here.

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party …" and that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." Discovery, however, is not absolute and Rule 26(b)(2) specifically provides that it "shall" be limited if the court determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(i), (ii) and (iii).

The limitations imposed by Rule 26(b)(2)(i), (ii) and (iii) provide for a "burden and expense analysis in order to determine whether the likely benefit of the discovery information would outweigh the expense of procuring it ... ." United States v. Duke Energy Corp., 214 F.R.D. 392, 393 (M.D.N.C. 2003).

The history of and changes made to Rule 26 emphasize the importance of this balancing process and how, absent such a process, discovery can be over-

used/abused. The issue of discovery abuse was a major concern at the American Bar Association's Conference held in August 1976. American Bar Association Report of Pound Conference Follow-Up Task Force, 74 F.R.D. 159 (1976). The American Bar Association noted that allegations of discovery abuse were widespread and that this alleged abuse was increasing litigation costs, unduly delaying adjudication and coercing unfair settlements. Id. at 191. It recognized the very real concern that the "discovery process [was] being overused" and that "[w]ild fishing expeditions, since any material which might lead to the discovery of admissible evidence is discoverable, seem to be the norm." The Pound Conference Recommendations: A Blueprint For The Justice System in the Twenty-First Century, 76 F.R.D. 277, 288 (1978).

Federal Rule 26 was amended in 1983 to curb this growing problem. The Advisory Committee Notes to the 1983 Amendment recognized that given "our adversary tradition and the current discovery rules, it is not surprising that there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay." The 1983 amendments to Rule 26 were purposely made to "confront the problem of over-discovery and to allow the court to proportion discovery, even though it may be relevant." Nestle Foods Corp. v. Aetna Cas. and Sur. Co., 135 F.R.D. 101, 107 (D.N.J. 1990).

In 1983, the last sentence of Rule 26(a), stating that "[u]nless the court orders otherwise … the frequency of use of these [discovery] methods is not

limited," was deleted and subparts i, ii, and iii (now found in Rule 26(b)(2)), setting forth instances where discovery "shall" be limited, were added to deal with the problem of over-discovery. *See* Advisory Committee Notes to Rule 26, 1983 Amendment. The amendment was intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. Id.

> One reporter, comparing the old and amended Rule 26(a), stated:
>
> Until last August, the last sentence in rule 26(a) said: 'Unless the court says otherwise, go ye forth and discover.' That had been the message of the last sentence of rule 26(a). In 1983, we decided it was a lousy message. That sentence has been stricken and replaced, quite literally, by the reverse message, which you now find in rule 26(b). Rule 26(b) now says that the frequency and extent of use of discovery shall be limited by the court if certain conditions become manifest. Just realize the 180-degree shift between the last sentence of the old rule 26(a) and the new sentence. Judges now have the obligation to limit discovery if certain things become manifest. The things that are then listed in that paragraph are basically the evils of redundancy and disproportionality.

Miller, The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility, 1984, pp. 32-33.

The court in In re Convergent Technologies Securities Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985), discussing the 1983 Rule 26 amendment, recognized that "[d]iscovery is expensive" and that "[t]he drafters of the 1983 amendments to … Rule 26 formally recognized that fact by superimposing the concept of proportionality on all behavior in the discovery arena." That court held "[i]t is no longer sufficient, as a precondition for conducting discovery, to show that the information sought 'appears reasonably calculated to lead to the discovery of admissible evidence.'" Id. The court concluded that "[a]fter satisfying this threshold requirement counsel *also must* make a common sense determination, taking into account all the circumstances" including whether the "information sought is of sufficient potential significance to justify the burden the discovery probe would impose" and whether "the discovery tool selected is the most efficacious of the means that might be used to acquire the desired information…" Id.

The Convergent Technologies court expressed its belief that "[a]t least in big cases involving big economic stakes, good faith and common sense hardly seem to be the dominant forces" but rather that "the root evil in complex civil litigation continues to be the pervasiveness of gaming." Id. at 332. The court observed that "civil litigation is too often civil only on the surface" and that "[u]nderneath, it is obsession with pursuit of procedural or psychological edge." Id. It noted that by "adopting the 1983 amendment, the rulemakers have unequivocally condemned that obsession." Id. The court expressed its "uneasy

sense that the discovery system in large commercial cases more than occasionally may be perverted into an arena for economic power plays" and "that parties use discovery tools (or cast their responses to discovery requests) not so much to learn what the facts are, but more to muscle one another into attitudes conducive to favorable settlements." Id. It found such behavior "irresponsible, unethical, and unlawful." Id. Regrettably, this negative side of discovery is still alive and well in the present case. It can end if this Court enters the Writ sought by Relators.

In 1993, Rule 26(b) was amended again in an effort to provide the court with even broader discretion to impose additional restrictions on the scope and extent of discovery. *See* Advisory Committee Notes to Rule 26, 1993 Amendments. In support of this change, the Committee noted that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." Id.

In 1993, Federal Rules 30, 31 and 33 were also amended, with presumptive limits being placed on the number of depositions that could be taken and the number of interrogatories asked. FED. R. CIV. P. 30, 31 and 33. The Advisory Committee Notes recognize that because Interrogatory practice "can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2)…" *See* Advisory Committee Notes to Rule 33, 1993 Amendments. Similarly one aim of the 1993 Amendments to Rule 30, limiting the number of depositions each side

can take, was to assure judicial review under the standards set out in Rule 26(b)(2). *See* Advisory Committee Notes to Rule 30, 1993 Amendments.

Rule 26(b)(1) was amended again in 2000 to add, among other things, a sentence reminding lawyers and judges of the limitations of subdivision (b)(2)(i), (ii) and (iii) and that these limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee Notes indicate that the "otherwise redundant cross-reference" was added to "emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery." *See* Advisory Committee Notes to Rule 30, 2000 Amendments.

Discovery rules, and the cases interpreting those rules, provide courts with ample discretion to prevent or restrict discovery that is obtainable from another source that is more convenient, less burdensome, or less expensive, or where burden or expense of proposed discovery outweighs its likely benefit. Not only do courts have such discretion, they have a duty under Rule 26(b)(2) and under Missouri law, to pare down overbroad discovery requests even if the material sought is arguably relevant. *See* Rowlin v. Alabama Dep't of Public Safety, 200 F.R.D. 459, 461 (M.D. Ala. 2001); and Nolan, 692 S.W.2d at 328. "A trial court has a duty of special significance in lengthy and complex cases where the possibility of abuse is always present, to supervise and limit discovery to protect parties and witnesses from annoyance and excessive expense." Dolgow v. Anderson, 53 F.R.D. 661, 664 (E.D.N.Y. 1971).

Courts and litigants must recognize that a party is not automatically entitled to all information relating to the subject matter of the lawsuit. The burden imposed in producing such information must be considered and balanced against the need for and potential benefit of the information. A trial court abuses its discretion where it fails to perform the necessary balancing test or performs it improperly. In Nolan, a writ of prohibition was made absolute because the ordered discovery was unnecessarily overly burdensome. Nolan, 692 S.W.2d at 328. The Writ sought by Relators is to protect the Hospitals from Tobacco's unnecessary and overbroad requests.

In Munoz-Santana v. United States, 742 F.2d 561 (9th Cir. 1984), the appellate court reversed a default judgment entered against defendant for failure to comply with discovery. The appellate court found the district court abused its discretion in entering the discovery order because the cost of further production was not warranted by the plaintiff's need for the records. Id. at 563-64. In reaching this conclusion the court noted the producing party's computer system was not indexed in such a way to permit easy retrieval of relevant files. Id. at 563. The files would therefore have to be searched by hand. The court recognized the cost of complying with the discovery order, either by hand search or by improving the computer filing system was substantial and found that the requesting party failed to make any showing that certain published criteria were not an adequate substitute for the documents requested. Id.

Green Const. Co. v. Kansas Power & Light Co., 732 F.Supp. 1550 (D. Kan. 1990), is another case where the court balanced the burden of production against potential benefit from the requested discovery. In Green Const. Co., a surety on a performance bond raised the defense of failure to give proper notice. Defendant sought the histories of other performance bond claims where the surety raised the same defense. The surety represented it would take an extraordinary amount of time to comply with the request because it had no index or filing code system and would need to physically examine over 62,000 claim files. Id. at 1554. The court found that although defendant demonstrated the claims histories might have some relevance, the burden imposed by the request outweighed its relevancy. Id.

In Ricotta v. Allstate Ins. Co., 211 F.R.D. 622 (S.D. Cal. 2002), the insured was denied coverage based upon a report issued by the insurer's expert. During discovery, the insured requested a copy of all reports ever prepared by this expert for this insurer. There was no database or comprehensive files containing all reports prepared by this particular expert. Compliance would have required defendant to hand-sort and manually review an estimated 50,000 claim files to determine if they contained a report prepared by this expert. Id. at 624. While recognizing potential bias might be established if all (or the vast majority) of the expert's past reports, were favorable to the insurer, the court concluded that the burden and expense of requiring the insurer to respond to such discovery far outweighed any likely benefit to the insured. Id.

In In re Vitamins Antitrust Litig., 198 F.R.D. 296 (D.D.C. 2000), a class consisting of direct purchasers of vitamins brought an antitrust suit for price-fixing against the largest vitamin manufacturers. The vitamin manufacturers sought to compel production of documents regarding each plaintiff's use, manufacture, sale, marketing, distribution and supply of vitamins or vitamin-containing products ('downstream data'). Id. at 297. The court refused to compel production of individualized 'downstream data' finding the extreme burden of defendants' requests outweighed any marginal relevance and any potential benefit defendants might yield from this data. Id. at 301-02.

In Aramburu v. Boeing Co., 885 F.Supp. 1434 (D. Kan. 1995), an employer accused of applying a discriminatory attendance policy was not compelled to cull information from 1,700 personnel files. The court found that although the files could contain some information relevant to evaluating statistics regarding the employer's attendance policies, it appeared that the information was of limited or negligible value. The court further found that the information already provided by the employer should have been sufficient for the employee to make a preliminary determination as to whether plaintiff had suffered disparate treatment in enforcement of the attendance policies.

In Kyriazi v. Western Electric Co., 74 F.R.D. 468 (D.N.J. 1997), the court found discovery to elicit detailed information concerning the nature of defendant's alleged discrimination against each of 4,000 members of the plaintiff class unreasonable. The court found it proper after 4 years to halt discovery, noting this

would not be unfair to defendants **because plaintiffs' case would be made with statistical proof and defendants would be called upon to defend statistical evidence, not individual claims.** Id. at 473. (emphasis added).

Overly burdensome discovery was prohibited in Coleman v. American Red Cross, 23 F.3d 1091 (6th Cir. 1994). The plaintiff in Coleman contracted the HIV virus via a blood transfusion with tainted blood donated to the American Red Cross. Id. at 1093. The trial court dismissed the action and plaintiff appealed. Among other issues, plaintiff appealed the district court's denial of plaintiff's request to obtain discovery documents located at the American Red Cross headquarters. Id. at 1098. Plaintiff sought data on the number of transfusions associated with AIDS/HIV infections in certain regions. Id. The Red Cross objected on the basis it was overly burdensome because it would require the Red Cross to "search every file that exists at National Headquarters for any document that might be of any relevance to any matter in the case." Id. The Red Cross argued the hundreds of interrogatory responses, numerous depositions, and thousands of pages of discovery already produced were sufficient. The Red Cross had responded to over 300 interrogatories and over 140 separate document requests, and had produced over 1,500 documents. Id. at 1097. The district court, agreeing with the Red Cross, denied the request as overly burdensome. The Court of Appeals held the district court did not abuse its discretion in refusing to grant plaintiff's request. Id. at 1098.

In Adkins v. Mid-America Growers, Inc., 141 F.R.D. 466 (N.D. Ill. 1992), the court did not allow discovery directed to all class action plaintiffs. The plaintiff filed suit claiming Mid-America deprived him of overtime wages he was entitled to under the Fair Labor Standards Act. Id. at 466. The case was certified as a class action and Adkins named as class representative. Plaintiffs appealed the magistrate judge's decision allowing discovery directed to individual class plaintiffs. Id. The Court of Appeals noted that "[t]his case exemplifies the hazards of individual class plaintiff discovery" and reported that "[a]fter receiving the go ahead from the magistrate judge, Mid-America served discovery on each plaintiff…and deposed more than eighty class members." Id. at 468. The court recognized that "many class actions have hundreds of thousands of members" and "[t]aken to its logical limits, individualized discovery would prevent such actions from being litigated." Id. The court found discovery "could be conducted on a generalized class-wide basis to give Mid-America an idea of the amount of liability it might be facing." Id. Interestingly, it noted that "[e]ven a sample of certain representative plaintiffs might be drawn to assess the situation more accurately." Id.

The above cases demonstrate the need for discovery must be balanced against the burden imposed in complying with discovery. The number of files the court ordered the Hospitals to produce in this case far exceeds the 62,000 claim files the court in Green Const. Co. found to be too burdensome to produce; or the 50,000 claim files the court in Ricotta found too burdensome; or the 1,770

personnel files the court in Aramburu found too burdensome; or the 4,000 class members the court in Kyriazi found it unreasonable to elicit detailed information on. In each of these cited cases, as in this one, the burden exceeded the benefit.

Some discovery necessarily must be foregone or structured in complex litigation if massive cases are to be resolved expeditiously or, as with this case, ever to be tried. Here the Hospitals' burden in complying with the Second Patient Record Order far out weighs any need Tobacco has for additional patient records.

Relators' Burden of Reviewing Hundreds of Thousands of Medical Records For Any Indication That the Patient Ever Smoked is So Great That It Will Force Many, if Not All, Hospitals to Dismiss their Lawsuit.

The Second Patient Record Order requires each Hospital to provide Tobacco with a list of patients, and the medical and financial files of those patients, who meet all the following criteria:

1. The patient's care was provided by the Hospital on or after November 16, 1993; and
2. The patient's bill was written off as charity care or bad debt; and
3. The patient had some history of smoking; and
4. The patient's diagnosis included one or more of the 23 ICD-9 code diagnoses that are medically recognized by the CDC as sometimes being directly caused by or closely related to smoking.

(*See* Exhibit 2 at Vol. 1, A11).

For this limited time period, most Relators (but not all) can determine which charity care and bad debt patients were treated for diseases having ICD-9 codes recognized by the CDC as caused by smoking using a computer program.[27] It would be hard enough if it stopped here but the Second Patient Record Order goes on to require the Hospitals to review each of these hundreds of thousands of medical charts to determine whether anything is recorded in the chart indicating whether the patient ever smoked.

[27] This step was performed by Relators' expert for those diseases he uses in his damage model. This list of diseases was compiled based on the "Silver Anniversary" report of the Surgeon-General (Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon-General*) (Washington, DC: Department of Health and Human Services, Publication No. CDC 89-8411, 1989) and on the advice of Dr. Ross Brownson (Professor of Community Health in Epidemiology at St. Louis University.) Performing this step, using the diseases caused by smoking as used in Relators' damage model, reduces the number of medical records to be pulled from 6.5 million to a still impossible 700,000. That number is doubled if financial records are also produced.

For some years, some hospitals coded for tobacco use. This was not required and was not consistently done. As such, files not coded for tobacco use could still contain some history somewhere in the file of tobacco use.

Those files not coded for tobacco use (which represent the vast majority of files) would all have to be reviewed manually until an indication of smoking is found or the review is complete. The time required to review each file will vary considerably depending on the size of the file and where in the file smoking history is documented, if at all. Someone familiar with patient medical records understands that information such as smoking history is not necessarily located on the front of the patient's chart. If smoking history is recorded on the front page, then the time needed to review that particular file will undoubtedly be less than the file that contains no indication anywhere regarding tobacco use. Many files, i.e. those containing no reference to tobacco use, will have to be reviewed in their entirety, one page at a time, before anyone could conclude there is no documentation of tobacco use. The process and time required to locate, pull and search the Hospitals' files for indications of smoking will be massive.

The overly burdensome nature of, and impossibility of complying with, the Second Patient Record Order is obvious. Not only does it require that hundreds of thousands of records be located and pulled from storage vaults, but it also requires Relators to individually review the vast majority of these records, record by record and page by page until they find some history of smoking. Relators cannot realistically comply with the Second Patient Record Order in any reasonable time

frame. The burden is too great and must be balanced against the ostensible purpose of requiring such discovery. If relief is not granted, most Hospitals will be forced to dismiss their claims or face sanctions, and will be denied their fundamental right to trial.

B. Other Than Eternal Delay, Tobacco Will Gain Little or Nothing, that Relators Do Not Readily Concede, by Reviewing Individual Patient Medical and Financial Records, because Relators Do Not Intend to Prove Any Particular Patient Ever Smoked or Ever Suffered Illness as a Result Of Tobacco Use.

Enough is enough! This case was filed in 1998 and an enormous amount of time, energy and money has been expended in discovery.[28] There is no sufficient need for Tobacco to review more patient files, because Relators do not intend to prove any **particular** patient ever smoked or ever suffered illness as a result of tobacco use.

Tobacco acknowledges that Relators are not proving their case through individual patients and that they want the patient records to support defenses they have created. This, however, is not an action brought by individual smokers against Tobacco. These are claims by Hospitals for damages they incurred as a result of the wrongful acts of the Tobacco Defendants.

[28] *See* footnote 3, *supra*.

Relators will show the harm caused by Tobacco to the hospitals, not the patients, using epidemiology. Relators must rely upon medical science and statistics to prove that a portion of their patients' illnesses and/or diseases were caused by tobacco use. While Relators do not intend to prove any particular patient smoked, numerous medical and statistical experts will establish that a certain percentage of the population smokes and that a certain percentage of the costs incurred by the Hospitals are attributable to smoking.[29]

Using the example of lung cancer patients, an individual lung cancer patient may never have smoked, but medical science and statistics have shown (and Relators will present such evidence at trial) that approximately 90% of all lung cancers are caused by smoking. Relators seek to recover 90% of the costs incurred in treating 100% of the lung cancer population; not 100% of the costs incurred in treating the 90% whose lung cancer was actually caused by smoking. Relators cannot reverse the calculation process and seek to recover 100% of the costs incurred in treating the 90% of the patients whose lung cancer actually was caused by smoking because this would require proof of medical causation on a case by case basis for hundreds of thousands of patients, which cannot be done in any of our lifetimes.

As previously indicated, most of the Hospitals can run a computer report to determine which bad debt and charity care patients were treated for lung cancer

[29] *See* footnote 11, *supra*.

since November of 1993. The Second Patient Record Order, going beyond anything reasonable, requires Relators to review each file (e.g. 100% of the lung cancer patients) for smoking history and turn over only those with a smoking history to Tobacco. What does this accomplish and what would Tobacco gain from only being given the files of lung cancer patients where there is a recorded history of smoking? Certainly on a case by case basis Tobacco could then dispute the causation between that patient's lung cancer and his/her smoking. As noted in Adkins v. Mid-America Growers, Inc., *supra*, such strategy would prevent this case from ever being litigated. Maybe Tobacco would argue that less than 90% of the files for lung cancer indicate any history of smoking **and** therefore the Hospitals' statistical damage model is inaccurate. Relators already admit that their records do not always collect or record smoking information unless it is directly related to that patient's treatment.

In Nolan, the court found production of all tax records unnecessary because pertinent information on the subject was obtained through deposition testimony. The court, denying the production of cumulative evidence, held that "[s]ince the deposition testimony amounted to the very admission defendants were seeking, there is no need for additional discovery to establish the same fact." 692 S.W.2d at 328.

The production of cumulative evidence was also denied in Boody v. Township of Cherry Hill, 997 F.Supp. 562, 574 (D.N.J. 1997). In Boody, the plaintiff alleged defendant secured his resignation in retaliation for his criticism of

the department in which he worked. Plaintiff sought discovery of the Police Department's payroll records in order to establish the magnitude of the alleged reward system he claimed to have criticized. The court found plaintiff was not entitled to production of the department's payroll records because they would be unreasonably cumulative and burdensome in light of their limited relevance to plaintiff's claims. Id. The court found production would have been cumulative, since defendants conceded the existence of the rewards system and documents already produced were consistent with this admission. Id.

As in Nolan and Boody, Tobacco gains little or nothing of relevance (that Relators do not readily concede) by reviewing patient files. Relators admit many of the patients for whom they are seeking to recover some portion of costs were not smokers; they admit that in some cases a patient's disease, though associated with smoking, was not caused by smoking; and they admit they cannot prove causation on a case by case (patient by patient) basis.

Relators' damage model is a statistical model -- Relators have not collected and will not use individual patient medical records or try to establish whether an individual patient smoked. That is not how Relators calculated damages and such information (smoking) cannot be reliably determined from a review of patient medical records or patient accounts. Rather, Relators use a statistical assessment based on national data on tobacco caused illnesses and apply it to the information gathered from the Hospitals as a whole.

Tobacco can challenge the statistic that 90% of lung cancers are caused by smoking; they can challenge the percentage of overall costs Relators' expert attributes to tobacco use; and they can challenge the statistic regarding the percentage of Missourians who smoke. If Tobacco wishes to challenge Relators' model on cross-examination, which they have done in other cases, they should do so on the basis of the information provided to Relators' damage experts, all of which was provided to Tobacco years ago.

C. This Information is Cumulative because Tobacco Has Already Received More than Sufficient Information With Which to Defend the Hospitals' Claims and Protect Itself from Any Risk of Double Recovery.

If Tobacco had any legitimate need to review individual patient files, which Relators deny, that need was sufficiently satisfied by the previous production of Patient Lists, patient data and thousands of patient files.[30] The court originally indicated in the course of denying Certain Defendants' Motion for Judgment on the Pleadings that: "[Relators] must, within the context of this lawsuit, even though not joining the individual patients for whose costs of care they seek to recover, provide reasonably specific identifying information with respect to each

[30] In exceptional circumstances, exceptions could be made and additional patient files produced, i.e. where one patient represents a large percentage of bad debt or charity care in a particular year.

such patient." (Exhibit 3 at Vol. 1, A52) (emphasis in original). More has already been done!

Relators provided Tobacco with lists of all bad debt and charity care patients (for the years they could gather electronic claims data). These lists, with limited exceptions, include the patient's admission and discharge dates, the patient's birth date and the patient's identification number. In addition, to the extent available and as given to Relators' expert, Defendants received the following additional patient information: Gender, Race, Zip Code of Patient, Smoking History (if any had been electronically recorded), Primary ICD-9 Code, Secondary ICD-9 Codes, DRG, Financial Class Code, Patient Type (Inpatient, Outpatient, Emergency), Total Charges, Payments Received, Bad Debt Write-Off, Charity Write-Off and Recoveries. (Exhibit 5B at Vol. 1, A98). Undoubtedly, all of this constitutes "reasonably specific identifying information with respect to each such patient."

In Carlson Companies v. Sperry & Hutchinson, 374 F.Supp. 1080 (D. Minn. 1973), the court found additional detail regarding information already provided was not necessary in light of the burden imposed by such production. In this antitrust suit, defendant requested a list of all jurisdictions in which plaintiff paid income taxes and corresponding tax documents. Defendant argued it needed this information as a way to determine the scope of plaintiff's activities. Plaintiff argued it supplied sufficient information about its activities in response to other discovery. The court, refusing discovery, stated it was not appropriate "to burden

the plaintiffs with the production of documents, the contents of which will possibly serve only to supplement material already revealed to [defendant] by [plaintiff]." Id. at 1085. The court felt that "[w]hile the tax documentation may reveal with microscopic precision the areas in which plaintiffs and defendants 'lock horns,' the added benefit of more detail, if any, to be provided by such records is outweighed by the burden imposed upon plaintiffs were they required to make the production." Id. Similarly, the information Tobacco seeks will serve only to supplement data already provided by the Hospitals and confirm what the Hospitals readily concede.

Tobacco cannot argue they need to review every patient file to prevent double recovery. For most hospitals, Tobacco has already received a list of bad debt and charity care patients, produced pursuant to the First Patient Record Order. In the First Patient Record Order, the court indicated that producing "the ***list*** identifying patients" for whom Relators' seek to recover costs was important because it serves as a "safeguard against the risk of double recovery due to later individual lawsuits." (Exhibit 5C at Vol. 1, A113) (emphasis added). The court does not state a review of each *medical record* is necessary to protect Tobacco from double recovery. It is sufficient that Defendants have the patient names and, if ever sued, they can compare the plaintiff(s) in that suit to the names on the Patient Lists. At that time Defendants can obtain the patient medical file. Even the court recognizes that a list "might adequately serve Defendants' interest of helping safeguard against the ***limited*** risk of 'double recovery.'" (Exhibit 5C at

Vol. 1, A122) (emphasis added). Defendants cannot credibly claim that the Patient Lists (whether "over" or "under" inclusive), which Relators' produced pursuant to their efforts to comply with the First Patient Record Order, would not assist in preventing or avoiding double recovery. Tobacco uses the double recovery theory as an attempt to gain sympathy from the court, contending they need to review each and every patient record to "protect" them from an unlikely individual suit.

Not only does Tobacco have these lists and the above described data (most of which is in computer readable form that they and their experts can slice and dice in every conceivable way),[31] it has reviewed tens of thousands of patient files. Defendants repeatedly stated during hearings regarding the production of patient records that they intended to review these records to determine whether the patients for whom Relators seek to recover costs of treatment were smokers or were exposed to tobacco smoke. Defense counsel pointed out at the March 8, 2004 hearing that Tobacco's reason for requesting this individualized patient information is that "[i]t's a way for [Defendants] to test [Relators' damages] model. It's a way for [Defendants] to cross-examine experts." (Exhibit 16J at Vol. 5, A726). This rationale for requiring Relators to produce individual patient

[31] Some Hospitals were unable to supply data and lists for patients going back as far as November 1993. The City of St. Louis was unable to provide any Patient List.

records is included in the First Patient Record Order where the court notes it serves the purpose of affording Defendants a meaningful opportunity to empirically test and challenge some of the assumptions and premises that may be inherent in Relators' 'statistical' model of damages. (Exhibit 5C at Vol. 1, A122).

By producing patient medical and accounting records for several hospitals, as Relators did from December 2004 to April 2005, Relators gave Defendants full opportunity to carry out their stated purpose in reviewing patient records. They don't need to look at every patient record from every Hospital to test Relators' damage model or cross examine their experts. The questions of whether such patient charts contain information regarding the patients' smoking status, or whether those patients were treated for diseases which Defendants believe are not "smoking related," are properly the subject of expert testimony, cross-examination and jury consideration at trial.

II. Alternatively, If This Court Believes Defendants Have a Legitimate Need for Additional Patient Records, then Relators Are Entitled to an Order Prohibiting Respondent from Requiring Relators to Produce Anything More than a Statistically Significant Random Sample of Patient Medical and Financial Records Because Respondent Abused His Discretion by Ordering Such Crippling Discovery When a Reasonable Alternative, That Would Satisfy All Legitimate Needs of Defendants, was Available.

Standard of Review

A writ of prohibition will issue "when an 'absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order.'" Ferrellgas, L.P. v. Williamson, 24 S.W.3d 171, 175 (Mo. Ct. App. W.D. 2000), *citing* State ex rel. Richardson v. Randall, 660 S.W.2d 699, 701 (Mo. 1983) (en banc). A writ of prohibition is also appropriate when the trial court abuses its discretion during discovery. State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602, 607 (Mo. 2002) (en banc). *See also* Nolan, 692 S.W.2d at 327.

A judge abuses his discretion when his ruling is "clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." MacDonald, 149 S.W.3d at 597 (quoting Lichtor, 845 S.W.2d at 59). An abuse of discretion occurs if the trial court "imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or society at large." Klay v. Humana, Inc., 382 F.3d 1241, 1251 (11th Cir. 2004).

Justice requires a balance be struck between the burden and expense of discovery sought and its potential benefit to the adversary. (*See* Nolan, 692 S.W.2d at 328). Respondent abused his discretion by ignoring or improperly applying this balancing process, such that the Hospitals will unnecessarily suffer irreparable harm.

For the reasons stated above Relators believe there is no need to produce any additional patient files. If this Court disagrees with Relators and finds Defendants have a legitimate need to some such discovery, then Relators urge this Court to limit Relators' obligation to only a statistically significant, random sample of individual patient medical records from the pool of records coded for diseases medically recognized by the CDC as caused by smoking and that Relators not be required to prereview any of these records for smoking history. Sampling would adequately furnish the information in a "… less intrusive, less burdensome or less expensive" method than going through each file. *See* Nolan, 692 S.W.2d at 328.

For some Hospitals, the number of files coded (from November 1993 to 2003 or 2004) for diseases associated with smoking is less than 5,000.[32] In those cases, Relators request they be required to only produce a statistically significant number of files (up to that lower number of files) and they not be required to first review the files for smoking history. For many other Hospitals, the number of files coded for diseases associated with smoking is far greater than 5,000. In those cases, Relators request they only be required to produce a statistically significant number of files (up to a maximum of 5,000) and they not be required to first review the files for smoking history. If ever there was a case for statistical

[32] The number of applicable records is ever growing as Relators daily incur additional uncompensated costs as a result of patient tobacco use.

sampling in discovery, it is now before this Court.

A. Statistical Sampling is Well Accepted.

"Sampling and survey techniques are a well-accepted alternative for the trial judge facing crippling discovery and evidentiary costs." Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Inc., 178 F.Supp.2d 198, 250 (E.D.N.Y. 2001), rev'd on other grounds, 344 F.3d 211 (2nd Cir. 2003). *See also* MANUAL FOR COMPLEX LITIGATION, (Third), § 21.422 (1995) ("[S]tatistical sampling techniques may be used to measure whether the results of the discovery fairly represent what unrestricted discovery would have been expected to produce."); §33.27 ("In cases that involve a massive number of claims for damages for similar injuries, sampling techniques can streamline discovery relating to individual plaintiffs' activities and injuries.")

Statistical evidence is used in a plethora of litigation scenarios and the acceptance of the use of statistics is widespread. Statistics are used in criminal court, (*See* State v. Kinder, 942 S.W.2d 313 (Mo. 1997) (en banc) and State v. Faulkner, 103 S.W.3d 346 (Mo. Ct. App. S.D. 2003) (discussing the acceptance of DNA testing which uses a statistical result to include or exclude a defendant in a crime)); to assess property valuation (*See* Savage v. State Tax Comm'n, 722 S.W.2d 72 (Mo. 1986) (en banc)); and to prove discriminatory discharge (*See* R.T. French Co. v. Springfield Mayor's Comm'n on Human Rights, 650 S.W.2d 717 (Mo. Ct. App. S.D. 1983)).

Courts have acknowledged the validity of sampling and surveys in

numerous other contexts as well. *See* Elam v. Alcolac, Inc., 765 S.W.2d 42, 187 n. 63 (Mo. Ct. App. W.D. 1988) ("The correlations between exposure [or other factor] and disease derived from an epidemiological study, when deemed statistically significant, suffices *in science* as an inference of biological causation between the factor and disease--in the sense that 'epidemiology allows one to state that a certain factor was the cause of a certain proportion of cases of a given disease in humans.' … The statistical quality of epidemiological correlations notwithstanding, regulators and **courts deem such evidence sufficiently significant as to be probative in law** as circumstantial proof of biological cause-in-fact in the individual suitor.") (Citations omitted; emphasis added); Castaneda v. Partida, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) (using statistical data to prove discrimination in jury selection); Hilao v. Estate of Marcos, 103 F.3d 767, 782-87 (9th Cir. 1996) (allowing use of aggregation and statistical analysis to determine compensatory damages); Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1285-88 (5th Cir. 1994) (allowing statistical analysis to establish disparate treatment in civil rights action against large employer); Capaci v. Katz & Besthoff, Inc., 711 F.2d 647, 653-57 (5th Cir. 1983) (using census data in gender discrimination case); Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14, 27 (Mo. 1959) (en banc) ("mortality tables are customarily admitted to show the probable duration of the life of the injured plaintiff or the deceased as the case may be, which is an element in estimating damages"); Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715, 754, 9 Cal. Rptr. 3d 544, 577 (2004) (Court notes there is a

"growing acceptance of scientific statistical methodology in judicial decisions and scholarship"); In re Simon II Litig., 211 F.R.D. 86, 157 (E.D.N.Y. 2002) (rev'd on other grounds) ("The equity in allowing statistical proof of reliance and causation is underscored by the massive nature of the fraud alleged"); State ex inf. Peach v. Boykins, 779 S.W.2d 236, 237 (Mo. 1989) (en banc) (In determining whether the City of St. Louis' License Collector failed to collect license taxes, "[t]estimony revealed that it would require a prohibitive amount of time to examine each of the records on the approximate 10,000 businesses in the City of St. Louis from which the collector was required to collect a license tax. Therefore the auditor decided to estimate the amount of uncollected taxes by a statistical sample").

Missouri, by regulation, uses statistical sampling in the Medicaid context to determine if a Provider has been overpaid for medical services. 13 CSR 70-3.130. Missouri's statutes also allow for statistical sampling to ensure compliance with the law, including Section 303.026.3 of the Missouri Revised Statutes, which states:

> To ensure compliance with [the Motor Vehicle Financial Responsibility Act requiring car owner's to maintain insurance], the director may utilize a variety of sampling techniques including but not limited to random samples of registrations subject to this section…and persons who during the preceding year have received a disposition of court-ordered supervision or suspension.

MO. REV. STAT. § 303.026.3.

Additionally, in a class-action lawsuit, the "class representative" scenario is itself a method of statistical sampling as not every member of the class has their records scrutinized and their depositions taken; rather, the class representatives undergo such a process. State ex rel. American Family Mut. Ins. Co. v. Clark, 106 S.W.3d 483 (Mo. 2003) (en banc).

In some cases, sampling techniques may prove the only practicable way to collect and present relevant data. Blue Cross and Blue Shield of New Jersey, Inc., 178 F.Supp.2d at 251, rev'd on other grounds, 344 F.3d 211 (2nd Cir. 2003). In Rosado v. Wyman, 322 F.Supp. 1173, 1180 (E.D.N.Y. 1970), the only sources of needed information were individual case records of AFDC families. The New York Court determined it was "entirely impracticable to review all the case records" and that "a sample of such cases was the only feasible technique." Id. at 1181. The decision notes that mathematical and statistical methods are well recognized by the courts as reliable and acceptable in determining adjudicative facts. Id. at 1180.

B. Statistical Sampling is Appropriate In this Case.

In the First Patient Record Order, the court found Defendants "are entitled, as part of a fair opportunity to defend the claims brought against them by [Relators], to discover whatever relevant information or patterns of information may be available to be gleaned from the records of those patients whose uncompensated costs of care [Relators] seek to recover from Defendants."

(Exhibit 5C at Vol. 1, A8). The court indicated that the following are legitimate areas where Defendants might wish to seek information from patient records:

> whether an individual was a smoker; what medical illness or problems the patient had; whether (and to what extent) such illness or problems were tobacco-related; whether the treatment the hospital provided was reasonably necessary; potential misdiagnosis in some cases; what were the costs of the patient's care and treatment; what portion of such costs might fairly be attributable to medical conditions caused or exacerbated by tobacco use; to what extent (if any) the hospital was paid for the care and treatment it provided the patient; and (perhaps) to what extent the hospital made reasonable efforts to collect payment for its services.

Id.

Fair, representative, and probative information on each of these topics will be more than adequately furnished by statistical sampling. **Tobacco never claims otherwise**. Sampling 5,000[33] medical/hospital charts from each Hospital is a huge sample in any type study. (*See* Affidavit of William D. Shannon, Exhibit 5S at Vol. 1, A169). Dr. Shannon concluded that "[i]n essence the 5,000 charts will look indistinguishable from all the charts for a given hospital in almost all the

[33] The number will be less for those hospitals which have identified fewer than 5,000 patients meeting criteria of Second Patient Record Order.

relevant information." Id. Defendants do not need to review each and every patient file to have a fair opportunity to defend the claims brought against them.

If statistical sampling is ever appropriate, it is appropriate here. Defendants would receive no additional benefit from reviewing each and every patient file as opposed to a statistically significant sample of the files. On the other hand, Relators' burden, if they are required to review and produce all such files, is overwhelming and for many Hospitals is all but impossible.

CONCLUSION

This Court must recognize that Tobacco's discovery, that the Hospitals have already complied with, is its "war of paper." Respondent's Orders exacerbate the burden on Relators and force the Hospitals into capitulation under the burden of excessive discovery. Relators should not be denied their day in court because of a discovery order that for most Hospitals is so burdensome as to be impossible. This case should be allowed to proceed to trial on its merits. Intervention by the Supreme Court is essential to protect the Hospitals' fundamental right to a trial by jury and to prevent irreparable harm to Relators.

Relators seek permanent writs of Mandamus and/or Prohibition commanding Respondent to (i) refrain from all action, except for withdrawal of

the Second Patient Record Order; and to either (ii) amend the Second Patient Record Order to relieve Relators from the obligation to produce any further medical and financial records of individual patients, or to (iii) modify Respondent's June 27, 2005 Order regarding Relators' Motion for Protective Order so that Relators need only produce to Tobacco Defendants a statistically significant, random sample of individual patient records from the pool of records coded with the ICD-9 diagnosis Codes recognized by the CDC as caused by smoking, without requiring Relators to first review said records for smoking history prior to disclosure to Tobacco Defendants.

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RULE 84.06(c) CERTIFICATION

I hereby certify in accordance with Rule 84.06(c) that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and contains 22,395 words in its entirety.

_____

CERTIFICATE OF VIRUS FREE DISK

I hereby certify that the disk filed with this Brief required by Rule 84.06(g) has been scanned for viruses and that it is virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served via hand delivery this 13th day of January, 2006, upon:

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