IN THE SUPREME COURT OF MISSOURI

NO. SC87245

STATE OF MISSOURI *ex rel.* CITY OF ST. LOUIS, *et al.*,

Relators,

v.

THE HONORABLE JOHN J. RILEY,

Respondent.

Original Proceeding on Petition for Writs of Mandamus and Prohibition

St. Louis City Circuit Court
Cause No. 982-09652A
Division 1
Hon. John J. Riley

CERTAIN DEFENDANTS' RESPONDENT'S BRIEF

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February 9, 2006

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INTRODUCTION

Relators seek to recover damages allegedly incurred in treating patients whose medical conditions they claim were caused or worsened by tobacco use. The Circuit Court ordered in December 2003 that relators identify those patients and produce their medical and financial records. *See* December 29, 2003 Order (Rel.Ex. 5A, A92-94).[1] Relators did not seek a writ at that time. Instead, they spent more than two years seeking reconsideration from two Circuit Court judges and the Special Master, *see* September 27, 2005 Order at 1-2 (Rel.Ex. 2, A4-5), while producing lists of millions of names and thousands of private medical records for patients whose injuries had nothing to do with smoking—precisely what the Circuit Court had ordered them not to do. *Id*. at 3-7 (A6-10). Now they seek extraordinary relief not from the initial order itself but from the Circuit Court's denial of their fifth request for reconsideration and its attempt to enforce its multiple prior orders. Because the Circuit Court has broad authority to ensure compliance with its own orders, and acted well within its discretion in requiring relators to produce the records of only those patients they actually claim were injured by smoking, this Court should deny the writ.

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[1] As used herein, "Rel.Ex. __, A__" refers to the exhibit and page number of the five-volume Appendix relators submitted in support of their Brief. "Def.Ex. __ at __" refers to the exhibit and page number of defendants' ten-volume Supplemental Exhibits. "R.B." refers to the Brief of Relators.

The records that relators were ordered to produce go to the most basic, fundamental issues in this litigation, including the identities of patients they claim defendants injured, whether the treatments provided were in fact attributable to smoking, whether those treatments were reasonably medically necessary, whether providing that treatment caused relators actual financial harm, and, if so, how much. *See* July 23, 2004 Order at 8-9 & n.8 (Rel.Ex. 5C, A113-14); *see also* September 27, 2005 Order at 4 (Rel.Ex. 2, A7). If this were a suit by one patient or fifty seeking to recover the same medical costs, no one would suggest that they could proceed anonymously and without producing their records. Likewise, if a single hospital brought suit on a lien to recover the same medical costs for those fifty patients, no one would suggest that the hospital could proceed without identifying the patients and producing the records to defendants. Those facts have not become less relevant, less discoverable, or less critical to the defense just because relators have chosen to aggregate the claims of more than fifty hospitals in seeking to recover medical costs for hundreds of thousands of patients instead of fifty.

Relators claim the Circuit Court "disregard[ed] the principles of fairness and equity underlying the American judicial system" by requiring them to produce the documents that contain the actual facts about the actual patients that relators claim were injured by smoking. *See* R.B. at 11. Yet relators do not cite a single Missouri case in which a party has been allowed to recover medical treatment costs without identifying the patients who were treated and producing the records. In fact, it is relators who seek to break new ground. Claims like theirs have been rejected across the country by every

single appellate court that has considered them because the alleged injury to the provider or payor is too indirect and remote and the damages too speculative. *See* footnote 14, *infra*. The Circuit Court neither dismissed relators' suit nor even required relators to abandon their approach of attempting to prove causation and injury entirely by statistical evidence, even though such an approach is unprecedented in Missouri. *See* July 23, 2004 Order at 6 (Rel.Ex. 5C, A111); September 27, 2005 Order at 10-11 (Rel.Ex. 2, A13-14). All the Circuit Court did was rule that, no matter how relators might try to prove their case, defendants are still entitled to discover the identities and records of the actual persons they are alleged to have injured and to use that information to challenge relators' statistics. As Judge Michael David put it in his July 23, 2004 Order, "Plaintiffs appear to be arguing that Defendants have no right to discover" the patient records "because [they] might show that the actual facts concerning the costs of care for the actual patients do not conform to Plaintiffs' statistical calculation." July 23, 2004 Order at 11 (Rel.Ex. 5C, A116). Relators contend that they "seek to recover a statistical portion of the costs of treating all charity care and bad debt patients," not the costs of treating the actual patients whom they alleged were injured by smoking. *See* R.B. at 54. But as Judge David recognized nearly a year and a half ago, it is "a denial of reality" for relators to argue, as they continue to before this Court, that they are not seeking to recover the costs of providing treatment for particular patients—those allegedly injured by defendants' products. That makes the identities and records of those patients critically relevant to this case. *See* July 23, 2004 Order at 10 n.10 (Rel.Ex. 5C, A115).

Judge David also made clear that relators were not to produce the "vastly overinclusive" list they proposed of "all patients who received uncompensated medical care" because a "huge portion" of those patients, "and probably most," "did not smoke and/or did not suffer from any tobacco-related illness." *Id.* at 4 n.4 (A109). Yet that is precisely what relators proceeded to do, producing millions of names and thousands of records of patients whose injuries had nothing to do with smoking, including young children injured in household accidents, a woman who tripped over a cow's foot, a child who stuck a bead up her nose, prospective employees sent to the hospital for a drug test, AIDS patients, healthy mothers who gave birth to healthy children, and psychiatric patients. *See, e.g.*, Confidential Appendix to Certain Defendants' Motion for Sanctions for Failure to Comply With Patient Records Order, April 7, 2005 ("Confidential Appendix") (Def.Ex. 21 at 1388-751). There is simply no conceivable way that defendants can be liable for such injuries that are utterly unrelated to smoking. When defendants discovered that relators' production violated Judge David's orders, as well as federal and state privacy laws, they stopped reviewing the tens of thousands of irrelevant records produced and went back to the Special Master, who agreed and recommended that relators do it correctly or face sanctions. Meanwhile, relators had filed another motion for reconsideration before Judge John J. Riley. While that was pending, they appealed the Special Master's sanctions ruling. Judge Riley agreed with Judge David and the Special Master. Noting relators' "repeated disregard for, adamant refusal to comply with, and seemingly endless requests for the Court to reconsider, the Court's prior orders concerning production of patient records information," he called relators'

attempts to justify their failure to comply with prior orders and totally improper partial production "nonsense that borders on bad faith and contumaciousness." September 27, 2005 Order at 4, 12 (Rel.Ex. 2, A7, A15).

Now relators offer exactly the same arguments to this Court in support of a petition for extraordinary relief.[2] They claim that defendants already have "everything regarding individual patients needed to defend this case," *see* R.B. at 55, but in fact relators have produced records from only eight of the fifty-five hospitals—and even for those eight they produced only a small fraction of patient records from the over- and under-inclusive set that includes all charity care and bad debt patients. Defendants plainly do not have "everything" they need even from those eight hospitals, let alone from the other forty-seven that have produced no records whatsoever.

In the alternative, relators argue that they should be permitted to produce only a statistical sample of records from each hospital, but drawn from a pool of patients the vast majority of whom neither were smokers nor had conditions allegedly caused or worsened by smoking. According to relators, they would do nothing to determine

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[2] Relators seek the writ only against Judge Riley's June 27, 2005 Order denying relators' second Motion for Protective Order on patient records (Rel.Ex. 1, A1-3) and Judge Riley's 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 (Rel.Ex. 2, A4-18).

whether any of these patients was ever exposed to tobacco. Other than admitting that their damages calculations are comprised largely of costs incurred in treating millions of patients who were not even exposed to defendants' products, relators do not attempt to justify their request that they be allowed to produce the private medical information of patients whose costs of care they could not possibly recover in this lawsuit. Defendants have never asked relators to produce the medical and financial records of patients who did not use tobacco, and the Circuit Court was never asked to compel them to do so. The Circuit Court rightly rejected relators' suggestion that they be permitted to produce statistical samples both because a sample would be inadequate as a matter of law and because plaintiffs propose to draw it from the wrong pool of people—patients diagnosed with conditions such as broken bones, gunshot wounds, psychiatric conditions, pregnancy complications, flu, sinusitis, and ear infections.

Finally, relators claim they need extraordinary relief because it would be "impossible" for "many" hospitals to comply with the Circuit Court's orders. *See id.* at 54, 55. But they offer no relevant record facts to support their claim of "impossibility," even under their special definition of the term, *id.* at 51 n.21, and they implicitly concede that for roughly forty-five hospitals the records of only 6000-7000 patients per hospital, on average, will need to be reviewed. Far fewer will need to be produced. That is hardly an "impossible" burden for plaintiffs seeking to recover tens of millions of dollars. Moreover, because the orders require relators to produce records only of those patients whose costs of care they seek as damages, the magnitude of their burden is entirely

within their control. They need not produce a single record of any patient whose costs of care they do not seek to recover. Thus relators will face sanctions only if they choose to.

This Court should not reward relators for more than two years of failing to comply with the Circuit Court's orders, nor should this Court find that the Circuit Court abused its discretion by enforcing an order that merely required production of the same materials that would be required in any case in which a plaintiff seeks to recover the costs of providing medical treatment for persons who were allegedly injured by a tort. The writ should be denied.

STATEMENT OF FACTS

Relators' statement of facts is not "fair and concise" as required by Supreme Court Rule 84.04(c). Instead, relators quote selectively from the Circuit Court's discovery orders in an attempt to persuade this Court that their ongoing failure to produce the requested documents resulted from a misunderstanding of the Circuit Court's orders. The following summary demonstrates that relators could not reasonably have been confused about which patients they were ordered to list or which records they were ordered to produce.

The Circuit Court's First Statement Concerning Patient Records

Under a variety of tort theories, relators seek to recover as damages "their uncompensated, unreimbursed costs for healthcare provided . . . to medically indigent and nonpaying patients suffering from tobacco related illness and disease." Second Amended Petition ¶ 4 (Def.Ex. 8 at 335-36).

The patient records issue first came before the Circuit Court in 2003 in connection with defendants' motion for judgment on the pleadings for failure to join the individual patients as indispensable parties. In denying that motion, Judge David concluded that those patients need not be joined because disclosure of their identifying information would be adequate protection for defendants: "Plaintiffs 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." May 22, 2003 Order at 34 (Rel.Ex. 3, A52) (emphasis in original); *id*. at 36-37 (A54-55). Providing such information was necessary, Judge David ruled, to avoid

"prejudice" to defendants and to protect them against the risk of double recovery. Relators do not seek a writ concerning this ruling.

The First Two Court Orders Requiring Production Of Patient Records

Defendants served a number of discovery requests asking relators to identify the individual patients relators claim that defendants injured and to produce relators' medical and financial records concerning those patients. *See, e.g.*, Certain Defendants' First Request For Production of Documents to Each Plaintiff, served May 29, 2002, Request Nos. 17, 18 (Def.Ex. 22 at 1755-56). When relators objected, defendants moved to compel, and on July 31, 2003, the Special Master recommended that defendants' request to discover individual patient records be sustained. *See* July 31, 2003 Master's Findings, Rulings, and Recommendations (Rel.Ex. 4, A57-58). The Special Master rejected relators' argument that the requests were unduly burdensome and their argument that they should be permitted to produce only a statistical sample of patient records. *See* Plaintiffs' Memorandum Opposing the Disclosure of Individual Patient Records or in the Alternative for the Appointment of a Special Statistical Master, May 5, 2003, at 16-18 (Rel.Ex. 13F, A313-15).[3] On December 29, 2003, Judge David overruled relators' objections to the Special Master's recommendation. *See* December 29, 2003 Order

[3] The Special Master also rejected relators' arguments based on physician-patient privilege and the federal Health Insurance Portability and Accountability Act of 1996, codified at 42 U.S.C. § 1320d-2 ("HIPAA"). Those objections are not before this Court.

(Rel.Ex. 5A, A92-94). Relators told the Circuit Court that they would be able to produce all requested records within sixty days, *see* July 23, 2004 Order at 2 (Rel.Ex. 5C, A107), so Judge David ordered them to do so. *See* January 22, 2004 Order (Def.Ex. 1 at 1-2).[4]

Relators' First Motion For Reconsideration Is Denied

Instead of producing the patient records, however, relators filed a self-styled "Motion for Protective Order" on February 23, 2004 (Rel.Ex. 5B, A95-105), which "in essence, amount[ed] to a motion for reconsideration." July 23, 2004 Order at 3 (Rel.Ex. 5C, A108). Relators sought leave to produce a list of every patient who received charity care or whose accounts were written off, at least in part, to bad debt; in other words, they sought to "produce the unencrypted list of patient names and file numbers used in the calculation of Plaintiffs' . . . damages." Motion for Protective Order, February 23, 2004, at 3 (Rel.Ex. 5B, A97). The Circuit Court rejected this request, *see* July 23, 2004 Order at 15 n.11 (Rel.Ex. 5C, A120), because such a list would be "vastly overinclusive," "in that it apparently includes all patients who received uncompensated medical care by Plaintiff hospitals over the years, even though a huge portion—and probably most—such patients did not smoke and/or did not suffer from any tobacco-related illness." *Id*. at 4 n.4 (A109); *see also id.* at 16 & n.12 (A121).

[4] The City of St. Louis was temporarily exempted from this order because it represented that it was not yet ready to produce its records. In fact, the City has never even produced a patient list.

As the Circuit Court noted, by offering this overinclusive list, relators sought to avoid going through the records of the patients on that list to find the uncompensated care patients whose injuries actually had something to do with relators' allegations in this case—patients who were exposed to tobacco, had an illness related to tobacco, and received treatment for which the hospital was not paid:

> The one thing that Plaintiffs seem the most determined to avoid . . . is any requirement that they must separate out from this larger 5.1 million-patient pool, or any other pool they may have used, a reasonably complete list of the names of **ONLY** those patients whose costs of care (or some part thereof) Plaintiffs seek to recover in this lawsuit.

Id. at 16 (A121) (emphasis in original).

The Circuit Court expressly rejected each of relators' proposals to escape their obligations under the earlier orders—(1) producing the vastly overinclusive list of all patients who received uncompensated care, (2) producing only a statistically significant portion (5%-10%) of those same patients' records, or (3) producing no records at all:

> Actually, there is a fourth alternative to the three that Plaintiffs have suggested: Plaintiffs can comply by providing the list of relevant patient names and the full range of patient records that the Court has said are necessary or, if unable or unwilling to show such compliance, face appropriate discovery sanctions.

Id. at 12 (A117); *see also id.* at 14-18 (A119-23). In rejecting relators' proposals, Judge David also rejected any notion that relators' proposed damages models actually changed the nature of their claim or the scope of related discovery. He explained that while relators' damages model may be based on the claim that "a 'portion' of the costs of the entire uncompensated care population represents a statistically valid approximation of the actual costs of treatment for the actual patients who were actually treated for problems that were actually smoking-related," "it simply is a denial of reality for Plaintiffs to suggest that their lawsuit 'does not seek to recover the costs of care for specific patients'[;] . . . [namely,] those non-paying patients who suffered medical problems either caused or worsened by tobacco use." *Id.* at 10-11 n.10 (A115-16) (emphasis added).

The Circuit Court explained the importance of the patient information that defendants sought:

> The Court believes that without the chance to inspect and examine the records of the relevant patient population at issue, in whatever numbers or samples Defendants choose to undertake the burden of doing, and to prepare charts, summaries and/or expert testimony based on such studies, Defendants would not have a fair opportunity to test or challenge Plaintiffs' damages claims. See, e.g., *Agency for Health Care Admin. v. Associated Indus. of Florida*, 678 So. 2d 1239, 1254 (Fla. 1996).

Id. at 9 (A114). Thus, defendants have the right to explore such questions as

> 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. at 8 n.8 (A113); *see also* September 27, 2005 Order at 4 (Rel.Ex. 2, A7).

The Circuit Court therefore held that "Plaintiffs 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) Plaintiffs seek to recover in this lawsuit." July 23, 2004 Order at 18 (Rel.Ex. 5C, A123) (emphasis in original). The Circuit Court also stressed that failure to comply with its order could result in sanctions. *Id.*

Relators Represent That They Will Comply With The July 23, 2004 Order

At later hearings about the time, place, and manner of the required production, relators represented to Judge David that they would comply with the July 23, 2004 Order and would not produce the overinclusive list of patient names. Specifically, relators' lead

counsel stated that they would at least narrow the universe to patients with smoking-related diseases:

> The overinclusive number is 5 million something. We have identified out of that number the patients whose ICD-9 [diagnosis] 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.[5]

Transcript, Sept. 10, 2004 Hearing, at 15 (Rel.Ex. 9, A187).

Ultimately, on December 1, 2004, the Circuit Court entered an agreed order negotiated by the parties to implement its prior orders and address the logistics of production. As to the patient list, that order stated: "Plaintiffs shall comply with this Court's Order dated July 23, 2004 (the 'Patient Records Order'), which requires Plaintiffs to 'provide to Defendants a reasonably complete unencrypted list identifying each individual patient whose costs of care (or any part thereof) Plaintiffs seek to recover in this lawsuit.'" December 1, 2004 Order at 1 (Rel.Ex. 10, A215).

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[5] Judge Riley observed that this statement was "very troubling" because relators' "counsel was attempting to suggest to the Court that the list of patient names that plaintiffs intended to provide Defendants was far narrower" than what relators actually produced. *See* September 27, 2005 Order at 5 n.5 (Rel.Ex. 2, A8).

Relators Provide The Original And Supplemental Lists

Relators provided their first list of between two and three million entries on September 20, 2004. Including supplemental filings, the current list has about 6.5 million entries—over a million more names than on the list the Circuit Court had described as "vastly overinclusive." Relators began producing records of patients on the list for a few hospitals, and defendants began reviewing those documents.

To understand what criteria relators had used in choosing patients for the list, defendants undertook written discovery and depositions, including a Rule 57.03(b)(4) deposition concerning patient lists and patient records. Relators designated Tim Herberts of CGI Management Consultants, an agent of relators' attorneys, as their witness. *See* Letter from Carolyn M. Kopsky to Paul E. Nemser, dated March 10, 2005 (Rel.Ex. 13R, A501). Relators' designee testified that relators were seeking to recover "the cost of care for those bad debt and charity care patients who suffered medical problems caused or worsened by tobacco use," and were not seeking "to recover for costs and care to patients whose medical problems were not caused or worsened by tobacco use." Deposition of Tim Herberts ("Herberts Dep.") at 56-58 (Rel.Ex. 13S, A516-17). Despite this understanding, the designee testified that the patient list produced by relators was not limited to patients with medical problems "caused or worsened by tobacco use," but instead consisted of all charity care patients and bad debt patients whose records were electronically available—precisely the list that Judge David had rejected in his written opinion. *Id*. at 54-56 (A516). Compounding this failure to comply, relators then produced reams of medical and financial records for patients whose care had nothing to

do with this case,[6] including psychiatric patients, small children with household injuries, patients with normal pregnancies, animal bites, and broken bones, and even patients who had just received AIDS tests, to name only a few.[7] Defendants had to spend thousands of hours reviewing these largely irrelevant materials to demonstrate that relators had not complied with the Circuit Court's orders.

Based on this discovery, the Circuit Court concluded that relators had not even tried "in good faith" to comply with the "clear requirements" of the July 23, 2004 Order. *See* September 27, 2005 Order at 1-2, 5 (Rel.Ex. 2, A4-5, A8). In the Circuit Court's words: "[A]s the 7-23-2004 Order indicated over and over again, the Defendants have asked for, and are entitled to, a list of those non-paying patients (i.e., bad debt or charity

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[6] Contrary to relators' assertions that their production "was too much for Tobacco," *see* R.B. at 35-36, as defendants came to realize that relators were producing records for untold numbers of patients whose care had nothing to do with smoking, defendants slowed and then suspended patient records review out of concern that (1) large numbers of records were irrelevant and (2) relators were producing, in violation of HIPAA, patient records that were outside the scope of the July 23, 2004 Order and that relators had no right to disclose to defendants. *See* Letter from Paul E. Nemser to Terrance J. Good, dated April 7, 2005, at 1-2 (Rel.Ex. 16I, A714-15).

[7] To document the types of records that relators produced, defendants submitted a Confidential Appendix of exemplary patient records to the Circuit Court and Special Master. *See* Confidential Appendix (Def.Ex. 21 at 1388-751).

care patients)—and only those patients—who suffered medical problems 'either caused or worsened by tobacco use.'" *Id.* at 4 (A7) (emphasis in original). But relators produced a list of 6.5 million patients that relators "could not have reasonably believed in good faith" was in compliance with the court's commands. *Id.* at 4-5 (A7-8). Instead, "[t]he list . . . that Plaintiffs have now produced, consisting of virtually all the uncompensated care patients available in Plaintiff hospitals' computer systems regardless of whether any of those patients ever used tobacco or suffered from any smoking-related disease, is the very list that the Court in its 7-23-04 [Order] told the Plaintiffs would be 'vastly overinclusive' and hence improper." *Id.* (emphasis in original).

Judge Riley Denies Relators' Second Motion For Reconsideration And Approves The Special Master's Recommendation On Sanctions

After Judge Riley replaced Judge David as Presiding Judge on January 1, 2005, relators filed yet another "Motion for Protective Order" on March 31, 2005 (Rel.Ex. 5, A59-67), seeking reconsideration of the patient records orders. For the third time, relators sought permission to produce a statistical sample of records of uncompensated care patients, *id.* at 1, 4 (A59, A62), rather than what Judge David had ordered. Judge Riley denied relators' motion on June 27, 2005. *See* June 27, 2005 Order (Rel.Ex. 1, A1-3).[8] In the meantime, on April 7, 2005, defendants moved for sanctions based on

[8] Also on June 27, 2005, relying on the statute of limitations, the Circuit Court entered an order restricting relators' claims to costs of treatment incurred after November 16, 1993. *See* June 27, 2005 Order (Rel.Ex. 11, A222-31).

relators' failure to comply with Judge David's patient records orders, especially the July 23, 2004 Order. *See* Certain Defendants' Motion for Sanctions for Failure to Comply with Patient Records Orders, April 7, 2005 (Rel.Ex. 13, A245-92). On May 23, 2005, the Special Master recommended that the motion be granted. *See* May 23, 2005 Master's Findings, Rulings, and Recommendations (Rel.Ex. 14, A561-64). Relators objected, and while the appeal was pending, they filed another motion seeking statistical sampling. *See* Motion for Reconsideration, September 20, 2005 (Rel.Ex. 12, A232-38). That motion was never heard because on September 27, 2005, Judge Riley entered the order overruling and denying relators' objection to the Special Master's sanctions recommendation. *See* September 27, 2005 Order (Rel.Ex. 2, A4-18).[9] Among other things, Judge Riley found that, in their effort to explain away their failure to comply with the July 23, 2004 Order, relators had put forward arguments that were "nonsense that borders on bad faith and contumaciousness—or, at the very least, a kind of willful blindness." *Id*. at 4 (A7).

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[9] As the Circuit Court said of the Special Master's recommendation that it approved in the September 27, 2005 Order, "considering all of the circumstances and the past history, . . . the Special Master's 5-23-05 [sanctions] ruling was, if anything, remarkably measured and restrained." September 27, 2005 Order at 13 (Rel.Ex. 2, A16). Although relators had failed to comply with the Circuit Court's orders for almost two years, the Special Master recommended that they be given additional time to comply before facing possible sanctions. Judge Riley agreed.

Writ Petitions

Relators did not seek a writ from the patient records orders of December 29, 2003, January 22, 2004, July 23, 2004, or December 1, 2004. In both the Court of Appeals and this Court, relators have sought a writ only from the last two orders: (1) the June 27, 2005 Order denying relators' Motion for Protective Order, which actually was relators' second motion for reconsideration of Judge David's December 29, 2003 and January 22, 2004 Orders; and (2) the September 27, 2005 Order affirming the Special Master's recommendation on patient records sanctions, which threatened sanctions if relators persisted in their failure to comply with the Circuit Court's prior orders. The Court of Appeals, Eastern District, denied relators' writ petition on November 3, 2005. This Court granted a preliminary writ on November 21, 2005, and defendants filed their answer to the writ petition on December 21, 2005.

Relators Have Produced Only Limited Information About Individual Patients

The undisputed evidence before the Circuit Court was that, aside from certain information gathered for one of their experts in 2002, relators did not even begin to try to locate the relevant patient list and records until August or September 2004, long after the Special Master's recommendation in July 2003 and the Circuit Court's orders of December 29, 2003 and January 22, 2004. *See* Herberts Dep. at 148-49 (Rel.Ex. 13S, A539). Then, after Judge David issued the July 23, 2004 Order, they produced the "vastly overinclusive" patient list of 6.5 million entries and, for a few hospitals, produced some records of the largely irrelevant patients on that list.

Relators' writ petition mentions two categories of individual patient information they have produced: a patient list, *see* Petition for Writs of Mandamus and Prohibitions ("Writ Pet.") ¶ 7, and medical and financial records from "[c]ertain Hospitals" for some patients on that list, *id.* ¶ 8. In fact, relators have produced the list of approximately 6.5 million patients that the Circuit Court determined was both vastly overinclusive and incomplete. *See* September 27, 2005 Order at 4, 13 (Rel.Ex. 2, A7, A16); *see also* May 23, 2005 Master's Findings, Rulings, and Recommendations ¶ 7 (Rel.Ex. 14, A562). The list is overinclusive because it contains the names of all electronically available charity care and bad debt patients and is not limited to the minority whose injuries arguably had anything to do with smoking. *See, e.g.*, July 23, 2004 Order at 10-11 n.10, 14-18 (Rel.Ex. 5C, A115-16, A119-23); September 27, 2005 Order at 3-4 (Rel.Ex. 2, A6-7). The list is incomplete because it includes only patients whose records were available electronically. *See, e.g.*, Writ Pet. ¶ 7 ("Relators provided Tobacco with lists of the patients . . . for those years they could gather electronic claims data."); R.B. at 34, 85 (same). To this day, relators have never represented that they have produced a reasonably complete list despite being ordered to produce one more than two years ago.

Second, only eight hospitals have produced <u>any</u> patient records from their files. *See* Affidavit of Sarah Heaton Concannon Evidencing Scope of Patient Medical and Financial Records Production ("Concannon Aff."), dated February 7, 2006, at 6 (Def.Ex. 24 at 1782). Because the records produced were drawn from the "vastly overinclusive" list of <u>all</u> charity care and bad debt patients, however, the great majority of them were for patients who neither were smokers nor had conditions allegedly caused by smoking. *See*

July 23, 2004 Order at 10-11 n.10, 14-18 (Rel.Ex. 5C, A115-16, A119-23); September 27, 2005 Order at 3-4 (Rel.Ex. 2, A6-7); Confidential Appendix (Def.Ex. 21 at 1388-751).

In addition to these two forms of patient information, relators also mention, without any record facts, a third, amorphous category, which they describe as electronic patient information that was produced "to the extent available and given to Relators' expert." R.B. at 85. This vague reference implies incorrectly that relators have produced, "to the extent available," their electronic patient data systems, which do contain, for many of the patients whose costs of care relators seek to recover in this lawsuit, some of the critical information that relators were ordered to produce. S*ee, e.g.*, Herberts Dep. at 118-119, 121 (Rel.Ex. 13S, A531). In fact, the information that relators describe consists only of those "fields" or categories of certain patient-specific datasets that were specifically requested from the hospitals by relators' consultant for purposes of later providing them to relators' testifying expert for use in his damages calculations. *Id.* at 33-47, 110-11, 117-19, 137-39, 154-56 (A510-14, A530-31, A536-37, A541). In addition, before sending these already-incomplete fields of data to relator's expert, the consultant apparently modified them in a variety of ways. *Id.* Defendants had no input in the process of selecting the information, but only received the data that relators had selected and processed for their own purposes. Contrary to the implication of relator's description in their brief, defendants have received only the modified version of this incomplete information, not the contents of relators' actual data systems. Indeed, these

data were compiled and modified for use by relators' expert, not for production to defendant in response to the Circuit Court's orders. Relators have not produced the more extensive electronic files from which these data were taken, or, (with the exception of one hospital) the electronic data systems that contain certain of the patient-specific information that is critical to the defense of this lawsuit and that relators were ordered to produce. Finally, it is important to note that for nearly all hospitals the electronic patient information produced to date contains no information about patient smoking. *See* R.B. at 46-47, 80.

POINTS RELIED ON

I. CONTRARY TO RELATORS' POINT I, NO WRIT OF PROHIBITION SHOULD ISSUE BECAUSE UNDER MISSOURI LAW RELATORS MUST ESTABLISH A CLEAR RIGHT TO THE WRIT, AND THEY HAVE NOT DONE SO.

State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750 (Mo. banc 1991)

State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. banc 1986)

State ex rel. Phillips v. LePage, 67 S.W.3d 690 (Mo. App. S.D. 2002)

A. RELATORS DID NOT SEEK REVIEW OF JUDGE DAVID'S JULY 23, 2004 ORDER AND THE CIRCUIT COURT COMMITTED NO CLEAR ABUSE OF DISCRETION IN DENYING RELATORS' SECOND MOTION FOR PROTECTIVE ORDER OR IN AFFIRMING, BUT LIMITING, THE SPECIAL MASTER'S SANCTIONS RULING.

Missouri Rule of Civil Procedure 61.01(d)

State ex rel. Douglas Toyota III, Inc. v. Keeter, 804 S.W.2d 750 (Mo. banc 1991)

State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. banc 1986)

State ex rel. Phillips v. LePage, 67 S.W.3d 690 (Mo. App. S.D. 2002)

B. THE CIRCUIT COURT PROPERLY ORDERED PRODUCTION OF THE NAMES AND RECORDS OF PATIENTS WITH CONDITIONS ALLEGEDLY CAUSED OR WORSENED BY SMOKING BECAUSE:

1. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PRODUCTION WAS NECESSARY UNDER THE RULES OF CIVIL PROCEDURE TO GIVE DEFENDANTS A FAIR OPPORTUNITY TO DEFEND THE CASE AND TO HAVE PROTECTION AGAINST THE RISK OF DOUBLE RECOVERY.

Missouri Rules of Civil Procedure 52.04, 56.01(b)

State ex rel. Health Midwest Dev. Group, Inc. v. Daugherty, 965 S.W.2d 841 (Mo. banc 1998)

State ex. rel. Williams v. Mauer, 722 S.W.2d 296 (Mo. banc 1987)

2. FOR THE SAME REASONS, THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PRODUCTION WAS NECESSARY AS A MATTER OF CONSTITUTIONAL DUE PROCESS.

U.S. Constitution, Amendment 14

Missouri Constitution Art. I, § 10

Agency for Health Care Admin. v. Assoc. Indus. of Fla., 678 So. 2d 1239 (Fla. 1996)

State ex rel. Health Midwest Dev. Group, Inc. v. Daugherty, 965 S.W.2d 841 (Mo. banc 1998)

3. RELATORS' ARGUMENTS TO DEMONSTRATE THAT DEFENDANTS DO NOT NEED INDIVIDUAL PATIENT RECORDS ARE UNPERSUASIVE.

Missouri Rule of Civil Procedure 56.01(b)

4. RELATORS HAVE NOT ESTABLISHED THAT COMPLIANCE WITH THE CIRCUIT COURT'S ORDERS WOULD BE UNDULY BURDENSOME OR THAT THEY ALREADY HAVE PRODUCED SUFFICIENT RECORDS.

State ex rel. Stolfa v. Ely, 875 S.W.2d 579 (Mo. App. W.D. 1994)

State ex rel. Ford Motor Co. v. Westbrooke, 12 S.W.3d 386 (Mo. App. S.D. 2000)

State ex rel. Specialty Foam Prods., Inc. v. Keet, 579 S.W.2d 650 (Mo. App. S.D. 1979)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 (Mo. App. S.D. 1997)

5. RELATORS' CASE LAW INTERPRETING THE MISSOURI AND FEDERAL RULES OF CIVIL PROCEDURE IS INAPPOSITE.

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

C. RELATORS HAVE NOT SHOWN THAT THEY WILL SUSTAIN ABSOLUTE IRREPARABLE HARM AS A RESULT OF THE CIRCUIT COURT'S ORDERS.

State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861 (Mo. banc 1986)

State ex rel. Health Midwest Dev. Group, Inc. v. Daugherty, 965 S.W.2d 841 (Mo. banc 1998)

II. CONTRARY TO RELATORS' POINT II, THE CIRCUIT COURT DID NOT CLEARLY ABUSE ITS DISCRETION IN DECLINING TO PERMIT RELATORS TO PRODUCE ONLY A STATISTICAL SAMPLE OF PATIENT NAMES AND RECORDS.

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

Missouri Rule of Civil Procedure 56.01(b)

ARGUMENT

Summary of Argument

For two years the Circuit Court entered a series of straightforward discovery orders requiring production of basic patient information that is indisputably relevant to relators' claims, critical to a meaningful defense, and necessary to protect against the possibility of double recovery: the identities and records of patients whose injuries relators claim were caused or worsened by smoking. Relators' response to the series of discovery orders issued since December 2003 has been, in the words of the Circuit Court, "repeated disregard for, adamant refusal to comply with, and seemingly endless requests for the Court to reconsider, the Court's prior orders." September 27, 2005 Order at 12 (Rel.Ex. 2, A15). Now relators seek extraordinary relief, asking this Court to prohibit enforcement of the Circuit Court's last two discovery orders, one that simply denied reconsideration of multiple earlier orders, and the other that set a schedule for compliance and for a hearing on possible sanctions. Relators do not deserve extraordinary relief. To grant the writ now would undermine the authority of the two Circuit Court judges and the retired judge sitting as Special Master, who have spent years trying to ensure compliance with their rulings, and would reward relators for conduct that the Circuit Court deemed "nonsense that borders on bad faith and contumaciousness." *Id.* at 4 (A7). Relators cannot possibly show that their right to relief is "clear."

This Court should deny relators' petition on the basis of their delay and repeated non-compliance with the Circuit Court's orders alone. But even if relators had sought a timely writ on those prior discovery orders, there would be no valid basis to challenge the

Circuit Court's rulings, which were well grounded in the facts and law and plainly within the Circuit Court's discretion. Relators brought a massive case, based on a novel theory, and seek to prove it through shortcut statistical models, while preventing defendants from discovering any of the actual facts about the actual patients whose injuries and treatments are at issue. To the extent relators' discovery burdens are substantial, the burden is of their own making.

Regardless how many evidentiary shortcuts relators may wish to take in trying their case, they cannot dictate how defendants defend the case. Relators sustained their alleged damages only through the effects they claim smoking had on the patients whose costs are at issue in this case. As a result, each causal chain of events at issue necessarily is complex and attenuated, and proof of damages necessarily becomes speculative. Judges David and Riley recognized that, for this case to proceed, production of patient information is essential so that defendants can prepare a defense to issues regarding both liability and damages, and test relators' statistical estimates and damages models with genuine facts about the real treatment of the actual patients whose costs are at issue. For these reasons, Judges David and Riley ruled that producing the names and records of patients who were allegedly injured by smoking was commensurate with the sweeping claims relators had chosen to bring. *See* December 29, 2003 Order at 2-3 (Rel.Ex. 5A, A93-94); July 23, 2004 Order at 13-14 (Rel.Ex. 5C, A118-19); June 27, 2005 Order at 2 (Rel.Ex. 1, A2); September 27, 2005 Order at 7 (Rel.Ex. 2, A10).

In seeking prohibition, relators do not seriously challenge the relevance of the medical records, but instead make two principal arguments to attack the Circuit Court's

orders. First, they assert that producing the requested information will, for some hospitals, take so long as to be practically "impossible." *See* R.B. at 55; Plaintiffs' Supplemental Memorandum Regarding Master's Recommendation for Production of Patient Records, July 19, 2005, at 7 (Rel.Ex. 17, A764). Second, relators assert that "Defendants have already been provided with more than sufficient data, information and patient files to defend Relators' claims," Writ Petition ¶ 34, and "[i]f any additional need exists for Defendants to review additional evidence, such is satisfied with a statistical sampling of such files," *id.* ¶ 35.

Even though a petition must unequivocally and explicitly set forth every fact requisite to the issuance of the writ, relators have neither pleaded nor cited the relevant record facts necessary to support either argument. *See State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. S.D. 1997) (unsworn statements by counsel and statements in briefs are not evidence and are insufficient to supply essential matters for review); *State ex rel. Specialty Foam Prods., Inc. v. Keet*, 579 S.W.2d 650, 652 (Mo. App. S.D. 1979) (citations omitted); *see also* Mo. R. Civ. P. 84.04(i) ("All statements of fact and argument shall have specific page references to the legal file or transcript.").

Relators, for example, have provided neither this Court nor the Circuit Court with an estimate of how long it would take the hospitals simply to comply with the narrow Circuit Court orders. Instead, they point to affidavits containing estimates of how long it would take ten of the fifty-five hospitals to produce the records of <u>all</u> the charity/bad debt patients on the vastly overinclusive list of 6.5 million, with its myriad patients whose care had nothing to do with smoking. *See* Rel.Exs. 5D, 5K-5R, A128-29, A148-65. This is a

production that the Circuit Court never ordered and that defendants never requested. For the other roughly forty-five hospitals, there is no record evidence at all.

Relators' assertions that defendants already have "more than sufficient" patient records data or, in the alternative, should receive a statistical sample of such records, *see* Writ Pet. at 3-5 and ¶¶ 7, 8, 34, 35, also are without basis. First, as the Circuit Court found, relators have never produced a reasonably complete list of the patients as ordered by the Circuit Court. *See* pages 33-36, *supra*. Second, only eight hospitals have produced any medical or financial records, and those hospitals produced largely irrelevant records of patients drawn from the vastly overinclusive list of 6.5 million. *See* Concannon Aff. at 6 (Def.Ex. 24 at 1782). Third, relators have never made a specific or coherent proposal for statistical sampling of patient records, let alone demonstrated that Missouri law permits such an approach, which would deprive defendants of highly relevant information.

In short, relators have not provided any basis for this Court to conclude that the Circuit Court clearly abused its discretion. Nor have they come close to showing that they will suffer "absolute irreparable harm" unless this Court prohibits enforcement of those orders. Indeed, relators seek a writ from a "sanctions" order, but the Circuit Court has not imposed any sanction. Reduced to its essence, relators' argument for the writ is an attempt to escape basic discovery that will require some work on their part, without providing any factually-based reason that it is unduly burdensome, improper, or unfair.

I. CONTRARY TO RELATORS' POINT I, NO WRIT OF PROHIBITION SHOULD ISSUE BECAUSE UNDER MISSOURI LAW RELATORS MUST ESTABLISH A CLEAR RIGHT TO THE WRIT, AND THEY HAVE NOT DONE SO.

Standard Of Review

"The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991). In the Court of Appeals, relators sought to establish entitlement to a writ only by showing that the Circuit Court's June 27, 2005 and September 27, 2005 Orders constituted a "clear excess of jurisdiction or abuse of discretion such that the lower court lacks the *power* to act as contemplated." *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861, 862 (Mo. banc 1986) (emphasis in original). In this Court, relators now assert a second ground for a writ—that they will suffer "absolute irreparable harm . . . if some spirit of justifiable relief is not made available to respond to" that order. *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. banc 1983). Relators cannot meet either standard.

To qualify for the extraordinary relief that relators seek based on a purported abuse of discretion, relators must demonstrate that the trial court's "order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration." *State ex rel. Ford Motor Co. v. Nixon*, 160 S.W.3d 379, 380 (Mo. banc 2005) (citations omitted); *see also State ex rel. Phillips v. LePage*, 67 S.W.3d 690, 692 (Mo. App. S.D. 2002) (appellate courts issue writs in their discretion and only

when the trial court has acted arbitrarily or unjustly). In particular, relators have the burden of showing that the Circuit Court clearly abused its discretion in issuing the June 27, 2005 and September 27, 2005 Orders—both of which merely sought to enforce prior, unchallenged orders to produce. *See State ex rel. Health Midwest Dev. Group, Inc. v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998). They have utterly failed to do so. Instead, they are asking this Court to do what it may not—"substitute its judgment or discretion for that of another court properly vested with jurisdiction and exercising its discretion within the legitimate boundaries of that jurisdiction." *Douglas Toyota*, 804 S.W.2d at 752.

A. RELATORS DID NOT SEEK REVIEW OF JUDGE DAVID'S JULY 23, 2004 ORDER AND THE CIRCUIT COURT COMMITTED NO CLEAR ABUSE OF DISCRETION IN DENYING RELATORS' SECOND MOTION FOR PROTECTIVE ORDER OR IN AFFIRMING, BUT LIMITING, THE SPECIAL MASTER'S SANCTIONS RULING.

Relators spend more than forty pages attempting to explain why they did not seek a writ after any of Judge David's rulings. Relators argue that, until Judge Riley's September 27, 2005 Order affirming the Special Master's recommendation on sanctions, they did not know that they were to produce records of only those patients whose conditions were "caused or worsened by tobacco use." Relators' argument is contrary to the record.

Any uncertainty relators may claim to have had about the required scope of production after Judge David's orders of December 29, 2003 and January 22, 2004 was certainly eliminated by his lengthy July 23, 2004 Order. In fact, Judge David expressly rejected the very same arguments relators now make to this Court eighteen months later. He ruled that relators were required to produce the records of only those patients whose injuries were "caused or worsened by tobacco use"—precisely the requirement relators claim they could not have known until the Special Master reiterated the requirement in May 2005. *See* July 23, 2004 Order at 10-11 n.10, 15-16 (Rel.Ex. 5C, A115-16, A120-21). The only changes that Judge Riley made to this instruction in his 2005 orders actually eased relators' task by narrowing the time frame for the records, and simplifying the criteria for whose records relators were required to produce to include only the records of smokers and people with smoking-related diseases. *See* September 27, 2005 Order at 13-14 (Rel.Ex. 2, A16-17).

In other words, Judge Riley merely enforced prior rulings of Judge David, and relators are now asking this Court to prohibit enforcement of those prior orders, which relators did not challenge.

1. The July 23, 2004 Order Required Relators To Produce Only Records Of Patients With Medical Conditions "Caused Or Worsened By Tobacco Use," And Relators' Suggestions To The Contrary Are Not Credible.

The July 23, 2004 Order unmistakably required relators to produce the names and records of charity/bad debt patients with medical conditions "caused or worsened by

tobacco use." *See* July 23, 2004 Order at 10-11 n.10, 15-18 (Rel.Ex. 5C, A115-16, A120-23). One of their principal arguments in support of their first Motion for Protective Order was that smokers' records were not relevant and that relators should be allowed to produce records of all charity care and bad debt patients because their expert's statistical damages model operates by applying a "smoking attributable fraction" to total charity care and bad debt costs. *Id.*. Relators have made that very same argument to Judge Riley and to this Court. *See* September 27, 2005 Order at 3-4 (Rel.Ex. 2, A6-7); R.B. at 54, 58, 84-85.

In his July 23, 2004 Order, Judge David not only rejected this argument, calling it a "denial of reality," (Rel.Ex. 5C, A115-16), but also emphasized that relators could not merely produce a "vastly overinclusive" list of all charity care and bad debt patients, instead of the patients whom the hospitals contend had medical conditions "caused or worsened by tobacco use." *Id.* at 4 n.4, 10-11 n.10, 15-16 (A109, A115-16, A120-21). Thus, as Judge Riley later found, the July 23, 2004 Order plainly and properly equated the patients "whose costs of care relators seek to recover" with the patients whom relators contend had conditions "caused or worsened by tobacco use," not every charity care and bad debt patient, as relators still claim. *See, e.g.*, September 27, 2005 Order at 6 (Rel.Ex. 2, A6-7; A9) (citing July 23, 2004 Order at 3-4; 15-18 & n.10); *See also* Herberts Dep. at 56-58 (Rel.Ex. 13S, A516-17).

2. The June 27, 2005 Order Was An Appropriate Exercise Of Discretion.

By challenging the June 27, 2005 Order, relators contend that Judge Riley lacked power to deny what was in essence a motion to reconsider Judge David's July 23, 2004 Order denying a previous motion to reconsider his earlier orders requiring production of patient records. *See* September 27, 2005 Order at 2 n.1, 3 n.2 (Rel.Ex. 2, A5-6). From Judge Riley's standpoint, the prior Presiding Judge not only had entered two orders requiring identification of patients and production of patient records, but had filed a twenty-two page opinion in denying a motion to reconsider. *Id.* at 2 n.1 (A5). It would be hard to imagine a situation that more clearly implicates interests in the efficiency and reliability of motion practice in the Circuit Court.

As Judge Riley recognized, relators' new motion made essentially the same arguments they had made over and over to Judge Riley. Judge Riley also recognized that nothing material had changed since Judge David had entered his earlier orders.[10] In the

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[10] Although by June 2005 relators' patient list had 6.5 million entries, whereas Judge David had based his decision on relators' representations that the list was 5.1 million, that difference was not material to any of the issues before the Circuit Court. *See* June 27, 2005 Order at 2 (Rel.Ex. 1, A2); September 27, 2005 Order at 5 n.4 (Rel.Ex. 2, A8). Also, relators did not present, and have never presented, evidence about how long it would take to produce the records for patients with conditions allegedly caused or worsened by tobacco use. *See* pages 43-44, *supra*; pages 73-74, *infra*.

circumstances, it would have been wholly unreasonable for Judge Riley to allow relators' motion to reconsider the ruling on the prior motion to reconsider.

Moreover, the June 27, 2005 Order changed nothing about relators' obligation to produce the records of persons with conditions "caused or worsened by tobacco use." It did impose a November 16, 1993 statute of limitations cut-off upon the patient list, *see* June 27, 2005 Order at 3 (Rel.Ex. 1, A3), but that only reduced relators' obligation from producing fifty years' worth of names and records of patients with conditions "caused or worsened by tobacco use" to roughly twelve years' worth.

3. The September 27, 2005 Order Was Not An Abuse Of Discretion.

Similarly, far from lacking power to issue the September 27, 2005 Order, the Circuit Court has express authority under Rule 61.01(d) of the Missouri Rules of Civil Procedure to issue an order requiring production of requested documents and to impose sanctions for failure to comply with such an order. Here, the Circuit Court had issued five separate orders requiring relators to produce particular patient records and an appropriate patient list—and relators still have not complied with those orders. *See* pages 23-32, *supra*. Indeed, Judge Riley found that relators had no good faith justification for their noncompliance. *See* September 27, 2005 Order at 4-5 (Rel.Ex. 2, A7-8).[11]

[11] When, in opposition to defendants' motion for sanctions, relators tried to resurrect the same arguments that Judge David had called a "denial of reality" and relators' own witness had contradicted, it is not surprising that Judge Riley found those arguments

In this context, the Circuit Court unquestionably had power to require relators to produce a corrected patient list and the corresponding records within thirty days and, if necessary, to appear for a hearing before the Special Master in forty-five days, with consideration of sanctions. In the words of the Circuit Court, "[t]he Special Master's ruling and recommendations of May 23, 2005 were a reasonable, appropriate and proper response to the Plaintiffs' repeated failure and refusal thus far to comply with the Court's prior orders concerning patient records." September 27, 2005 Order at 12-13 (A15-16).[12] No other conclusion is tenable. Discovery rules would be unenforceable if a court could not enforce orders that it found were being repeatedly disobeyed.

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to be "nonsense that borders on bad faith and contumaciousness, or at the very least a kind of willful blindness." September 27, 2005 Order at 4 (Rel.Ex. 2, A7). Relators nevertheless offer the very same arguments to this Court. *See* R.B. at 54, 58, 84-85.

[12] In his May 23, 2005 Rulings and Recommendations, the Special Master merely continued to apply the requirement of the July 23, 2004 Order and recommended that relators be required to "provide Defendants with a corrected patient list consisting only of patients from the existing patient list whose costs of care were caused or worsened by tobacco use," and to produce those patients' medical and financial records. *See* May 23, 2005 Master's Findings, Rulings, and Recommendations (Rel.Ex. 14, A563).

Moreover, the September 27, 2005 Order further simplified relators' task. Judge Riley narrowed the criteria for the charity/bad debt patients whose records relators had to produce. These now included only smokers with specific smoking-related diseases (rather than anyone exposed to tobacco smoke with a condition allegedly caused or worsened by that exposure). *Id.* at 8, 14 (A11, A17).

In sum, the June 27, 2005 and September 27, 2005 Orders were both entirely appropriate exercises of discretion, given the settings in which they arose. And the simplified requirements found in the orders reflect the Circuit Court's careful exercise of discretion in defining relators' task and in weighing the importance of the information to defendants against the burden of compliance for relators.

Relators' argument that the Special Master's May 23, 2005 Recommendation and the September 27, 2005 Order "transformed" their task for the worse is indefensible. *See* R.B. at 42. Because the July 23, 2004 Order had defined the patients whose costs of care relators seek to recover as the patients with conditions "caused or worsened by tobacco use," relators had no credible basis for interpreting either the July 23, 2004 Order or the December 1, 2004 Order as they claim they did. And they thus had no credible basis for producing the overinclusive and underinclusive list of 6.5 million patients, no basis for producing thousands of irrelevant records of patients whose care had nothing to do with smoking, no basis for submitting affidavits concerning the time it would take to produce records for 6.5 million patients (which include millions of superfluous patients), and no basis for complaining when the Circuit Court simplified relators' task in the September 27, 2005 Order.

B. THE CIRCUIT COURT PROPERLY ORDERED PRODUCTION OF THE NAMES AND RECORDS OF PATIENTS WITH CONDITIONS ALLEGEDLY CAUSED OR WORSENED BY SMOKING.

The Circuit Court's power to uphold and enforce its orders by itself justifies denying relators' petition. But even if this Court entertains relators' belated invitation to consider whether the earlier patient records orders were an abuse of discretion, no writ should issue. The thorough opinions of two Circuit Court judges and a retired judge sitting as Special Master demonstrate that the discovery orders at issue were not merely within the bounds of permissible discretion; they were necessary as a matter of fundamental fairness to allow defendants to defend against relators' claims. As those judges concluded, it would have been illogical, arbitrary, and unreasonable not to have entered the orders.

1. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PRODUCTION WAS NECESSARY UNDER THE RULES OF CIVIL PROCEDURE TO GIVE DEFENDANTS A FAIR OPPORTUNITY TO DEFEND THE CASE AND TO HAVE PROTECTION AGAINST THE RISK OF DOUBLE RECOVERY.

The facts about the actual patients whose injuries relators claim were caused or worsened by smoking go to the heart of this case. Relators' petition in the Circuit Court makes this clear. *See, e.g.*, Second Amended Pet. ¶ 4 (relators seek to recover

"uncompensated, unreimbursed, costs for healthcare provided . . . to medically indigent and nonpaying patients suffering from tobacco related illness and disease").[13]

If one hospital sought to recover for John Doe's $200,000 medical bill that allegedly became a bad debt, and the bill was for treatment of a heart attack, defendants surely would have no obligation to pay for that bill if John Doe was not exposed to tobacco smoke, or if his smoking did not cause the heart attack, or if his insurer actually paid the bill. To explore those issues, defendants would plainly be entitled to discovery of John Doe's name and of the hospital's medical and financial records for him. Nothing could be more basic. *See State ex. rel. Williams v. Mauer*, 722 S.W.2d 296, 301 (Mo. banc 1987) ("Under our discovery rules, if an adverse party has sought the information, each party will have disclosed the names of persons having knowledge of facts and opinions relating to the litigation."). These are classic examples of information that is not merely "reasonably calculated," but highly likely, to lead to the discovery of admissible evidence. *See* Mo. R. Civ. P. 56.01(b)(1). This is also information that would diminish the risk that defendants would be subject to double recovery should the individual or an insurer, for example, seek to recover the same medical expenses. *See* Mo. R. Civ. P. 52.04; *see also* May 22, 2003 Order at 13-37 (Rel.Ex. 3, A31-55). That relators have

[13] Remarkably, relators did not include any version of their petition below in the record before this Court. Defendants, however, have done so. The language quoted in the text indisputably demonstrates the relevance of the patient records at issue.

chosen to sue for costs of treating hundreds of thousands of patients does not diminish the relevance of this type of information.

The same conclusion follows from the deposition admissions of relators' corporate designee concerning the patient lists. He admitted that relators are seeking to recover the costs of charity care and bad debt patients who suffered from medical problems "caused or worsened by tobacco use," but are not seeking to recover the costs of charity care and bad debt patients who did not suffer from medical problems "caused or worsened by tobacco use." *See* Herberts Dep. at 56-58 (Rel.Ex. 13S, A516-17). Thus, relators' own designee drew the same distinction as Judges David and Riley: relators are seeking to recover the costs of treating patients whose injuries they claim were caused or worsened by smoking, and therefore must produce the records of those patients and only those patients.

The Circuit Court judges repeatedly recognized why the discovery was "appropriate and necessary." *See* July 23, 2004 Order at 8-9 (Rel.Ex. 5C, A113-14). First, defendants need access to the patient records "as part of a fair opportunity to defend the claims brought against them by Plaintiffs, to discover whatever relevant information or patterns of information may be available . . . from the records" because, without such access, "Defendants would not have a fair opportunity to test or challenge Plaintiffs' damage claims." *Id.* Judge David ruled that defendants would have the right to explore a number of key factual questions such as whether the patient was a smoker, had a smoking-related disease, received medically necessary treatment, qualified for charity care, incurred a bad debt, and so forth. *Id.* at 8 n.8 (A113); *see also* September 27, 2005

Order at 4 (Rel.Ex. 2, A7) (Judge Riley ruling the same). Second, defendants need reasonably complete patient information to protect against the possibility of double recovery. The availability of such information was a key premise of the Circuit Court's decision denying defendants' motion to join the patients as necessary parties.

The requirements imposed by the Circuit Court are hardly surprising given that twenty appellate courts have unanimously rejected suits like this one on the ground that the plaintiff's asserted injury is too remote and indirect as a matter of law.[14] In reaching

[14] *Perry v. Am. Tobacco Co.*, 324 F.3d 845 (6th Cir. 2003); *Ala. Coushatta Tribe of Tex. v. Am. Tobacco Co.*, 46 Fed. Appx. 225 (5th Cir. 2002) (per curiam), *cert. denied*, 537 U.S. 1159 (2003); *Serv. Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068 (D.C. Cir. 2001); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir. 2001); *Regence Blueshield v. Philip Morris Inc.*, 5 Fed. Appx. 651 (9th Cir. 2001); *United Food & Commercial Workers Unions, Employers Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir. 2000); *Lyons v. Philip Morris Inc.*, 225 F.3d 909 (8th Cir. 2000); *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429 (3d Cir. 2000); *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788 (5th Cir. 2000); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818 (7th Cir. 1999); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999); *Laborers Local 17 Health &*

this conclusion, the appellate courts have noted that in cases of this type, the causal chain is attenuated, making damages highly speculative and difficult to measure. *See, e.g.*, *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 441-44 (3d Cir. 2000) (stating that "speculative calculations create a vast uncertainty about the Hospitals' damages" and observing that calculations based on "aggregation and statistical modeling" are "highly speculative"); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 703 (9th Cir. 2001) ("Calculation of the Hospital Districts' damages would entail considerable speculation. . . ."). [15] Furthermore, "the circuits have concluded that

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Benefit Fund v. Philip Morris, Inc., 191 F.3d 229 (2d Cir. 1999); *Owens Corning v. R.J. Reynolds Tobacco Co.*, 868 So. 2d 331 (Miss. 2004); *Venezuela v. Philip Morris Cos.*, 827 So. 2d 339 (Fla. Dist. Ct. App. 2002) (per curiam), *rev. denied*, 847 So. 2d 978 (Fla. 2003); *State ex rel. Miller v. Philip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998); *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996); *County of Cook v. Philip Morris, Inc.*, 817 N.E.2d 1039 (Ill. App. Ct. 2004), *appeal denied*, 829 N.E.2d 786 (Ill. 2005); *A.O. Fox Mem'l Hosp. v. Am. Tobacco Co.*, 754 N.Y.S.2d 368 (N.Y. App. Div. 2003), *appeal denied*, 793 N.E.2d 410 (N.Y. 2003); *Steamfitters Local Union No. 614 Health & Welfare Fund v. Philip Morris, Inc.*, Civ. A. No. W1999-01061-COA-R9-CV, 2000 WL 1390171 (Tenn. Ct. App. Sept. 26, 2000).

[15] *See also Serv. Employees*, 249 F.3d at 1073-74 ("[D]amages for such claims are highly speculative and difficult to calculate given the many other potential causes for

allowing such claims to proceed would create a risk of multiple recoveries and necessitate complicated rules for apportioning damages between groups of plaintiffs removed at various levels from the tobacco industry's alleged wrongdoing." *Serv. Employees*, 249 F.3d at 1073 (citing cases).[16]

This line of precedent points to the critical need for production of patient names and records in this case. The problems of the attenuated causal chain, speculative damages, and risks of multiple recovery that other courts have ruled dispositive are fully present here. By requiring production of information bearing on the actual patients who allegedly were injured by smoking, the orders of Judges David and Riley were their attempt to mitigate the problems that other courts had found so serious. The judges' orders were well within the bounds of reason, fully consistent with the discovery rules, and far from an abuse of discretion.

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the alleged financial injuries . . . . Reliance on aggregate statistical proof . . . compounds the difficulties and does not alter the speculative nature of the claimed damages."); *Laborers Local 17 Health & Benefit Fund*, 191 F.3d at 240 (damages analysis involved "the sheerest sort of speculation"); *Steamfitters Local Union*, 171 F.3d at 933 ("too speculative and attenuated" as a matter of law to support a finding of proximate cause).

[16] Defendants believe that, like all the cases cited in note 14, *supra*, this case should have been dismissed on remoteness grounds, but Judge Calvin of the Circuit Court denied defendants' motion to dismiss. That ruling is not currently before this Court.

2. FOR THE SAME REASONS, THE CIRCUIT COURT CORRECTLY CONCLUDED THAT PRODUCTION WAS NECESSARY AS A MATTER OF CONSTITUTIONAL DUE PROCESS.

By aggregating claims for the treatment of hundreds of thousands of patients who were allegedly injured by smoking, but refusing to identify and produce records for those patients, relators seek to force defendants to rely on national statistics simply because that is how relators have chosen to present their case. Relators' choice of strategy, however, cannot defeat defendants' right to defend by using the facts about the actual patients at issue. "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938); *cf. In re Oliver*, 333 U.S. 257, 275 (1948) ("[D]ue process of law requires that one charged with contempt . . . have a reasonable opportunity to meet [the charges against him] by way of defense or explanation."); *Tullock v. City of St. Charles*, 602 S.W.2d 860, 863 (Mo. App. E.D. 1980) (holding, in a hearing to demote policeman, that it violated due process for administrative board to have seen investigative report, but to have denied officer the "opportunity to see the report and rebut the material therein"). Indeed, due process of law requires that defendants be provided the discovery necessary to rebut relators' case on an individual-by-individual basis. *See, e.g., Agency for Health Care Admin. v. Assoc. Indus. of Fla.*, 678 So. 2d 1239, 1254 (Fla. 1996) (holding that due process guarantees of Florida constitution require identification of Medicaid patients for whose cost of care state seeks

to recover so that defendants can investigate issues such as fraud, misdiagnosis, unnecessary treatment, and whether individual smoked); *see also In re Fibreboard*, 893 F.2d 706, 712 (5th Cir. 1990) (rejecting, on mandamus, trial court's plan to hold "aggregate" trial of 3,000 asbestos claims based on sample evidence and expert testimony). In addition, relators' planned trial tactics cannot justify exposing defendants to a risk of double recovery. *See W. Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 76-77 (1961) (action could not go forward in the absence of other parties because judgment "might force [the defendant] to pay a single debt more than once," implicating the due process clause).

If a single plaintiff hospital brought suit against defendants to recover for treatment provided to a single nonpaying patient, defendants could not be forced to proceed without knowing who the patient was. Defendants also could not be denied the right to investigate whether the patient was a smoker whose smoking necessitated treatment which actually cost the hospital money in the amount the hospital claimed. If the hospital refused to provide that information because it decided production would be too burdensome, the case could not proceed at all. Allowing it to proceed would violate due process. Indeed, even if the information were protected by privilege, the case could not proceed without disclosure. *See State ex rel. St. John's Reg'l Med. Ctr. v. Dally*, 90 S.W.3d 209, 217 (Mo. App. S.D. 2002) ("Due process, which requires a fair trial, is a strong societal interest that mandates the yielding of a privilege.").

Relators' aggregated approach presents exactly the same due process violation, but compounded hundreds of thousands of times for the hundreds of thousands of patients

about whom relators have withheld the critical facts. Those facts are especially critical in a case like this one, with its attenuated causal chain, speculative damages, and risk of multiple recovery.

3. RELATORS' ARGUMENTS TO DEMONSTRATE THAT DEFENDANTS DO NOT NEED INDIVIDUAL PATIENT RECORDS ARE UNPERSUASIVE.

Unable to deny the clear relevance of this discovery, relators argue that defendants do not actually need individual patient records for three reasons: (1) relators' damages models use statistics to estimate smoking-attributable fractions that are applied to all charity care and bad debt patients and the only use defendants could make of individual records would be to turn this case into a series of myriad individual cases, *see* R.B. at 52-53; (2) the Circuit Court's criteria for selecting the patients—smokers with smoking-related diseases—result in a collection of records that is "not probative of issues in this suit," *id.* at 54; and (3) relators already concede all of the points that defendants might make with the individual records, *id.* at 83-84. None of these arguments survives scrutiny. *See* Mo. R. Civ. P. 56.01(b).

a. Relators' Use Of Statistical Damages Models Does Not Reduce The Relevance Of Individual Patient Records.

The Circuit Court did not rule on the admissibility, sufficiency, or accuracy of relators' statistical damages models, and those issues are not before this Court. Nevertheless, throughout their brief, relators stress that their use of a statistical damages models means that this case is not really about the patients who were allegedly injured by

smoking and who received the care for which relators seek damages. Relators' brief states, for example: "Relators will show the harm caused by Tobacco to the hospitals, not the patients, using epidemiology." R.B. at 52 (emphasis in original); *see also id.* at 81. This is a remarkable statement, insofar as epidemiology is about human populations. For example, J.M. Last, *A Dictionary of Epidemiology* 62 (4th ed. 2001), defines "epidemiology" as "[t]he study of the distribution and determinants of health-related states or events in specified populations, and the application of this study to the control of health problems." The "specified population" in this case is a group of charity/bad debt patients whose medical conditions plaintiffs claim were caused or worsened by smoking. *See* July 23, 2004 Order at 10-11 n.10 (Rel.Ex. 5C, A115-16).

Relators' statistical models, however, do not focus on the hospitals' actual patients. Instead, in their own words, "[r]elators 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." R.B. at 84. Specifically, they use "national data" to estimate the fraction of treatment costs they claim are attributable to smoking (the "smoking – attributable fraction" or "SAF"), and then multiply that SAF by the aggregated annual charity and bad debt costs per hospital. Even if relators are permitted to use such a model in an attempt to estimate their alleged damages—a question the Circuit Court has not yet addressed—defendants are entitled to test relators' statistical manipulation of "national data" using the real facts about the actual patients whom relators claim they treated for diseases purportedly caused or worsened by smoking.

Using the example of lung cancer, relators argue that defendants do not need actual patient records because relators' damages models are based on recovering "90% of the costs incurred in treating 100% of the lung cancer population; not 100% of the costs incurring in treating the 90% whose lung cancer was actually caused by smoking." *Id.* at 82. They continue: "The Second Patient Records 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 . . .[?]" *Id.*

Relators have chosen this example for their own strategic purposes, and it is misleading. Lung cancer represents only a tiny fraction of patients and alleged injuries at issue. Relators also seek to recover the costs of treating a whole host of conditions such as chronic sinusitis, high blood pressure, asthma, peptic ulcer, gastric ulcer, pregnancy complications, and childhood ear and respiratory infections, some of which may only be weakly associated with smoking, and others, like broken bones and household accidents, which are not linked to smoking at all. Yet plaintiffs would base their damages on a percentage of <u>all</u> treatment for <u>all</u> such illnesses—the vast majority of which even they admit were not caused by smoking. *See* Expert Report of Glenn W. Harrison in the Missouri Hospitals' Tobacco Case, May 14, 2003 ("Harrison Report") at 5 (Rel.Ex. 16B, A639). The problem is further exacerbated because relators also purport to estimate damages for costs incurred in treating literally every other condition, including those that no one claims are even associated with, much less caused by, tobacco use, such as broken bones, gunshot wounds, diabetes, and schizophrenia. *See, e.g.*, Confidential Appendix

(Def.Ex. 21 at 1388-1571). Thus, contrary to the implication of the lung cancer example, millions of patients on the list will not have been injured by exposure to cigarette smoke. *See, e.g.*, July 23, 2004 order at 4 n.4 (Rel.Ex. 5C at A109). Defendants are entitled to know for just how many patients relators have actual evidence supporting their claim that smoking caused the patients' injuries. That evidence is in the patients' records.

Furthermore, a local hospital plaintiff's decision to use national statistics to prove damages does not render irrelevant more accurate information that can be found in medical and financial records. Imagine, for example, that Hospital X is suing the Bus Company for charity care provided to John Smith, whose hip was broken when struck by a bus. The hospital's damages expert testifies that he reviewed the hospital's computerized records and found that two charity patients named John Smith were treated for a broken hip on the relevant day, but there was no indication which one was hit by a bus. One John Smith received $5000 worth of care; the other received $45,000 worth. The expert opines that the damages in the case are $25,000. He cites statistics from national data and from Hospital X showing that the average treatment cost for a broken hip is about $25,000, which is also the average of the costs for the two John Smiths. Assuming for the sake of argument that such expert testimony were admissible, there can be no doubt that, if the medical records of the John Smith who was hit by the bus existed, they would be relevant and discoverable by the Bus Company and could be used to impeach the expert's report. Defendants are entitled to the requested documents so that they can make precisely these types of challenges to relators' statistical models.

Furthermore, although relators suggest that the patient records will be useful only to create millions of individual trials, defendants also can use large groups of patient records to test questions about relators' damages models. For example, defendants can identify specific subpopulations and compare the real patients with what the models say about the damages for that subpopulation. Suppose, for example, that the damages models estimate damages for stroke at hospital X to be $500,000 for women and $1,000,000 for men since November 16, 1993. If 500 charity/bad debt patients were smokers treated for stroke at Hospital X after November 16, 1993, it would be possible to compare the total costs for women and men among the actual patients with relators' damages numbers. If either of the actual numbers were radically different from the numbers in the models, that would raise questions about the models. Furthermore, review of those 500 patients' records might reveal other problems such as patients whose treatment was not medically necessary or patients for whom the hospital received payment.

b. The Records Of Patients Who Are Smokers With Smoking-Related Diseases Are Probative Of Issues In This Case.

The issue before this Court is whether the Circuit Court abused its discretion in enforcing a series of orders that required relators to produce in discovery the best evidence they have supporting their claim that certain charity care and bad debt patients were injured by smoking: the identities and records of patients who were smokers and were treated for diseases associated with smoking. Relators nevertheless disparage the

idea that actual facts about their actual patients who smoked and contracted smoking-related diseases are even relevant: "The patient records . . . 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." R.B. at 54. This admission—that relators seek to recover a percentage of costs incurred treating patients who were not even exposed to defendants' products—cannot provide a valid basis for the relief relators seek. As Judge David observed, it is a "denial of reality" for relators to say they are not seeking to recover the costs of providing treatment for particular patients—patients allegedly injured by smoking. Plaintiffs have chosen to estimate those costs by taking a percentage of all charity care and bad debt costs, but that does not mean that the treatment of all charity care and bad debt patients is at issue. No matter how relators estimate their damages, they cannot actually recover for the costs of treating patients who were not injured by defendants' products. Thus, as Judges David and Riley both held, the only patients whose medical and financial records are relevant to questions of causation and injury are the patients whose injuries relators claim were caused or worsened by smoking.

Those are precisely the records that defendants requested and the Circuit Court's July 23, 2004 Order required relators to produce. This was entirely reasonable because these are the patients whose costs of care relators own witness testified they are trying to recover. *See, e.g.*, Herberts Dep. at 56-58 (Rel.Ex. 13S, A516-17). Under that order,

relators would have had to produce the records not just of smokers with smoking-related diseases, but also nonsmokers whose conditions relators contend were caused or worsened by secondhand smoke, and smokers who did not have smoking-related diseases whose conditions relators contend were complicated or worsened by smoking. In the September 27, 2005 Order, at defendants' suggestion, the Circuit Court cut back on this requirement and limited the production to records of smokers with smoking-related diseases. *See* September 27, 2005 Order at 9 n.8 (Rel.Ex. 2, A12). This restriction eased relators' burden considerably.[17]

Relators now argue that, because their damages model seeks recovery for patients other than smokers with smoking-related diseases, the actual facts about the "limited subset" of actual patients who are smokers with smoking-related diseases are irrelevant. But relators have it exactly backwards. Smokers with smoking-related diseases are the category of patient for which relators' case on causation and damages is strongest. Defendants are entitled to see the hospitals' strongest evidence supporting their claim that they treated charity/bad debt patients injured by smoking and to compare that number to the results of relators' damages model to argue that the real-world data confirm that

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[17] Relators admit that they can identify charity/bad debt patients with smoking-related diseases by computer and that such patients constitute less than 20% of all charity/bad debt patients. *See* R.B. at 78-79 & n. 27. In addition, patient smoking information surely is more likely to be found in a medical record than is evidence of exposure to secondhand smoke. *See* pages 78-79, *infra*.

relators' estimates are fiction. Defendants might show, for example, that the smokers with smoking-related diseases represent a small portion of total damages and that most of the claimed damages are from other, highly speculative sources. If through analysis of the records concerning the actual patients defendants can demonstrate that relators' smoking-related disease model is inaccurate, that evidence will also raise questions about the validity of relators' even more speculative claim regarding patients with non-smoking related diseases.

Second, regardless of any descriptions in relators' brief, the only record facts on the subject of the damages model are found in relators' damages expert's report, and that report puts forward two different models. One model purports to estimate the allegedly increased costs of care for bad debt and charity patients with smoking-related diseases caused by exposure to smoke (the "smoking-related disease" model). *See* Harrison Report at 5 (Rel.Ex. 16B, A639). Those are precisely patients whose records the Circuit Court ordered relators to produce—smokers with smoking-related diseases. Relators' other model, the "all disease model," purports to estimate total costs for both smoking-related diseases and all other diseases and conditions, including broken bones, household accidents, psychiatric treatment, and so on. Even under that approach, defendants must be entitled to get the records of patients whose injuries were actually "caused or

worsened by" smoking and to use those records to demonstrate how relators' "all-disease" model will lead to grossly inflated damages.[18]

Defendants therefore need the patients' medical and financial records to test both of relators' models. Suppose, for example, that for 2002 relators' smoking-related disease model showed Hospital X had damages of $1 million and the all disease model showed damages of $5 million. Yet a review of the records might show that Hospital X's bad debt and charity care patients who had a history of smoking and smoking-related disease had charges of only $100,000 for 2002. This is the type of analysis that defendants must be free to explore. In a different vein, suppose that a hospital benefited financially by coding patients as having smoking-related diseases (for example, because insurers paid more for treatment of such conditions), and as a result many hospital patients were coded for smoking-related diseases they did not really have. The medical and financial records at issue in this case would plainly be relevant to expose this practice.

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[18] Even if relators are trying to recover for nonsmokers with smoking-related diseases on the ostensible ground that these nonsmokers were injured by second-hand smoke, *see* R.B. at 53, defendants have a right to test how much of relators' alleged damages stem from smokers rather than nonsmokers, as to whom it will be difficult or impossible for relators to find epidemiological or clinical evidence of association, much less causation.

c. Relators' Supposed Concessions Do Not Mean That "Tobacco Gains Little Or Nothing Of Relevance . . . By Reviewing Patient Files."

Relators argue that they are willing to make various concessions that render individual patient files irrelevant in this case. In particular, they "concede" that their records "do not always collect or record smoking information." R.B. at 82-83. Relators also concede that "many of the patients for whom they are seeking to recover . . . were not smokers," that they are seeking to recover for injuries that "though associated with smoking, [were] not caused by smoking," and that "they cannot prove causation on a case by case . . . basis." *Id.* at 83-84. Admitting that their records are incomplete and that their proof is limited, however, can hardly restrict defendants' ability to discover relevant information and use it to attack relators' limited proof. The patient records are the best evidence relators have about which patients were smokers with smoking-related diseases, and defendants are entitled to that best evidence. Relators will try to use national statistics to argue that the true number is higher. Defendants will challenge that assertion with the actual facts from relators' own files. A judge or a jury will decide whether and to what extent relators should be bound by the facts they can prove rather than the numbers they can estimate. This is what happens in any trial. Relators are not entitled to short circuit that process with self-serving concessions designed to hide the best evidence they have about the actual patients just because they have chosen to ignore that evidence in favor of national statistics.

Moreover, none of the concessions are sufficient to decide even the limited questions they are offered to resolve because they are not stated in quantitative terms. If relators' all disease model estimates past damages for all hospitals at $400 million, and the smoking-related disease model estimates them at $100 million, but the files of smokers with smoking-related diseases reflect costs of only $20 million, surely defendants are entitled to demonstrate the magnitude of the difference.

Another problem with relators' argument is that they make no concessions about the bulk of the questions to which Judge David found the patient records to be relevant. For example, relators have not conceded that they seek to recover for treatment that was not medically necessary, yet in any normal case, the defendant could explore this issue. Relators also make no concessions about patient financial accounting. Defendants are entitled to explore whether the costs relators are seeking to recover were properly written off to charity care or bad debt, whether relators made reasonable efforts to collect the funds from insurers or the government, whether payments received for patients were properly credited to their accounts—and so forth.

4. RELATORS HAVE NOT ESTABLISHED THAT COMPLIANCE WITH THE CIRCUIT COURT'S ORDERS WOULD BE UNDULY BURDENSOME OR THAT THEY ALREADY HAVE PRODUCED SUFFICIENT RECORDS.

Relators contend that the judges below did not properly "balance the need of the interrogator to obtain the information against the respondent's burden in furnishing it."

R.B. at 63 (quoting *State ex rel. Blue Cross & Blue Shield of Mo. v. Anderson*, 897 S.W.2d 167, 169 (Mo. App. S.D. 1995) (citation omitted)).

First, relators are simply wrong about the standard. Defendants need a reasonably complete patient list not merely for discovery, but also to alleviate concerns about double recovery. Judge David characterized the list as an important "protective provision" justifying his denial of defendants' motion for judgment on the pleadings for failure to join the individual patients as parties. If relators are relieved of the obligation to produce the list, the Circuit Court has already stated that it might have to reconsider its denial of defendants' joinder motion. *See* July 23, 2004 Order at 9 n.9 (Rel.Ex. 5C, A114). Similarly, a reasonably complete set of patient records is a fundamental component of a fair opportunity to prepare a defense: defendants are entitled to know the actual facts about relators' actual patients to develop challenges to relators' damages model, which is based on national statistics.

Second, even under the balancing test applicable to discovery, relators have not submitted cognizable facts that establish either of the principal claims they raise on this issue: (1) that relators face an unreasonable and insurmountable burden in complying with the Circuit Court's orders; and (2) that defendants already have all the patient records they need to defend the case. *See* R.B. at 78-81, 85-89. To the contrary, relators' unsupported claims of "impossibility" do not come close to outweighing defendants' need for patient records that go to the heart of relators' claims.

a. Relators Have Offered No Relevant Record Facts Showing That Production Would Be Unduly Burdensome, Let Alone "Impossible."

For their "burden" point, relators rely heavily on unsupported assertions in briefs and "Suggestions." Such assertions do not suffice in an original writ proceeding. *See, e.g.*, *State ex rel. Ford Motor Co. v. Westbrooke*, 12 S.W.3d 386, 391 (Mo. App. S.D. 2000) ("Rule 84.04(i) requires that the statement of facts and argument portion of the brief 'shall have specific page references to the legal file or the transcript.' . . . While the record in the appellate court in original writ cases does not necessarily include a transcript or legal file, it is apparent that the record provided in such cases should include such exhibits, papers, documents, and records necessary to support the contention of the petitioning party."); *Specialty Foam Prods.*, 579 S.W.2d at 653 ("[R]ecord facts cannot be supplied in a brief."); *see also State ex rel. Ford Motor Co. v. Westbrooke*, 151 S.W.3d 364, 368 (Mo. banc 2004).

The only other information that relators provided to the Circuit Court was framed in terms of the time it would take for ten of the more than fifty-five hospitals to produce all charity care and bad debt records.[19] In other words, relators provided no evidence as

[19] *See, e.g.*, Ferguson Aff. (Rel.Ex. 5D, A128-29); Beezley Aff. (Rel.Ex. 5K, A148-49); Thompson Aff. (Rel.Ex. 5L, A150-51); Wagher Aff. (Rel.Ex. 5M, A152-53); Sanders Aff. (Rel.Ex. 5N, A154-56); Dix Aff. (Rel.Ex. 5O, A157-58); Dean Aff. (Rel.Ex. 5P,

to approximately forty-five hospitals. As to the other ten hospitals, relators provided estimates only as to the amount of time that it would take to produce a "vastly overinclusive" set including millions of superfluous records, not the time that it would take to produce what the Circuit Court actually ordered. "In a prohibition proceeding . . . [t]he reviewing court is limited to the record made in the court below." *Dixon*, 939 S.W.2d at 69. Relators presented no evidence in the Circuit Court concerning how long it would take any hospital to produce only the records of smokers with smoking-related diseases. Relators have not come close to meeting their burden.

Furthermore, relators' admissions in the Circuit Court and the Court of Appeals, belie their assertions that compliance is "impossible" even for the few hospitals for which they claim it. Relators do not deny that the information necessary to create a reasonably complete, but not overinclusive, patient list is available in their hospital records. Indeed, they admit that almost all of the hospitals have computer-searchable databases containing both charity/bad debt patients and diagnosis information that would permit the hospital to identify patients with diagnosis codes for conditions considered "smoking-related." *See* R.B. at 78-79 & n.27. And in a brief submitted in July 2005, *see* Plaintiffs' Supplemental Memorandum Regarding Master's Recommendation for Production of Patient Records, July 19, 2005 (Rel.Ex. 17, A758-65), relators admitted that if the list is limited to patients with smoking-related diseases, it shrinks from 6.5 million to about 700,000. *Id.* at 7 &

A159-61); Winans Affs. (Rel.Exs. 5Q & 5R, A162-65); *see also* Bunzel Aff. (Rel.Ex. 5H, A141-42); Wilderman Aff. (Rel.Ex. 5G, A138-40).

n.11 (A764); *see also* R.B. at 78-79 & n.27. Because the 700,000 records are divided among more than fifty hospitals, the average is less than 14,000 records per hospital. Furthermore, because more than 450,000 of the 700,000 records are concentrated in only ten hospitals, *see* R.B. at 43 n.17, the average for the remaining roughly forty-five hospitals is 6,000-7,000 records per hospital—hardly an overwhelming burden given the tens of millions of dollars that relators seek. *Cf.* R.B. at 91 ("For some Hospitals, the number of files coded (from November 1993 to 2003 or 2004) for diseases associated with smoking is less than 5000.").

Before the Circuit Court and the Court of Appeals, relators admitted that limiting the list to smoking-related diseases "lessens the burden substantially for many Hospitals," but "would still be too burdensome for some." *See* Relators' Suggestions in Support of Petition for Writ of Mandamus and/or Prohibition in the Court of Appeals ("Ct. App. Suggestions") at 12 (Def.Ex. 6 at 72); *see also* R.B. at 43. The "many" hospitals that relators concede would not find the task of production too burdensome plainly are not entitled to extraordinary relief from this Court under any circumstance.

Even as to the ten hospitals for whom relators contend the production would be too burdensome, however, *see* R.B. at 43 & n.17, they have exaggerated the burden. With their second Motion for Protective Order, dated March 31, 2005, relators submitted affidavits and visual evidence from St. John's Mercy Medical Center describing how hard it would be to pull and process the 610,644 patient medical records relators said would have to be produced: "The court was advised that St. John's had conducted a time study . . . [which] determined it would take 61 years for one person to pull and replace all

498,644" medical charts stored in a particular warehouse. *See* Relators' Suggestions in Support of Petition for Writ of Mandamus and/or Prohibition ("Suggestions") at 16-17 n.13 (emphasis added). In their writ papers before the Court of Appeals, however, relators claimed that limiting the list to patients with smoking-related diseases would require production of "over 55,000" medical records, and "it would take St. John's Mercy Medical Center over 850 man days (2+ years) to produce every patient record from November 1993 to the present." Ct. App. Suggestions at 12-13 & n.12 (Def.Ex. 6 at 72-73) (citing Plaintiffs' Supplemental Memorandum Regarding Master's Recommendation for Production of Patient Records, July 19, 2005, at 7 (Rel.Ex. 17, A764)). Thus, according to relators' admissions, the number of records shrank from 610,644 to about 55,000, and the sixty-one years to do the job shrank to "850 man-days," a task that four people could complete in seven months.[20] St. John's Mercy Medical Center is one of the largest hospitals in Missouri and one of the plaintiffs seeking the most damages in this litigation, an amount likely in the tens of millions of dollars.[21] The burden of producing 55,000 patient records is hardly undue considering the damages sought.

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[20] Had relators begun work when the Circuit Court first ordered production on December 29, 2003, even one person working on the project would nearly be done today.

[21] Before the statute of limitations ruling, St. John's Mercy Medical Center was seeking past compensatory damages of $230,591,844 in 2001 dollars, as well as future damages. *See* Harrison Report at 12 (Rel.Ex. 16B, A646).

Now, having failed to convince the Court of Appeals to intervene, relators play tricks with the facts that they admitted twice before. To this Court, they state: "Relators noted it would take St. John's Mercy Medical Center over 850 man days (2 + years) just to pull, much less copy, 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)." R.B. at 43-44 (footnote omitted). But neither Plaintiffs' Supplemental Memorandum Regarding Master's Recommendation for Production of Patient Records, July 19, 2005, at 7 (Rel.Ex. 17, A764), to which they cite, nor their Suggestions in the Court of Appeals said anything about "just pull[ing]" records. *See* Ct. App. Suggestions at 12-13 & n.12 (Def.Ex. 6 at 72-73). Their earlier briefs said relators could "produce" the 55,000 patient records in 850 man-days, and they cannot now break the process into steps to make it seem more onerous. *See* R.B. at 43-44.[22] In any event, relators' unsupported, changing estimates are entitled to no weight. *See Dixon*, 939

[22] Relators' brief also states, without citation, that the estimate of 850 man days did not include "locating, pulling and producing" the patients' financial records. *See* R.B. at 44. Relators did not make this argument in the Circuit Court, and this Court should therefore disregard it. *See* Plaintiffs' Supplemental Memorandum Regarding Master's Recommendation for Production of Patient Records, July 19, 2005, at 7 (Rel.Ex. 17, A764). In any event, relators have never given a separate estimate of how long it would take any or all of them to produce financial records for any particular group of patients, including those with smoking-related diseases.

S.W.2d at 69 (statements in briefs and unsworn statements of attorneys are no substitute for record facts).

Furthermore, and again without any record support, relators greatly exaggerate the burden of reviewing the records for smoking information. Relators' assertion that nearly all hospitals will have to search through every scrap of paper in a chart looking for stray evidence of smoking misrepresents the task. *See* R.B. at 46-47, 80. Certainly by 1993, the first year for which relators must produce records, Missouri hospitals, like others around the country, routinely recorded smoking information in particular locations in a chart—quite often on the cover jacket of the chart, in nurses' admitting forms, or in the physician's initial history and physical. For example, St. John's Mercy Medical Center—relators' chosen example for its burdensomeness argument—as well as its sister hospital, St. John's Mercy Hospital, both record smoking information for every patient on a nursing assessment form on admission and sometimes in the physician's history and physical as well. *See* Deposition of Ann Hartley, March 20, 2003, at 77-78 (Def.Ex. 5 at 58-59). Similarly, the SSM hospital network, which consists of seven plaintiff hospitals, records smoking information for all patients on an admitting form. Indeed, the SSM network's corporate designee testified that the smoking information is "easily identifiable" because it has "got a red rim around it." *See* Deposition of Carol Roeder, January 23, 2003, at 21-23 (Def.Ex. 4 at 54-56). Equally important, the only files that will have to be reviewed are those of patients with smoking-related diseases. When a patient is diagnosed with lung cancer or emphysema or heart disease, the medical staff should have been monitoring for smoking history and should have recorded it repeatedly

in prominent places such as the history and physical or the discharge summary. Thus, for the great bulk of patients at issue, the smoking information will not be hard to find. Relators, after all, are more familiar with their own patient records than anyone else.

Even if relators' unsupported representations about burden were taken as true, their arguments would still fail. Both Missouri and federal law recognize that a party cannot escape its discovery obligations merely because it stores the relevant information in a way that makes it hard to retrieve:

> That production of documents would be burdensome and expensive and would hamper the party's business operations has not been in itself a reason for refusing to order discovery that is otherwise appropriate. Thus, lack of an adequate filing system has not excused a party from producing requested documents.

4A *Moore's Federal Practice* § 34.19, at 34-77 & nn.10-11 (collecting cases), *cited in State ex rel. Stolfa v. Ely*, 875 S.W.2d 579, 582 (Mo. App. W.D. 1994); *see also Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 610-11 (D. Neb. 2001) ("The fact that a corporation has an unwieldy record keeping system which requires it to incur heavy expenditures of time and effort to produce requested documents is an insufficient reason to prevent disclosure of otherwise discoverable documents.") (collecting cases).

Thus, in *Stolfa*, the Western District granted a writ to a plaintiff who had sought three years of information from defendant K-Mart about prior incidents of misfilling prescriptions. K-mart had a computerized database listing such incidents, but argued that

the underlying files were unindexed and were stored in boxes in a warehouse so that it would be a "prodigious task" to locate and produce them. Having determined that the information was relevant, the Court of Appeals rejected K-mart's burden argument: "The absence of indexing cannot be laid to the plaintiffs, however; it was K-mart's decision to store the files without a convenient system of retrieval." *Stolfa*, 875 S.W.2d at 582.

Here relators, like K-mart, complain that it would be unreasonably burdensome to produce the paper records of patients found on a computerized list, but it was relators' decision to store the records without a convenient system of retrieval. Moreover, unlike K-mart, relators are the plaintiffs in this case, and thus put the patient records in issue themselves. The Circuit Court's orders require them to produce the records of certain patients treated after November 16, 1993. Yet the Circuit Court has expressly found that relators knew or should have known of their claims against the tobacco industry prior to 1993.[23] Indeed, relators have admitted that they did not systematically code files for

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[23] The court found:

> It is apparent from the record that plaintiffs knew or should have known prior to 1993 that smoking causes serious diseases including lung cancer, emphysema and various heart conditions; that the information being disseminated by the tobacco industry with regard to the health effects from cigarette smoking was self-serving, misleading and deceptive; and that the hospitals were providing uncompensated health

smoking even after they filed this suit. *See* R.B. at 79-80. If relators chose not to collect smoking information for these patients at an easy-to-find location in their records, that was relators' decision. It is no excuse for refusing now to locate and produce such information—especially given the relevance of the records to the sweeping claims that relators have chosen to bring.

b. Relators Have Offered No Relevant Record Facts Showing That The Patient Information They Have Produced To Date Suffices To Confer On Defendants A Fair Opportunity To Mount A Defense.

Finally, relators' unsupported rhetoric that defendants have "everything regarding individual patients needed to defend this case" is untrue. *Id.* at 55; *see also id.* at 85-89. Relators produced some largely irrelevant patient records from a few hospitals and provided a patient list that was both overinclusive and at the same time incomplete. *See, e.g.*, September 27, 2005 Order at 3-6, 13 (Rel.Ex. 2, A6-9, A16); May 23, 2005 Master's Findings, Rulings, and Recommendations at 2 (Rel.Ex. 14, A562). Relators have not put forward a single record fact demonstrating that their production, which Judge Riley found could not have been made in good faith, *see* September 27, 2005 Order at 5 (Rel.Ex. 2, A8), even comes close to meeting the requirements of fundamental fairness as

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care to individuals suffering from such conditions that could be traced to smoking defendants' tobacco products.

See June 27, 2005 Order at 6 (Rel.Ex. 11, A227).

determined by the Circuit Court. Relators have the burden of proving that defendants do not need the records they seek and that the Circuit Court abused its discretion in ordering the production of those documents. *See Health Midwest Dev. Group*, 965 S.W.2d at 844 (finding that relator has the burden of showing that the trial court's ruling is beyond judicial discretion). The record shows that relators have never produced a reasonably complete list of patients as ordered by the Circuit Court. *See* pages 33-36, *supra*. Thus, defendants still face a risk of double recovery and remain in the dark about even the identity of the many patients who are not on the list, but whose costs of care relators seek to recover. Furthermore, relators have not even begun producing records for more than forty-five of the hospitals, and the eight hospitals that began producing the over- and under-inclusive set are not nearly finished. *See* pages 34-36, *supra*. Relators have not carried their burden of showing how defendants have received "everything . . . needed to defend this case." R.B. at 55.[24]

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[24] Without support in the factual record, relators point to a long list of information that they purportedly "provided" about "each identifiable patient." R.B. at 55-56. Elsewhere in their brief, however, they admit that general identifying information was supplied "with some exceptions," *id.* at 34 n.12, and more detailed information was supplied only "to the extent available and as given to Relators' expert," *id.* at 86—a fraction of the patients whose costs of care relators seek to recover. Furthermore, this more detailed information was selected, assembled, and modified by an agent of relators' attorneys for use by relators' damages expert. *See* pages 35-36, *supra*. Even

Instead of citing record facts, relators bemoan an alleged "war of paper," *id.* at 65, 97, and seek relief from the supposedly unparalleled discovery they have been subjected to. By multiplying each of defendants' requests by the number of plaintiffs, relators grossly inflate the written discovery burden they have faced. *Id.* at 13-14 & n.3, 51. This is an ironic strategy considering that relators chose to aggregate the claims of more than fifty hospitals, all of which initially provided a single combined set of discovery responses until ordered to respond individually—and even then their "individual" responses were virtually identical. The records relators have struggled so mightily to avoid producing are merely what their own claims put in issue. What has driven the discovery in this case are the number of plaintiffs from whom defendants have to seek discovery and the number of patients whose records are directly relevant to the claims—both matters within the control of relators, not defendants. In short, the discovery in this case is entirely commensurate with the breadth of relators' claims. Relators' reference to other discovery does not help them meet their burden of showing how defendants have received "everything . . . needed to defend this case." *Id.* at 55-56. And the only "war of paper" is the one relators have waged with the Circuit Court by refusing to comply with six separate court orders.

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if the detailed information were reasonably complete, defendants could not be limited to prepackaged electronic information selected and modified by relators for relators' own strategic purposes.

5. RELATORS' CASE LAW INTERPRETING THE MISSOURI AND FEDERAL RULES OF CIVIL PROCEDURE IS INAPPOSITE.

Relators devote roughly fifteen pages to a discussion of the rules of discovery. *See* R.B. at 62-77. The rules and cases they discuss, however, do not support their position.

First, this case is entirely distinguishable from *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325 (Mo. App. E.D. 1985), which relators cite nine times throughout their brief. In the suit underlying *Anheuser*, the question was whether the parties had complied with or violated a consulting agreement. *Id.* at 327. Defendants sought discovery of the realtor's financial documents, including tax returns, but "none of [the financial documents were] relevant or probative to any issue raised by the pleadings." *Id.* "The only relevant information sought by the massive request for production concerned the tax treatment accorded by plaintiff to the income from the consultant contract." *Id*. at 328. Because the plaintiff had already admitted in deposition the only fact to which the tax treatment was relevant, the court held that the plaintiff's tax returns did not need to be produced since they were relevant only to an undisputed matter. *Id*. at 327.

For another example, relators cite *Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848 (Mo. App. E.D. 2000), but that case does not help them. In *Misischia,* the appellate court found no abuse of discretion in limiting discovery because the plaintiff had already received an exhibit containing the records in question, and had failed to

"demonstrate how it is incomplete nor what more he could have obtained, in other words, how he was prejudiced." *Id*. at 865.

The present case is nothing like *Anheuser* or *Misischia* because the patient names and records go to the very heart of relators' claims. Relators are trying to recover for bad debt and charity care patients who were smokers with smoking-related diseases and were treated after November 16, 1993. Furthermore, relators have not even begun to concede all the propositions to which the individual patient records are relevant. *See* July 23, 2004 Order at 8 n.8 (Rel.Ex. 5C, A113). At most, they have conceded the broadest generalities. *See* pages 70-71, *supra*. And relators have not begun to produce all the individual patient information that defendants need. Roughly forty-five hospitals have produced no patient records at all. *See* pages 34, 44, *supra*.

Relators' other cases are also inapposite. They fall into seven broad categories, each readily distinguishable from the case currently before this Court.

1. Cases involving overly broad requests that are not tailored to the issues, are unlimited as to time, geography, or subject matter, or are duplicative. *See*, *e.g.*, *State ex rel. Coffman Group, LLC v. Sweeney*, ___S.W.3d___, Civ. A. No. 26793, 2005 WL 278661, at *4 (Mo. App. S.D. Oct. 27, 2005); *State ex rel. Kawasaki Motors Corp. USA v. Ryan*, 777 S.W.2d 247, 248-49, 253 (Mo. App. E.D. 1989); *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1098 (6th Cir. 1994); *see also Ford Motor Co. v. Nixon*, 160 S.W.3d at 380. Here, by contrast, defendants seek only the information that precisely corresponds to the injuries relators claimed to have sustained: unreimbursed health care dating after November 16, 1993, for illnesses allegedly caused or worsened by smoking.

2. Cases denying discovery of an expert's documents that bear only on impeachment, not substantive issues in the case. *See, e.g.*, *State ex rel. Whitacre v. Ladd*, 701 S.W.2d 796, 798-99 (Mo. App. E.D. 1985); *Ricotta v. Allstate Ins. Co.*, 211 F.R.D. 622, 624 (S.D. Cal. 2002). Here, by contrast, as already shown, the patient names and records sought are of core relevance to this case, not just for impeachment of a witness.

3. Cases in which the party seeking discovery did not establish the relevance of the information sought. *See, e.g., State ex rel. MacDonald v. Franklin*, 149 S.W.3d 595, 596, 598 (Mo. App. S.D. 2004); *Anheuser*, 692 S.W.2d at 327-28; *see also In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 299-303 (D.D.C. 2000); *Anker v. G.D. Searle & Co.*, 126 F.R.D. 515, 518 (M.D.N.C. 1989). Here, relevance cannot reasonably be disputed.

4. Class action cases in which the court precluded individualized discovery. *See, e.g., Adkins v. Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 472-74 (N.D. Ill. 1992); *Kyriazi v. W. Elec. Co.*, 74 F.R.D. 468, 472-73 (D.N.J. 1977). The present case is not a class action.

5. Cases in which courts precluded discovery of incidents similar, but unrelated, to the specific litigation at issue because these other incidents were not sufficiently probative of the defendant's liability in the case at issue. *See, e.g.*, *Munoz-Santana v. INS*, 742 F.2d 561, 563-64 (9th Cir. 1984); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434, 1441-44 (D. Kan. 1995); *Green Constr. Co. v. Kansas Power & Light Co.*, 732 F. Supp. 1550, 1554 (D. Kan. 1990); *Misischia*, 30 S.W.3d at 864-65. These cases are totally inapplicable here.

6. Cases in which courts denied discovery from non-parties. *See, e.g., Blue Cross & Blue Shield v. Anderson*, 897 S.W.2d at 169; *Anheuser*, 692 S.W.2d at 328; *see also Anker*, 126 F.R.D. at 518. Here, defendants are not seeking discovery from nonparties.

7. Cases in which courts denied discovery requests, at least in part, as untimely. *See, e.g., Green Constr. Co.*, 732 F. Supp. at 1553-54; *Dolgow v. Anderson*, 53 F.R.D. 661, 664 (E.D.N.Y. 1971). This is not an issue here.

C. RELATORS HAVE NOT SHOWN THAT THEY WILL SUSTAIN ABSOLUTE IRREPARABLE HARM AS A RESULT OF THE CIRCUIT COURT'S ORDERS.

For the same reasons discussed in the previous sections, this case is not one of the "peculiarly limited situations" in which plaintiffs will suffer "absolute irreparable harm" as a result of the June 27, 2005 and September 27, 2005 Orders. *See Richardson*, 660 S.W.2d at 701. For example, in *State ex rel. Faith Hospital v. Enright*, 706 S.W.2d 852 (Mo. banc 1986), a medical malpractice plaintiff sought to obtain hospital peer review materials, and the trial judge permitted such discovery even though the materials fell squarely within a statutory exemption from discovery. Noting that once the materials were disclosed in discovery, the disclosure could not be remedied on appeal, the court concluded that prohibition was appropriate as to information that fell within the statutory

exemption. *Id.* at 856. Unlike in *Faith Hospital*, relators do not rely on privilege to resist the discovery at issue.[25]

Relators have not pointed to anything that rises to the level of "absolute irreparable harm" as required by the case law. Relators have offered no record facts about the burden that any of the hospitals would face as a result of having to comply with the order the Circuit Court actually imposed—to produce the records of smokers with smoking-related diseases—and relators themselves seem to concede that some hospitals can comply.

The June 27, 2005 and September 27, 2005 Orders are case-ending only if relators choose to make them so. At this point, no sanction has been imposed upon them, and the facts upon which a sanctions determination would be based are entirely missing from the record. Furthermore, relators offer no authority showing that voluntary dismissal in the face of a discovery order can be irreparable harm warranting an extraordinary writ.

It is relators' burden to prove entitlement to extraordinary relief based on their allegation of absolute irreparable harm, *see Health Midwest Dev. Group*, 965 S.W.2d at 844, and they completely fail to carry that burden.

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[25] This case is also wholly unlike cases in which the challenged order denied a party discovery. *See, e.g., Noranda Aluminum*, 706 S.W.2d at 862; *Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 175 (Mo. App. W.D. 2000).

II. CONTRARY TO RELATORS' POINT II, THE CIRCUIT COURT DID NOT CLEARLY ABUSE ITS DISCRETION IN DECLINING TO PERMIT RELATORS TO PRODUCE ONLY A STATISTICAL SAMPLE OF PATIENT NAMES AND RECORDS.

A. Relators Have Not Established That Producing Only A Statistical Sample Of Patient Names And Records Is An Adequate Substitute For Producing All Such Names And Records.

Relators have not shown that the Circuit Court abused its discretion by not permitting relators to produce only a "statistically significant" sample of records for patients with smoking-related diseases.[26] First, defendants have already shown that, in

[26] Point II is governed by the same standard of review as Point I. *See supra* pages 45-46. And although relators pray for mandamus in the conclusion of their brief, *see* R.B. at 97, their brief appears not to make any argument that relators are entitled to a writ of mandamus. Therefore defendants do not include a separate section on mandamus in this brief. In any event, it is not apparent how mandamus can conceivably be the appropriate remedy. "Prohibition lies to prevent the forced disclosure of information during discovery. . . . Mandamus lies to require the disclosure of information during discovery when the information is relevant to the lawsuit or reasonably calculated to lead to the discovery of admissible evidence." *State ex rel. White v. Gray*, 141 S.W.3d 460, 463 (Mo. App. W.D. 2004) (internal quotations and citation omitted). Insofar as relators are seeking to prevent discovery,

directing relators to produce a reasonably complete set of names and records for patients who are smokers with smoking-related diseases, the Circuit Court did not exceed its jurisdiction or abuse its discretion, and in those rulings, supported by careful opinions, the Circuit Court judges rejected the repeated request that relators be permitted to produce only a sample. Second, permitting relators to produce only a sample of records does not satisfy defendants' need for a reasonably complete patient list to protect them against double recovery. *See* pages 53-58, *supra*.

Third, relators did not even begin to show that a statistical sample of patient records from each hospital would be adequate to protect defendants' rights. Nothing in Missouri law suggests that a plaintiff can choose to produce a statistical sample of highly relevant documents as a substitute for production of all. Beyond this, relators' proposal for producing a statistical sample, and the expert affidavit offered to support it, serve to confirm the Circuit Court's ruling that statistical sampling is not sufficient to "allow Defendants a fair and meaningful opportunity to defend against the claims that are being brought against them." July 23, 2004 Order at 9 (Rel.Ex. 5C, A114).

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mandamus is not the right remedy. Furthermore, "[m]andamus will lie only when there is a clear, unequivocal, and specific right." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994) (internal citations omitted). Relators have no clearly established right to produce only a statistical sample of highly relevant records.

B. Relators' Only Record Evidence On Sampling Is The Shannon Affidavit, Which Does Not Address The Sampling Issues In This Case.

The only evidence that relators offered on the subject of statistical sampling was an affidavit from a Washington University biostatistician, William D. Shannon, Ph.D. (Rel.Ex. 5S, A166-70). The affidavit, submitted with relators' second Motion for Protective Order, never once mentions tobacco use or smoking and never indicates familiarity with the claims made by relators in this case.

The affidavit defines "population" as "the set of all hospital/medical charts." Shannon Aff. ¶ 7a (Rel.Ex. 5S, A167). Presumably this refers to all of the medical records of the relator hospitals. The affidavit does not indicate whether "charts" includes patient financial records and does not specify any time period for the population.

The affidavit states:

> In my previous report to the court I developed a sampling scheme to allow the verification that the total unpaid claims (the distribution) being sought represented the true total unpaid claims (the population) in the medical/hospital charts. This design suggested a simple random sample of 250 charts from each hospital be obtained, and the total in unpaid claims and the 95% confidence interval (very high level of accuracy) be calculated. Based on my calculations I am convinced that 250 charts would be sufficient to estimate the unpaid claims distribution with high accuracy, and that the sample

> distribution in unpaid claims would be indistinguishable from the population (total) unpaid claims.

Id. ¶ 11 (A168).[27] The only question addressed in this paragraph 11 is whether the sample could estimate the "population (total) unpaid claims." The affidavit neither discloses the calculations to which paragraph 11 refers nor defines "unpaid claims." It appears that the (largely unspecified) sampling scheme was designed solely to estimate each hospital's total charity care and bad debt charges over an unspecified time period.

The affidavit continues:

> In this affidavit I was asked to address two issues: would random samples of 5,000 medical/hospital charts be sufficient to estimate many distributions within the data (e.g., admission categories, treatments, gender and ages of patients), and will increasing the number of charts to approximately 6,500,000 effect [sic] the sampling design.

Id. ¶ 12 (A168-69). The answer to the first question, in pertinent part, was as follows:

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[27] Defendants pointed out that, although the Shannon Affidavit refers to a "previous report to the court," no such report was ever submitted to the court or to defendants. *See* Certain Defendants' Memorandum in Opposition to Plaintiffs' Motion for Protective Order, dated May 10, 2005, at 13 n.6 (Def.Ex. 2 at 15). Relators have never responded to or explained this reference.

> A sample of 5,000 medical/hospital charts will most likely be sufficient to provide very accurate estimates of the different population distributions. In essence the 5,000 charts will look indistinguishable from all the charts for a given hospital in almost all the relevant information (e.g., percentage of admission diagnoses, gender and age distributions, paid and unpaid claims).

Id. ¶ 12a (A169). The affidavit acknowledged, however, that unspecified further sampling would be required "if a specific characteristic of the chart is of primary interest, say the distribution of the admission diagnosis." *Id*. The affidavit also gave the following, confusing answer to the second question: "Addition of more charts bringing the total to around 6.5 million should not change this sampling design . . . ." *Id.* ¶ 12b (A169).

The affidavit does not say if the 5,000 charts per hospital were to be taken from all of the hospital's medical records, all records for charity care and bad debt patients, or any other specific group. One cannot tell the time period from which the sample is to be drawn—*e.g.*, if annual information is needed, does that mean 5,000 per year? The affidavit says nothing about how the sample should be drawn from the population. In addition, no criterion is specified to identify what the expert considered "relevant information," other than the example of percentage of "admission diagnoses, gender and age distributions, paid and unpaid claims." *Id.* ¶ 12b (A169). Nor is there any indication that the expert considered how to address any number of the questions identified by

Judge David as relevant in this case: for example, smoking history, whether smoking caused particular illnesses, whether the treatment was reasonably necessary, what were the treatment costs, what portion of those costs were the result of conditions caused or exacerbated by tobacco use, or to what extent the hospital was paid for the treatment or made reasonable efforts to collect payments. *See* July 23, 2004 Order at 8 n.8 (Rel.Ex. 5C, A113). Still less does the affidavit indicate whether the sample could address any such questions on an annual basis, even though relators' damages expert estimated damages per hospital per year.

In sum, the Shannon Affidavit does not contain opinions that actually bear on the question whether relators should be permitted to produce only a statistical sample of records. There is no indication that the affiant is even familiar with the issues in the case. The affidavit does not mention smoking or tobacco use, or set any time frames defining the population at issue. The affidavit refers to a nonexistent "report to the court." The affidavit does not spell out how sampling should take place, except to mention 5,000 "charts" per hospital, with the possibility of unspecified supplemental sampling. And the affidavit does not begin to address the factual questions to which patient records are relevant, as described by Judge David.

The one thing that <u>is</u> clear about relators' sampling proposal is that they wish to draw the sample from the wrong pool of patients. In the Circuit Court, relators apparently intended to use the entire pool of patients on their list of 6.5 million, who were treated for everything from animal bites to broken bones, gunshot wounds, AIDS, and depression. According to relators, they would do nothing to determine whether any of

these patients ever used tobacco.[28] Defendants have never asked relators to produce the medical and financial records of patients who did not use tobacco, and the trial court was never asked to compel them to do so. Relators have no justification for producing so much irrelevant information, and there is no merit to their request to produce statistical samples from the wrong pool of records.

Thus, no coherent or even relevant plan for sampling is part of the record before this Court. Defendants and this Court therefore are in no position to evaluate whether any reliable inferences could theoretically be drawn from such a sample. But no sample,

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[28] Although in the Circuit Court relators appeared to request sampling from the entire overinclusive list of 6.5 million charity care/bad debt patients, *see* Motion for Protective Order, March 31, 2005, at 1 (Rel.Ex. 5, A59) (speaking of 13 million files or twice 6.5 million), and the Shannon Affidavit speaks of 6.5 million, *see* Shannon Aff. ¶ 12 (Rel.Ex. 5S, A168-69), relators' petition in this Court requests different relief: an order for sampling "from the pool of records coded with . . . ICD-9 diagnosis Codes [for smoking-related diseases]." Writ Pet. at 14. Since this request for relief was never presented to the Circuit Court, this Court should disregard it in evaluating whether the Circuit Court properly rejected the request for sampling. Even so narrowed, however, the pool of patients to be sampled would include people treated for everything from heart attack to asthma to sinusitis to ulcers to ear infections and flu, including thousands who were never even exposed to defendants' products.

no matter how chosen, would allow defendants to draw reliable conclusions about all the questions that Judge David ruled are relevant to the case, and defendants therefore cannot be limited to using a sample of records that relators choose. That is why Judge David granted defendants access to all records and ruled that defendants may rely on whatever records defendants choose. That is why Judge Riley, reconsidering Judge David's conclusions, agreed with him. *See* June 27, 2005 Order at 2 (Rel.Ex. 1, A2).

C. There Are Many Relevant Questions That Sampling Cannot Answer.

Sampling is not a suitable way to answer a number of critical questions in this case. For example, sampling may give a wrong answer when only a few people in the population are driving the result. Consider, for example, a small hospital with only a single lung cancer patient with a charity care or bad debt charge in a particular year. Under relators' proposal, it would be the luck of the draw whether defendants obtained any information on this patient.[29] Or consider a hospital with 200,000 charity care and bad debt patients overall. Suppose that in 1995 there were 3,000 charity/bad debt patients with total charges of $500,000. If three of the 1995 patients happened to have over $100,000 in charges in 1995, the facts relating to those patients would have a huge impact on the statistical estimates of total charity care and bad debt charges for that year.

[29] Relators now appear to concede this point. *See* R.B. at 85 n.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.").

But under relators' proposal, it would again be the luck of the draw whether those three patients were in the sample of 5,000 drawn from a total population of 200,000.

This issue is not purely hypothetical. Documents produced by relators to date, for example, indicate that as few as two patients made up over 90% of the charity care and bad debt expense for Saint Francis Medical Center in 2000. *See* Certain Defendants' Memorandum in Opposition to Plaintiffs' Motion for Protective Order, March 8, 2004, at 5 & Exhibits A & B (Def.Ex. 23 at 1764). If either (or both) of these individuals do not happen to fall into relators' sample, defendants would be denied the ability to investigate the factual underpinnings and basis for relators' claim for that hospital in that year.

Sampling is also an inadequate way to test relators' damages estimates insofar as they are calculated on an annual basis. Relators' damages model purports to calculate damages for each hospital for each year. For each year this involves determining the hospital's costs for providing charity care and for providing care to patients whose bills became bad debts, and then calculating the share of those costs that is allegedly attributable to patient smoking. *See* Harrison Report at 1-2 (Rel.Ex. 16B, A635-36). If defendants are limited to a sample, they almost certainly will not receive a complete set of the patient records for any single year; instead the records will be spread among many years. Thus, defendants will be unable to add up all the costs of a single year to determine the correctness of relators' damages model for that year. For example, the individual financial records might show that in 1999 a particular hospital spent a total of $1,000,000 on charity care and bad debt whereas the damages model shows a figure of $2,000,000. But there is no guarantee that the sample will include most, let alone all, of

the records for 1999. Defendants should not be foreclosed from pursuing such challenges to relators' model merely because relators would prefer to produce a sample.

Access to all medical and financial files is also essential to defendants' ability to assess and present individualized defenses. Defendants should not be precluded from exploring such issues as misdiagnosis—for example, whether a patient's lung tumor diagnosed as lung cancer had really spread from the breast—or alternative causation—for example, whether a patient's heart disease was caused by an infection rather than by smoking. Similarly, relators' failure to warn claim requires proof that the individual patients were not aware of information that a warning would have provided. *See Arnold v. Ingersoll-Rand Co*., 834 S.W.2d 192, 194 (Mo. banc 1992). Medical records could reveal that many patients had already received that information or warning—e.g., doctors repeatedly warned the patient to stop smoking, and the patient ignored that advice. Such details can only be gleaned from individual files. As a third example, for claims about patients whose accounts were written off to bad debt, relators must show that they attempted to recover the costs from the patient himself. Only through review of individual financial records can defendants obtain specific information on relators' collection efforts.

Defendants made each of these arguments in the Circuit Court,[30] but relators never once responded to them. Thus, relators have not established that their proposal for

[30] *See* Certain Defendants' Memorandum in Opposition to Plaintiffs' Motion for Protective Order, March 8, 2004, at 4-5 (Def.Ex. 23 at 1763-64), which gave rise to

statistical sampling is an adequate substitute for the production of all relevant patient records. Denying production of all such records would deny defendants a fair opportunity to develop a defense of this case.

D. Authority Cited By Relators Does Not Support Their Argument For Statistical Sampling.

Finally, the cases cited by relators do not even purport to permit a party to produce only a statistical sample of highly relevant documents. To the contrary, this Court should not, and as a matter of due process cannot, force defendants to rely upon a statistical analysis to defend this case. *See W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [defendants] the right to present a full defense on the issues would violate due process."); *cf. Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-45 (4th Cir. 1998) (defendant in a class action cannot be forced to defend against a "fictional composite" plaintiff that "suffered a uniform, collective injury" without the "benefit of deposing . . . the disparate individuals behind the composite creation").

For example, relators rely upon *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. App. W.D. 1988), for the proposition that "[c]ourts have acknowledged the validity of sampling and surveys in numerous contexts," R.B. at 92-93, but both the plaintiffs and

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Judge David's July 23, 2004 Order, and Certain Defendants' Memorandum in Opposition to Plaintiffs' Motion for Protective Order, May 10, 2005, at 14-15 (Def.Ex. 2 at 16-17), which gave rise to Judge Riley's June 27, 2005 Order.

defendants in *Elam* conducted extensive factual investigation about the medical conditions of the actual plaintiffs at issue. *See Elam*, 765 S.W.2d at 82 (describing panels of immunology tests administered to each individual plaintiff at instruction of plaintiffs and defendants); *id.* at 100-62 (reviewing detailed medical evidence for each of the 31 individual plaintiffs). The experts explicitly considered possible alternative causes for each plaintiff, *id.* at 163-64, and the individualized analysis was important not only to support the finding of liability, but also to analyze the issue of damages, *id.* at 222. One individual plaintiff was unable to submit to individualized testing, and a verdict was therefore directed against him at trial and was not appealed. *Id.* at 172 n.55.

Moreover, the *Elam* court recognized that "epidemiology can establish the increased incidence of the disease in a population from the exposure to the chemical toxin, but not whether the exposure caused the particular disease in a particular person." *Id.* at 188 n.63 (emphasis in original) (citation omitted). In *Elam*, the court affirmed a finding of liability based not upon a statistical analysis of a different population, but a detailed, individualized analysis of the people at issue in the case.

Similarly, while the court in *Moore v. Ready Mixed Concrete Co.*, 329 S.W.2d 14 (Mo. banc 1959), affirmed the admissibility of general mortality tables, it did so only while also considering individualized evidence of the life expectancy of the person at

issue and affirming a jury instruction requiring the jury to "take into consideration all the other evidence relating to the health and physical condition of the plaintiff." *Id.* at 28.[31]

[31] The other Missouri cases cited by relators offer no more support. Many just outline the general discovery powers of the Circuit Court. *See, e.g., Kawasaki Motors Corp.*, 777 S.W.2d at 251-54; *State ex rel. Upjohn Co. v. Dalton*, 829 S.W.2d 83, 85 (Mo. App. E.D. 1992); *Blue Cross & Blue Shield v. Anderson*, 897 S.W.2d at 169-71; *Anheuser*, 692 S.W.2d at 327. The other cited case admitted a statistical analysis into evidence, where the party had access to all files and chose to study only a sample. *See State ex inf. Peach v. Boykins*, 779 S.W.2d 236, 237 (Mo. banc 1989). No Missouri case cited by relators stands for the proposition that discovery should be limited only to statistical samples. The cases cited by relators from other jurisdictions also do not help their cause. Many simply discuss the use of statistical evidence at trial, and most make clear that the parties are entitled to take broader discovery if they wish. *See Castaneda v. Partida*, 430 U.S. 482, 486-89, 495-96 (1977); *Hilao v. Estate of Marcos*, 103 F.3d 767, 782 (9th Cir. 1996); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1289 (5th Cir. 1994); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 656 (5th Cir. 1983); *Bell v. Farmers Ins. Exch.*, 115 Cal. App. 4th 715, 753 (2004); *Rosado v. Wyman*, 322 F. Supp. 1173, 1180 (E.D.N.Y. 1970) (Weinstein, J.). Two other cases cited by plaintiffs reflect a single federal judge's erroneous and unprecedented view of discovery. *See Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198, 247-62 (E.D.N.Y. 2001) (Weinstein, J.), *rev'd on*

In sum, relators have offered neither record facts nor pertinent authority demonstrating that they may produce only a "statistically significant" sample of records for patients with smoking-related diseases.

CONCLUSION

For the foregoing reasons, relators' petition for writs of mandamus and prohibition should be denied.

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other grounds, 344 F.3d 211 (2d Cir. 2003); *In re Simon II Litigation*, 211 F.R.D. 86, 146-59 (E.D.N.Y. 2002) (Weinstein, J.), *vacated and remanded*, 407 F.3d 125 (2d Cir. 2005).

Dated: February 9, 2006

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CERTIFICATE REQUIRED BY RULES 84.06(c) & (g)

The undersigned hereby certifies that the foregoing Certain Defendants' Respondent's Brief includes the information required by Rule 55.03 and complies with the length limitations in Rule 84.06(b) in that there are 24,089 words in the brief (exclusive of the cover, signature pages, and certificates of counsel) according to the word count of Microsoft Word, the word-processing system used to prepare to brief.

The undersigned further certifies that the disks filed and served containing the brief, as required by Rule 84.06(g), have been scanned for viruses and are virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies and a disk of the foregoing Certain Defendants' Respondent's Brief were served by hand delivery on the 9th day of February, 2006 on Kenneth C. Brostron, Lashly & Baer, P.C., 714 Locust Street, St. Louis, Missouri 63101, Attorneys for Relators, and the Honorable John J. Riley, Presiding Judge, City of St. Louis Circuit Court, 10 North Tucker, St. Louis, MO 63101, Respondent, and by electronic mail and/or first-class mail, postage prepaid to all other counsel of record on the attached service list.

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