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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

ROBERT MURPHY,) No. CV 99-7155-RAP (JWJx)
Plaintiff,)
v.) ORDER GRANTING DEFENDANT
PHILIP MORRIS INCORPORATED, et al.,) PHILIP MORRIS' MOTION TO COMPEL
Defendants.) PRODUCTION OF DOCUMENTS IN
Response to SUBPOENA DUCES
TECUM; PROTECTIVE ORDER

Pending before this Court is the "Motion to Compel Production of Documents in Response to Subpoena Duces Tecum" served by defendant Philip Morris Incorporated on third party respondent University of Southern California ("USC"). The Court conducted hearings on this motion on September 9, 1999 and December 17, 1999. Upon consideration of the motion and supporting pleadings, the opposition pleadings of third party University of Southern California and intervenor the State of California, and the arguments of counsel, the Court orders the following:

Defendant Philip Morris' Motion to Compel Production of Documents in Response to Subpoena Duces Tecum is **GRANTED, SUBJECT TO THE PROTECTIVE ORDER SET FORTH HEREIN.**

Plaintiff Robert Murphy has initiated an action against defendant Philip Morris and others in the District of Nevada, case number CV-S-98-00021-HDM(RJR), asserting he contracted lung cancer because of alleged exposure to second hand tobacco smoke. (Defendant's Notice of

1 Related Case Pursuant to Local Rule 4.3.1(c), p. 1-2). Further, the expert witnesses designated
2 by plaintiff Murphy in the District of Nevada lawsuit have identified the December 1992 report
3 of the United States Environmental Protection Agency (“EPA”), entitled “Respiratory Health
4 Effects of Passive Smoking: Lung Cancer and Other Disorders,” as one of the reports that they
5 will rely upon to support their testimony. It is undisputed that the epidemiological study entitled
6 “Lung Cancer in Nonsmoking Women” (the “Fontham Study”) by the University of Southern
7 California, the California Department of Health Services (“DHS”), and four other universities
8 was one of the principal studies on which the EPA based its conclusion that there is a causal
9 connection between environmental tobacco smoke and certain diseases, among them lung cancer.

10 As part of its preparation for defense of the Murphy lawsuit, Philip Morris seeks to
11 compel the University of Southern California to disclose the raw data (including primarily, the
12 information contained in “completed research interview questionnaire[s] filled out during the
13 interview[s] of [] research participant[s]”) that underlies the Fontham study. The University of
14 Southern California and intervenor the State of California oppose the motion on the ground that
15 disclosure would abrogate the prohibition against disclosure of the identities of study participants
16 delineated by California Health and Safety Code §§ 100330 and 103885. Moreover, respondents
17 argue that California Evidence Code § 1040(b)(1) provides an umbrella of absolute privilege for
18 the Fontham raw data as “official information.” Alternatively, respondents contend that even if
19 the raw data is not covered by an absolute privilege, disclosure “is barred by the conditional
20 privilege set forth in California Evidence Code § 1040(b)(2).” Respondents further argue that
21 compelling disclosure will have a damping effect on future public health studies where
22 confidential information about individuals must be gathered.

23 The parties do not dispute this Court’s determination that California privilege law (as
24 opposed to that of Nevada) should be applied in this case. While Rule 501 of the Federal Rules
25 of Evidence says nothing about “which state’s privilege law to apply when state law controls and
26 the litigation has contacts with two or more states,
27 . . . [t]he majority of circuits apply the privilege law of the state that would be chosen under the
28 choice-of-law rules used by the state where the court sits.” 3 Weinstein’s Federal Evidence

1 § 501.02[3][b] (2d Edition, 1999).¹ Since the State of California, through the DHS, played a
2 substantial role in the collection of the raw data, since a substantial portion of the participants
3 whose Fontham Study raw data would be disclosed are or were California residents, and since the
4 State of California has a significant interest in ensuring that its statutory provisions for
5 confidentiality (under the California Health and Safety Code) are vindicated, California's choice
6 of law rules require that California privilege law apply. In contrast, no party to this discovery
7 proceeding has asserted, and the court is not aware of, a distinct governmental interest on the part
8 of the State of Nevada in the discovery issue before this Court. See Bernhard v. Harrah's Club,
9 16 Cal.3d 313, 316; Hurtado v. Superior Court, 11 Cal.3d 574, 579-80 (1974).

10 In Wolpin v. Philip Morris Incorporated, et al., CV 98-3027 RAP (JGx), United States
11 District Judge Richard A. Paez considered the impact of these same California statutes on
12 disclosure of some of the same Fontham study raw data that is at issue here. Analogizing to the
13 California Supreme Court's determination in Davies v. Superior Court, 36 Cal.3d 291 (1984),
14 Judge Paez held that the confidentiality-based privilege defined by Health and Safety Code
15 § 110330 is not an absolute privilege. In Davies, a petitioner sought disclosure of California
16 Highway Patrol accident data, which came under the confidentiality coverage of California
17 Vehicle Code § 20012. The California Supreme Court ultimately construed the confidentiality
18 provision to apply only to the identifying information of the person(s) reporting the accident, and
19 not to the non-identifying accident data. Thus, the California Supreme Court construed the
20 confidentiality privilege in the Vehicle Code as a conditional, rather than absolute, privilege.
21 On the basis of the California Supreme Court's treatment of the Vehicle Code confidentiality
22 privilege, Judge Paez reasoned that the similarly styled confidentiality privilege in Health and
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24 ¹The Ninth Circuit Court of Appeals has not addressed this issue. See, e.g.,
25 Samuelson v. Susen, 576 F.2d 546, 549-550 (3d Cir. 1978) (Fed. R. Evid. 501 requires federal
26 court to apply privilege law of state that forum state's courts would choose to apply); Williams v.
27 American Broadcasting Cos., 96 F.R.D. 658, 662 (W.D. Ark. 1983) (availability of journalist's
28 privilege determined after applying choice-of-law rule of forum state); but see Dixon v. Pine
Street Corp., 516 F.2d 1278, 1280 (2d Cir. 1975) (in diversity case, issue of privilege governed
by substantive law of forum state).

1 Safety Code § 110330 should not be deemed an absolute privilege, but instead a conditional
2 privilege coming under the auspices of California Evidence Code § 1040(b)(2). (“Order Denying
3 University of Southern California’s Motion for Review and Reconsideration of Magistrate
4 Judge’s Order for Production of Documents,” CV 98-3027 RAP, pp. 15-16; Exhibit “E” to
5 Declaration of Barry R. Davidson in Support of Defendant’s Motion to Compel Production of
6 Documents, filed July 13, 1999.) Section 1040(b)(2) requires non-disclosure when “[d]isclosure
7 of the information is against the public interest because there is a necessity for preserving the
8 confidentiality of the information that outweighs the necessity for disclosure in the interest of
9 justice.” Cal. Evid. Code § 1040(b)(2).

10 As this court stated during the hearings on this motion, this court concurs with Judge
11 Paez’s analysis as to the nature of the section 110330 confidentiality privilege; accordingly, the
12 objectives of the hearings conducted by this Court were to determine 1) whether it is feasible to
13 disclose the raw data in a form such that the identities of the study participants would not be
14 compromised; and 2) whether the public interest in non-disclosure outweighs Philip Morris’ need
15 for the raw data to defend itself in the Murphy case.

16 This court has carefully considered the submissions of both parties in this regard.
17 Respondent USC has made a compelling case, especially through its court-ordered in camera
18 submissions, that the data itself (where the names and addresses of the participant and family
19 members have been redacted) in at least several instances can be used by a reasonably capable
20 researcher to identify the subject that the data reflects. However, the question this court must
21 consider is whether that possibility of identity revelation is unavoidable by virtue of the
22 interconnection of the raw data to the identity of the study participant.

23 This Court finds that while USC has demonstrated that the Fontham study raw data could
24 be used to identify many of the study participants, the data itself without further inquiry does not
25 automatically identify any participant; in other words, the Court finds it unlikely that anyone
26 without personal knowledge of a particular study participant could read the raw data and, without
27 using the information therein to research other databases, know the identity of the participant.
28 Movant Philip Morris has repeatedly assured this court that it has no intention of using the raw

1 data to identify any of the study participants. The court accepts Philip Morris' representation.

2 Nevertheless, the mandate that this Court take affirmative steps to avoid the unnecessary
3 disclosure of the personal identities of the Fontham study participants is unarguable. In addition
4 to the conditional, confidentiality privilege of California Health and Safety Code § 110330,
5 respondent USC has correctly noted that since the Fontham study was federally funded, 45
6 C.F.R. § 46.116(a)(1)-(5) and 42 U.S.C. § 241(d) also require that the names and "identifying
7 characteristics" of the subjects not be disclosed. Likewise, as USC has noted, there is a strong
8 public policy interest in protecting the identities of the study participants so that public
9 health/academic research will not be stymied. (Opposition of Third Party University of Southern
10 California to Defendant Philip Morris' Motion to Compel Production of Documents, filed
11 August 26, 1999, pp. 20-24.) In Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir.
12 1995), the Third Circuit Court of Appeal set forth "several factors, which are neither mandatory
13 nor exhaustive, that may be considered in evaluating whether 'good cause' exists [for issuance of
14 a protective order]:

- 15 1) whether disclosure will violate any privacy interests;
- 16 2) whether the information is being sought for a legitimate purpose or for an
improper purpose;
- 17 3) whether disclosure of the information will cause a party embarrassment;
- 18 4) whether confidentiality is being sought over information important to
public health and safety;
- 19 5) whether the sharing of information among litigants will promote fairness
and efficiency;
- 20 6) whether a party benefitting from the order of confidentiality is a public
entity or official; and
- 21 7) whether the case involves issues important to the public

22 23 F.3d at 787-91. Although we have recognized that the district court is best
situated to determine what factors are relevant to the dispute, we have cautioned
that the analysis should always reflect a balancing of private versus public
interests --

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24 'Discretion should be left with the court to evaluate the competing
considerations in light of the facts of individual cases. By focusing
25 on the particular circumstances in the cases before them, courts are
in the best position to prevent both the overly broad use of
26 [confidentiality] orders and the unnecessary denial of
confidentiality for information that deserves it'

27 *Id.* at 789 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and*
28 *Public Access to the Courts*, 105 Harv.L.Rev. 427, 492 (1991)).

1 In the case at bar, all of the aforementioned factors militate for imposition of a protective
2 order. The impact of environmental tobacco smoke on human health is a significant public
3 health concern; likewise, due process specifically and justice generally require that Philip Morris'
4 ability and right to defend itself against the Murphy allegations, where the outcome of such
5 defense may impact both the public and Philip Morris, not be compromised; in contrast, the
6 identities of individuals whose personal stories have contributed to the collection of information
7 on this subject is of little or no public concern. Moreover, both California law and federal law
8 require that, to the extent possible, these identities be protected.

9 Finally, since the public's interest in non-disclosure of the data is actually limited only to
10 non-disclosure of the actual identities of the study participants, and since this Court herein will
11 establish a protective order designed to protect precisely that information while not affecting
12 Philip Morris' ability to present its best defense, the Court finds that Philip Morris' interest in
13 disclosure of the redacted raw data outweighs the interest of the public in non-disclosure of that
14 redacted data.²

15 **IT IS THEREFORE ORDERED** that respondent University of Southern California
16 shall within 30 days of the date of this order deliver to Philip Morris, through its counsel herein,
17 a complete set of the so-called raw data underlying the Fontham study (hereinafter "the
18 disclosure"). That disclosure may take the form of actual paper copies or a computer disk
19 containing the data. The disclosure and all documents contained therein shall be altered as
20 follows: **personal names, addresses, social security numbers, personal identification**
21 **numbers, insurance policy numbers, specific places of employment, specific places of**
22 **education, telephone numbers, and any other data which identifies or accesses the**
23 **participant and/or her relatives, friends, employers or associates shall be redacted or**
24 **removed from the disclosure before it is delivered to Philip Morris.**

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26 ²During the hearings on this matter, this court also considered whether the alleged
27 deleterious impact of environmental tobacco smoke has been reliably established by scientific
28 research such that Philip Morris can not seriously litigate the issue in Murphy and therefore has
less basis for compelled disclosure. However, this court concludes that the question of what
evidentiary use or value Philip Morris is able to make of the Fontham raw data in the Murphy
trial is to be determined by the trial judge. This Court will not interfere with those decisions.

1 The disclosure shall be subject to the following protective order:

2 1. Neither defendant Philip Morris nor any other person or entity having access to the
3 disclosure by virtue of this order shall attempt in any way, directly or indirectly, to ascertain the
4 identity of any such Fontham study participant. Such attempts are hereby expressly prohibited.

5 2. Defendant Philip Morris and all other persons or entities having access to the
6 disclosure by virtue of this order shall not use or disclose the subject documents for any purpose
7 other than preparation for, and defense of, Murphy v. Philip Morris Incorporated, et al., (District of
8 Nevada, Case No. CV-S-98-00021-PMP-(RJJ). Neither the documents nor their contents shall be
9 disclosed to any persons other than the following: (a) outside counsel for defendant and their office
10 staff, (b) outside experts engaged for purposes of the underlying litigation, and (c) the corporate
11 officer of defendant responsible for the supervision of counsel and the conduct of the litigation.
12 Each person having access to the documents shall first execute a non-disclosure undertaking (in a
13 form to be mutually agreed upon by counsel for defendant, respondent USC, and intervenor State
14 of California), which shall refer to this Order. In the event the contents of one or more of the
15 documents are to be disclosed to a deposition witness, the witness shall first be informed, on the
16 record, of the requirements of this Order and the witness' obligation to comply with this order.
17 Absent such agreement, no portion of the disclosure shall be shown to any deposition witness.
18 Nothing herein shall prevent defendant from referencing or appending any portion of the documents
19 in court submissions, but such submissions shall be made under seal.

20 3. Defendant Philip Morris shall return the subject documents, and all copies thereof
21 in any form (except as may have been filed with the court or marked as exhibits), to respondent USC
22 at the conclusion of all proceedings in Murphy v. Philip Morris Incorporated, et al., (District of
23 Nevada, Case No. CV-S-98-00021-PMP-(RJJ).

24 4. Nothing herein shall be construed to restrict the authority of the presiding judge in
25 the underlying case to make such other and further orders with respect to the documents as may be
26 deemed appropriate under the circumstances; it shall be the responsibility of defendant Philip Morris
27 promptly to notify counsel for USC and the State of California, respectively, of any such proposed
28 change or changes so that they may have an opportunity to state their position(s) on such change or
changes.

1 5. Defendant Philip Morris shall reimburse USC its reasonable expenses in complying
2 with this Order.

3 This Court shall retain jurisdiction over the parties to this discovery proceeding for
4 the limited purpose of overseeing compliance with this Order

5 DATED: _____

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8 JEFFREY W. JOHNSON
9 United States Magistrate Judge
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