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Superior Court of California,
County of Orange

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Clerk of the Superior Court
By Lateasha M Stallworth, Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

BRIAN CLEARY,
Plaintiff,

vs.

COX COMMUNICATIONS CALIFORNIA,
LLC, a limited liability company; ELSTER
AMERICAN METER COMPANY, LLC, a
limited liability company; SOUTHERN
CALIFORNIA GAS COMPANY, a
corporation; and DOES 1 through 100,
inclusive,
Defendants.

CASE NO. 30-2013-00648401-CU-PL-CJC
(related to Case No. 30-2013-00648371-
CU-PL-CJC)

[Assigned to Hon. John C. Gastelum, Dept. C-7]

(Complaint Filed: 5/7/13)

**PLAINTIFF'S MOTION TO
QUASH/MOTION FOR PROTECTIVE
ORDER REGARDING DEFENDANT
SOUTHERN CALIFORNIA GAS
COMPANY'S SUBPOENA OF
MEDICAL RECORDS OF PLAINTIFF
BRIAN CLEARY; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF MOLLY M.
McKIBBEN WITH EXHIBITS**

[Filed Concurrently with Plaintiff's
Separate Statement of Discovery Items in
Dispute; [Proposed] Order on Plaintiff's
Motion to Quash/Motion for Protective
Order]

**NOTICE OF AUTOMATIC STAY OF
PRODUCTION OF DOCUMENTS**

**Date: March 25, 2014
Time: 2:00 p.m.
Dept: C-7
Reservation Conf. No.: 71847941**

1 TO THE HONORABLE COURT, DEFENDANTS, THEIR ATTORNEYS OF RECORD, THE
2 DEPOSITION OFFICER, AND THE FOLLOWING CUSTODIANS OF RECORDS:

3 PLEASE TAKE NOTICE that on March 25, 2014 at 2:00 p.m., or as soon thereafter as the
4 matter may be heard, in Department C-7 of the above-entitled Court, Plaintiff will move this Court
5 for an Order quashing subpoena for production of medical records served by Defendant Southern
6 California Gas Company (hereinafter "SoCal Gas") concerning Plaintiff Brian Cleary. Plaintiff
7 will further move the Court for a protective order regarding the aforesaid subpoena to prevent the
8 production of certain documents requested by the subpoena.

9 **TO ALL CUSTODIAN OF RECORDS SUBJECT TO THIS MOTION,**
10 **PLEASE TAKE NOTICE THAT PURSUANT TO CALIFORNIA CODE**
11 **OF CIVIL PROCEDURE SECTION 2025.410(c) THE FILING OF THIS**
12 **MOTION AUTOMATICALLY STAYS THE PRODUCTION OF**
13 **DOCUMENTS. MEANING NONE OF THE DOCUMENTS REQUESTED**
14 **BY THE SUBPOENA MAY BE PRODUCED UNTIL THE MATTER HAS**
15 **BEEN RESOLVED BY THE COURT.**

16 This Motion is brought pursuant to California *Code of Civil Procedure* sections 1985.3,
17 1987.1, 2017.020, 2025.410, and 2025.420 on the following grounds:

18 1. SoCal Gas's subpoena seeks Plaintiff Brian Cleary's medical history for any
19 treatment for any injury from the subpoenaed provider and is therefore overbroad, unfocused and
20 seek information not reasonably calculated to lead to the discovery of admissible evidence. *Cal.*
21 *Civ. Proc. Code* § 2020.410(a).

22 2. Defendant's subpoena violates Plaintiff's right to privacy. California Constitution,
23 Art. I, § 1.

24 3. SoCal Gas has failed to provide any reasonable and supported basis why it must
25 subpoena Plaintiff's medical history for unrelated injuries and thus fails to overcome the
26 heightened burden associated with his right of privacy.

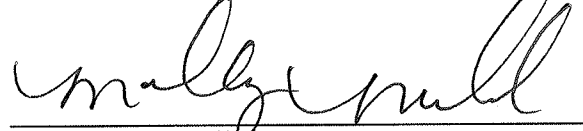
27 Plaintiff asks that the Court modify the subpoena so that it is limited only to the areas of
28 body at issue in this lawsuit as clearly set forth in Plaintiff's response to Form Interrogatory No.
6.2.

Plaintiff's Motion is based on the attached Memorandum of Points and Authorities, the
Declaration of Molly M. McKibben and attached Exhibits, Plaintiff's Separate Statement of

1 Discovery Items in Dispute, all pleadings currently on file in this action, and any oral argument
2 and evidence presented on hearing in this matter.¹

3
4 DATED: November 22, 2013

GREENE BROILLET & WHEELER, LLP



5
6
7 Geoffrey S. Wells
8 Tobin M. Lanzetta
9 Molly M. McKibben
10 Attorneys for Plaintiff

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¹ As set out in the Declaration of Molly M. McKibben, prior to filing this motion Plaintiff's counsel met and conferred with SoCal Gas' counsel on this matter. See Declaration of Molly M. McKibben at ¶¶ 1-2, 5-18. Pursuant to the California *Code of Civil Procedure* and the California *Rules of Court*, the parties attempted to resolve this matter informally and in good faith. The parties could not resolve this issue, which required the filing of this motion. Good cause exists to protect the privacy rights of Brian Cleary, which is consistent with well-settled law.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On October 12, 2011 at approximately 10:00 a.m., Plaintiff Brian Cleary was working in
4 his capacity as a service technician for The Irvine Company at apartments located at 146 Baywood
5 Drive, in Corona Del Mar, California, when there was a gas leak on the property which came into
6 contact with a flame and ignited, causing an explosion. Plaintiff was in extremely close proximity
7 to the explosion, and sustained severe and permanent injuries.

8 Plaintiff subsequently filed the instant lawsuit against various entities involved in the
9 installation and maintenance of equipment involved in the explosion, including defendant
10 Southern California Gas Company (hereinafter "SoCal Gas"). SoCal Gas served Plaintiff with
11 discovery requests, including form interrogatories, which Plaintiff responded to, specifically
12 identifying the injuries he sustained as a result of the explosion. SoCal Gas then issued subpoenas
13 for Mr. Cleary's medical records, billing records, diagnostic records and mental health records.
14 However, these subpoenas are inappropriate because they seek every record of Plaintiff's medical
15 records from each provider and do not limit the request to the body parts at issue; as such, they are
16 overbroad and violative of Mr. Cleary's constitutionally-protected right to privacy.

17 While SoCal Gas is entitled to subpoena medical records related to the parts of Plaintiff's
18 body that were injured in the explosion and mental conditions sustained as a result of the
19 explosion, as well as medical bills related to the treatment of such injuries, SoCal Gas' current
20 subpoena goes well beyond what is permitted under the California Constitution and well-settled
21 California case law. During the various attempts to meet and confer, Plaintiff's counsel simply
22 requested that the subpoenas be limited to the body parts and mental conditions at issue. SoCal
23 Gas has refused to consider well-settled law provided by Plaintiff and now compels the use of
24 court resources to resolve this simple issue.

25 Plaintiff brings this motion to quash or modify the subpoena so that SoCal Gas may obtain
26 the appropriate records relating to Plaintiff's injuries. As discussed below, the subpoena is
27 overbroad, the information sought is not restricted to the parts of Plaintiff's body placed at issue in
28 this litigation and therefore violate Plaintiff's right of privacy and the Discovery Act. Plaintiff

1 does not object to SoCal Gas' ability to obtain records related to the body parts at issue in this
2 litigation. As such, Plaintiff asks this Court to issue a protective order appropriately narrowing the
3 scope of Defendant's subpoena in accordance with California law.

4
5 **II. PROCEDURAL HISTORY.**

6 SoCal Gas served Plaintiff with discovery requests, including form interrogatories. In
7 response to Form Interrogatory No. 6.2, which asked Plaintiff to "identify each injury you attribute
8 to the INCIDENT and the area of your body affected," Plaintiff responded as follows:

9 Second and third degree burns to face, hands and arms; tear duct damage in left
10 eye; problems with vision in left eye; tinnitus in left ear; hearing loss in both ears;
11 skin sensitivity on burn areas; herniated discs on C3 – T1 (in neck); muscle
12 spasms in neck and left shoulder; aggravation/nerve damage to prior left shoulder
13 injury; future surgery needed to left elbow for nerve damage; difficulty
14 sleeping/night terrors; claustrophobia; post traumatic stress disorder; migraine
15 headaches.

16 *See* Plaintiff's Responses to Form Interrogatories Propounded by SoCal Gas, No. 6.2, attached as
17 Exhibit 1.

18 Defendant SoCal Gas then issued subpoenas for business records to thirteen (13) medical
19 providers, with language requesting documents that is overbroad and violative of Plaintiff's
20 privacy as they are not limited in any way to the portions of the body Plaintiff described in his
21 response to form interrogatories. This is contrary to well-settled California law.

22 On September 30, 2013, counsel for Plaintiff sent counsel for SoCal Gas a letter requesting
23 that SoCal Gas narrow its subpoenas to request only records related to the portions of the body and
24 mental conditions Plaintiff listed in his response to Form Interrogatory No. 6.2. *See* September
25 30, 2013 Letter to Jamiel Dave, Esq., attached as Exhibit 3. On October 8, 2013, counsel for
26 SoCal Gas responded, stating that SoCal Gas would not narrow its subpoenas unless Plaintiff
27 could prove that he had treated with subpoenaed facilities prior to the date of the explosion, and
28 arguing that it would be impossible to narrow its subpoenas. *See* October 8, 2013 Letter to Molly
McKibben, attached as Exhibit 4. On October 17, 2013, Plaintiff's counsel sent another letter to
SoCal Gas counsel, again reiterating that SoCal Gas' subpoenas are impermissibly overbroad and

1 violate Plaintiff's right to privacy, and offering to provide defense counsel with suggested
2 language for narrowing the document requests. *See* October 17, 2013 Letter to T. Vincent
3 Consolo, Esq., attached as Exhibit 5.

4 On October 22, 2013, counsel for Plaintiff spoke with counsel for Defendant via
5 telephone regarding the subpoenas. *See* Declaration of Molly M. McKibben at ¶ 10. At the
6 conclusion of conversation, defense counsel stated that he would send Plaintiff's counsel proposed
7 narrowing language for the subpoenas. *See id.* On October 23, 2013, defense counsel telephoned
8 Plaintiff's counsel and stated that he was unable to come up with proposed language and reiterated
9 his argument that SoCal Gas's subpoenas should not be narrowed. *See* Declaration of Molly M.
10 McKibben at ¶ 11. On October 24, 2013, Plaintiff's counsel sent defense counsel an email with
11 proposed narrowing language for SoCal Gas's subpoenas. *See* October 24, 2013 Email to T.
12 Vincent Consolo, attached as Exhibit 6. On October 28, 2013, defense counsel responded by
13 email, stating that unless Plaintiff had previously treated at any of the subpoenaed facilities, there
14 is no need for SoCal Gas to narrow its subpoenas. *See* October 28, 2013 Email to Molly M.
15 McKibben attached as Exhibit 7. On October 28, 2013, Plaintiff's counsel responded, stating that
16 that SoCal Gas' position is not supported by case law, and that it was clear that the parties were
17 not going to agree on a solution for narrowing the subpoenas, and as such, a motion to
18 quash/motion for protective order was necessary to adjudicate the dispute. *See* October 28, 2013
19 Email to T. Vincent Consolo, attached as Exhibit 8. Plaintiff filed a Motion to Quash/Motion for
20 Protective order as to these thirteen subpoenas on October 29, 2013, and that motion is set to be
21 heard by this Court on March 4, 2013. *See* Declaration of Molly M. McKibben at ¶ 14.

22 After filing the previous Motion, Plaintiff provided SoCal Gas with copies of all medical
23 records related to the portions of the body Plaintiff described in his response to form
24 interrogatories, which had been provided to defendant Elster American Meter Company LLC in
25 response to its narrowly tailored requests for relevant medical records. *See* Declaration of Molly
26 M. McKibben at ¶ 15.

27 Despite the fact that Plaintiff had already explained his objections to overbroad language
28 included in its prior subpoenas, and despite the fact that Plaintiff had filed a Motion to

1 Quash/Motion for Protective Order for subpoenas with the same language, and despite the fact that
2 Plaintiff voluntarily provided it with all of his medical records related to this incident, Defendant
3 SoCal Gas issued another subpoena, this time to One Call Care Management, with language
4 requesting documents as follows:

5 All itemized statements of billing charges, invoices, records of adjustments
6 and/or write-offs, payments and credits. All of the above pertaining the care,
7 treatment or examination of Brian Cleary (DOB: 01/03/19761) from
8 01/01/2001 to and including the present day.

9 *See* SoCal Gas Subpoena to One Call Care Management, attached as Exhibit 2. Like the other
10 thirteen subpoenas issued by SoCal Gas, this subpoena is overbroad and violative of Plaintiff's
11 privacy as it is not limited in any way to the portions of the body Plaintiff described in his
12 response to form interrogatories. This is contrary to well-settled California law, and is

13 **III. THIS COURT HAS AUTHORITY TO QUASH THE SUBPOENA IN ITS**
14 **ENTIRETY AND TO ISSUE A PROTECTIVE ORDER.**

15 California *Code of Civil Procedure* section 1985.3 provides that “[a]ny consumer whose
16 personal records are sought by a subpoena *duces tecum* and who is a party to the civil action in
17 which this subpoena *duces tecum* is served may, prior to the date for production, bring a motion
18 under *Code of Civil Procedure* Section 1987.1 to quash or modify the subpoena *duces tecum*.”
19 *Code of Civil Procedure* section 1987.1 empowers this Court to “make an order quashing the
20 subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as
21 the court shall declare, including protective orders.”

22 Furthermore, Section 2025.410(c) states in pertinent part: “In addition to serving this
23 written objection, a party may also move for an order staying the taking of the deposition and
24 quashing the deposition notice” Section 2025.420(a) states in pertinent part: “Before,
25 during, or after a deposition, any deponent, or any other affected natural person or organization
26 may promptly move for a protective order”

27 Section 2025.420(b) further states, “[t]he court, for good cause shown, may make any
28 order that justice requires to protect any party . . . from unwarranted annoyance, embarrassment, or

1 oppression, or undue burden or expense.” As such, Plaintiff is empowered by the *Code of Civil*
2 *Procedure* to stay the subpoena, while seeking an order quashing the subpoena.

3

4 **IV. ANY PRODUCTION OF DOCUMENTS PURSUANT TO THIS SUBPOENA IS**
5 **AUTOMATICALLY STAYED PENDING RESOLUTION OF THIS MOTION.**

6 California *Code of Civil Procedure* section 2025.410(c) states in pertinent part that after
7 serving an objection on a Defendant to a subpoena for production of documents at
8 deposition/deposition: “A party may also move for an order staying the taking of the deposition
9 and quashing the deposition notice. This motion shall be accompanied by a declaration stating
10 facts showing a reasonable and good faith attempt at an informal resolution of any issue presented
11 by the motion. The taking of the deposition is stayed pending the determination of this motion.”

12

13 **V. DEFENDANT CANNOT OVERCOME PLAINTIFF’S PRIVACY AND**
14 **RELEVANCE OBJECTIONS.**

15 **A. Plaintiff’s Unrelated Medical Records Are Protected From Discovery By the**
16 **California Constitution and Well-Settled Case Law.**

17 California *Constitution*, Art. I, § 1, specifically states:

18 All people are by nature free and independent and have inalienable rights. Among
19 these are enjoying and defending life and liberty, acquiring, possessing, and
20 protecting property, and pursuing and obtaining safety, happiness, and privacy.

21

22 The California Constitution right to privacy protects a party’s medical history. *Jones v.*
Superior Court of Alameda County (1981) 119 Cal. App. 3d 534, 548-549. In *Heda v. Superior*
23 *Court*, the Court of Appeals stated:

24 A person’s medical profile is an area of privacy infinitely more intimate, more
25 personal in quality and nature than many areas already judicially recognized and
26 protected...The information that may be recorded in a doctor’s files is
27 broadranging. The chronology of ailments and treatments is potentially sensitive.
28 Patients may disclose highly personal details of lifestyle and information
concerning sources of stress and anxiety. These are matters of great sensitivity
and going to the core of the concerns for the privacy of information about an
individual.

1 *Heda v. Superior Court* (1998) 225 Cal. App. 3d 525, 529 (internal citation omitted, emphasis
2 added); see also *Puerto v. Superior Court* (2008) 158 Cal. App. 4th 1242, 1253 (noting the
3 sensitive nature of a person's medical details). "A person's medical history undoubtedly falls
4 within the recognized zones of privacy."

5
6 When seeking private medical information, a defendant cannot merely rely on the
7 argument that it is reasonably calculated to lead to the discovery of admissible evidence. *Britt v.*
8 *Sup. Ct.* (1978) 20 Cal. 3d 844, 864. "Plaintiff is not compelled, as a condition to entering the
9 courtroom, to discard entirely her mantle of privacy." *Vinson v. Sup. Ct.* (1987) 43 Cal. 3d 833,
10 841-42. Rather, a defendant is required to make an **actual showing** that the information is directly
11 relevant and must demonstrate that the need for such information is compelling. *Id.* (emphasis
12 added). Thus, constitutionally protected records are not subject to the broad rules of discovery
13 that favor disclosure of information. The Court in *Lantz v. Sup. Ct.* (1994) 28 Cal. App. 4th 1839;
14 court held:

15 [E]ven when discovery of private information is found directly relevant to the
16 issues of ongoing litigation, it will not be automatically allowed; there must then
17 be 'careful balancing' of the 'compelling public need' for discovery against the
18 'fundamental right of privacy.'

19 Thus, ". . . the party seeking discovery must make a higher showing of relevance and
20 materiality than otherwise would be required for less sensitive material." *Rancho Publications v.*
21 *Sup. Ct.* (1999) 68 Cal. App. 4th 1538, 1549; *Heda v. Sup. Ct.* (1990) 225 Cal. App. 3d 525, 528;
22 *Eldorado Savings & Loan Association v. Sup. Ct.* (1987) 190 Cal. App. 3d 342, 345.

23 In *Tylo v. Sup. Ct.* (1997) 55 Cal. App. 4th 1379, 1387-88, the Court wrote that disclosure
24 can be compelled **only with respect to those conditions the patient-litigant has "disclose[d] by**
25 **bringing an action in which they are in issue.**" Disclosure cannot be compelled with respect to
26 other aspects of the patient-litigant's condition even though they may, "in some sense, be
27 'relevant' to the substantive issues of litigation. The patient thus is not obligated to sacrifice all
28 privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted

1 depends upon the nature of the injuries which the patient-litigant himself has brought before the
2 court.” *Id.* (citing *Britt, supra*, 20 Cal. 3d at 863-64.)

3 In order for the records to be reasonably calculated to lead to admissible evidence, there
4 must be some indicia they are related to the parts of the body at issue in the lawsuit. Anything else
5 would constitute an impermissible fishing expedition. SoCal Gas’ request must be limited to
6 specific charges, invoices, and records which have relevance to this matter, not simply every
7 document which reflect all billing for every doctor’s visit Plaintiff attended in the past twelve
8 years. Relevant records are those related to any of the conditions listed by Plaintiff in his response
9 to Form Interrogatory No. 6.2.

10 Through the meet and confer process, defense counsel has repeatedly argued that the
11 above-cited cases are “not on point.” *See* Exhibit 4, October 8, 2013 Letter to Molly McKibben.
12 These are cases that have been repeatedly upheld by California courts supporting the proposition
13 that a defendant is permitted to discovery of information and records relating *only* to the medical
14 conditions in question in the litigation, and that the filing of a personal injury lawsuit does not
15 open all of a plaintiff’s past medical history to scrutiny. *See Hallendorf v. Superior Court* (1978),
16 85 Cal. App. 3d 553, 556-557; *Jones, supra*, 119 Cal. App. 3d at 546-547; *see also Simek v.*
17 *Superior Court* (1981) 117 Cal. App. 3d 169, 173-175. This holding has been applied by the
18 California Supreme Court and courts of appeal in many different contexts with plaintiffs suffering
19 many different degrees of injury.

20 Counsel for Defendant has also argued that Plaintiff “has put most, if not all, of his
21 physical and mental conditions at issue in this litigation,” and therefore Defendant is entitled to
22 discovery of all of Plaintiff’s medical records, a proposition for which defense counsel cited no
23 supporting law. *See* Exhibit 4, October 8, 2013 Letter to Molly McKibben. This argument is
24 completely without merit. Plaintiff’s response to SoCalGas’s form interrogatories specifically
25 identifies the parts of his body which were injured as a result of the gas explosion and mental
26 injuries he has sustained as a result of the incident. *See* Exhibit 1, Plaintiff’s Responses to Form
27 Interrogatories, No. 6.2. No injuries to any body part below Plaintiff’s waist are identified.
28

1 Moreover, to say that Plaintiff has put “all” of his “mental conditions” at issue in this
2 litigation is without basis. During multiple telephone calls, defense counsel has argued that
3 mental issues stem from the brain, and because Plaintiff has alleged four mental injuries as a result
4 of the explosion Defendant is entitled to discovery of any records related to any mental condition
5 Plaintiff has ever sustained in the past twelve years. Plaintiff specifically identified the aspects of
6 emotional distress that have mental symptoms caused by the incident (difficulty sleeping/night
7 terrors; claustrophobia; post traumatic stress disorder; migraine headaches) – records related to
8 those injuries is all Defendant is allowed to request. If, for instance, Plaintiff had suffered from
9 ADHD in the past twelve years for something prior to the incident at issue here, SoCalGas would
10 not be entitled to records related to treatment for that. Defendant’s argument seems to imply that
11 by sustaining numerous injuries as a result of multiple entities’, including SoCal Gas’, negligence,
12 Plaintiff has somehow “waived” his right to privacy to records having to do with unrelated parts of
13 his body and conditions. Such reasoning is baseless. *See Heda v. Superior Court* (1998) 225 Cal.
14 App. 3d 525, 530 (holding that waivers of constitutional rights “are not lightly found”).

15 SoCal Gas cannot make an actual showing that records for injuries/mental issues unrelated
16 to the subject incident area directly relevant to this case and cannot demonstrate that the need for
17 such information is compelling. As such, SoCal Gas’ subpoena must be narrowed to only request
18 documents related to the body parts and mental conditions Plaintiff has placed at issue in this
19 lawsuit.

20 **B. Plaintiff’s Unrelated Medical Records Are Not Relevant to the Instant Litigation**
21 **and Is Not Discoverable.**

22 California *Code of Civil Procedure* section 2017.010 provides that discovery is only
23 permitted regarding “any matter not privileged, that is relevant to the subject matter involved in
24 the pending action or to the determination of any motion made in that action, if the matter either is
25 itself in evidence or appears reasonably calculated to lead to the discovery of admissible
26 evidence.” In addition, under California *Code of Civil Procedure* section 2017.020, the trial court
27 is authorized to limit the scope of discovery where, “the burden, expense, or intrusiveness of that
28

1 discovery clearly outweighs the likelihood that the information sought will lead to the discovery of
2 admissible evidence.” *See also, Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal. App. 4th
3 733. Finally, subpoenas cannot be overbroad. They must comply with the bounds of proper
4 discovery. *California Code of Civil Procedure* section 2025.420.

5 While the scope of civil discovery is typically broad, it is not limitless. *Calcor Space*
6 *Facility, Inc. v. Superior Court* (1997) 53 Cal. App. 4th 216, 223. “When discovery requests are
7 grossly overbroad on their face, and hence do not appear reasonably related to a legitimate
8 discovery need, a reasonable inference can be drawn of an intent to harass and improperly
9 burden.” *Obregon v. Superior Court* (1998) 67 Cal. App. 4th 424, 431. As the Court in *Calcor*,
10 *supra*, tellingly wrote:

11 Because of the potential for promiscuous discovery imposing great burdens, even
12 though ultimately the probative value of the discovered material may be
13 questionable, trial judges must carefully weigh the cost, time, expense and
14 disruption of normal business resulting from an order compelling the discovery
15 against the probative value of the material which might be disclosed if the
16 discovery is ordered. A carelessly drafted discovery order may result in cost and
17 inconvenience far outweighing the potential usefulness of the material ordered to
18 be produced. Because of the difficulty in drawing clear lines as to what is and
19 what is not proper, this danger is particularly great with respect to orders requiring
20 the production of materials.

21 *Calcor, supra*, 53 Cal. App. at 223.

22 Clearly there is no point in demanding records having to do with unrelated physical
23 injuries and mental conditions other than to invade Plaintiff’s right of privacy and go on an
24 unwarranted fishing expedition. Plaintiff is in no way attempting to preclude Defendant from
25 discovery of relevant information but Defendant’s subpoena operates to obtain information which
26 is well beyond the relevant scope and issues presented by this action.

27 SoCalGas can demonstrate no compelling state interest in medical records having to do
28 with body parts that Plaintiff has not alleged were injured in the subject incident, or records having
to do with unrelated mental conditions. They are simply not relevant in any way to this litigation.

1 VI. DEFENDANT'S SUBPOENA IS IMPERMISSIBLY OVERBROAD AND CAN BE
2 EASILY NARROWED.

3
4 A party issuing a business records subpoena must identify with reasonable particularity the
5 documents sought, tailoring its demands to the subject matter of the litigation; otherwise, the
6 request is overly broad and not reasonably particularized. *Cal. Civ. Proc. Code* § 2020.410(a);
7 *Calcor, supra*, 53 Cal. App. 4th at 225. This directive is especially true when conducting nonparty
8 discovery. *Id.* at 225. Further, an overbroad request is impermissibly burdensome where it
9 requires a detailed search of extensive records without specifically limiting the requests to that
10 information directly relevant to the case. *Nelson v. Superior Court* (1986) 184 Cal. App. 3d 444,
11 452-53 (1986); *see also Ryan v. Superior Ct.* (1960) 186 Cal. App. 2d 813, 817 (discovery is
12 improper where it calls for disclosure of matters so remote from the suit's subject matter that
13 disclosure is of little or no benefit to a propounding party or if to answer would place a burden and
14 expense upon the answering parties).

15 In *Calcor*, the plaintiff served a manufacturer of gun mounts an elaborate inspection
16 demand which cumulatively instructed the manufacturer to "send us everything you have" related
17 to the manufacturer's product. *Id.* at 222. Such broad requests constituted an impermissible
18 "fishing expedition." *Id.* at 224-25. Indeed, such demands placed the burden on the responding
19 party to review its files to determine what might fall within the over broad categories. *Id.* at 222.
20 Therefore the court denied the motion to compel. *Id.* For the same reasons, this Court should
21 quash or modify this third-party subpoena which include requests for Plaintiff's unrelated, highly
22 private medical records.

23 When asked to narrow the scope of SoCal Gas' subpoenas, defense counsel responded that
24 he would "hard pressed to draft subpoena language that would encompass" Plaintiff's specifically
25 alleged injuries. *See* Exhibit 4, October 8, 2013 Letter to Molly McKibben. Counsel for Plaintiff
26 offered to provide Defendant with language from the many subpoenas issued by other defendants
27 in other cases wherein they were easily able to limit their scope to just those injuries alleged by the
28

1 plaintiff. In fact, counsel for Plaintiff sent defense counsel proposed language used by other
2 defendants in other cases, incorporating Plaintiff's response to Form Interrogatory No. 6.2:

3 All documents, medical records, medical tests, charts, radiological reports,
4 psychiatric, drug and/or alcohol treatment, counseling or rehabilitation records,
5 office records and sign-in sheets, itemized statements of billing charges, invoices,
6 records of adjustments and/or write-offs, payment and credits from January 1,
7 2001 to and including the present day, which pertain to the care, treatment or
8 examination of Brian Cleary pertaining to second and third degree burns to face,
9 hands and arms; tear duct damage in left eye; problems with vision in left eye;
10 tinnitus in left ear; hearing loss in both ears; skin sensitivity on burn areas;
11 herniated discs on C3 – T1 (in neck); muscle spasms in neck and left shoulder;
12 aggravation/nerve damage to prior left shoulder injury; future surgery needed to
13 left elbow for nerve damage; difficulty sleeping/night terrors; claustrophobia; post
14 traumatic stress disorder; migraine headaches.

15 See Exhibit 6, October 24, 2013 Email to T. Vincent Consolo. Defendant still refuses to narrow
16 its subpoenas.

17 This case is analogous to *Hallendorf, supra*. In *Hallendorf*, a defendant driver in an
18 automobile collision case sought discovery of information and records related to plaintiff's
19 medical problems other than those caused by the accident. *Hallendorf, supra*, 85 Cal. App. 3d at
20 554-555. The Court of Appeal held that, in line with the Supreme Court's holding in *Britt*,
21 *supra*, 20 Cal. 3d 844, defendant's subpoenas were "clearly overbroad." *Id.* at 557. The court
22 stated that the defendant was not precluded from issuing more narrowly-framed, "more precisely
23 tailored interrogatories or subpoenas which do not improperly impinge on privileged information."
24 *Id.* Here, the same is true. Defendant has issued an overbroad subpoena that seeks Plaintiff's
25 entire medical history over the past twelve years. This subpoena must be narrowly tailored to
26 request only relevant information and preclude Defendant from improperly obtaining Plaintiff's
27 private medical information unrelated to this case.
28

1 **VII. ANY ARGUMENT BY DEFENDANT THAT PLAINTIFF'S OBJECTIONS**
2 **REGARDING PRIVACY RIGHTS AND RELEVANCY CONCERNS ARE**
3 **"ACADEMIC" IS WITHOUT BASIS.**

4 Throughout the meet and confer process, counsel for Defendant has repeatedly argued that
5 it should not have to comply with the California Constitution, well-settled case law, or the Civil
6 Discovery Act because there is no evidence that Plaintiff has treated with the subpoenaed facilities
7 prior to the subject incident. *See* Exhibit 4, October 8, 2013 Letter to Molly McKibben; Exhibit 7,
8 October 28, 2013 Email to Molly McKibben. Defendant argues that until Plaintiff can prove that
9 he has medical records to protect, his objections are just "academic" and without merit. *Id.*
10 Defendant suggests that instead of simply reissuing its subpoenas with the language proposed by
11 Plaintiff, the "simplest" solution would be for Plaintiff to identify what facilities he treated with
12 prior to the incident, and *then* Defendant would agree to narrow its subpoenas. Essentially,
13 Defendant contends that given the choice between Defendant narrowing its subpoenas or Plaintiff
14 agreeing to allow the subpoenas to proceed as worded, the parties should err on the side of
15 unveiling of Plaintiff's entire medical history for the past twelve years, related or not.

16 The burden is on the party issuing discovery requests, including subpoenas, to narrowly
17 tailor them. *Cal. Civ. Proc. Code* § 2020.410(a); *Calcor, supra*, 53 Cal. App. 4th at 225; *Nelson,*
18 *supra*, 184 Cal. App. 3d at 452-53; *Ryan, supra*, 186 Cal. App. 2d at 817. It is not Plaintiff's job
19 to research whether he has previously treated at any of the subpoenaed facilities in order to defend
20 himself against Defendant's overbroad subpoena. Moreover, a patient's memory of where they
21 may have previously treated is not always accurate, so even if Plaintiff stated that he does not
22 remember treating somewhere prior to the incident giving rise to this litigation, it is possibly that
23 he may have. Then, without having narrowed Defendant's subpoenas, Defendant will receive
24 records of injuries/issues unrelated to this litigation, the discovery of which will violate Plaintiff's
25 right to privacy.

26 Plaintiff has made a very simple request of Defendant: to narrow its subpoenas in
27 accordance with California Constitution, well-settled case law, or the Civil Discovery Act.
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1 Defendant has refused to do so. As such, Plaintiff requests that the Court issue a Protective Order
2 narrowing Defendant's subpoena accordingly.

3

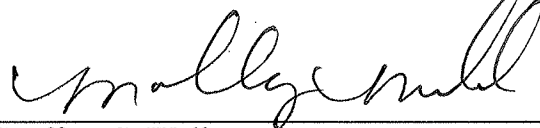
4 **VIII. CONCLUSION.**

5 For the reasons set out above, Plaintiff respectfully requests this Court to grant its motion
6 to quash in its entirety and issue a protective order narrowing the scope of SoCal Gas' subpoena.

7

8 DATED: November 22, 2013

GREENE BROILLET & WHEELER, LLP



Geoffrey S. Wells
Tobin M. Lanzetta
Molly M. McKibben
Attorneys for Plaintiff

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GREENE BROILLET & WHEELER, LLP
P.O. BOX 2131
SANTA MONICA, CA 90407-2131

1 **DECLARATION OF MOLLY M. McKIBBEN**

2
3 I, MOLLY M. McKIBBEN, declare and say that:

4 I am an attorney at law licensed to practice before all of the courts of the State of
5 California, and am a member of the law firm of Greene Broillet & Wheeler, LLP, attorneys of
6 record for Plaintiff Brian Cleary. As such, I have personal knowledge of the facts surrounding the
7 present action and all facts herein stated. If called as a witness, I could testify competently to the
8 following:

9 1. Pursuant to local rules, I attempted numerous times to meet and confer with
10 counsel for Southern California Gas Company.

11 2. The meet and confer process was unsuccessful, and thus required the filing of this
12 Motion.

13 3. Good cause exists for this Motion. The subpoena is not limited in scope, and as
14 such violates Plaintiff's right to privacy. This runs directly contrary to well-settled California law.

15 4. Attached hereto as Exhibit "1" is a true and correct copy of the pertinent portions of
16 Plaintiff's Responses to Form Interrogatories, Set One, Propounded by SoCal Gas.

17 5. Attached hereto as Exhibit "2" is a true and correct copy of the subpoena issued by
18 SoCal Gas requesting Plaintiff's records from One Call Care Management.

19 6. Attached hereto as Exhibit "3" is a true and correct copy of the September 30, 2013
20 letter I sent to Jamiel Dave, Esq., counsel for SoCal Gas, requesting that he narrow the scope of
21 the subpoenas issued by his client pursuant to well-settled California law.

22 7. Attached hereto as Exhibit "4" is a true and correct copy of the October 8, 2013
23 letter from T. Vincent Consolo, Esq., counsel for SoCal Gas, stating that SoCal Gas would not
24 narrow its subpoenas.

25 8. Attached hereto as Exhibit "5" is a true and correct copy of the October 17, 2013
26 letter I sent to Mr. Consolo again requesting that SoCal Gas narrow its subpoenas.

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1 9. On October 22, 2013, I spoke with Mr. Consolo via telephone regarding his client's
2 subpoenas. At the conclusion of conversation, Mr. Consolo stated that he would send me
3 proposed narrowing language for the subpoenas.

4 10. On October 23, 2013, Mr. Consolo telephoned me and informed me that he was
5 unable to come up with proposed language and reiterated his argument that SoCal Gas's
6 subpoenas should not be narrowed.

7 11. On October 24, 2013, I sent Mr. Consolo an email with proposed narrowing
8 language for SoCal Gas's subpoenas, and requested that Mr. Consolo inform me by October 28,
9 2013 whether or not his client would narrow its subpoenas. A true and correct copy of said email
10 is attached hereto as Exhibit "6".

11 12. On October 28, 2013, I received an email from Mr. Consolo stating that unless
12 Plaintiff had previously treated at any of the subpoenaed facilities, there is no need for SoCal Gas
13 to narrow its subpoenas. A true and correct copy of said email is attached hereto as Exhibit "7".

14 13. On October 28, 2013, I responded to Mr. Consolo's email, stating that I disagreed
15 with his position, which is not supported by case law. I stated that it was clear that the parties
16 were not going to agree on a solution for narrowing the subpoenas, and as such, the instant Motion
17 was necessary to adjudicate the dispute. A true and correct copy of said email is attached hereto
18 as Exhibit "8".

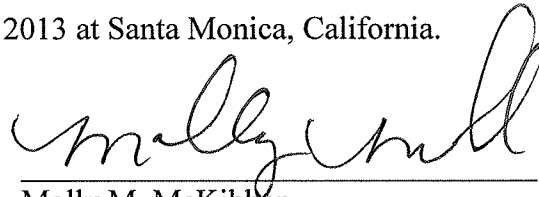
19 14. Plaintiff filed a Motion to Quash/Motion for Protective order as to the prior thirteen
20 subpoenas on October 29, 2013, and that motion is set to be heard by this Court on March 4, 2013.

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1 15. After filing the previous Motion, my office provided SoCal Gas with copies of all
2 medical records related to the portions of the body Plaintiff described in his response to form
3 interrogatories, which had been provided to defendant Elster American Meter Company LLC in
4 response to its narrowly tailored requests for relevant medical records.

5
6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct.

8 Executed this 22 day of November, 2013 at Santa Monica, California.



Molly M. McKibben
Declarant

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GREENE BROILLET & WHEELER, LLP

(SPACE BELOW FOR FILING STAMP ONLY)

LAWYERS
100 WILSHIRE BOULEVARD, SUITE 2100
P.O. BOX 2131
SANTA MONICA, CALIFORNIA 90407-2131
TEL. (310) 576-1200
FAX. (310) 576-1220

GEOFFREY S. WELLS, State Bar No. 126498
TOBIN M. LANZETTA, State Bar No. 228674
MOLLY M. MCKIBBEN, State Bar No. 273897
Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

BRIAN CLEARY,

Plaintiff,

vs.

COX COMMUNICATIONS CALIFORNIA,
LLC, a limited liability company; ELSTER
AMERICAN METER COMPANY, LLC, a
limited liability company; SOUTHERN
CALIFORNIA GAS COMPANY, a
corporation; DOES1 through 100, inclusive,

Defendants.

CASE NO. 30-2013-00648401-CU-PL-
CJC

**RESPONSES OF PLAINTIFF BRIAN
CLEARY TO FORM
INTERROGATORIES, SET 1
PROPOUNDED BY DEFENDANT
SOUTHERN CALIFORNIA GAS
COMPANY**

PROPOUNDING PARTY: DEFENDANT SOUTHERN CALIFORNIA GAS COMPANY

RESPONDING PARTY: PLAINTIFF BRIAN CLEARY

SET NO: ONE

TO DEFENDANT SOUTHERN CALIFORNIA GAS COMPANY, AND TO ITS ATTORNEYS
OF RECORD HEREIN:

COMES NOW Plaintiff, pursuant to Section 2030.010, et seq. of the California *Code of
Civil Procedure*, and hereby provides the following responses, without prejudice to further
discovery.

1 **FORM INTERROGATORY 6.2:**

2 Identify each injury you attribute to the **INCIDENT** and the area of your body affected.

3 **RESPONSE TO FORM INTERROGATORY 6.2:**

4 2nd and 3rd degree burns to face, hands and arms; tear duct damage in left eye; problems
5 with vision in left eye; tinnitus in left ear; hearing loss in both ears; skin sensitivity on burn areas;
6 herniated discs on C3 - T1 (in neck); muscle spasms in neck and left shoulder; aggravation/nerve
7 damage to prior left shoulder injury; future surgery needed to left elbow for nerve damage;
8 difficulty sleeping/night terrors; claustrophobia; post traumatic stress disorder; migraine
9 headaches.

10

11 **FORM INTERROGATORY 6.3:**

12 Do you still have any complaints that you attribute to the **INCIDENT**? If so, for each
13 complaint state:

- 14 (a) a description;
15 (b) whether the complaint is subsiding, remaining the same, or becoming worse;
16 (c) the frequency and duration.

17 **RESPONSE TO FORM INTERROGATORY 6.3:**

18 Yes.

- 19 (a) Pain in neck and left shoulder, arm and hand;
20 (b) Remaining the same;
21 (c) Varies depending on level of activity;
22 (a) Night terrors;
23 (b) Varies;
24 (c) Varies - approximately once a week;
25 (a) Migraine headaches;
26 (b) Subsiding;
27 (c) Varies - went from approximately once a week to a couple of times a month.

28

GREENE BROILLET & WHEELER, LLP
P.O. BOX 2131
SANTA MONICA, CA 90407-2131

1 **RESPONSE TO FORM INTERROGATORY 14.1:**

2 Objection: The question is objectionable on grounds that it is vague and ambiguous,
3 compound, overbroad, oppressive, burdensome and harassing, calls for information protected by
4 the attorney-client privilege and attorney work product doctrine, seeks disclosure of information
5 from expert witnesses in violation of California *Code of Civil Procedure* Section 2034. Without
6 waiving the foregoing objections, Plaintiff responds as follows: In addition to any violations found
7 in the OSHA report, cabling through conduit/pass-through into heater closet was not run properly
8 or sealed correctly. Investigation and discovery continue; as such, Responding Party reserves the
9 right to amend this response at a later date.

10
11 **FORM INTERROGATORY 14.2:**

12 Was any **PERSON** cited or charged with a violation of any statute, ordinance, or
13 regulation as a result of this **INCIDENT**? If so, for each **PERSON** state:

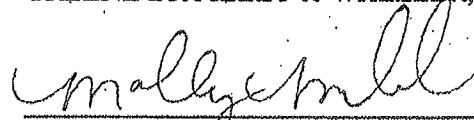
- 14 (a) the name, **ADDRESS**, and telephone number of the **PERSON**;
- 15 (b) the statute, ordinance, or regulation allegedly violated;
- 16 (c) whether the **PERSON** entered a plea in response to the citation or charge and, if so,
17 the plea entered;
- 18 (d) the name and **ADDRESS** of the court or administrative agency, names of the parties,
19 and case number.

20 **RESPONSE TO FORM INTERROGATORY 14.2:**

21 (a-d) Unknown other than as indicated in OSHA report.

22
23 DATED: August 15, 2013

GREENE BROILLET & WHEELER, LLP



Browne Greene
Tobin M. Lanzetta
Molly M. McKibben
Attorneys for Plaintiff

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VERIFICATION

STATE OF CALIFORNIA
COUNTY OF ORANGE

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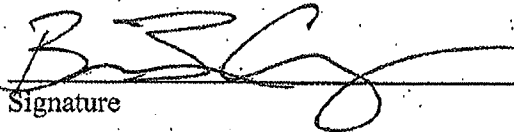
I have read the foregoing RESPONSES OF PLAINTIFF BRIAN CLEARY TO FORM INTERROGATORIES, SET 1 PROPOUNDED BY DEFENDANT SOUTHERN CALIFORNIA GAS COMPANY and know of its contents.

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed on ~~XXXXXX~~ ^{August 15} ~~XXXXXX~~, 2013, at Newport Beach, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Brian Cleary
Type or Print Name


Signature

Southern California
P.O. Box 93010
Long Beach, CA 90809-3010
(562) 595-0900 FAX (888) 696-2270

Central Valley
SACRAMENTO
CA 95829
(800) 696-2511



Northern California
P.O. Box 4217
San Leandro, CA 94579-0217
(510) 483-2679 FAX (510) 483-1470

Nationwide
(800) 696-2511

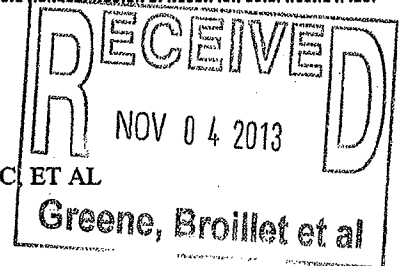
INTEGRITY. QUALITY. DIVERSITY.

November 01, 2013

Job #: HP467536



GEOFFREY C. WELLS, ESQ.
GREENE BROILLET & WHEELER LLP
100 WILSHIRE BLVD. STE. 2100
SANTA MONICA, CA 90407-2131



Case Caption: BRIAN CLEARY vs. COX COMMUNICATIONS CALIFORNIA, LLC, ET AL
Records of: BRIAN CLEARY
Case Number: 30-2013-00648401-CU-PL-CJC

The attached copy of Subpoena(s) is/are submitted for your file concerning the above-entitled case and represents notification to you. Should you desire to receive an identical copy of the subpoenaed RECORDS submitted for your file, please contact our firm by one of the following methods:

1. Call (888) 554-0900 extension 250. Please leave a detailed message when calling after hours.
2. Fax a completed copy of this form to (888) 696-2270.
3. Order online at www.macropro.com. Select 'Opposing Counsel' from the menu.
4. Mail a completed copy of this form to our Records Request Department at:

SCANNED
cc: TL
MM
LS

Records Request Department
Macro-Pro, Inc.
P.O. Box 93010
Long Beach, CA 90809-3010

Our charge for this service per set of SUBPOENAED RECORDS REQUESTED is \$30.00, \$0.25 for each page, and Shipping/Handling. After you have requested a copy of the subpoenaed records and the records from all the locations you have requested have been copied, an itemized invoice will be sent to your office. Upon receipt of payment, the records will be prepared and shipped to you.

Please provide an identical copy of records from the following locations:

(#27) ONE CALL CARE MANAGEMENT (SOLVIN McLAUGHLIN;LEGAL) 8501 FALLBROOK AVE STE 100 WEST H

Please provide the above-noted records in the following format(s) (Select Options Below):

- Paper Set
 - CDROM
 - Download
- Email Address: _____ (required for downloads)

If the location provides a Certificate of No Records:

- Send Copy
- Do Not Send Copy

If films are obtained:

- Duplicate
- Call for Cost Approval
- No Films Needed

Signature _____

Print Name _____

Date _____

Telephone Number: _____ (Just in case we need to contact you)

EXHIBIT 2

ATTORNEY OR PARTY WITHOUT ATTORNEY: JAMIEL G. DAVE, ESQ. SB# 70580 OFFICE OF GENERAL COUNSEL-SC GAS COMPANY 555 WEST FIFTH STREET SUITE 1400 LOS ANGELES, CA 90013 TELEPHONE NO: (213)244-2937 FAX NO: 213-629-9620 E-MAIL ADDRESS: ATTORNEY FOR: Southern California Gas Co.	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE STREET ADDRESS: 700 CIVIC CENTER DRIVE WEST MAILING ADDRESS: CITY AND ZIP CODE: SANTA ANA, CA 92701 BRANCH NAME: CENTRAL JUSTICE CENTER	
PLAINTIFF/PETITIONER: BRIAN CLEARY DEFENDANT/RESPONDENT: COX COMMUNICATIONS CALIFORNIA, LLC, ET AL	
DEPOSITION SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS	CASE NUMBER: 30-2013-00648401-CU-PL-CJC

THE PEOPLE OF THE STATE OF CALIFORNIA, TO THE CUSTODIAN OF RECORDS FOR:

ONE CALL CARE MANAGEMENT, 8501 FALLBROOK AVE, STE 100, WEST HILLS, CA 91304-
Phone: (818) 346-8700

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

To: MACRO-PRO, INC At: 8:00 AM On: 11/27/2013 Location: P.O. BOX 93010, LONG BEACH, CA 90809-3010
Do not release the requested records to the deposition officer prior to the date and time stated above.

- a. by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.
 - b. by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).
 - c. by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.
2. The records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records shall be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.
3. The records to be produced are described as follows (if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):

** SEE ATTACHMENT "3" **

Continued on attachment 3.

4. IF YOU HAVE BEEN SERVED WITH THIS SUBPOENA AS A CUSTODIAN OF CONSUMER OR EMPLOYEE RECORDS UNDER CODE OF CIVIL PROCEDURE SECTION 1985.3 OR 1985.6 AND A MOTION TO QUASH OR AN OBJECTION HAS BEEN SERVED ON YOU, A COURT ORDER OR AGREEMENT OF THE PARTIES, WITNESSES, AND CONSUMER OR EMPLOYEE AFFECTED MUST BE OBTAINED BEFORE YOU ARE REQUIRED TO PRODUCE CONSUMER OR EMPLOYEE RECORDS.

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF FIVE HUNDRED DOLLARS AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date Issued: 11/01/2013

JAMIEL G. DAVE, ESQ.
(TYPE OR PRINT NAME)

_____/s/JAMIEL G. DAVE, ESQ.
(SIGNATURE OF PERSON ISSUING SUBPOENA)



Attorney for Southern California Gas Co.
(TITLE)

PLAINTIFF/PETITIONER: BRIAN CLEARY DEFENDANT/RESPONDENT: COX COMMUNICATIONS CALIFORNIA, LLC, ET AL	CASE NUMBER: 30-2013-00648401-CU-PL-CJC
---	--

ATTACHMENT 3

ALL ITEMIZED STATEMENTS OF BILLING CHARGES, INVOICES, RECORDS OF ADJUSTMENTS AND/OR WRITE-OFFS, PAYMENTS AND CREDITS. ALL OF THE ABOVE PERTAINING TO THE CARE, TREATMENT OR EXAMINATION OF BRIAN CLEARY (DOB:01/03/1961) FROM 01/01/2001 TO AND INCLUDING THE PRESENT DAY. SPECIFICALLY TO INCLUDE ALL OF THE AFOREMENTIONED FROM NEWPORT DIAGNOSTIC CENTER ON 1605 AVOCADO AVENUE IN NEWPORT BEACH, CA.

>> RE: BRIAN CLEARY BIRTH: 01/03/1961

<p>ATTORNEY OR PARTY WITHOUT ATTORNEY: JAMIEL G. DAVE, ESQ. SB# 70580 OFFICE OF GENERAL COUNSEL-SC GAS COMPANY 555 WEST FIFTH STREET SUITE 1400 LOS ANGELES, CA 90013 TELEPHONE NO: (213)244-2937 FAX NO: 213-629-9620 ATTORNEY FOR: Southern California Gas Co.</p>	<p>CASE NUMBER: 30-2013-00648401-CU-PL-CJC</p>
<p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE STREET ADDRESS: 700 CIVIC CENTER DRIVE WEST MAILING ADDRESS: CITY AND ZIP CODE: SANTA ANA, CA 92701 BRANCH NAME: CENTRAL JUSTICE CENTER</p>	<p>NOTICE OF DEPOSITION (Records only--no personal appearance necessary) AFFIDAVIT for Subpoena Duces Tecum</p>
<p>PLAINTIFF/PETITIONER: BRIAN CLEARY DEFENDANT/RESPONDENT: COX COMMUNICATIONS CALIFORNIA, LLC, ET AL</p>	

NOTICE TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD:

1. The depositions of and production of documents by Custodian of Records of businesses will be taken as follows:
 ONE CALL CARE MANAGEMENT

11/27/2013 8:00 AM

2. **NO DEPOSITION TESTIMONY WILL BE TAKEN.** The deponent need not appear if he or she complies with Evidence Code Sections 1560 through 1566, and Code of Civil Procedure Sections 2018 through 2021. True, legible and durable copies of all the documents described in the supporting Subpoena Duces Tecum, which certified by the above named Custodian will be accepted as sufficient compliance by said Custodian.

AFFIDAVIT

1. The declarant requests that a Subpoena Duces Tecum be issued, directing said witness to appear in person at the time and place specified in the Subpoena and that said witness there produce the aforesaid records.
2. The Custodian of Records has in their possession or under their control various papers, records and other documents.
3. The documents are material to the issues in this case in that said records constitute and contain evidence that is relevant to the subject matter and material to the issues involved herein.
4. Good cause exists for their production under Subpoena Duces Tecum in that testimony will be elicited from the original records obtained through the witness named herein and there is no other process available to secure said original records.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on 11/01/2013.

JAMIEL G. DAVE, ESQ.
 (TYPE OR PRINT NAME)

▶ /s/JAMIEL G. DAVE, ESQ.
 (SIGNATURE OF PERSON ISSUING SUBPOENA)

Attorney for Southern California Gas Co.
 (TITLE)

ATTORNEY OR PARTY WITHOUT ATTORNEY: JAMIEL G. DAVE, ESQ. SB# 70580 OFFICE OF GENERAL COUNSEL-SC GAS COMPANY 555 WEST FIFTH STREET SUITE 1400 LOS ANGELES, CA 90013 TELEPHONE NO: (213)244-2937 FAX NO: 213-629-9620 ATTORNEY FOR: Southern California Gas Co.	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE STREET ADDRESS: 700 CIVIC CENTER DRIVE WEST MAILING ADDRESS: CITY AND ZIP CODE: SANTA ANA, CA 92701 BRANCH NAME:	
PLAINTIFF/PETITIONER: BRIAN CLEARY DEFENDANT/RESPONDENT: COX COMMUNICATIONS CALIFORNIA, LLC, ET AL	CASE NUMBER: 30-2013-00648401-CU-PL-CJC
NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION (Code Civ. Proc., §§ 1985.3, 1985.6)	

NOTICE TO CONSUMER OR EMPLOYEE

TO: BRIAN CLEARY

1. PLEASE TAKE NOTICE THAT REQUESTING PARTY: OFFICE OF GENERAL COUNSEL-SC GAS COMPANY, SEEKS YOUR RECORDS FOR EXAMINATION by the parties to this action on: 11/27/2013.

The records are described in the subpoena directed to witness:

CUSTODIAN OF RECORDS FOR:

ONE CALL CARE MANAGEMENT, 8501 FALLBROOK AVE, STE 100, WEST HILLS, CA 91304-

A copy of the subpoena is attached.

2. IF YOU OBJECT to the production of these records, YOU MUST DO ONE OF THE FOLLOWING BEFORE THE DATE SPECIFIED IN ITEM a. OR b. BELOW:

- a. If you are a party to the above-entitled action, you must file a motion pursuant to Code of Civil Procedure section 1987.1 to quash or modify the subpoena and give notice of that motion to the witness and the deposition officer named in the subpoena at least five days before the date set for production of the records.
- b. If you are not a party to this action, you must serve on the requesting party and on the witness, before the date set for production of the records, a written objection that states the specific grounds on which production of such records should be prohibited. You may use the form below to object and state the grounds for your objection. You must complete the Proof of Service on the next page indicating whether you personally served or mailed the objection. The objection should not be filed with the court. **WARNING: IF YOUR OBJECTION IS NOT RECEIVED BEFORE THE DATE SPECIFIED IN ITEM 1, YOUR RECORDS MAY BE PRODUCED AND MAY BE AVAILABLE TO ALL PARTIES.**

3. YOU OR YOUR ATTORNEY MAY CONTACT THE UNDERSIGNED to determine whether an agreement can be reached in writing to cancel or limit the scope of the subpoena. If no such agreement is reached, and if you are not otherwise represented by an attorney in this action, YOU SHOULD CONSULT AN ATTORNEY TO ADVISE YOU OF YOUR RIGHTS OF PRIVACY.

Date: 11/01/2013

..... JAMIEL G. DAVE, ESQ.
(TYPE OR PRINT NAME)

..... /s/JAMIEL G. DAVE, ESQ.
(SIGNATURE OF REQUESTING PARTY ATTORNEY)

OBJECTION BY NON-PARTY TO PRODUCTION OF RECORDS

- 1. I object to the production of all of my records specified in the subpoena.
- 2. I object only to the production of the following specified records:
- 3. The specific grounds for my objection are as follows:

Date:

.....
(TYPE OR PRINT NAME)

.....
(SIGNATURE)

PLAINTIFF/PETITIONER: BRIAN CLEARY	CASE NUMBER:
DEFENDANT/RESPONDENT: COX COMMUNICATIONS CALIFORNIA, LLC, ET AL	30-2013-00648401-CU-PL-CJC

PROOF OF SERVICE OF NOTICE TO CONSUMER OR EMPLOYEE AND OBJECTION
(Code Civ. Proc., §§ 1985.3, 1985.6)

Personal Service Mail

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. I served a copy of the **Notice to Consumer or Employee and Objection** as follows (check either a or b):
 - a. **Personal Service.** I personally delivered the **Notice to Consumer or Employee and Objection** as follows:

(1) Name of person served:	(3) Date served:
(2) Address where served:	(4) Time served:
 - b. **Mail.** I deposited the **Notice to Consumer or Employee and Objection** in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:

(1) Name of person served: See attached Proof	(3) Date of mailing: 11/01/2013
(2) Address: of Service	(4) Place of mailing: Long Beach, CA

(5) I am a resident of or employed in the county where the **Notice to Consumer or Employee and Objection** was mailed.

- c. My residence or business address is: P.O. Box 93010 Long Beach, CA 90809-3010.
- d. My phone number is: (562) 595-0900

Macro-Pro, Los Angeles County Registration #X-0066 and #2311, Alameda County Registration #19 and #412

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: 11/01/2013

ANABEL GARCIA
(TYPE OR PRINT NAME OF PERSON WHO SERVED)

Anabel Garcia
(SIGNATURE OF PERSON WHO SERVED)

PROOF OF SERVICE OF OBJECTION TO PRODUCTION OF RECORDS
(Code Civ. Proc., §§ 1985.3, 1985.6)

Personal Service Mail

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. I served a copy of the **Objection to Production of Records** as follows (complete either a or b):
 - a. ON THE REQUESTING PARTY
 - (1) **Personal Service.** I personally delivered the **Objection to Production of Records** as follows:

(i) Name of person served:	(iii) Date served:
(ii) Address where served:	(iv) Time served:
 - (2) **Mail.** I deposited the **Objection to Production of Records** in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:

(i) Name of person served:	(iii) Date of mailing:
(ii) Address:	(iv) Place of mailing (city and state):
 - b. ON THE WITNESS
 - (1) **Personal Service.** I personally delivered the **Objection to Production of Records** as follows:

(i) Name of person served:	(iii) Date served:
(ii) Address where served:	(iv) Time served:
 - (2) **Mail.** I deposited the **Objection to Production of Records** in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed as follows:

(i) Name of person served:	(iii) Date of mailing:
(ii) Address:	(iv) Place of mailing (city and state):
3. My residence or business address is (specify):
4. My phone number is (specify):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME OF PERSON WHO SERVED)

(SIGNATURE OF PERSON WHO SERVED)

PROOF OF SERVICE BY MAIL

I am employed in the STATE OF CALIFORNIA, COUNTY OF LOS ANGELES. I am over eighteen years of age and not a party to the within action; my business address is P.O. Box 93010 Long Beach, CA 90809-3010.

On November 01, 2013, I served the Deposition Subpoena for Production of Business Records, Notice of Deposition, Notice to Consumer, and Affidavit on all appearing parties and upon any consumer not represented by counsel regarding whom records are being sought, by placing copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Long Beach, California, addressed as follows:

GEOFFREY C. WELLS, ESQ.
GREENE BROILLET & WHEELER LLP
100 WILSHIRE BLVD.
STE. 2100
SANTA MONICA, CA 90407-2131

DAVID L. WINTER, ESQ.
BATES WINTER & CAMERON LLP
925 HIGHLAND POINTE DRIVE
STE. 380
ROSEVILLE, CA 95678

KENNETH PETERSON/CARMEN COLE, ESQ.
LITTLETON, JOYCE, UGHETTA, PARK & KELLY
601 S. FIGUEROA ST.
STE. 3825
LOS ANGELES, CA 90017

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 11/01/2013, in Signal Hill, California.

Signed

Corabel Haucci



MOLLY M. MCKIBBEN

September 30, 2013

VIA FACSIMILE AND US MAIL

Jamiel G. Dave, Esq.
Office of the General Counsel
555 W. 5th Street, 14th Floor
Los Angeles, CA 90013-1011

Re: Cleary, Brian v Cox Communications California, LLC

Dear Mr. Dave:

This letter concerns the subpoenas issued by you pertaining to the medical records of Plaintiff Brian Cleary in the above-referenced matter. The goal of this letter is to start the meet-and-confer process to narrow the overbroad and impermissible nature of these subpoenas. I am confident that we will be able to work this matter out informally. If not, Plaintiff will have no choice but to seek a Motion to Quash/Motion for Protective Order seeking to either quash the subpoenas in their entirety, or at the very least, alter the subpoena so that it is limited in accordance with California law and the California Code of Civil Procedure.

Your client issued subpoenas to the following entities:

- South Coast Dermatology Institute Newport Beach
- Sierra Eye & Laser Institute
- Western Medical Center - Santa Ana
- Specialty Surgical Center
- Laguna Orthopedic Rehabilitation
- Mission Hospital Regional Medical Center
- AOS Advanced Orthopedic Specialists
- Nancy Woods, R.N., Psy. D.
- Zotec Partners

These subpoenas seek "all documents, medical records, office records, emergency room records, sign-in sheets, medical tests, inpatient and outpatient charts and records. All films, x-ray, MRI, CT scans, radiological reports and test results. All itemized statements of billing charges, invoices,

T: 310 576 1200 / 866 576 1200 F: 310 576 1220

100 WILSHIRE BOULEVARD, TWENTY FIRST FLOOR

P.O. BOX 2131 SANTA MONICA, CALIFORNIA 90407-2131

[WWW.GREENE-BROILLET.COM]

[GREENE BROILLET & WHEELER, LLP]

EXHIBIT 3

Jamie G. Dave, Esq.
Re: Cleary, Brian v Cox Communications California, LLC
September 30, 2013
Page 2

records of adjustments and/or write-offs, payments and credits. All of the above pertaining the care, treatment or examination of Brian Cleary (DOB: 01/03/19761) from 01/01/2001 to and including the present day."

These subpoenas are wholly overbroad in that they are not limited in scope or time. Just because Mr. Cleary has filed a personal injury action does not mean you are entitled to his entire medical history from the past twelve years through the present. Limitations in terms of time and scope must be imposed.

When seeking private medical information, a defendant cannot merely rely on the argument that it is reasonably calculated to lead to the discovery of admissible evidence. *Britt v. Sup. Ct.* (1978) 20 Cal. 3d 844, 864. "Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy." *Vinson v. Sup. Ct.* (1987) 43 Cal. 3d 833, 841-42. Rather, a defendant is required to make an **actual showing** that the information is directly relevant and must demonstrate that the need for such information is compelling. *Id.* (emphasis added). Thus, constitutionally protected records are not subject to the broad rules of discovery that favor disclosure of information. The Court in *Lantz v. Sup. Ct.* (1994) 28 Cal. App. 4th 1839; court held:

[E]ven when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed; there must then be 'careful balancing' of the 'compelling public need' for discovery against the 'fundamental right of privacy.'

Thus, ". . . the party seeking discovery must make a higher showing of relevance and materiality than otherwise would be required for less sensitive material." *Rancho Publications v. Sup. Ct.* (1999) 68 Cal. App.4th 1538, 1549; *Heda v. Sup. Ct.* (1990) 225 Cal. App. 3d 525, 528; *Eldorado Savings & Loan Association v. Sup. Ct.* (1987) 190 Cal. App. 3d 342, 345.

In *Tylo v. Sup. Ct.* (1997) 55 Cal. App. 4th 1379, 1387-88 the Court wrote that disclosure can be compelled only with respect to those conditions the patient-litigant has "disclose[d] by bringing an action in which they are in issue." Disclosure cannot be compelled with respect to other aspects of the patient-litigant's condition even though they may, "in some sense, be 'relevant' to the substantive issues of litigation. The patient thus is not obligated to sacrifice all privacy to seek redress for a specific mental or emotional injury; the scope of the inquiry permitted depends upon the nature of the injuries which the patient-litigant himself has brought before the court." *Id.* (citing *Britt, supra*, 20 Cal. 3d at 863-64.)

In order for the records to be reasonably calculated to lead to admissible evidence, there must be some indicia they are related to the parts of the body at issue in the lawsuit. Anything else would constitute an impermissible fishing expedition. Your client's requests must be limited

Jamlel G. Dave, Esq.
Re: Cleary, Brian v Cox Communications California, LLC
September 30, 2013
Page 3

to specific tests, reports and material which have relevance to this matter, not simply every document which reflect every doctor's visit Mr. Cleary attended in the past twelve years. Please limit these subpoenas to the scope of Mr. Cleary's injuries in this matter as outlined in his responses to your client's interrogatories.

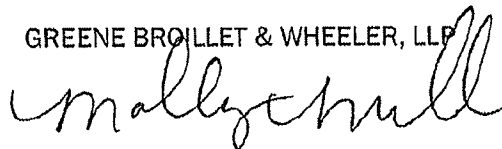
Plaintiff is willing to agree to subpoenas limited in scope, such that they seek medical records pertaining to treatment only for those portions of his body which was injured in the October 12, 2011 incident as outlined in Plaintiff's responses to your client's interrogatories, from five years prior to the date of the incident to the present. Any period farther back than that is overbroad, in violation of the *Code of Civil Procedure*, and violates Mr. Cleary's constitutionally protected privacy rights.

I would like to work this out with you informally and resolve this short of litigation. I believe the best solution would be for you to either issue new subpoenas limiting the scope of the requests, or send a letter to the subpoenaed facilities limiting the scope of the requests. If I do not receive a response to this letter by **Monday, October 7, 2013**, I will have no choice but to object to these subpoenas and to seek to file a Motion to Quash/Motion for Protective Order in this matter.

Please do not hesitate to contact me should you have any questions or concerns.

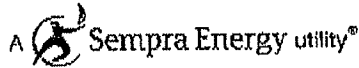
Very truly yours,

GREENE BROUILLET & WHEELER, LLP



MOLLY M. MCKIBBEN

1BC9.B8
/mm



555 W. Fifth Street, Suite 1400
Los Angeles • CA 90013-1011

T. Vincent Consolo
Attorney

Tel: (213) 244-2975
Fax: (213) 629-9620
TConsolo@semprautilities.com

October 8, 2013

Via Facsimile to (310) 576-1220 & U.S. Mail

Molly M. McKibben, Esq.
Greene Broillet & Wheeler, LLP
100 Wilshire Blvd., Suite 2100
Santa Monica, CA 90407

Re: Brian Cleary v. Cox Communications California LLC, et al
OCSC Case No.: 30-2013-00648401-CU-PL-CJC

Dear Ms. McKibben:

We have considered your letter of September 30, 2013, pertaining to SoCalGas' subpoenas to Newport Medical Solutions and other health care providers identified in plaintiff's responses to written discovery. For the foregoing reasons we are unable to accommodate your request to narrow the scope of the subpoenas.

Mr. Cleary alleges a variety of personal injuries in this action, including, physical injuries to his face, hands, arms, eye, ear, skin, spine, neck, left shoulder, and left elbow. He indicates complications with his vision, hearing, nerves, ability to sleep, and migraine headaches. He also indicates mental injuries associated with sleeping/night terrors, claustrophobia, and post-traumatic stress disorder.

Simply stated, Mr. Cleary has put most, if not all, of his physical and mental conditions at issue in this litigation. Giving due respect to Mr. Cleary's constitutional right of privacy, we would be hard pressed to draft subpoena language that would encompass all of Mr. Cleary's alleged injuries, while carving out other non-related treatment.

Furthermore, the case law cited in your letter is not on point. *Britt v. Superior Court* (1978) 20 Cal.3d 844, specifically held that plaintiffs waived their physician-patient and psychotherapist-patient privileges as to all information concerning the medical conditions which they had put in issue. The *Britt* Court protected plaintiffs' non-relevant past medical history only where the alleged injuries consisted mostly of mental annoyance and inconvenience. Mr. Cleary's alleged injuries are far more encompassing than the injuries alleged by the *Britt* plaintiffs. *Vinson v. Superior Court* (1987) 43 Cal.3d 833, a sexual harassment lawsuit, involved speculative

EXHIBIT 4

Page 2

psychiatric testing, and inquiry into plaintiff's sexual history, habits, or practices. SoCalGas' subpoenas are not equivalent to a mental examination with questioning. The remaining cases are a variety of employment, medical malpractice, and defamation actions that are inapplicable to a complex personal injury case such as this. *Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839—[plaintiff's medical records relating to her breast surgery in a sexual harassment case]; *Heda v. Superior Court* (1990) 225 Cal.App.3d 525—[plaintiff's health records to support defendant's motion for trial preference in a med mal case]; *El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 Cal.App.3d 342—[nonparty employec's entire personnel file in a discrimination case]; *Rancho Publications v. Superior Court* (1999) 68 Cal.App.4th 1538—[identity of authors of anonymous advertisements in a defamation case]; and *Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379—[television production company's demand for marital, sexual, and pregnancy information from a television actress in a wrongful termination and discrimination case].

Not only are these cases inapplicable to our situation here, but your objection is premised on the presumption that Mr. Cleary treated with Newport Medical Solutions, or other subpoenaed facilities, for issues that do not relate to the injuries or aggravations of injuries claimed in this case. Since you cannot confirm your presumption, your objection, which is thus based on speculation that there **might** be privacy issues at play, is therefore purely academic.

If you can demonstrate that Mr. Cleary has previously treated with Newport Medical Solutions, or other subpoenaed facilities, for conditions wholly unrelated to any claimed injury in this case, we will reconsider our position.

Lastly, we will not limit the years of our subpoena requests. We are unaware of case law limiting the time period of a subpoena to a health care provider in a personal injury action. Moreover, we note that Judicial Council Interrogatory No. 10.1 contains no time limit on the disclosure of complaints or injuries that involved the same parts of a plaintiff's body claimed to have been injured in the incident. Accordingly, we do not believe SoCalGas' subpoenas for medical records should be time limited.

Sincerely,



T. Vincent Consolo

TVC:sd



SCANNED

MOLLY M. MCKIBBEN

October 17, 2013

VIA FACSIMILE AND US MAIL

Jamiel G. Dave, Esq.
Office of the General Counsel
555 W. 5th Street, 14th Floor
Los Angeles, CA 90013-1011

Re: Cleary, Brian v Cox Communications California, LLC

Dear Mr. Dave:

Thank you for your October 8, 2013 letter in response to my request to narrow the scope of the overbroad subpoenas issued by SoCalGas for Mr. Cleary's medical records.

I disagree wholeheartedly that Mr. Cleary "has put most, if not all, of his physical and mental conditions at issue in this litigation," a proposition for which you have cited no supporting law. His response to SoCalGas's form interrogatories specifically identifies the parts of his body which were injured as a result of the gas explosion and mental injuries he has sustained as a result of the incident:

"Second and third degree burns to face, hands and arms; tear duct damage in left eye; problems with vision in left eye; tinnitus in left ear; hearing loss in both ears; skin sensitivity on burn areas; herniated discs on C3 - T1 (in neck); muscle spasms in neck and left shoulder; aggravation/nerve damage to prior left shoulder injury; future surgery needed to left elbow for nerve damage; difficulty sleeping/night terrors; claustrophobia; post traumatic stress disorder; migraine headaches."

See Plaintiff's Response to Form Interrogatory No. 6.2. Nothing below his waist is identified. And to say that he has put "all" of his "mental conditions" at issue in this litigation is without basis. He has specifically identified the aspects of emotional distress that have mental symptoms caused by the incident - if, for instance, he had suffered anxiety in the past for something prior to the incident at issue here, SoCalGas would not be entitled to records related to treatment for that.

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EXHIBIT 5

Jamie G. Dave, Esq.
Re: Cleary, Brian v Cox Communications California, LLC
October 17, 2013
Page 2

Your argument seems to imply that by sustaining numerous injuries as a result of multiple entities', including your client's, negligence, Mr. Cleary has somehow "waived" his right to privacy to records having to do with unrelated parts of his body and conditions. Such reasoning is baseless. See *Heda v. Superior Court* (1998) 225 Cal. App. 3d 525, 530 (holding that waivers of constitutional rights "are not lightly found").

Moreover, your contention that that you'd be "hard pressed to draft subpoena language that would encompass" Mr. Cleary's specifically alleged injuries, preventing SoCalGas from inappropriately obtaining records related to parts of the body Mr. Cleary has not alleged to be injured is without merit. *Code of Civil Procedure* section establishes that subpoenas cannot be overbroad. They must comply with the bounds of proper discovery. See *Code Civ. Proc.* § 2025.420. I am happy to provide you with language from the many subpoenas issued by defendants in other cases wherein they were easily able to limit their scope to just the injuries alleged by the plaintiff. Please let me know if you'd like me to do so.

I disagree that the law cited in my prior letter is "not on point." You state that *Britt v. Superior Court* is inapposite to this case because Mr. Cleary's injuries are more substantial than those sustained by the plaintiffs in *Britt*. *Britt* was cited for the proposition that disclosure of privileged medical records can be compelled only with respect to those physical injuries or mental conditions the plaintiff has disclosed by bringing an action in which those conditions are at issue. See *Britt v. Superior Court* (1978) 20 Cal. 3d 844, 863. This holding has been applied by the Supreme Court and courts of appeal in many different contexts with plaintiffs suffering many different degrees of injury.

And, contrary to your conclusory statement, the cases I cited in my prior letter (*Lantz v. Superior Court* (1994), 28 Cal. App. 4th 1839; *Heda, supra*, 225 Cal. App. 3d 525; *El Dorado Savings & Loan Assn. v. Superior Court* (1987) 190 Cal. App. 3d 342; *Rancho Publications v. Superior Court* (1999) 69 Cal. App. 4th 1538; *Tylo v. Superior Court* (1997) 55 Cal. App. 4th 1379) are on point. The proposition that discovery of a plaintiff's medical records is limited to only relevant information applies to any case, regardless of what cause of action is the impetus behind the action. Distinguishing those cases on that basis is baseless.

However, despite my disagreement with your characterization of long-established case law, I am willing to provide you with additional legal authority for the proposition that a defendant's discovery of a plaintiff's medical records must be narrowly tailored to only relevant information. In *Heda, supra*, 225 Cal. App. 3d at 529, the Court of Appeals stated:

A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected...The information that may be recorded in a doctor's files is broadranging. The chronology of ailments and treatments is potentially sensitive.

Jamie G. Dave, Esq.
Re: Cleary, Brian v Cox Communications California, LLC
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Patients may disclose highly personal details of lifestyle and information concerning sources of stress and anxiety. These are matters of great sensitivity and going to the core of the concerns for the privacy of information about an individual.

(internal citation omitted, emphasis added); see also *Puerto v. Superior Court*, 158 Cal. App. 4th 1242, 1253 (2008) (noting the sensitive nature of a person's medical details). "A person's medical history undoubtedly falls within the recognized zones of privacy." *Johnson v. Superior Court* (2000) 80 Cal. App. 4th 1050, 1068. Discovery of constitutionally-protected information such as Mr. Cleary's medical records may only be ordered where SoCalGas can demonstrate a compelling state interest. *Id.* at 1071.

Here, SoCalGas can demonstrate no *compelling* state interest in medical records having to do with body parts that Mr. Cleary has not alleged were injured in the subject incident, or records having to do with unrelated mental conditions. They are simply not relevant in any way to this litigation. California *Code of Civil Procedure* section 2017.010 provides that discovery is only permitted regarding "any matter not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." In addition, under *Code of Civil Procedure* section 2017.020, the trial court is authorized to limit the scope of discovery where, "the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." See, also, *Irvington-Moore, Inc. v. Superior Court* (1993) 14 Cal.App.4th 733. "When discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden." *Obregon v. Superior Court* (1998) 67 Cal. App. 4th 424, 431.

Finally, your argument that it is Plaintiff's job to research whether he has previously treated at any of the subpoenaed facilities in order to defend himself against your client's overbroad subpoenas has no basis. Plaintiff is not required to do so, and his constitutionally protected right to privacy prevails over a defendant's fishing expedition.

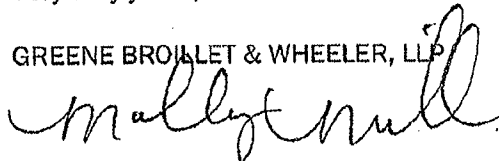
I hope to avoid wasting the Court's valuable time to resolve an issue that is clearly defined by well-settled California law. I have contacted Macro Pro, Inc. and sent letters with objections to all of the subpoenaed entities advising them not to produce the requested records. Please let me know by tomorrow, Friday, October 18, 2013 at 5:00 p.m. whether or not you will agree to limit the subpoenas as requested. If not, I will have no choice but to file a Motion to Quash and Motion for Protective Order.

Jamiel G. Dave, Esq.
Re: Cleary, Brian v Cox Communications California, LLC
October 17, 2013
Page 4

Please do not hesitate to contact me should you have any questions or concerns.

Very truly yours,

GREENE BROUILLET & WHEELER, LLP



MOLLY M. MCKIBBEN

1BC9.DD
/mm

Molly McKibben

From: Molly McKibben
Sent: Thursday, October 24, 2013 11:53 AM
To: 'Consolo, T. Vincent'
Cc: Sheri Dempsey; Tobin Lanzetta
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Mr. Consolo,

I propose that SoCal Gas reissue it's subpoenas for both Mr. Cleary medical records with the following language:

All documents, medical records, medical tests, charts, radiological reports, psychiatric, drug and/or alcohol treatment, counseling or rehabilitation records, office records and sign-in sheets, itemized statements of billing charges, invoices, records of adjustments and/or write-offs, payment and credits from January 1, 2001 to and including the present day, which pertain to the care, treatment or examination of Brian Cleary (DOB: 01/03/1961) pertaining to second and third degree burns to face, hands and arms; tear duct damage in left eye; problems with vision in left eye; tinnitus in left ear; hearing loss in both ears; skin sensitivity on burn areas; herniated discs on C3 – T1 (in neck); muscle spasms in neck and left shoulder; aggravation/nerve damage to prior left shoulder injury; future surgery needed to left elbow for nerve damage; difficulty sleeping/night terrors; claustrophobia; post traumatic stress disorder; migraine headaches.

An alternative method would be to use Plaintiff's response to Form Interrogatory No. 6.2 as an attachment to the subpoena itself:

Any and all records from January 1, 2001 to the present which pertain to the injuries claimed by plaintiff, Brian Cleary, as set forth in Brian Cleary's response to Interrogatory 6.2, a true and correct copy of which is attached hereto as Exhibit "A" including, but not limited to, prescription notes, discharge and admission records, emergency room records, itemized bills, insurance, physicals, medical history, progress notes, sign-in sheets, nurses notes, doctor's orders, notes, health questionnaires, physical therapy records, radiology records.

I propose the following language for Mr. Pytlik's medical records:

All documents, medical records, medical tests, charts, radiological reports, psychiatric, drug and/or alcohol treatment, counseling or rehabilitation records, office records and sign-in sheets, itemized statements of billing charges, invoices, records of adjustments and/or write-offs, payment and credits from January 1, 2001 to and including the present day, which pertain to the care, treatment or examination of Brian Cleary (DOB: 04/08/1985) pertaining to second degree burns on face and both hands; pigment damage on both hands; post traumatic stress disorder; depression.

Or, alternatively,

Any and all records from January 1, 2001 to the present which pertain to the injuries claimed by plaintiff, Brian Cleary, as set forth in Charles Pytlik's response to Interrogatory 6.2, a true and correct copy of which is attached hereto as Exhibit "A" including, but not limited to, prescription notes, discharge and admission records, emergency room records, itemized bills, insurance, physicals, medical history, progress notes, sign-in sheets, nurses notes, doctor's orders, notes, health questionnaires, physical therapy records, radiology records.

Please let me know by Monday, October 28, 2013 if you are agreeable to narrowing your client's subpoenas for Mr. Cleary and Mr. Pytlík's medical records in this fashion. If not, Plaintiff will have no choice but to file a Motion to Quash/Motion for Protective Order. I will be in the office today until 1:30 pm, and am out of the office in depositions all day tomorrow, but can be reached by email if you have any questions or concerns.

Very truly yours,

Molly M. McKibben

Attorney

Greene Broillet & Wheeler, LLP
100 Wilshire Boulevard, 21st Floor
P.O. Box 2131
Santa Monica, CA 90407-2131

Tel: (310) 576-1200

Fax: (310) 576-1220

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From: Consolo, T. Vincent [mailto:TConsolo@semprautilities.com]
Sent: Tuesday, October 22, 2013 10:51 AM
To: Molly McKibben
Cc: Dave, Jamiel; Sheri Dempsey
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Hi Ms. McKibben:

We've exchanged a few missed calls. I think it important that we talk about the subpoena issues, rather than hash it out over email. I'm around most of the day. Please try me at (213) 244-2975.

Regards,

T. Vincent Consolo
Attorney at Law
Southern California Gas Company | Law Department
555 W. 5th Street, 14th Floor, Los Angeles, CA 90013
213-244-2975 | tel
213-629-9620 | fax
TConsolo@semprautilities.com | email

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Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Mr. Consolo,

Can you please let me know today whether or not SoCal Gas will narrow its subpoenas or if I should plan to file my Motion to Quash/Motion for Protective Order?

Very truly yours,

Molly M. McKibben
Attorney
Greene Broillet & Wheeler, LLP
100 Wilshire Boulevard, 21st Floor
P.O. Box 2131
Santa Monica, CA 90407-2131

Tel: (310) 576-1200
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Sent: Friday, October 18, 2013 1:51 PM
To: Molly McKibben
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Ms. McKibben,

I've forwarded your email to Vince Consolo, who is assisting on this file and authored our responsive meet and confer letter, with the request that he follow-up with you on this matter.

JAMIEL G. DAVE | Senior Counsel - Litigation
Southern California Gas Company
555 W. Fifth Street | GT14G1
Los Angeles, CA 90013-1011
Desk: 213/244-2937 | Fax: 213/629-9620
E-mail: jdave@semprautilities.com

From: Molly McKibben [<mailto:MMcKibben@greene-broillet.com>]
Sent: Thursday, October 17, 2013 3:26 PM
To: Dave, Jamiel
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Mr. Dave,

Please see the attached correspondence.

Very truly yours,

Molly M. McKibben

Attorney

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Molly McKibben

From: Consolo, T. Vincent [TConsolo@semprautilities.com]
Sent: Monday, October 28, 2013 1:57 PM
To: Molly McKibben; Dave, Jamie
Cc: Sheri Dempsey
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

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As we discussed last week, the simplest way to handle this is for your office to inquire of your clients if they ever treated at any of these facilities for unrelated injuries. If they have not, there is no issue. If they have, we can work to narrow the subpoenas to just those facilities, for which we will know specifically what they treated for.

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Sent: Monday, October 28, 2013 10:16 AM
To: Consolo, T. Vincent
Cc: Sheri Dempsey
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Mr. Consolo,

Please let me know today whether or not your client is agreeable to narrowing the scope of its subpoenas per my earlier email.

Very truly yours,

Molly M. McKibben
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From: Molly McKibben
Sent: Thursday, October 24, 2013 11:53 AM
To: 'Consolo, T. Vincent'
Cc: Sheri Dempsey; Tobin Lanzetta
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Mr. Consolo,

I propose that SoCal Gas reissue it's subpoenas for both Mr. Cleary medical records with the following language:

All documents, medical records, medical tests, charts, radiological reports, psychiatric, drug and/or alcohol treatment, counseling or rehabilitation records, office records and sign-in sheets, itemized statements of billing charges, invoices, records of adjustments and/or write-offs, payment and credits from January 1, 2001 to and including the present day, which pertain to the care, treatment or examination of Brian Cleary (DOB: 01/03/1961) pertaining to second and third degree burns to face, hands and arms; tear duct damage in left eye; problems with vision in left eye; tinnitus in left ear; hearing loss in both ears; skin sensitivity on burn areas; herniated discs on C3 - T1 (in neck); muscle spasms in neck and left shoulder; aggravation/nerve damage to prior left shoulder injury; future surgery needed to left elbow for nerve damage; difficulty sleeping/night terrors; claustrophobia; post traumatic stress disorder; migraine headaches.

An alternative method would be to use Plaintiff's response to Form Interrogatory No. 6.2 as an attachment to the subpoena itself:

Any and all records from January 1, 2001 to the present which pertain to the injuries claimed by plaintiff, Brian Cleary, as set forth in Brian Cleary's response to Interrogatory 6.2, a true and correct copy of which is attached hereto as Exhibit "A" including, but not limited to, prescription notes, discharge and admission records, emergency room records, itemized bills, insurance, physicals, medical history, progress notes, sign-in sheets, nurses notes, doctor's orders, notes, health questionnaires, physical therapy records, radiology records.

I propose the following language for Mr. Pytlik's medical records:

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Or, alternatively,

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Please let me know by Monday, October 28, 2013 if you are agreeable to narrowing your client's subpoenas for Mr. Cleary and Mr. Pytlik's medical records in this fashion. If not, Plaintiff will have no choice but to file a Motion to Quash/Motion for Protective Order. I

will be in the office today until 1:30 pm, and am out of the office in depositions all day tomorrow, but can be reached by email if you have any questions or concerns.

Very truly yours,

Molly M. McKibben
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Greene Broillet & Wheeler, LLP
100 Wilshire Boulevard, 21st Floor
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JAMIEL G. DAVE | Senior Counsel - Litigation Southern California Gas Company
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Molly McKibben

From: Molly McKibben
Sent: Monday, October 28, 2013 2:49 PM
To: 'Consolo, T. Vincent'
Cc: Sheri Dempsey; Tobin Lanzetta
Subject: RE: Cleary, Brian v Cox Communications California, LLC: Subpoenas

Vincent,

The Discovery Act is clear that a party may obtain only discovery of information that is relevant to the litigation. You clearly agree that records of prior injuries/issues sustained by Mr. Cleary and Mr. Pytlik that are not related to the body parts/mental issues alleged in this incident are not relevant to this lawsuit. You agree that your client is not entitled to discovery of such records. Therefore, it seems the most simple for your client to revise its subpoenas as I proposed in my prior email, as many other defendants have done in many other cases.

We disagree that it is Plaintiff's job to inquire as to each facility as to whether or not he previously treated there before. Moreover, a patient's memory of where they may have previously treated is not always accurate, so even if Mr. Cleary or Mr. Pytlik stated that he does not remember treating somewhere prior to the incident giving rise to this litigation, it is possibly that he may have. Then, without having narrowed your client's subpoenas, your client will receive records of injuries/issues unrelated to this litigation, the discovery of which will violate his right to privacy.

Furthermore, I disagree that the current composition of your document requests do not invade my clients' right to privacy. It clearly does, as it is not narrowed to the injuries at issue in this litigation. Even if hypothetically Mr. Cleary or Mr. Pytlik had not treated at the subpoenaed facilities prior to the subject incident, your subpoenas would still be overbroad and not tailored as required by California case law and *Code of Civil Procedure*.

It is clear that we are not going to agree on a solution for SoCal Gas' overbroad subpoenas. As such, it seems most appropriate to let the Court decide which position has merit. Plaintiff will be filing Motions to Quash and Motions for Protective Order as to the subpoenas issued by your client for both Mr. Cleary and Mr. Pytlik's records.

Please do not hesitate to contact me should you have any questions or concerns.

Very truly yours,

Molly M. McKibben
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JAMIEL G. DAVE | Senior Counsel - Litigation Southern California Gas Company
555 W. Fifth Street | GT14G1
Los Angeles, CA 90013-1011
Desk: 213/244-2937 | Fax: 213/629-9620
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PROOF OF SERVICE
(C.C.P. 1013A, 2015.5)

STATE OF CALIFORNIA

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 100 Wilshire Boulevard, 21st Floor, Santa Monica, California 90401.

On November 22, 2013, I served the foregoing document, described as PLAINTIFF'S MOTION TO QUASH/MOTION FOR PROTECTIVE ORDER REGARDING DEFENDANT SOUTHERN CALIFORNIA GAS COMPANY'S SUBPOENA OF MEDICAL RECORDS OF PLAINTIFF BRIAN CLEARY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MOLLY M. McKIBBEN WITH EXHIBITS on the interested parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

XX **BY MAIL.**

XX As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Monica, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

 BY PERSONAL SERVICE. I delivered such envelope by hand to the offices of the addressee.

 BY OVERNIGHT DELIVERY. I caused such envelope to be deposited with a delivery service (Federal Express) in Santa Monica, California, for overnight delivery to the addresses set forth on the attached mailing list.

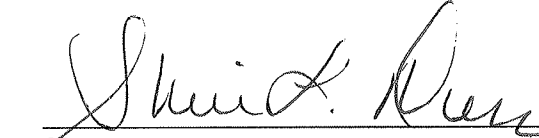
 BY FACSIMILE. I faxed a copy of the above-described document to the interested parties as set forth on the attached mailing list.

 BY ELECTRONIC MAIL. I e-mailed a copy of the above-described document to the interested parties as set forth on the attached mailing list.

Executed on November 22, 2013 at Santa Monica, California.

X (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Sheri L. Dempsey
Name


Signature

Cleary v. Cox Communications California, etc., et al.
Service List

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