

2017

**Intermountain Surgical, LLC, Petitioner / Appellant, vs. Whitney A. Nesbitt, Jacob C. Loveland, Ignacio Buenrostro, Ester Buenrostro, and Hon. Ryal I. Hansen Respondents / Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

INTERMOUNTAIN SURGICAL, LLC,

Petitioner / Appellant,

vs.

WHITNEY A. NESBITT, JACOB C.  
LOVELAND, IGNACIO BUENROSTRO,  
ESTER BUENROSTRO, and HON.  
ROYAL I. HANSEN

Respondents / Appellees.

Case No. 20170701-CA

**BRIEF OF PETITIONER/APPELLANT**

*On Petition for Writ of Extraordinary Relief from the Order of the Honorable  
Royal I. Hansen, Third District Court Judge, Utah Case No. 160902137*

Lloyd R. Jones  
LAW OFFICE OF LLOYD R. JONES  
P.O. BOX 258829  
Oklahoma City, OK 73125  
lloyd.jones@farmers.com

Gary L. Cooper  
COOPER & LARSEN, CHARTERED  
151 North Third Avenue, 2nd Floor  
P.O. Box 4229  
Pocatello, ID 83205  
gary@cooper-larsen.com

*Attorneys for Respondents-Appellees*

Karra J. Porter, No. 5223  
Scott T. Evans, No. 6218  
Kristen C. Kiburtz, No. 12572  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Suite 1100  
Salt Lake City, Utah 84111  
karra.porter@chrisjen.com  
scott.evans@chrisjen.com  
kristen.kiburtz@chrisjen.com  
Telephone: (801) 323-5000

*Attorneys for Petitioner-Appellant*

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Lloyd R. Jones  
LAW OFFICE OF LLOYD R. JONES  
P.O. BOX 258829  
Oklahoma City, OK 73125  
lloyd.jones@farmers.com

Gary L. Cooper  
COOPER & LARSEN, CHARTERED  
151 North Third Avenue, 2nd Floor  
P.O. Box 4229  
Pocatello, ID 83205  
gary@cooper-larsen.com

*Attorneys for Respondents-Appellees*

Karra J. Porter, No. 5223  
Scott T. Evans, No. 6218  
Kristen C. Kiburtz, No. 12572  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Suite 1100  
Salt Lake City, Utah 84111  
karra.porter@chrisjen.com  
scott.evans@chrisjen.com  
kristen.kiburtz@chrisjen.com  
Telephone: (801) 323-5000

*Attorneys for Petitioner-Appellant*

## LIST OF PARTIES TO THE PROCEEDING

The parties to the proceedings below are Plaintiffs/Respondents Ignacio and Esther Buenrostro and Defendant/Respondent Whitney A. Nesbitt. Defendant Jacob C. Loveland has been dismissed from the case and is not a party to the instant appeal. The Petitioner, Intermountain Surgical LLC is not a party to the proceeding below. Intermountain seeks extraordinary relief from the District Court's order requiring it to produce proprietary documents and 30(b)(6) testimony in response to Defendant/Respondent Whitney A. Nesbitt's subpoena *duces tecum*.

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## JURISDICTION

This Court has jurisdiction under Utah Code sections 78A-4-103(1), 78A-4-103(2)(j), and Utah R. App. P. 19.

## ISSUES FOR REVIEW

**ISSUE 1:** Whether the District Court correctly interpreted and determined the relevancy and proportionality standard of Utah R. Civ. P. 26(b) with respect to discovery requests to a non-party to the litigation?

**Standard of Review:** This Court reviews the application and interpretation of a rule of procedure for correctness. *State v. Ashby*, 2015 UT App 169, ¶ 18, 357 P.3d 554.

**Preservation:** This issue was preserved in the District Court, *see Order*, attached as Addendum 1.

## DETERMINATIVE STATUTES, CONSTITUTIONAL PROVISIONS AND RULES

### (b) Discovery scope.

**(b)(1) In general.** Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below. Privileged matters that are not discoverable or admissible in any proceeding of any kind or character include all information in any form provided during and created specifically as part of a request for an investigation, the investigation, findings, or conclusions of peer review, care review, or quality assurance processes of any organization of health care providers as defined in the Utah Health Care Malpractice Act for the purpose of evaluating care provided to reduce morbidity and mortality or to improve the quality of medical care, or for the purpose of peer review of the ethics, competence, or professional conduct of any health care provider.

**(b)(2) Proportionality.** Discovery and discovery requests are proportional if:



(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

**(b)(3) Burden.** The party seeking discovery always has the burden of showing proportionality and relevance. To ensure proportionality, the court may enter orders under Rule 37.

## STATEMENT OF THE CASE

### *Nature of the case, course of proceeding, and disposition below*

This petition arises from the District Court's denial of Petitioner Intermountain Surgical, LLC's ("Intermountain") motion for a protective order related to the discovery of confidential proprietary business information. (6/1/17 Order on Non-Party's Motion for Protective Order ("Order"), attached as addendum 1.)<sup>1</sup> This Order contradicts two other district court orders granting Intermountain a protective order over the same information. (3/8/17 Memo iso Motion for Protective Order ("Memo"), pp. iv-v.)

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<sup>1</sup> The record from the District Court has not been forwarded to this Court for purposes of appeal. Counsel was directed by the Clerk of the Court to cite to the record by docket entry date and name of document.

Plaintiffs, Ignacio Buenrostro and Esther Buenrostro, brought this action against defendants Whitney Nesbitt and Jacob Loveland for personal injuries sustained in an auto accident. (3/30/16 Complaint.) Intermountain is not a party to this litigation. (*Id.*) Intermountain's involvement in the case was limited to providing estimates for surgeries contemplated by the Plaintiffs back in 2014. (Memo, p. ii.) Intermountain is aware that Dr. Kade T. Huntsman consulted with each of the Plaintiffs about future surgery in December of 2014. (*Id.*) Intermountain has not been involved with any treatment or surgeries that the Plaintiffs may have had since December 2014. Likewise, Intermountain has no lien or contract with the Plaintiffs. (*Id.*)

Under the guise of defending this lawsuit, Defendant's insurance carrier Farmers Insurance ("Farmers") directed its appointed attorneys to serve a 30(b)(6) notice to Intermountain, with the express intent of obtaining confidential proprietary, business information. (Memo at Ex. 1.) Intermountain moved the court for a protective order, arguing that the information sought was proprietary trade secrets and/or did not meet the proportionality test under Rule 26. (*Id.*, pp. 1-8.) The District Court denied Intermountain's motion and ordered that Intermountain produce various proprietary documents and 30(b)(6) testimony. *See* Order. Intermountain filed a petition for extraordinary relief from the District Court's order. The Court requested further briefing from the parties on Intermountain's petition.

## FACTS

### *Background Facts*

Intermountain is an entity that facilitates surgical treatment for patients who do not have health insurance. In so doing, Intermountain leases a surgical suite from Canyon Crest Surgical Center. Intermountain owns and maintains all of the surgical equipment used for these surgeries at its own expense. Intermountain is responsible for the acquisition and purchase of the surgical supplies, surgical implants and hardware used in these surgeries and does so through its own efforts via negotiation of contracted rates. (*See* Memo, pp. ii, 2-5; *id.* at Ex. 11, p. 3; *id.* at Ex. 23, pp. 12-14.)

In cases where Intermountain actually provides its services to patients, each of the surgeries performed include “professional fees” and “facilities fees.” (Memo at Ex. 11 pp. 3-4; *id.* at Ex. 24 ¶¶ 7-8.) The professional fees are those charged by the medical professionals such as surgeons, anesthesiologists and physician’s assistants. (*Id.* at Ex. 24, ¶¶ 6-8.) The medical professionals who provide medical services are independent contractors. (*Id.* at Ex. 11, p. 4.) There are several surgeons in the area who perform surgeries for Intermountain patients. These surgeons and other professionals bill Intermountain directly. Intermountain pays the medical professionals for the services rendered without reduction. Intermountain includes the fees paid for medical professional services in a statement that includes “CPT” codes. (*Id.*, at p. 2; *id.* at Ex. 24, ¶¶ 6-8; *id.* at Ex. 23, pp. 12-13.) Intermountain charges the patient exactly what the medical professionals charge Intermountain, with no “up charge.”

Intermountain is not a medical professional and therefore does not charge professional fees. However, Intermountain is a facilities provider and charges a facility fee. (*Id.*, Ex. 24 ¶¶ 7-8; *id.* at Ex. 23, pp. 12-13.) Intermountain's invoices to patients include facility fees and CPT codes that are similar to the facility fees charged by other facility providers. (*Id.*, p. 2.) These charges include the use of the surgical suite, equipment, surgical supplies and surgical implants/hardware used in these surgeries. (*Id.*, Ex. 24, ¶¶ 7-8, 11, 19; *id.* at Ex. 11, p. 3-4; *id.* at Ex. 17, p. 1.) Intermountain considers the pricing analysis it has performed and continues to perform to be proprietary trade secrets, research, development and commercial information, which if disclosed would prejudice its ongoing business efforts. (Memo, pp. 1-8.)

When Intermountain provides services to patients, Intermountain and the patient enter into a lien agreement wherein Intermountain agrees to accept deferred payment of the charges for medical and facilities services until after a patient receives a recovery by way of settlement or verdict. However, even if there is no recovery, the patient is responsible for payment. (*Id.* at Ex. 11, p. 3.)

The foregoing is what occurs when Intermountain provides its services to patients. However, in this case Intermountain did not provide any services to the plaintiffs. (Memo, p. ii.) Intermountain has not paid any medical professionals or provided facilities services for either Plaintiff. (*Id.*) Intermountain did not enter into any contractual agreements with the plaintiffs and Intermountain has no lien rights. (*Id.*) Intermountain's only involvement in this case occurred in December of 2014. At that time, Intermountain was approached by Plaintiffs' counsel for a surgical referral. Intermountain provided Plaintiffs with a referral

to Dr. Huntsman, an orthopedic surgeon who practices at the Salt Lake Orthopedic Clinic. Plaintiffs presented to Dr. Huntsman at the Salt Lake Orthopedic Clinic on December 15, 2014, for a medical consultation. (*Id.*) Thereafter, on December 18, 2014, Plaintiffs' counsel asked Intermountain to provide estimates for what the costs would be if the Plaintiffs decided to undergo the surgeries recommended by Dr. Huntsman. As requested, Intermountain provided the estimates to Plaintiffs' counsel. These were simple estimates and did not include CPT codes that would normally be on an actual statement for services. (*Id.*, p. ii; *id.*, Ex. 2.) After December 18, 2014, Intermountain had no additional involvement with the Plaintiffs, their attorney or anyone else associated with the case until November 11, 2016, when Farmers served a subpoena upon Intermountain for the Plaintiffs' medical records. (*Id.*, p. ii.)

Petitioner responded to Farmers' subpoena in this case by producing the medical records it had with respect to the Plaintiffs. (*Id.* at Ex. 2.) These records consisted of Dr. Huntsman's report and the estimates of the costs of the recommended surgeries. (*Id.*) Thereafter, Farmers served a Rule 30(b)(6) deposition notice upon Intermountain. The Rule 30(b)(6) notice gave notice of an obvious attempt by Farmers to obtain confidential proprietary business information and processes including Intermountain's internal records and analysis of profit, overhead, studies and subscriptions purchased by Intermountain, analysis and processes developed by Intermountain, and other trade secrets. (*See Order.*) In addition, Farmers gave notice that it would require Intermountain to identify expert qualifications of its employees who would provide expert testimony in the instant case. (*Id.*)

After receiving Farmers' Rule 30(b)(6) deposition notice, Intermountain filed a Motion for Protective Order. (*See* Memo.) Intermountain argued that Farmers could not meet its burden of showing that the requested information was relevant and proportional pursuant to Rule 26(b) as amended in 2011. Additionally, Intermountain argued that the information was confidential proprietary business information, processes and trade secrets pursuant to Utah Code § 13-24-2. (*Id.*) Finally, Intermountain argued that it has not been designated as an expert and has already represented that it is not qualified as an expert. Intermountain has no intention of testifying as an expert in this, or any other litigation. (3/22/17 Reply Memo in Support of Protective Order, p. 8.)

Despite the fact that Intermountain did not provide services to the Plaintiffs, did not have a contract/lien agreement with the Plaintiffs, and had only provided a referral and estimates to the Plaintiffs, Farmers argued that “[b]ecause Petitioner will obtain a lien on the [Plaintiffs’] recovery in this litigation to finance the surgery proposed by Dr. Huntsman it has a strong incentive or bias to testify that the charges are reasonable and customary.” (*See* 3/15/17 Defense Memorandum in Response to Intermountain Surgical Motion for Protective Order, p. 11.) In other words, even though the Plaintiffs have not had surgery, because they might have surgery sometime in the future, it argued Intermountain might be the provider. Based upon this non-existent hypothetical scenario, Farmers claimed entitlement to unprecedented access to Intermountain’s confidential proprietary business information, processes and trade secrets.

After the May 9, 2017, telephonic hearing on Intermountain's Motion for Protective Order, the District Court granted Farmers' request and required Intermountain to produce its confidential proprietary business information, processes and trade secrets. (*See Order.*)

This is not the first time that liability carriers have attempted to obtain Intermountain's confidential data, but it is the first time that a court has interpreted Rule 26 to require its production. In *Vigueras-Amezcuca v. Shoeman*, Farmers attempted to obtain substantially the same information. Intermountain filed a Motion for Protective Order, which was heard by Judge Bates on December 8, 2016. In his January 11, 2017, order, Judge Bates significantly limited the scope of Farmers' inquiry and entered a strict Protective Order. *See Decision and Order, Vigueras-Amezcuca v. Shoeman*, No. 160903969 (January 11, 2017), attached as addendum 2, and Protective Order, *Vigueras-Amezcuca v. Shoeman*, No. 160903969 (January 16, 2017), attached as addendum 3. Prior to the *Vigueras-Amezcuca* case, Intermountain had a similar experience with another liability insurance company in *Salisbury v. The Living Planet*. In *Salisbury*, Judge Scott granted Petitioner's Motion for Protective Order. *See Intermountain Surgical's Order Granting Motion for Protective Order, Salisbury v. The Living Planet*, No. 130905519 (December 14, 2015), attached as addendum 4. In this case, the District Court diverged from the interpretations of Judge Bates and Judge Scott and granted Farmers unprecedented and expansive access to Intermountain's confidential proprietary business information, processes and trade secrets. (*See Order.*)



## SUMMARY OF ARGUMENT

A protective order is necessary to prevent Farmers' ongoing disproportionate discovery requests aimed at obtaining irrelevant, confidential, proprietary and protected information from Intermountain. Under Rule 26(b) of the Utah Rules of Civil Procedure, before a discovery request is initiated, the matters sought must be: (1) relevant to a "claim or defense" and (2) proportional to the needs of the case. In this case, the District Court failed to properly apply Rule 26.

First, Rule 26 requires that discovery be relevant to a "claim or defense." Farmers argued its request was relevant to Plaintiffs' future medical expenses. Under Utah law, future medical expenses are determined by the price that those services sell for in the marketplace. However, instead of analyzing whether Farmers' discovery request was relevant to determining the reasonable value of Plaintiffs' medical expenses, the District Court analyzed the relevancy of the discovery as pertains to questions that are not even at issue in this case.

Second, Rule 26 requires the request to be proportional to the needs of the case. This element analyzes whether the information sought is important to a parties' claim or defense, and whether the same or similar information can be obtained from another source. As stated above, Farmers claims to need information from Intermountain to determine/dispute the reasonable value of Plaintiffs' future surgical expenses. However, the information that Farmers seeks (including, among other things, Intermountain's profit-margins, contracts, business model, etc.) is not important to determining the reasonable value of future medical expenses and Farmers admits its expert can testify

regarding the value and necessity of those expenses. In this case, the District Court did not analyze whether the information requested is important to calculating Plaintiffs' future surgical expenses. Nor did it analyze whether Farmers could obtain information regarding the value and necessity of future surgical expenses from another source. Instead, the District Court appeared to analyze whether Intermountain's proprietary information could be, without great burden, obtained from another source. That analysis is error on its face. If that were the test, proprietary information would always be discoverable.

Applying the correct legal analysis, the information that Farmers requested, and that the District Court ordered to be produced, was not discoverable under Rule 26. Intermountain therefore requests that the District Court's Order be reversed and that it be directed to grant Intermountain's motion for a protective order.

## ARGUMENT

### **I. The Information Farmers Seeks is Irrelevant and Disproportional to the Needs of the Personal Injury Action.**

Farmers subpoena request to Intermountain seeks information that is irrelevant and disproportional to the determination of the Plaintiffs' future medical damages. "It is well established that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26(b)." *XPO Logistics Freight, Inc. v. YRC, Inc.*, 2016 U.S. Dist. LEXIS 165323, \*10, 2016 WL 6996275; *see also* Utah R. Civ. P. 45 Advisory Committee Notes (equating a subpoena to discovery). Rule 26 of the Utah Rules of Civil Procedure outlines the scope of permissible discovery. Under this rule, "[p]arties

may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality.” Utah R. Civ. P. 26(b)(1). Thus, to be discoverable under Utah R. Civ. P. 26, the information sought must be (1) relevant to any party’s “claim or defense” and (2) proportional to the needs of the case. The Rule further provides that “the party seeking discovery always has the burden of showing proportionality and relevance.” Utah R. Civ. P. 26(b)(3). In this case, the District Court misapplied the test set forth in Rule 26. The information sought by Farmers is neither relevant nor proportional to the needs of the parties in this case.

**A. The District Court erred in its application of Rule 26 when it failed to analyze the relevancy of Farmers’ subpoena request as relates to the parties’ claims and defenses.**

The district court abused its discretion because it failed to properly determine whether the information sought by Farmers was relevant to any “claim or defense” set forth in this case. Utah R. Civ. P. 26(b)(1). Relevant evidence is evidence that “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence of determining the action.” Utah R. Evid. 401. The only claim asserted by Plaintiffs against Defendant is for negligence. (*See* Complaint.) The elements of negligence are well known: duty, breach causation, and damages. *Rose v. Provo City*, 2003 UT App 77, ¶ 7, 67 P.3d 1017.

Farmers argued that the discovery it seeks is relevant to the issue of damages (i.e., the amount and necessity of Plaintiffs’ future surgeries). However, Farmers did not demonstrate below and the District Court did not analyze how Intermountain’s business information (including, among other things profit margins, contracts, costs, risk

assessment, and business/plans) is relevant to determining the reasonable amount of the Plaintiffs' future surgical expenses. *See, e.g., Chatterton v. Walker*, 938 P.2d 255 (Utah 1997) (reversing district court's decision regarding protective order when court failed to properly analyze whether the information sought was pertinent to the actual issue in the case.)

Under Utah law, the reasonableness of a plaintiff's medical expenses is determined by the price those services sell for in the marketplace as demonstrated by comparing the prices of what other providers charge for the same services in the community. This determination is not made based on a specific provider's profit margin, contracts, overhead, lease payments, rent, etc. *See, e.g., Jones v. Mackey Price Thompson & Ostler*, 2015 UT 60, ¶ 58, 355 P.3d 1000 (holding that, in cases of professional services, the reasonable value of those services normally equates to the market value of those services); *Express Recovery Servs. v. Reuling*, 2015 UT App 299, ¶¶ 14-15, 364 P.3d 766 (the proper measure of damages for professional services is the reasonable value of those services in the marketplace).

Other jurisdictions similarly hold that the value of medical services is determined based upon the price those services sell for in the relevant community. *See Charlotte-Mecklenburg Hosp. Auth. v. Talford*, 727 S.E.2d 866, 870 (N.C. 2012) (“[I]t is appropriate when determining what a service is ‘reasonably worth’ to look to ‘the time and labor expended, skill, knowledge and experience involved, and other attendant circumstances, rather than . . . the benefit to the person for whom the services are rendered. Those ‘other attendant circumstances’ include the rates charged by similar

market participants in similar geographic areas to perform similar work at the relevant time.” (internal quotation marks and citations omitted)); *Kunz v. Little Co. of Mary Hosp. & Health Care Ctrs.*, 869 N.E.2d 328, 337-338 (Ill. Ct. App. 2007) (holding that the reasonable amount of medical expenses is determined by the “customary charges for services in a similar geographic area in which the services are provided”); *Bielar v. Washoe Health Sys.*, 306 P.3d 360 (Nev. 2013) (granting summary judgment against party who attempted to prove the unreasonableness of medical expenses by the cost-plus method (cost plus reasonable mark-up) because the value of medical services is determined by the price those services sell for in the marketplace, not by profit margin); Restatement 2d of Torts, § 911 (price of services is determined by the price those services sell for in the marketplace).<sup>2</sup>

One need only look to other institutions to show the fallacy of Farmers’ argument that Intermountain’s business information is somehow relevant to any determination in this case. For example IHC, St. Marks/Mountain Star, IASIS, University of Utah Hospital, as well as other outpatient surgical centers are legal entities/corporations. They own and/or lease buildings and facilities and are “facilities” which charge facilities fees with the proper CPT coding. They equip those facilities so that medical care providers can provide medical care to patients. They arrange medical care for patients by way of their employees as well as independent contractors who are qualified medical

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<sup>2</sup> Generally, if Intermountain contracts to perform services for patients the invoice that is provided by Intermountain to the patients identifies the services provided, the CPT codes and the charges for the services provided. This information, along with the Plaintiffs’ medical records provides all the necessary information required for Farmers to perform its own analysis of whether charges are reasonable and customary.

professionals. They charge patients for use of the facilities they own or lease. They also charge for medical care provided by qualified medical care providers. It goes without saying that their medical charges include profit. Otherwise, they would go out of business.<sup>3</sup>

If IHC, St. Marks/Mountain Star, IASIS, University of Utah Hospital, or others similarly situated were on the receiving end of subpoenas and 30(b)(6) notices similar to those served by Farmers in this and other cases, these entities would inevitably respond the same way as Intermountain has. It would be surprising if a court allowed Farmers to delve into IHC's or St. Marks contractual relationships with medical care personnel or vendors because the information is irrelevant/inadmissible, confidential, and proprietary business information. Likewise, it would be beyond the pale to require IHC or St. Marks to disclose how much they paid for overhead, supplies, equipment, employees, independent contractors, etc.<sup>4</sup>

Another example outside of the medical context is the method generally employed to determine the reasonableness of attorney's fees. Compare *Express Recovery Servs.*, 2015 UT App 299 (determining value of medical services based on price services sell for in the marketplace) with *Jones*, 2015 UT 60 (determining value of legal services based on price of services in the marketplace). In determining the reasonableness of attorney's

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<sup>3</sup> Farmers is a "for profit" enterprise and presumably makes a profit. Otherwise, Farmers would not be able to justify retaining two law offices in different states to defend a relatively uncomplicated personal injury case.

<sup>4</sup> On several occasions Intermountain has requested that Farmers identify other cases where it has burdened providers like IHC, St. Marks or other surgical centers in Utah with the same intrusive discovery. However, to date, Farmers has not responded with even one example.

fees, courts look to what other attorneys of like experience charge for similar services in similar cases. *Jones*, 2015 UT 60. Courts do not delve into the law firm's books to see how much they pay their employees or independent contractors, how much they pay for their computers, how much they pay for office space, or whether they lease or own their copy machines. As one court noted, engaging in such an analysis would present myriad problems and result in the unnecessary analysis and presentation of evidence that is beyond what is needed to determine the reasonableness of a fee:

Is every single item of cost incurred by a firm (e.g., both capital expenditures and costs of operations) to be part of the calculation? What special rules must be adopted in order to avoid punishing law firm efficiency or a firm's skill or luck in negotiating favorable leases or vendor contracts? Is every single item of revenue received by a firm to be included in the calculation (e.g., what about investment income)? How will the quality of the legal services be incorporated into the analysis? What about other intangibles, like professional reputation and goodwill? Will the firm be forced to disclose the compensation it pays to every lawyer and staff member? Will it be forced to disclose the amounts it pays for office space, equipment, supplies, furniture or utilities? Will it be forced to disclose the individuals or entities to whom it makes these payments? What portion of the attorney's overall costs of doing business should be allocated to the particular case in which the fee dispute arises?

*Shaffer v. Superior Court*, 33 Cal. App. 4th 993, 1001, 39 Cal. Rptr. 2d 506 (1995).

Instead of analyzing whether the discovery sought by Farmers is relevant to the reasonableness and necessity of Plaintiffs' future medical expenses, Farmers persuaded the District Court to "go off into the weeds" so to speak and analyze the relevancy of the discovery sought as pertains to questions that are not even pertinent in this case. Specifically, the Court held that Farmers was entitled to Intermountain's proprietary business information because this information was relevant to the determination of:



(1) Whether Intermountain is a medical provider or a collateral source provider (i.e., someone who pays for medical services),

(2) the factual foundation for the estimated cost of surgery that was provided by Intermountain to determine whether the estimate represents reasonable or customary charges or collateral source payments that might be made; and

(3) the contractual relationship between Intermountain and Plaintiffs' expert (Dr. Huntsman), who has been designated to provide testimony regarding the value of Plaintiffs' future surgeries. (Order, p. 2.)

That is not the correct legal analysis. Under Rule 26, the District Court was required to analyze the relevancy of the information sought as relates to the claims and defenses made in this case. As described above, the only claim or defense Farmers identified was the future surgical damages claimed by the Plaintiffs. The court, therefore, should have analyzed the test for determining future medical expenses under Utah law and then analyzed whether the information sought would resolve that issue. By deviating from the correct legal analysis, the District Court focused on the resolution of three issues that are not even pertinent to this case.

The first two issues identified by the District Court relate to the determination of whether Intermountain is a medical provider or a collateral source provider. But what does that matter? Intermountain's status is not in dispute in this case. Intermountain has not provided any services to the Plaintiffs (medical or collateral). Nor does Intermountain have a contract to provide any services for the Plaintiffs. Intermountain

has already disclosed all documents contained in its files as relates to the Plaintiffs. The only information it has regarding this case is a surgical estimate that it provided in 2014. Farmers' speculation that Intermountain "might" provide some services in the future does not provide a basis under Rule 26 for it to go on a "fishing expedition" through Intermountain's proprietary business records so that it can defend an issue that is not even being litigated in this case. Moreover, it is unclear how determining the status of Intermountain is helpful in determining the marketprice for surgical services in the community.

The third issue—the contractual relationship between Dr. Huntsman and Intermountain—is also not being litigated in this case. Moreover, as stated above, there is no contract to provide medical services to the Plaintiffs. If Farmers means to imply that Dr. Huntsman's opinions of what is "reasonable and customary" are skewed because he allegedly charges and is paid more than is customary in the industry, Farmers should dispute Dr. Huntsman's testimony with relevant evidence (i.e., prices charged for similar services in the community).<sup>5</sup>

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<sup>5</sup> Although not at issue in this case, Farmers admits that Intermountain's financial relationship with its clients likely constitutes a collateral source. (3/15/17 Defense Memorandum in Response, p. 6.) Other Utah district courts have similarly held that the financial relationship between Intermountain and its clients constitutes irrelevant collateral source information. See addendums 2-4. The Utah Supreme Court has likewise held that "[h]ow a plaintiff satisfies his medical expense obligations presents a separate issue that is irrelevant to the calculation of his damages." *Wilson v. IHC Hosps., Inc.*, 2012 UT 43, ¶ 38, 289 P.3d 369.

**B. Farmers did not satisfy its burden that the confidential and proprietary information that it seeks is proportional discovery.**

The District Court also failed to properly apply the proportionality test outlined in Utah Rule of Civil Procedure 26(b). Rule 26(b)(2) outlines that discovery requests are proportional if:

(b)(2)(A) the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues;

(b)(2)(B) the likely benefits of the proposed discovery outweigh the burden or expense;

(b)(2)(C) the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case;

(b)(2)(D) the discovery is not unreasonably cumulative or duplicative;

(b)(2)(E) the information cannot be obtained from another source that is more convenient, less burdensome or less expensive; and

(b)(2)(F) the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information.

Utah R. Civ. P. 26(b)(2).

The theme underlying all of these factors is that there must be a legitimate need for the information requested based on the claims and defenses in the case and that the party cannot obtain the same information from another source that is more convenient, less burdensome, or less expensive. *See also* Utah R. Civ. P. 45(e)(5) (stating that only “[i]f the party or attorney responsible for issuing the subpoena shows a substantial need for the information that cannot be met without undue hardship, the court may order compliance upon specified conditions.”)

The Utah Supreme Court's decision in *Chatterton*, 938 P.2d 255, is useful in demonstrating the correct application of the proportionality test. In that case, the plaintiff sought to discover the following from his insurance carrier: the "(1) complete case file information on cases involving specified circumstances similar to Chatterton's accident and injuries, (2) comprehensive information on [the insurer's] policies and procedures for handling uninsured motorist claims, and (3) detailed information on all internal aspects of the insurer's processing of Chatterton's claim from its insurance carrier." *Id.* at 262. The plaintiff argued that he needed this information to prove the elements of liability and damages as relates to his personal injury claim. Plaintiff also argued that he could not obtain the same information from another source. The district court agreed. On appeal, the Supreme Court reversed. The Supreme Court noted that, under Utah law, liability and the amount and necessity of a plaintiff's damages is dependent upon the unique circumstances of each case. The court held that information regarding the insurer's policies and procedures and what the insurer paid on claims for similar injuries was therefore not important to resolve the issue of damages or liability. The court further held that the plaintiff could obtain information regarding the amount of his damages from an expert.

Here, the District Court failed to properly analyze (1) the importance and need for the information sought as compared to (2) the burden imposed upon Intermountain. First, even assuming that Intermountain's proprietary information is somehow relevant, which it is not, this information is not important or needed to determine or dispute the amount or necessity of damages in this case. As described above, delving through

Intermountain's proprietary records regarding its charges, payments, contracts, costs, and other pricing information will provide little, to no help, determining the necessity or market price for the plaintiffs' future medical expenses. Additionally, Farmers has the ability, and almost unlimited resources, to have a third party review the charges based upon CPT codes as well as Farmers' own internal data bases. Indeed, Farmers has already obtained the information relevant to this determination from another source, and admits that its expert will testify that Plaintiffs' future surgeries are not necessary and the amount plaintiffs' expert is asserting for those surgeries is excessive compared to the amount typically charged in the community. (3/15/17 Defense Memorandum in Response to Intermountain Surgical Motion for Protective Order, pp. 3-6.)<sup>6</sup>

Second, the burden on Intermountain in providing this information is not insignificant. Intermountain will be forced to divert resources from its business operations so that it can gather the requested information, meet with its attorneys to ensure that its proprietary information is properly marked and protected, prepare the 30(b)(6) witness to be knowledgeable about the relevant subject matter, hire an attorney to attend the deposition, and incur expenses sending its employee and attorney to attend the deposition. The nature of the request is also highly intrusive. Much of the information sought is proprietary business information. The District Court did not hold otherwise. Moreover, the District Court ordered that Intermountain's proprietary

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<sup>6</sup> *Chatterton* was decided prior to the 2011 amendments to Rule 26. The current version of the Rule anticipates that the Court will take a more active role in determining the relevancy and proportionality of discovery and places the burden of proving both elements on the party seeking the discovery. See Utah R. Civ. P. 26(b) and Advisory Committee Notes.

information be released to the in-house attorneys for Farmers—a company that Intermountain views as its adversary and that, in Intermountain’s view, has attempted to violate protective orders pertaining to Intermountain in the past. (*See* Memo, Ex. 23 (Motion for Order to Show Cause Re: Contempt).)

Although unclear, the District Court appears to have held that the request for Intermountain’s proprietary information is proportional because Farmers could not obtain (without great burden) this information from another source. (*See* Order, p. 2.) That reasoning is error on its face. If that were the test, proprietary information would always be discoverable. Of course Farmers could not obtain Intermountain’s proprietary information from another source and for good reason—it is proprietary. That is not the test. The appropriate inquiry is whether Farmers can obtain the information it needs to determine/defend the reasonable value of Plaintiffs’ future medical expenses. Farmers already demonstrated that it can. The District Court erred in holding otherwise, and this Court should reverse.

**C. Applying the correct legal analysis, the information that Farmers seeks is not relevant and proportional.**

As described above, the District Court misapplied Rule 26. Pursuant to this Rule, the District Court should have analyzed whether the information requested was relevant to determining the reasonable amount of Plaintiffs’ future surgical expenses (i.e., the price for the surgery in the marketplace). Then, if this threshold burden was met, the District Court should have analyzed whether Farmers could have obtained the information from another source that was less burdensome, costly, or convenient.

Applying the correct legal analysis, it is clear that Farmers did not meet its burden as relates to each of the items that the District Court ordered to be produced:

1. Farmers did not meet its burden in establishing that the production of information regarding Intermountain's licenses and accreditations is relevant and proportional:

Intermountain's licenses and accreditations are not relevant to determining what the market price is for a future surgical procedure. (Order, p. 4, ¶¶ 1-3.) The market price is determined by the prices charged in the community. *Supra*, pp. 14-17. Farmers can determine the market price through the use of an expert.

2. Farmers did not meet its burden that the production of information regarding the number of surgeries performed by Dr. Huntsman for Intermountain and the fees paid by Intermountain to Dr. Huntsman is relevant and proportional.

The number of surgeries performed by Dr. Huntsman for Intermountain and the total fees charged associated with those surgeries is not relevant to determining the market price of Plaintiffs' future medical expenses. (Order, p. 4, ¶¶ 4-5.) The market price is determined by comparing the prices charged in the community. *Supra*, pp. 14-17. Additionally, the prices associated with other peoples' surgeries, does not equate to the necessity or price of the Plaintiffs' surgeries which depends on the Plaintiffs' unique circumstances. Moreover, the parties in this case can obtain information regarding the reasonable amount and necessity of Plaintiffs' surgeries through expert testimony.



3. Farmers did not meet its burden that the production of information regarding when, how, and by whom the Plaintiffs were referred to Intermountain is relevant and proportional.

Who, when, and how Intermountain was referred to Plaintiffs is irrelevant in the resolution of the amount or degree of Plaintiffs' damages, which is determined by the price of the particular surgical service in the marketplace. (*See* Order, p. 4, ¶¶ 6-7.) Intermountain has not provided or been contracted to provide any surgical services for Plaintiffs. Farmers can obtain information regarding the reasonable amount of Plaintiffs' surgeries through expert testimony.

4. Farmers did not meet its burden that the production of information underlying Intermountain's formula for determining its prices is relevant and proportional.

Intermountain's proprietary information for determining its prices is not relevant to Plaintiffs' future damages. (*Id.*, p. 4-6, ¶¶ 8, 9, 12, 13, 14, 15.) Plaintiffs' future damages are determined by the surgical procedure they are to receive (as determined by a medical doctor) and the price of that procedure in the marketplace. Intermountain has not provided or been contracted to provide surgical services to Plaintiffs. Although Intermountain might be considered a market player, it does not constitute the "marketplace" for surgical services. Moreover, Intermountain has not been designated as an expert in this case, is not qualified as an expert, and has no intention of testifying as an expert. Therefore, Intermountain's opinions regarding what is "reasonable and customary" or its opinions regarding what documents would be important for such a determination is not relevant or admissible. Finally, Farmers has not demonstrated a

need for this information. Farmers can determine what is “reasonable and customary” through expert testimony

5. Farmers did not meet its burden that the production of information regarding Intermountain’s qualifications to provide expert testimony is relevant or proportional.

Intermountain has not been designated as an expert and has already represented to the District Court and to the parties in this case that it is not qualified as an expert and has no intention of providing any expert testimony. (*Id.*, p. 5, ¶¶ 10-11.) Intermountain should not have to attend a 30(b)(6) deposition to reiterate the same.

The District Court abused its discretion and improperly denied Intermountain’s request for a protective order. As such, Intermountain respectfully requests that this Court grant its petition for extraordinary relief and direct the District Court to issue a protective order prohibiting Farmers from seeking additional information that has not already been produced either by way of production of documents or through 30(b)(6) depositions.

### CONCLUSION

For the foregoing reasons, this Court should grant Intermountain’s petition for extraordinary relief, reverse the decision of the District Court, and direct the District Court to issue a protective order prohibiting Farmers from seeking additional information from Intermountain.

DATED this 24th day of October, 2017.

**CHRISTENSEN & JENSEN, P.C.**



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Karra J. Porter  
Scott T. Evans  
Kristen C. Kiburtz  
*Attorneys for Petitioner*

## CERTIFICATE OF SERVICE

This is to certify that on the 24th day of October, 2017, a copy of the foregoing **BRIEF OF PETITIONER/APPELLANT** was emailed to the following and also two true and correct copies were mailed to:

Lloyd R. Jones  
LAW OFFICE OF LLOYD R. JONES  
P.O. BOX 258829  
Oklahoma City, OK 73125  
[lloyd.jones@farmers.com](mailto:lloyd.jones@farmers.com)

Gary L. Cooper  
COOPER & LARSEN, CHARTERED  
151 North Third Avenue, 2nd Floor  
P.O. Box 4229  
Pocatello, ID 83205  
[gary@cooper-larsen.com](mailto:gary@cooper-larsen.com)

Brent M. Johnson  
Administrative Office of the Courts  
450 South State Street, 3rd Floor  
Salt lake City, Utah 84111  
[brentj@utcourts.gov](mailto:brentj@utcourts.gov)

Brett R. Boulton  
FLICKINGER SUTTERFIELD & BOULTON  
3000 North University Avenue, #300  
Provo, Utah 8404  
[brett@fsutah.com](mailto:brett@fsutah.com)



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Karra J. Porter  
Scott T. Evans  
Kristen C. Kiburtz  
*Attorneys for Petitioner*

## CERTIFICATE OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), Counsel for Petitioner/Appellant hereby certifies that the foregoing brief contains a proportionally spaced 13-point typeface and contains 6,396 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and the addendum.



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Karra J. Porter  
Scott T. Evans  
Kristen C. Kiburtz  
*Attorneys for Petitioner/Appellant*

# **Addendum 1**

**Order  
May 31, 2017**

JUN 01 2017

IN THE THIRD JUDICIAL DISTRICT, STATE OF UTAH  
IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT

SALT LAKE COUNTY

Deputy Clerk

IGNACIO BUENROSTRO and ESTHER  
BUENROSTRO,

Plaintiffs,

vs.

WHITNEY A. NESBITT and JACOB C.  
LOVELAND,

Defendants.

**ORDER ON NON-PARTY'S MOTION  
FOR PROTECTIVE ORDER**

Civil No. 160902137

Judge Royal I. Hansen

This matter came on for a telephone hearing on Tuesday, May 9, 2017, on a Motion for Protective Order filed by non-party Intermountain Surgical, LLC ("IMS").<sup>1</sup> Plaintiffs' counsel, Brett R. Boulton, Flickinger, Sutterfield & Boulton did not participate. Defendants were represented by Gary L. Cooper of Cooper & Larsen; and IMS was represented by Scott Evans of Christensen & Jensen. Following the May 9 hearing, the Court requested counsel for IMS and counsel for Defendants to prepare and simultaneously submit proposed orders for consideration. Both parties filed Proposed Orders in accordance with the Court's Order on or about May 16, 2017. The Court, having fully reviewed all relevant pleadings and law to the Motion for Protective Order, having considered the argument of counsel and having now been fully informed, orders as follows.

Rule 26(b) allows discovery of any matter, not privileged, which is relevant to a claim or defense of any party if the discovery satisfies the standards of proportionality. The disputed

<sup>1</sup> IMS included a request for attorney fees in their Motion for Protective Order. Based on the Court's decision, outlined *infra*, the Court denies IMS's request for attorney fees.



discovery involves a subpoena and a 30(b)(6) deposition directed to IMS seeking information about (1) the business model/plan of IMS to determine if it has acted as a medical provider or as a finance company in this case; (2) the factual foundation for the estimated costs of surgery provided to the Plaintiffs by IMS to determine if the estimate represents reasonable and customary medical expenses or collateral source evidence about how the Plaintiffs intend to pay for their medical expenses; and (3) the contractual and financial relationship between IMS and Dr. Huntsman who provided causation opinions and surgical recommendations at the request of IMS and who has been designated as a "retained expert" by the Plaintiffs to testify concerning causation, surgical necessity and reasonable and customary charges for medical treatment.

There is no claim that the disputed discovery involves privileged material. Therefore, the question is whether the disputed discovery involves material which is relevant to a claim or defense and is proportional. The collateral source doctrine does not render the disputed discovery irrelevant. IMS is arguably a collateral source because it is a financial services company which provides litigants like the Plaintiffs in this case with a method to pay for the surgery recommended by Dr. Huntsman. IMS, however, argues that it is also a medical service provider which contracts with third parties to provide the place and personnel to perform the surgery recommended by Dr. Huntsman. This dispute about the role IMS plays makes the IMS business model/plan and factual foundation for the cost estimate IMS provided to the Plaintiffs relevant and discoverable. The collateral source doctrine does not bar the disputed discovery because there is a dispute whether the cost estimate is a collateral source or is evidence of reasonable and customary charges for medical services.

IMS further argues that even if the requested discovery is relevant it is not proportional because IMS is a non-party. The party seeking discovery always bears the burden of showing proportionality.

By its own arguments, IMS occupies multiple roles in this case, including acting as a medical services facilitator which arranged for the Plaintiffs to be examined by Dr. Huntsman to determine if causation and surgical necessity existed and as a potential financial provider which would finance the surgery recommended by Dr. Huntsman. It is also important that Dr. Huntsman has agreed to act as a retained expert in this case to testify on causation, medical necessity and reasonable and customary charges for medical treatment. Considering the needs of this case, the requested discovery is reasonable to determine the factual foundation for the IMS estimate of surgery and to explore the financial relationship between IMS and Dr. Huntsman. This is because it was IMS that connected the Plaintiffs with Plaintiffs' retained expert, Dr. Huntsman.

The information sought is accessible and available to IMS from its own business records and the burden or expense of providing the requested information is not excessive. Discovery of this information will facilitate a pre-trial determination of collateral source evidence and bias. The information sought is not cumulative or duplicative of other information already produced in this case. The information sought by subpoena and 30(b)(6) deposition is within the control of IMS and the information sought cannot be obtained from another source that is more convenient and less burdensome or less expensive. The Defendants have been denied the opportunity to obtain this information to date because of the limited response by IMS to a subpoena and because of IMS's refusal to appear at a scheduled 30(b)(6) deposition. Therefore, the discovery is proportional.

Accordingly, the Court orders that, in addition to the records and documents already produced in response to the subpoena served on IMS, IMS shall designate and produce a 30(b)(6) witness or witnesses who can testify about the matters described below at a time and place to be determined by the parties and non-parties. Furthermore, IMS shall produce in advance of the 30(b)(6) deposition documents and tangible things in its possession and control which document or form the basis for answering the matters on which the witness is being produced for examination pursuant to rule 30(b)(6):

1. All business licenses issued to Intermountain Surgical, LLC to operate an ambulatory surgical facility from December 18, 2014 to present;
2. All licenses issued by the Utah Department of Health to Intermountain Surgical, LLC to operate an ambulatory surgical facility from December 18, 2014 to present;
3. All accreditations issued to Intermountain Surgical, LLC in connection with its operation of an ambulatory surgical facility from December 18, 2014 to present;
4. The number of surgeries Dr. Huntsman performed in 2016 for which he or his business entity was paid by Intermountain Surgical, LLC;
5. The total fees IMS paid Dr. Huntsman in 2016 to perform surgeries for clients Intermountain Surgical, LLC referred to Dr. Huntsman for surgical evaluations;
6. When, how, and by whom Esther Buenrostro was referred to Intermountain Surgical, LLC to obtain the surgical cost estimate dated December 18, 2014;
7. When, how, and by whom Ignacio Bu Buenrostro was referred to Intermountain Surgical, LLC to obtain the surgical cost estimate dated December 18, 2014;
8. All data, documentation or other information relied upon by Intermountain Surgical, LLC to prepare the surgical cost estimate dated December 18, 2014 for Esther Buenrostro;

9. All data, documentation or other information relied upon by Intermountain Surgical, LLC to prepare the surgical cost estimate dated December 18, 2014 for Ignacio Buenrostro;
10. The identity and expert qualifications of any employee, agent or representative of Intermountain Surgical, LLC who intends to testify as an expert in this litigation to establish that the surgical cost estimate dated December 18, 2014 for Ignacio Buenrostro represents usual, customary and reasonable charges for the community where the services were provided and the surgery was performed;
11. The identity and expert qualifications of any employee, agent or representative of Intermountain Surgical, LLC who intends to testify as an expert in this litigation to establish that the surgical cost estimate dated December 18, 2014 for Esther Buenrostro represents usual, customary and reasonable charges for the community where the services were provided and the surgery was performed;
12. All data, documentation, or other information relied upon by Intermountain Surgical, LLC to establish that the surgical cost estimate dated December 18, 2014 for Esther Buenrostro represents usual, customary and reasonable charges for the community, including but not limited to data, documentation and information from ConsulMed, LLC and/or FAIR Health, Inc. and/or other consultants;
13. All data, documentation, or other information relied upon by Intermountain Surgical, LLC to establish that the surgical cost estimate dated December 18, 2014 for Ignacio Buenrostro represents usual, customary and reasonable charges for the community, including but not limited to data, documentation and information from ConsulMed, LLC and/or FAIR Health, Inc. and/or other consultants;

14. The portion of the Intermountain Surgical, LLC surgical cost estimate dated December 18, 2014 for Ignacio Buenrostro that represents profit, interest, finance charge, risk of capital loss, or similar exposure;
15. The portion of the Intermountain Surgical, LLC surgical cost estimate dated December 18, 2014 for Esther Buenrostro that represents profit, interest, finance charge, risk of capital loss, or similar exposure;
16. The identity of all documents contained in the file maintained by Intermountain Surgical, LLC for Ignacio Buenrostro;
17. The identity of all documents contained in the file maintained by Intermountain Surgical, LLC for Esther Buenrostro.



#### **PROTECTIVE ORDER**

Notwithstanding the foregoing, IMS's request for a Protective Order with respect to the use of information and materials this Court may require IMS to produce herein is granted as follows:

1. The information that IMS is required to produce pursuant to this Order will be deemed confidential, private and protected and shall be used solely for the purpose of conducting this litigation and not for any other purpose whatsoever. To be subject to the protections of this Protective Order, IMS, Canyon Crest, and Huntsman shall designate the documents as "Confidential" or "Private."
2. None of the documents, materials, items, or information produced by IMS, subsequent to the date of this Order shall be distributed outside of or leave the possession of the attorneys in this litigation without prior order of the Court. If a party wishes to disclose any of the documents referenced herein, that party must file a motion with the Court.

3. All documents, materials, items, or information referenced herein shall be designated as “CONFIDENTIAL” or “PRIVATE” if filed with the Court and shall be filed in a sealed envelope with the notation thereon that the contents are filed pursuant to this Protective Order and that the envelope shall not be opened or its contents disclosed (other than to the Court in-camera) until an Order of the Court is entered after notice to the parties and non-parties.
4. Nothing in this Protective Order shall be deemed to preclude any party or non-party from seeking and obtaining additional protection from the Court regarding the treatment of documents or other material covered by this Order.
5. Within sixty (60) days after the termination of this action, each party shall assemble all documents, materials, items, or information referenced herein and shall either (i) return such documents and things and all copies thereof to IMS, or (ii) destroy the documents and things and all copies thereof and provide written certification of such destruction to IMS.

So Ordered this 31 day of May, 2017.

  
\_\_\_\_\_  
Judge Royal I. Haven  
District Court Judge  


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 160902137 by the method and on the date specified.

EMAIL: BRETT R BOULTON brett@fsutah.com

EMAIL: GARY L COOPER gary@cooper-larsen.com

EMAIL: LLOYD R JONES lloyd.jones@farmersinsurance.com

EMAIL: SCOTT T EVANS Scott.Evans@chrisjen.com

06/01/2017

/s/ CHERI LINDSLEY

Date: \_\_\_\_\_

\_\_\_\_\_

Deputy Court Clerk

# **Addendum 2**

**Decision and Order**  
*Vigueras-Amezcuca v. Shoeman*  
**Case No. 160903969**  
**January 11, 2017**



The Order of the Court is stated below:

Dated: January 11, 2017  
01:49:16 PM

/s/ MATTHEW BATES  
District Court Judge



LLOYD R. JONES Bar # 6757  
PETERSEN & ASSOCIATES  
Mailing Address  
PO Box 258829  
Oklahoma City, OK 73125-8829  
Physical Address  
230 South 500 East, Suite 400  
Salt Lake City, UT 84102  
Telephone: (801) 328-5555  
Facsimile: (801) 524-0998  
[lloyd.jones@farmers.com](mailto:lloyd.jones@farmers.com)

GARY L. COOPER, Bar #13602  
COOPER & LARSEN, CHARTERED  
151 North Third Avenue, Second Floor  
P. O. Box 4229  
Pocatello, ID 83205-4229  
Telephone: (208) 235-1145  
Facsimile: (208) 235-1182  
[gary@cooper-larsen.com](mailto:gary@cooper-larsen.com)

Counsel for Defendant

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IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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JAVIER VIGUERAS-AMEZCUA,

Plaintiff,

vs.

NOAH SHOEMAN,

Defendant.

DECISION AND ORDER

Case No. 160903969

Judge: Matthew Bates

This matter came on for hearing on Thursday, December 8, 2016, on Plaintiff's

Statement of Discovery Issues and the Motion for Protective Order filed by the non-parties,

Intermountain Surgical, LLC (“IMS”), Canyon Crest Surgical II, LLC (“Canyon Crest”) and Salt Lake Orthopedic Center/Dr. Kade Huntsman (“Huntsman”). Plaintiff was represented by Jordan P. Kendall of Eisenberg, Gilchrist & Cutt; Defendant was represented by Gary L. Cooper of Cooper & Larsen; and the non-parties were represented by Scott Evans of Christensen & Jensen.

The Court read the submissions by the parties and the non-parties, heard oral arguments and after considering the submissions, the case law and the arguments, the Court grants in part and denies in part, the Plaintiff’s Statement of Discovery Issues and the Motion for Protective Order filed by the non-parties as detailed below.

Ut. R. Civ. P. 26(b) allows discovery of “any matter, not privileged, which is relevant to a claim or defense of any party if the discovery satisfies the standards of proportionality....” Neither the parties nor the non-parties claim that the disputed discovery involves privileged material. Therefore, the question before the court is whether the disputed discovery involves material which is relevant to a claim or defense and is proportional. The Plaintiff and the non-parties have argued that the discovery is not relevant and the non-parties have argued that the disputed discovery is not proportional. The Defendant has argued that the disputed discovery is not prohibited by the collateral source rule, is relevant and is proportional under the Ut. R. Civ. P. 26 standards.

The collateral source doctrine states that a tort feisor may not reduce his damages by

the amount that a plaintiff receives from collateral sources. In that sense, IMS is a collateral source because it provides a benefit to the plaintiff and provides a way for the plaintiff to pay for the costs he has incurred. The most primary collateral source evidence here is the evidence of a financial relationship between IMS and the Plaintiff in this case and has already been disclosed. This is the collateral source evidence that should not come in at trial when we get there, because the jury does not need to know or should know about whatever the financial arrangement is between IMS and the Plaintiff, whether that bill will ever be paid, whether it is paid in installments, whether interest is accruing or not and the fact that IMS has a lien on any judgment that may be obtained so that IMS can get its money back. The collateral source rule does not by itself bar the discovery requested at this stage of the litigation.

Even though in its financial disclosure it seems to say that they are not a medical provider, IMS appears to have multiple roles. One of the roles is to provide medical services or at least coordinate medical services, and the other is to provide financial services. Therefore, while IMS is a collateral source, IMS is also a medical provider. In determining whether requested discovery is proportional the court must weigh the fact that IMS has multiple roles in this case. IMS has represented that it leases a surgical suite from Canyon Crest and owns the equipment in the surgical space. There is some evidence that IMS is augmenting or making the Statement of Account allegedly higher than what was charged by the providers to account for the fact that it is covering the Plaintiff's bills and providing essentially a collateral source for him. With this understanding the court will allow the defense to get behind that initial bill and look a

little bit deeper. Essentially, the Court is ordering the non-parties to basically turn over their file as it pertains to Mr. Javier Viguera-Amezcu. The Defendant is entitled to at least look at the costs that IMS incurred in coordinating those services for the Plaintiff. However, the court will not require IMS to provide invoices for any medical surgical supplies or DME supplies. These are items that are commonly used by many medical providers and there is plenty of information available to Defendant about the cost of these items generally.

Defendant's request for discovery into the tax information and payments by or to non-parties like IMS, Huntsman and Canyon Crest is beyond what is pertinent to the Plaintiff in this case, and imposes a burden on non-parties that is not proportional under Ut. R. Civ. P. 26. In addition, Dr. Huntsman has already submitted an Affidavit in which he denies a financial interest in IMS and/or Canyon Crest. If the defense can later on get some evidence to show that there is some financial relationship beyond just being a doctor and an independent contractor, the Court will absolutely reconsider this. Therefore, Defendant's request for tax information and payments by or to the non-parties is denied for now.

The court now turns to the specific subpoenas served upon the non-parties by the Defendants. In addition to the records and documents already produced in response to those subpoenas, the non-parties shall produce the following documents:

1. Canyon Crest Surgical II, LLC ("Canyon Crest") shall produce the following in response to the subpoena served by the defense:

- The Canyon Crest Surgical Center invoice/bill for the facility charge for the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016;
- The form used in 2015 by Canyon Crest Medical/Canyon Crest Surgical Center to disclose to patients about the ownership or investment by Salt Lake Orthopedic Clinic and/or Dr. Kade T. Huntsman in Canyon Crest Medical/Canyon Crest Surgical Center;
- The form used in 2016 by Canyon Crest Medical/Canyon Crest Surgical Center to disclose to patients about the ownership or investment by Salt Lake Orthopedic Clinic and/or Dr. Kade T. Huntsman in Canyon Crest Medical/Canyon Crest Surgical Center;
- The form used in 2015 by Canyon Crest Medical/Canyon Crest Surgical Center to disclose to patients about the relationship with the manufacturer(s)/supplier(s) of the Surgical Implants/Supplies used in the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016;
- The form used in 2016 by Canyon Crest Medical/Canyon Crest Surgical Center to disclose to patients about the relationship with the manufacturer(s)/supplier(s) of the Surgical Implants/Supplies used in the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest

Surgical Center on January 16, 2016; and

- All licenses which were in force and which had been issued to Canyon Crest Surgical Center by any regulating entity at the time the Two Level Anterior Cervical Disc Fusion (ACDF) was performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016.

2. Salt Lake Orthopedic Center/Dr. Kade Huntsman ("Huntsman") shall produce the following in response to the subpoena served by the defense:

- The Salt Lake Orthopedic Clinic/Dr. Kade T. Huntsman invoice/bill for Dr. Huntsman's professional services for the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016, and all pre- and post-surgical treatment;
- The form used in 2015 by Salt Lake Orthopedic Clinic and/or Dr. Kade T. Huntsman to disclose to patients about the ownership of or investment in Intermountain Surgical, LLC: and
- The form used in 2016 by Salt Lake Orthopedic Clinic and/or Dr. Kade T. Huntsman to disclose to patients about the ownership of or investment in Intermountain Surgical, LLC.

3. Intermountain Surgical, LLC ("IMS") shall produce the following in response to

the subpoena served by the defense:

- The Canyon Crest Surgical Center invoice/bill for the facility charge for the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016;
- The Salt Lake Orthopedic Clinic/Dr. Kade T. Huntsman invoice/bill for Dr. Huntsman's professional services for the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016
- The Anesthesiologist invoice/bill for the anesthesia services provided for the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016;
- The Physicians Assistant invoice/bill for the Physician Assistant services provided for the Two Level Anterior Cervical Disc Fusion (ACDF) performed on Javier Viguera-Amezcu at Canyon Crest Surgical Center on January 16, 2016; and

- The invoice/bill for any medical services or supplies paid by Intermountain Surgical, LLC for treatment provided to Javier Viguera-Amezcu. However, the Court will not require IMS to provide invoices for any of the medical surgical supplies or DME supplies.

Production of the rest and remainder of the documents and material requested by the defense in the subpoenas is denied without further order by the Court. The defense shall pay reasonable copy costs for the documents produced by the non-parties. All documents not previously produced, but produced in response to this Order shall not be shared or communicated to anyone outside of personnel in the law offices defending the Defendant without further order of the Court. Counsel for the non-parties shall prepare an appropriate protective order consistent with the oral pronouncement of the order of the Court.

The order is entered by the Court as evidenced by the dated electronic signature at the top of this document



# **Addendum 3**

**Protective Order**  
***Viguerras-Amezcuca v. Shoeman***  
**Case No. 160903969**  
**January 16, 2017**

The Order of the Court is stated below:

Dated: January 16, 2017  
12:56:14 PM

/s/ MATTHEW BATES  
District Court Judge



Karra J. Porter, 5223  
Scott T. Evans, 6218  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Suite 1100  
Salt Lake City, Utah 84111  
Telephone: (801) 323-5000  
[Karra.Porter@chrisjen.com](mailto:Karra.Porter@chrisjen.com)  
[Scott.Evans@chrisjen.com](mailto:Scott.Evans@chrisjen.com)

*Attorneys for Intermountain Surgical, LLC, Canyon Crest Surgical II, LLC, and Dr. Huntsman*

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY

<p>JAVIER VIGUERAS-AMEZCUA,  Plaintiff,  vs.  NOAH SHOEMAN,  Defendant.</p>	<p><b>PROTECTIVE ORDER</b>  Case No.: 160903969  Judge Matthew Bates</p>
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This matter came on for hearing on Thursday, December 8, 2016, on Plaintiff's Statement of Discovery Issues and the Motion for Protective Order filed by the non-parties, Intermountain Surgical, LLC ("IMS"), Canyon Crest Surgical II, LLC ("Canyon Crest") and Salt Lake Orthopedic Center/Dr. Kade Huntsman ("Huntsman"). Plaintiff was represented by Jordan P. Kendell of Eisenberg, Gilchrist & Cutt; Defendant was represented by Gary L. Cooper of Cooper & Larsen; and the non-parties were represented by Scott Evans of Christensen & Jensen.

The Court read the submissions by the parties and the non-parties, heard oral arguments and after considering the submissions, the case law and the arguments, the Court grants the non-parties' Motion for Protective Order as follows:

1. This Order applies to all documents, materials, items, or information produced pursuant to this Court's order and after December 8, 2016, whether in tangible or electronic form, such as electro-magnetic storage and computer storage disks or other electronic media, which is produced by IMS, Canyon Crest, and Huntsman pursuant to subpoenas served by Defendant in this litigation are deemed confidential, private and protected and shall be used solely for the purpose of conducting this litigation and not for any business or other purpose whatsoever.

2. To be subject to the protections of this order, IMS, Canyon Crest, and Huntsman shall designate the documents as "Confidential" or "Private".

3. None of the documents, materials, items, or information produced by IMS, Canyon Crest, and Huntsman pursuant to subpoenas served by Defendant in this litigation shall be distributed outside of or leave the possession of the attorneys in this litigation without prior order of the Court. If a party wishes to disclose any of the documents referenced herein, that party must file a motion with the Court.

4. All documents, materials, items, or information referenced herein shall be designated as "CONFIDENTIAL" or "PRIVATE" if filed with the Court and shall be filed in a sealed envelope with the notation thereon that the contents are filed pursuant to this Order and that the envelope shall not be opened or its contents disclosed (other than to the Court in camera) until an Order of the Court is entered after notice to the parties.

5. Nothing in this Order shall be deemed to preclude any party or non-party from seeking and obtaining additional protection from the Court on the treatment of documents or other material covered by this Order.

6. Within sixty (60) days after the termination of this action, each party shall assemble all

documents, materials, items, or information referenced herein and shall either (i) return such documents and things and all copies thereof to the IMS, Canyon Crest, and Huntsman, or (ii) destroy the documents and things and all copies thereof and provide written certification of such destruction to the IMS, Canyon Crest, and Huntsman.

***In accordance with the Utah State District Courts Efiling Standard No. 4, and URCP Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.***

Approved as to form this 12<sup>th</sup> day of January, 2017.

EISENBERG, GILCHRIST & CUTT

/s/ Jordan P. Kendall signed w permission

Jordan P. Kendall  
jkendell@ecglegal.com

Approved as to form this 12<sup>th</sup> day of January, 2017.

COOPER & LARSEN, CHARTERED

/s/ Gary L. Cooper signed w permission

Gary L. Cooper  
gary@cooper-larsen.com

Approved as to form this 12<sup>th</sup> day of January, 2017.

PETERSEN & ASSOCIATES

/s/ Lloyd R. Jones signed w permission

Lloyd R. Jones  
Lloyd.jones@farmers.com

Approved as to form this 12<sup>th</sup> day of January, 2017.

CHRISTENSEN & JENSEN, P.C.

/s/ Scott T. Evans

Scott T. Evans  
Scott.evans@chrisjen.com

# **Addendum 4**

**Order Granting  
Motion for Protective Order  
*Salisbury v. The Living Planet*  
Case No. 130905519  
December 14, 2015**

The Order of the Court is stated below:

Dated: December 14, 2015  
10:29:13 AM

/s/ LAURA SCOTT  
District Court Judge



Karra J. Porter, 5223  
Scott T. Evans, 6218  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Suite 1100  
Salt Lake City, Utah 84111  
Telephone: (801) 323-5000  
[Karra.Porter@chrisjen.com](mailto:Karra.Porter@chrisjen.com)  
[Scott.Evans@chrisjen.com](mailto:Scott.Evans@chrisjen.com)  
*Attorneys for Intermountain Surgical, LLC*

IN THE THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH  
SALT LAKE COUNTY

<p>RAMBEAU SALISBURY,  Plaintiff,  vs.  THE LIVING PLANET, INC., a Utah Corporation, DBA THE LIVING PLANET AQUARIUM; and JOHN DOE, an individual,  Defendant.</p>	<p><b>INTERMOUNTAIN SURGICAL'S ORDER GRANTING MOTION FOR PROTECTIVE ORDER</b></p> <p>Case No.: 130905519  Judge Laura Scott</p>
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Intermountain Surgical, LLC (hereinafter "IMS") and Canyon Crest Surgical II, LLC (hereinafter Canyon Crest) filed a joint Motion for Protective Order with respect to Defendant's requests for 30(b)(6) depositions of IMS and Canyon Crest. The motion was fully briefed and heard on August 11, 2015 before the Honorable Laura Scott. Peter L. Mifflin appeared on behalf of Plaintiff Rambeau Salisbury, Paul M. Belnap of Strong and Hanni appeared on behalf of Defendant The Living Planet, Inc., and Karra J. Porter and Scott T. Evans of Christensen & Jensen appeared on behalf of Intermountain Surgical, LLC.



Having already responded to Defendant's request to produce documents, IMS and Canyon Crest objected to Defendant's taking of the 30(b)(6) depositions as well as the scope of the 30(b)(6) Notices and Subpoenas Duces Tecum served on IMS and Canyon Crest. Judge Scott, after hearing argument from counsel, and being fully advised,

ADJUDGES and DECREES as follows:

1. The Court hereby grants the Motion for Protective Order filed by IMS and Canyon Crest.
2. The Court finds the business relationship between IMS and Canyon Crest is not relevant to the ultimate issue, which is whether the charges from IMS to the Plaintiff are customary and reasonable. Defendant is not permitted to perform discovery or make further inquiry into the business relationship between IMS and Canyon Crest. Likewise, Defendant is not permitted to perform discovery on the issue of IMS's markup or profit margin in relation to what their vendors charge for products or services.
3. Subject to paragraph 2 of this order, Defendant will be allowed to take the 30(b)(6) deposition of Canyon Crest, if it so chooses.
4. Subject to paragraph 2 of this order, Defendant will be allowed to take the 30(b)(6) deposition of IMS concerning the billings rendered with respect to the above Plaintiff and concerning information that would typically be provided in a medical bill from a similarly situated medical billing provider to a similarly situated patient to the extent not already provided.
5. Any pricing analysis that IMS or Canyon Crest has performed, or continues to perform, are confidential and proprietary trade secrets which are not subject to discovery. This information is also irrelevant to the ultimate issue, which is whether IMS's charges to the Plaintiff are customary and reasonable.

6. IMS's and Canyon Crest's request that the information they produce pursuant to Defendant's subpoenas be deemed confidential is granted. The information that has been produced and which may be produced is confidential and shall not be used for any purpose outside of the above captioned litigation.
7. The request for attorney fees associated with this motion has been withdrawn. Therefore, attorney fees are not awarded

----- END OF ORDER -----

***In accordance with the Utah State District Courts Efiling Standard No. 4, and URCP Rule 10(e), this Order does not bear the handwritten signature of the Judge, but instead displays an electronic signature at the upper right-hand corner of the first page of this Order.***

Approved as to form this 11<sup>th</sup> day of  
December, 2015.

*/s/ Paul M. Belnap, signed with permission*

Paul M. Belnap  
Nicholas E. Dudoich  
STRONG & HANNI  
Attorneys for The Living Planet

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of December, 2015, I electronically filed the foregoing **INTERMOUNTAIN SURGICAL'S PROPOSED ORDER GRANTING MOTION FOR PROTECTIVE ORDER** with the Clerk of the Court using the e filing system, which sent notification of such filing to the following:

Paul M. Belnap  
Nicholas E. Dudoich  
STRONG & HANNI  
102 South 200 East, Suite 800  
Salt Lake City UT 84111

Rambeau Salisbury  
8638 West Park Street  
Copperton, Utah 84026

*Via US Mail*

*/s/ Judy Garrett, Secretary*