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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

CALVIN DONALD OSTLER, individually and as personal representative of the Estate of Lisa Marie Ostler, KIM OSTLER, and the three minor children of Lisa Marie Ostler, C.K., E.L.K., and L.M.O., through their adoptive parents and next friends, CALVIN DONALD OSTLER and KIM OSTLER,

Plaintiffs,

v.

HOLLY PATRICE HARRIS, ZACHARY PAUL FREDERICKSON, TODD ALLAN BOOTH, TODD RANDALL WILCOX, M.D., RONALD PAUL SEEWER, JR., BRENT LEE TUCKER, JAMES M. WINDER, PAM LOFGREEN, RICHARD BELL, JOHN DOE, whose true name is unknown, and SALT LAKE COUNTY, a political subdivision of the State of Utah,

Defendants.

**MOTION FOR SANCTIONS
AND TO HOLD DEFENDANT
SALT LAKE COUNTY AND
DEFENDANTS' COUNSEL
IN CONTEMPT FOR FAILURE
TO COMPLY WITH THE
COURT'S ORDER AND
MEMORANDUM IN SUPPORT**

Case No. 2:18-cv-00254-001

Judge Bruce S. Jenkins

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MOTION

Pursuant to Rule 37(b)(2)(A) and (C), Federal Rules of Civil Procedure, Plaintiffs respectfully move the Court for an Order:

- (1) Holding Defendant Salt Lake County and Defendants' counsel in contempt of Court for materially failing to comply with the Court's Order of February 22, 2019, that "Defendants shall, within 20 days of this order, produce the medical records kept by the Jail for each person identified in response to Plaintiffs' Interrogatory No. 8;"¹
- (2) Accepting as established for the purposes of this action that the circumstances surrounding the deaths of Carlos Umana, Lindsay Goggin, Jean Kuykendall, and Jeremy Aus constitute a custom, pattern, and practice on the part of Salt Lake County at the Salt Lake County Metro Jail of deliberate indifference to the constitutional rights of incarcerated persons to receive adequate medical treatment.

¹ Order Granting in Part and Denying in Part Plaintiffs' Short Form Discovery Motion to Compel Answers to Interrogatories and Production of Documents [ECF 77] ("Order") at 3, ¶ 6.

- (3) Prohibiting Defendants from introducing into evidence any of the medical records of Carlos Umana, Lindsay Goggin, Jean Kuykendall, or Jeremy Aus;
- (4) Striking Defendants' Answer [ECF 75] and entering default judgement as to liability against Defendants; and
- (5) Requiring Defendants or Defendants' Counsel to pay Plaintiffs' reasonable attorneys' fees in connection with Plaintiffs' efforts to obtain from Defendant Salt Lake County the medical records relating to the medical conditions, diagnoses, medical treatment, and deaths of Carlos Umana, Lindsay Goggin, Jean Kuykendall, and Jeremy Aus, and, in addition, reasonable fees for work performed in connection with this Motion.

SUPPORTING MEMORANDUM

INTRODUCTION

Defendants failed—(1) in Defendants’ response to Plaintiffs’ motion to compel [ECF 50], (2) in their argument at the hearing of January 22, 2019, and (3) in their objection to Plaintiffs’ proposed order [ECF 63]—to avoid their obligation to provide to Plaintiffs certain medical records relating to deaths of inmates at the Salt Lake County Metro Jail. Then, in the face of a clearly written Order [ECF 77], which unmistakably required the production of those documents, Defendants continued to withhold the documents and have provided no explanation for their refusal to comply with the Court’s Order.

From the outset of this matter, Plaintiffs faced a Herculean challenge in seeking some semblance of justice and accountability for the death of Lisa Ostler in the Salt Lake County Metro Jail. Salt Lake County (the “County”) and its subordinates created, maintained, and controlled nearly all relevant records about the circumstances leading to Lisa’s death, causing Plaintiffs to depend on Defendants themselves to produce the information highly relevant to proving their liability. The resources of the County have been utilized by the County to contest any and all issues, whether in good faith or bad faith, no matter the likely outcome and no matter the delays caused in the proceedings.

The Federal Rules of Civil Procedure (the “Rules”) were designed to make the adjudication of disputes blind to the asymmetries of information and power held by the parties. The Rules pertaining to discovery contemplate forthright disclosures and comprehensive responses to requests for information. Whether the defendant is a wealthy individual, a billion-dollar corporation, or a wealthy municipality, it is subject, like anyone else, to the requirements of the Rules and the orders of the Federal Courts. No party should be allowed to simply ignore a duly issued order by this Court or that party’s obligations under the Rules.

Where a defendant’s refusal to provide information creates an insurmountable burden to a plaintiff’s discovery of relevant information, the Court must intervene to ensure the fair discovery of information. That is exactly what this Court has done in issuing its Order compelling disclosure by Defendants of information and documents. The casual disregard by Defendants and Defendants’ counsel of their obligations to comply with that Order is highly prejudicial to Plaintiffs and contemptuous of this Court.

STATEMENT OF FACTS RELEVANT TO THIS MOTION

1. On August 23, 2018, Plaintiffs served interrogatories on Defendants.² Interrogatory No. 8 requested that Defendants “identify” all incarcerated persons who died in the Salt Lake County Metro Jail.³ Interrogatory No. 9 requested medical information about those inmates.⁴

2. Without any legitimate basis, Defendants objected and refused to provide information responsive to Interrogatories 8 and 9.⁵

3. Plaintiffs moved the Court for an order requiring Defendants to provide the information,⁶ which Defendants opposed.⁷

4. At a hearing on January 22, 2019, the Court ruled that, in response to Interrogatory No. 8, Defendants were required to identify (a) the names of individuals whose deaths led to legal action against Salt Lake County within the past ten years⁸ as well as (b) the names of all inmates whose deaths occurred within the

² Declaration of Walter M. Mason (“Mason Decl.”) (attached hereto as Exhibit “A”), at 1 and Exhibit “1” thereto.

³ *Id.* at ¶ 2.

⁴ *Id.* at ¶ 3.

⁵ *Id.* at ¶¶ 4–6.

⁶ Plaintiffs’ Motion to Compel [ECF 46].

⁷ Defendants’ Response to Plaintiff’s Motion [ECF 50].

⁸ Transcript of January 22, 2019, Hearing [ECF 63-3], at 74:7–8.

last five years.⁹ The Court also ordered that, in response to Interrogatory No. 9, Defendants were to produce medical records relating to *all* of those individuals.¹⁰

5. Plaintiffs submitted a proposed order reflecting the Court's ruling.¹¹ Defendants objected to the form of Plaintiffs' proposed order and submitted their proposed order,¹² to which Plaintiffs objected.¹³

6. A primary point of disagreement between the parties as to the form of the order was whether Defendants were required to produce medical records relating to *all* individuals identified in response to Interrogatory No. 8 or only those individuals who died within the last five years.¹⁴ Defendants argued, contrary to the clear intent of the Court expressed at the hearing, that Defendants should be required to produce medical records for only the "inmates who died in-custody within five years prior" to the Court's Order.¹⁵

⁹ *Id.* at 100:8–9.

¹⁰ *Id.* at 104:4–8 ("MS. RAMOS: Are you talking about their medical information . . . or just a list of individuals? THE COURT: That includes medicals,").

¹¹ Mason Decl., ¶ 7.

¹² Defendants' Objection to Proposed Order [ECF 63], Defendants' Proposed Order [ECF 64-1].

¹³ Plaintiffs' Objection to Defendants' Proposed Order [ECF 66].

¹⁴ *Id.* at 3; Defendants' Objection to Proposed Order [ECF 63], at 7 (arguing that the "Court simply ordered the production of medical records for in-custody jail deaths within the last five years" (emphasis removed)).

¹⁵ Defendants' Proposed Order [ECF 64-1], at 3 ¶ 5.

7. Leaving absolutely no ambiguity about whose medical records were to be produced by Defendants, the Court issued a written order on February 22, 2019, stating as follows:

In response to Plaintiffs' Interrogatory No. 9, Defendants shall, within 20 days of this order, produce the medical records kept by the Jail *for each person identified in response to Plaintiffs' Interrogatory No. 8.*¹⁶

8. Defendants, in direct contravention and disregard of the Court's explicit order, failed to produce medical records relating to several individuals identified in response to Interrogatory No. 8. Instead, Defendants merely produced the medical records pertaining to deaths of inmates in the previous *five years*, ignoring the fact that the Court had rejected Defendants' argument that Defendants should only be required to produce medical records about the deaths within five years.¹⁷

9. Specifically, Defendants have continued to refuse to produce *any* medical records relating to Lindsay Goggin, Carlos Umana, Jean Kuykendall, or Jeremy Aus, even though Defendants included, on March 1, 2019, the following in response to Interrogatory No. 8:¹⁸

¹⁶ Order [ECF 77], at ¶ 6 (footnote omitted) (emphasis added).

¹⁷ Exhibit 4 to Mason Decl., at 19–21.

¹⁸ Exhibit 4 to Mason Decl., at 17–19. Defendants produced the list of names without designating the information “confidential.” Mason Decl., at ¶ 12.

[P]ursuant to the Court's January 22, 2019 order below is an itemized list of all in-custody deaths at the jail which resulted in a lawsuit within ten years prior to January 22, 2019:

1. Lindsay Goggin, . . .
2. Carlos Umana, . . .
3. Jean Kuykendall, . . .
4. Jeremy Aus, . . .

10. The deadline for Defendants to produce those medical records was March 14, 2019. As of the date of this Motion, Defendants have not provided *any* medical records relating to those four individuals and have provided no explanation for Defendants' failure to produce those documents.¹⁹

11. As a result of Defendants' failure to produce information about the deaths of those four individuals, Plaintiffs are, with a fact discovery deadline looming, without necessary information to evaluate the need for further discovery pertaining to those deaths.²⁰ Without those records, Plaintiffs are also unable to conduct their own independent investigation of the circumstances of those deaths.²¹

¹⁹ Mason Decl., ¶ 10.

²⁰ *Id.* at ¶ 11.

²¹ *Id.* at ¶ 10.

ARGUMENT

I. DEFENDANT SALT LAKE COUNTY’S UNEXPLAINED AND UNJUSTIFIABLE REFUSAL TO COMPLY WITH THE COURT’S ORDER REQUIRES A FINDING THAT DEFENDANT SALT LAKE COUNTY AND ITS COUNSEL ARE IN CONTEMPT OF COURT.

Pursuant to Rule 37(b)(2)(A)(vii), Fed R. Civ. P., the Court may treat “as contempt of court the failure to obey” an order to provide discovery. This Court has the power to “punish by fine or imprisonment, or both, at its discretion such contempt of its authority . . . [as] disobedience or resistance to its lawful . . . order”²² To prevail on a motion for contempt, a movant “has the burden of proving, by clear and convincing evidence, that a valid court order existed, that the [party] had knowledge of the order, and that the [party] disobeyed the order.”²³ “A party will not be held in contempt if it was ‘reasonably diligent and energetic in attempting to accomplish what was ordered.’”²⁴

²² 18 U.S.C. § 401(3). *See also Fed. Trade Comm'n v. Kuykendall*, 371 F.3d 745, 752 (10th Cir. 2004) (“A contempt sanction is considered civil if it is remedial and for the benefit of the complainant.” (citations and internal quotations omitted)).

²³ *Fed. Trade Comm'n*, 371 F.3d at 756–57 (citations and internal quotations omitted).

²⁴ *Catheter Connections, Inc. v. Ivera Med. Corp.*, No. 2:14-CV-70-TC, 2015 WL 93881, at *3 (D. Utah Jan. 7, 2015) (unpublished) (citation omitted); *see also Oak Valley Investments, L.P. v. Southwick*, No. 2:06-CV-737 DB, 2007 WL 4276708, at *1 (D. Utah Dec. 3, 2007) (“[C]ontempt sanctions may ensue if it is later discovered

Here, Defendants vigorously argued a point—that they should be required to produce medical records *only* relating to deaths that occurred in the prior five years—then knowingly disregarded the Court’s express Order requiring Defendants to produce medical records pertaining to *all deceased individuals* Defendants were required to identify in response to Interrogatory No. 8. Defendants have provided no explanation regarding Defendants’ failure and refusal to provide the medical records relating to inmates whose deaths during the past ten years were the basis of lawsuits. Defendants have not contended, nor could they contend, that the Court’s Order is invalid. Defendants have not attempted *at all* to comply with the relevant portion of the Court’s Order, making no “reasonably diligent and energetic” attempt to comply.

Accordingly, Defendants should be found in contempt of the Court’s Order and appropriate sanctions should be imposed. “The purpose of contempt is to coerce compliance and remedy harm, if any, to the other party.”²⁵ Because Defendants’ counsel was acutely aware of the distinction between producing medical records for *all* deceased persons identified in response to Interrogatory No. 8 as opposed to only for those people who died in the last five years, they well realized what was required

that IMC possessed the information requested in the subpoena and failed to produce it.”).

²⁵ *Catheter Connections, Inc.*, 2015 WL 93881, at *6.

to be produced. Further, because (1) the parties have enormously disparate resources, (2) the fact discovery cut-off is approaching soon, and (3) Plaintiffs and Plaintiffs' counsel have been deprived of relevant information and put to the burden of, yet again, moving the Court for relief relating to the same discovery requests, the need to remedy harm is at its maximum.

II. THE FLAGRANT DISREGARD OF THIS COURT'S ORDER BY DEFENDANT SALT LAKE COUNTY AND DEFENDANTS' COUNSEL JUSTIFIES ENTRY OF DEFAULT JUDGMENT AND AN AWARD OF REASONABLE ATTORNEYS' FEES.

“Default judgment is generally considered a harsh sanction that should be used only when a party's noncompliance is due to ‘willfulness, bad faith, or any fault of the [disobedient party]’ and not when a party is unable to comply with a discovery order.”²⁶ The Tenth Circuit Court of Appeals has “defined a willful failure as ‘any intentional failure as distinguished from involuntary noncompliance. No wrongful intent need be shown.’”²⁷ Default judgement is even available in the absence of a written order.²⁸

²⁶ *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1160–61 (10th Cir. 2013) (citations omitted) (alteration in original).

²⁷ *In re Standard Metals Corp.*, 817 F.2d 625, 628–29 (10th Cir.1987) (citation omitted).

²⁸ See e.g., *Henry v. Sneiders*, 490 F.2d 315, 318 (9th Cir. 1974) (“Where oral proceedings unequivocally give a litigant notice that certain documents are to be

Here, Defendant Salt Lake County and Defendants’ counsel have demonstrated flagrant bad faith and cavalier disregard of the Court’s Order where (1) Defendants explicitly sought to be relieved of the obligation to disclose particular documents, (2) the Court unambiguously ordered the disclosure of the documents within a set timeframe, and (3) Defendants have blatantly disregarded the Court’s Order.

“The sanction of default, although extreme, is available and an appropriate and integral part of the discovery process.”²⁹ Severe sanctions, such as default judgment—or, at minimum, establishing as true that a custom, pattern, and practice of deliberate indifference toward the serious medical needs of incarcerated people exists at the Salt Lake County Metro Jail and awarding reasonable attorneys’ fees in connection with the long history of Plaintiffs endeavoring to obtain the information Defendants were ordered, but failed, to produce—are necessary to (1) remedy the prejudice to Plaintiffs of being unable to obtain and investigate highly relevant information, (2) punish Defendant Salt Lake County and Defendants’ counsel for

produced, the absence of a written order does not preclude the entry of a default judgment for failure to comply.”).

²⁹ *Hall v. Leon Cty. Bldg. Supply Co.*, 84 F.R.D. 372, 372 (N.D. Fla. 1979).

their flagrant bad faith and cavalier disregard of the Court's Order, and (3) deter others from similarly disregarding the orders of the Court.

CONCLUSION

The disregard of the Court's Order and the pattern of discovery abuses by Defendant Salt Lake County and by Defendants' counsel, as demonstrated here and in Plaintiffs' prior motions for sanctions [ECF 97 and 98], merit intervention and severe sanctions by this Court.

DATED this 22nd day of March 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter M. Mason

Walter M. Mason

Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

In compliance with the word-count limit of DUCivR 7-1(a)(3)(C), I certify that the foregoing Motion For Sanctions and to Hold Defendant Salt Lake County and Defendants' Counsel In Contempt For Failure To Comply With the Court's Order and Memorandum in Support contains 2,454 words, excluding the items that are exempted from the word count under DUCivR 7-1(a)(3)(C).

DATED this 22nd day of March 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter M. Mason

Walter M. Mason

Attorney for Plaintiffs