Ross C. Anderson (#0109)
Walter M. Mason (#16891)
LAW OFFICES OF ROCKY ANDERSON
The Judge Building
Eight East Broadway, Suite 450
Salt Lake City, Utah 84111
Telephone: (801) 349-1690
Fax: (801) 349-1682
rocky@andersonlawoffices.org
walter@andersonlawoffices.org

Attorneys for Plaintiffs

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, RONALD PAUL SEEWER, JR., BRENT LEE TUCKER, JOHN DOE, whose true name is unknown, and SALT LAKE COUNTY, a political subdivision of the State of Utah,

Defendants.

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS FOR DISCOVERY ABUSES RELATING TO DEPOSITIONS

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

Judge Bruce S. Jenkins

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I. INTRODUCTION

The discovery abuses by Defendants' counsel have been wholly at odds with the mandates that "the examination and cross-examination of a deponent [shall] proceed as they would at trial under the Federal Rules of Civil Procedure" and "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)." Rules 30(c)(1), (2), Federal Rules of Civil Procedure. For the severe and nearly constant abuses by Defendants' counsel, which have had the obvious effects of impeding, delaying, and frustrating "the fair examination of the deponent[s]," the Court should impose substantial sanctions, including fair restitution to Plaintiffs, pursuant to Rule 30(d)(2) and DUCivR 30-1, as well as the Court's inherent authority.[1]

Defendants' counsel have conceded that objections by them were made at the appalling rates of up to 28.72%, 43.95%, and 67.27% of the questions asked during

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[1] Defendants misrepresent the limits of the Court's inherent authority to impose sanctions for discovery abuse. Defendants' Opposition to Plaintiffs' Motion for Sanctions [ECF 116] ("Defendants' Opposition"), at 3–4. They misleadingly cite cases dealing only with fee shifting federal statutes, *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240 (1975), sanctions for a frivolous appeal, *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987), or considerations—not criteria—for the sanction of dismissal with prejudice, *Erenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992).

depositions.[2] Exhibit A to the Declaration of Ross C. Anderson ("Anderson Decl."), submitted herewith as Exhibit 1 ("Partial Encyclopedia of Improper Disruptive Interjections, Instructions, and Coaching by Defendants' Counsel" ("Partial Encyclopedia")), is comprised of excerpts from nine of twenty-one depositions taken by Plaintiffs so far, reflecting almost constant deposition interruptions, many of the thousands of baseless objections by Defendants' counsel, and numerous instances of improper instructions and coaching of witnesses by Defendants' counsel, organized under 27 categories, for the convenience (if not the enjoyment) of the Court.[3]

Making clear the appropriateness of sanctions in this matter, Defendants' counsel unrepentantly represent that their thousands of objections are "clearly contemplated and, indeed, required by Rule 30 of the Federal Rules of Civil Procedure . . . ."[4] They claim, incongruously, that what they have done is "[i]n furtherance of" Fed. R. Civ. P. 30(c)(2) and DUCiv R 30-1.[5] They expressly "stand

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[2] Defendants' Opposition, at 8.
[3] That "Partial Encyclopedia" was compiled to save this Court from the "boundless joy" experienced by another court, which felt compelled to "dive into the deposition transcripts" to determine if there was improper coaching of a deposition witness. *IPS Group, Inc. v. Duncan Solutions, Inc.*, No. 15cv1526-CAB-MDD, 2017 WL 3457141 (S.D. Cal. August 11, 2017) (unpublished), at *3, 4 (finding that objections constituted coaching, as evidenced at times when the witness's responses parroted the lawyer's objections).
[4] Defendants' Opposition, at 7.
[5] *Id*. at 8.

by" their promiscuous and baseless objections, downplaying their outrageous abuses of the rules governing depositions as "slights and petty offenses."[6] And, perhaps most galling, Defendants' counsel place the blame for their egregious deposition abuses on the Court, representing that, by making their thousands of baseless objections, coaching witnesses, and providing prohibited instructions to witnesses, they "have scrupulously adhered to the wishes of this Court: Do your job. Make your record."[7]

The sort of obnoxious and disruptive misconduct in which Defendants' counsel have engaged, completely at odds with Rule 30, is extraordinary enough that it was covered in an article in the online ABA Journal, headlined "Judge sanctions New York City after lawyer makes 600 objections in one deposition."[8]

Such stupendous disregard for the Rules, in a conspicuous effort to interfere with the efforts of Plaintiffs' counsel to ferret out the truth through the discovery process, cannot be condoned and should be sanctioned.

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[6] *Id.* at 11.
[7] *Id.* at 10.
[8]http://www.abajournal.com/news/article/judge_sanctions_city_for_lawyers_plethora_of_deposition_objections/?icn=most_read

II. DEFENDANTS' COUNSEL ENGAGED IN BLATANT, SANCTIONABLE COACHING OF DEPOSITION WITNESSES.

Defendants' counsel, Jacque Ramos, stated, under penalty of perjury, as follows:

> **I do not believe that I coached any witness** or otherwise contravened Rule 30(c)(2), even when faced with Plaintiffs' counsel utilizing vulgarity and demeaning remarks towards me both on and off the record.

Ramos Declaration [ECF 118], at 2, ¶ 2 (emphasis added).

Notwithstanding her effort to divert attention from this serious issue by a vague reference to one cuss word expressed by Mr. Anderson out of frustration regarding Ms. Ramos's unprofessional and disruptive misconduct (for which he apologized twice),[9] the crucial fact is that Ms. Ramos repeatedly violated Rule 30(c)(2) and DUCivR 30-1 by improperly coaching witnesses throughout this litigation, even after repeated requests by Plaintiffs' counsel that she refrain from doing so.

> Instructions to a witness that they may answer a question "if they know" or "if they understand the question" are raw, unmitigated coaching, and are *never* appropriate.

[9] Tucker Dep., Exhibit 52 to Exhibit A to Plaintiffs' Motion for Sanctions for Discovery Abuses Relating to Depositions [ECF 97-1] ("Plaintiffs' Motion"), 55:4–57:23.

Cincinnati Ins. Co. v. Serrano, No. 11-2075-JAR, 2012 WL 28071 (D. Kan. Jan. 5, 2012) (unpublished) (emphasis in original). *See also In re EpiPen Marketing, Sales Practices and Antitrust Litigation*, No. 17-md-2785-DDC-TJJ, 2018 WL 6617105 (D. Kan. December 14, 2018) (unpublished), at *1, 3 ("The court wouldn't tolerate a speaking objection like this one ["You can answer it, if you can, Ms. Bresch."] during a trial. And the Federal Rules of Civil Procedure make it equally impermissible during a deposition.") As one judge has expressed, in frustration with deposition misconduct like that of Ms. Ramos:

> If I was an elementary school teacher instead of a judge I would require both counsel to write the following clearly established legal rules on a blackboard 500 times:
>
> > I will not make speaking, coaching, suggestive objections which violate Rule 30(c)(2). . . . **I know I am prohibited from frustrating or impeding the fair examination of a deponent during the deposition. I know that constant objections and unnecessary remarks are unwarranted and frustrate opposing counsel's right to fair examination. I know that speaking objections such as "if you remember," "if you know," "don't guess," "you've answered the question," and "do you understand the question" are designed to coach the witness and are improper.**

Mazzeo v. Gibbons, No. 2:08-cv-01387-RLH-PAL, 2010 WL 3020021 (D. Nev. July 27, 2010) (unpublished), at *2 (emphasis added).

Among the many documented examples of Ms. Ramos's brazen coaching of deposition witnesses set forth in Anderson Decl., Exhibit B (which covers merely nine of the twenty-one depositions taken by Plaintiffs' counsel so far), are the following:

> **MS. RAMOS: Don't guess.**
> **MR. ANDERSON: Hey, you know, that is not an objection, for you to keep telling your witnesses don't guess and telegraphing it to them that they should say that they're just guessing, that it's speculative. It's so obvious what you're doing.**
> MS. RAMOS: **I'm not doing anything other --**
> MR. ANDERSON: Your role here is to object --
> MS. RAMOS: **-- than instructing him to not answer.**
> MR. ANDERSON: -- or if there's a privilege to instruct not to answer. That's it.
> **MS. RAMOS: All right. I instruct you not to speculate.**

Wilcox Depo., 102:10–103:1

> **MS. RAMOS: Would you be guessing?**
> THE WITNESS: Yes.
> MR. ANDERSON: **Okay. Let's quit with the coaching.**
> **MS. RAMOS: I'm not coaching. I'm just helping.**

H. Harris Depo., 130:17–23

The prejudice to Plaintiffs, and to the pursuit of the truth through the discovery process, is obvious. From the deposition transcripts, it is readily apparent that the flow of the examination was constantly interrupted; the witnesses were being manipulated like puppets by their lawyers (often parroting back in their answers the language of Ms. Ramos's "objections" or coaching comments); and the expensive depositions, paid for out of the dwindling resources of Plaintiffs' counsel, have been

made far lengthier and less coherent. No litigant, lawyer, or court should have to abide the bad faith obstructions and misconduct of Defendants' counsel.

III. NOTWITHSTANDING STATEMENTS BY DEFENDANTS' COUNSEL TO THE CONTRARY, SHE IMPROPERLY TOLD SEVERAL WITNESSES *NOT* TO ANSWER, OR INSTRUCTED THEM THAT THEY MAY *REFUSE* TO ANSWER, DEPOSITION QUESTIONS UNRELATED TO PRIVILEGED INFORMATION.

Defendants' counsel, Ms. Ramos, stated, under penalty of perjury, that "I believe that all questions posed to the deponents were answered unless an instruction based on privilege was asserted," Ramos Decl. at 3, ¶ 6, and that "**I was careful to instruct the witness to answer information that would not be covered by the privilege**." *Id*. at ¶ 7 (emphasis added). Those statements are categorically false.

In the clearest terms, Ms. Ramos instructed deposition witnesses not to answer, or that they were entitled to refuse to answer, certain questions unrelated to any privilege. A list of such instructions by Ms. Ramos, covering only seven of twenty-one depositions taken by Plaintiffs' counsel, is set forth in Anderson Decl., Exhibit C. Also, many of the instances in Exhibit B of Ms. Ramos's coaching of witnesses also comprise improper instructions not to answer, such as "I don't want you to guess" and "Don't guess."

Included among the several examples in Exhibit C are the following:

> MS. RAMOS: **I'm not doing anything other . . . than instructing him to not answer [on the ground of speculation].**

Wilcox Depo., 102:17–18, 12–22.

> MS. RAMOS: Wait a minute. Objection. Asked and answered. And to the extent that he has already answered, **he can refuse to answer** because he already provided an answer to your question, counsel.
> THE WITNESS: **It has been asked before, and I answered earlier.**

Seewer Depo., 193:4–9

> Q. No, no. I'm asking whether it's a violation of protocol --
> MS. RAMOS: Again --
> MR. ANDERSON: -- not to take the vitals if she was available?
> MS. RAMOS: -- Rocky, you've asked this five times. He's answered your question. Move on, please. **I will instruct him not to answer**. [10]

Seewer Depo., 166:15–22.

IV. THOUSANDS OF INTERRUPTIVE OBJECTIONS BY DEFENDANTS' COUNSEL WERE BASELESS AND IMPROPER

Throughout this litigation, Defendants' counsel behaved as if they were in a contest to see how many objections they could squeeze into every deposition, and as if they couldn't draw a breath without rotely uttering "no foundation, calls for speculation" or some other inapplicable set of objections. The mindless, uncivil interruptions with thousands of objections were relentless. Defendants themselves

[10] Curiously, Ms. Ramos states, under penalty of perjury, that she "never instruct[ed] [Seewer] to not answer." Ramos Decl. [ECF 118], at 5, ¶ 15. She also mischaracterizes her comment quoted here as merely requesting that Mr. Anderson "move on, please" "or I would not allow the questioning to continue as permitted under rule." *Id*. at 5, ¶ 14.

have counted the objections during some of the many depositions: 409 objections during the Lofgreen deposition; 424 during Beasley's; 442 during Lewis's; and 508 during Seewer's.[11]

Ms. Ramos has represented that, after the Seewer deposition (and after already objecting in depositions thousands of times), she "endeavored to object less and to make a record where I feel it crucial." Ramos Decl., at 8, ¶ 26. She may have "endeavored," but she certainly continued with her excessive, baseless objections during the deposition of William Harris,[12] which was taken less than a month after the Seewer deposition. An example of the extreme, bad faith endeavor of Defendants' counsel to come up with some—*any*—objection and interruption, no matter how absurd, follows:

> Q. When did you first learn that Lisa had died?
> MS. RAMOS: Objection. Assumes facts not in evidence.
> MR. MASON: That Lisa died?
> MS. RAMOS: No, that you are asking him – strike that. Objection. Foundation. How about that?

William Harris Depo., 20:5–13.

[11] Defendants' Opposition, at 8.
[12] The transcript of the William J. Harris Deposition is attached as Exhibit D to the Anderson Declaration. Ms. Ramos made 275 objections during that deposition.

A. Defendants' Counsel Interrupted Improperly, Saying Only "Objection" or "Form."

Defendants' counsel improperly interrupted questioning during depositions by simply objecting to "form," which is prohibited under DUCivR 30-1, and also simply stated "objection," which is likewise improper. Following are only two examples from the Partial Encyclopedia (Anderson Decl., Exhibit 1):

> Q. And it's true, is it not, that Frederickson did not tell you that Lisa had been screaming out and crying all night?
> **MS. RAMOS: Objection. Form.**

Tucker Depo., 117:24–118:2

> Q. He said nothing to you about severe abdominal pain, did he?
> **MS. RAMOS: Object.**

Tucker Depo., 120:3–5

B. Hundreds of Objections by Defendants' Counsel That Questions Were Vague, Mischaracterize Testimony, Assume Facts Not in Evidence, or Call for Speculation Were Wholly Improper and Baseless Interruptions to the Depositions.

While Plaintiffs' counsel was seeking relevant information in response to proper questions without characterizing the prior testimony of the witness, without assuming facts not in evidence, and without asking for the witness to speculate, Defendants' counsel interrupted several hundreds of times, objecting on the baseless grounds that the question was "vague," or that it "mischaracterized testimony," "assumed facts not in evidence," or called for speculation. Or some other wholly inapposite objection would be interjected, seemingly for no reason other than to

break the flow of the questions and answers, confuse the witnesses, and subvert the fact-finding that is to be facilitated by the discovery process. Among the hundreds of examples set forth in Anderson Decl., Exhibit A, are the following:

> Q. I'll show you what's been marked as Exhibit 2 for identification. Do you recognize that?
> **MS. RAMOS: Objection. Vague.**

Bates Depo., 38:25–39:2

> Q. How did she appear?
> **MS. RAMOS: Objection. Vague.**

Frederickson Depo., 88:5–6

> Q. How would you go about ensuring an inmate was transferred from a housing unit to an acute medical unit?
> A. It would take a physician's order.
> Q. And how would you request that physician's order?
> **MS. RAMOS: Objection.** Foundation; **assumes facts not in evidence**.

Seewer Depo., 263:16–24

> **Q. And did you take part in the drafting and promulgation of that policy?**
> **MS. RAMOS: Objection. Mischaracterizes testimony.** Go ahead.

Wilcox Depo.,74:10–13

> Q. How is Wellcon compensated by the county?
> A. The formula for that is a capitated rate based on the number of prisoner days in the jail.
> Q. How much per inmate per day?
> A. Well --
> MS. RAMOS: Objection. **Calls for speculation.** Go ahead.

Wilcox Depo., 90:2–8[13]

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[13] Wilcox is the Medical Director at the Jail and the founder and sole employee of Wellcon. Wilcox Depo. 7:23–25; 8:9–10;18–19.

CONCLUSION

Although frustrated and often appalled at the misconduct of Defendants' counsel, Plaintiffs' counsel endeavored, without having to resort to lengthy motion practice, to ameliorate the barriers Defendants' counsel have created to the efficient ascertainment of relevant information regarding the unnecessary and tragic death of Lisa Ostler. However, the misconduct of Defendants' counsel continued unabated, leading to the present motion.

Significant sanctions should be imposed, pursuant to Fed. R. Civ. P. 30(d)(2), and this Court's inherent power, including restitution for Plaintiffs, for the gross violations of Rule 30 and the overall abuses of the discovery process by Defendants' counsel throughout the course of this litigation.

Respectfully submitted this 2nd day of May 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Ross C. Anderson
Ross C. Anderson
Attorney for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

In compliance with the word-count limit of DUCivR 7-1(b)(2)(C), I certify that the foregoing PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS FOR DISCOVERY ABUSES RELATING TO DEPOSITIONS contains 2,499 words, excluding the items that are exempted from the word count under DUCivR 7-1(b)(2)(C).

DATED this 2nd day of May 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Ross C. Anderson
Ross C. Anderson
Attorney for Plaintiffs