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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, 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 AND TO HOLD SALT LAKE COUNTY AND DEFENDANTS' COUNSEL IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S ORDER

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

Judge Bruce S. Jenkins

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INTRODUCTION

Defendants and Defendants' counsel failed to produce records required to be produced by the Court's Order Granting in Part and Denying in Part Plaintiffs' Short Form Discovery Motion ("Order") [ECF 77]. The information contained in those records was sought by Plaintiffs for *over seven months*.[1] Defendants' failure to produce those records is one more major willful delay and obstruction in a long, unabating pattern of vexatious discovery abuses.

Plaintiffs and Plaintiffs' counsel respectfully urge the Court to issue significant sanctions, based on the totality of the circumstances reflected in Plaintiffs' three motions for sanctions [ECF 97, 98, and 105], in order to (1) remedy the severe harm suffered by Plaintiffs and Plaintiffs' counsel in terms of expense, inability to conduct follow-up discovery, and the incredible efforts required to address the unjustifiable obstructions and delays by Defendants and Defendants' counsel; (2) to punish Defendants and Defendants' counsel for their flagrant disregard for their duties pursuant to the applicable Rules of Civil Procedure and the orders of this Court; and (3) to deter lawyers, especially those at the Office of the Salt Lake County District Attorney, from engaging in such irresponsibility and dilatoriness.

[1] Declaration of Walter Mason, Exhibit "1" hereto, ¶ 1 and Exhibit "A" thereto.

ARGUMENT

I. Defendants and Defendants' Counsel Concede That Their Failure to Produce Records Constituted Contempt of the Court's Order.

Defendants and Defendants' counsel do not contest that from March 14, 2019, the deadline by which Defendants were to provide records pursuant to the Court's Order, until March 26, 2019, the date Defendants produced additional records (only after Plaintiffs' counsel inquired about them and filed a motion to hold Defendants and Defendants' counsel in contempt [ECF 105]), Defendants and Defendants' counsel were in contempt of the Court's Order. Instead of arguing their conduct does not constitute contempt, Defendants and Defendants' counsel contend, remarkably, that their "contempt borne [sic] out of inattention and oversight" does not warrant severe sanctions.[2]

II. Defendants' Failure to Comply with the Court's Order Warrants Significant Sanctions.

A. Primary Purposes of Rule 37 Are Punishment and Deterrence; Thus, Defendants Err by Claiming Sanctions Are Only Permissible for Remedial Purposes.

The rule of law should be vindicated, particularly when those who disregard the Court's orders are lawyers in the District Attorney's Office. Defendants misrepresent the law by asserting that "[b]ecause a contempt citation will

[2] Defendants' Opposition [ECF 112], 10.

accomplish no remedial purpose . . . Plaintiffs' motion should summarily be denied."[3] Primary purposes of Rule 37 sanctions are punishment and deterrence.

"Rule 37 sanctions must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent.' " *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 763–64 (1980) (alteration in original). *See also Quiles v. Beth Israel Med. Ctr.*, 168 F.R.D. 15, 18 (S.D.N.Y. 1996) ("Sanctions provided under Rule 37 serve several purposes: to ensure that the parties comply with court orders in the particular case; to serve as a specific deterrent by penalizing those whose conduct warrants sanction; and to provide a general deterrent effect." (citations omitted)); *Bankatlantic v. Blythe Eastman Paine Webber, Inc.*, 130 F.R.D. 153, 154 (S.D. Fla. 1990), *aff'd*, 955 F.2d 1467 (11th Cir. 1992) ("Enforcement of the sanctions order is necessary to serve the punishment and deterrence goals of the rule and to vindicate the integrity of the Court and discovery process.").

Further, ". . . specific and general deterrence . . . are legitimate purposes for imposing the most serious sanctions under Rule 37 . . . ." *Blake Assocs., Inc. v. Omni Spectra, Inc.*, 118 F.R.D. 283, 293 (D. Mass. 1988) (citations omitted). *See also Altschuler v. Samsonite Corp.*, 109 F.R.D. 353, 356 (E.D.N.Y. 1986) ("The severe

[3] Defendants' Opposition [ECF 112], 11.

sanctions of dismissal and entry of judgment serve to punish litigants whose conduct is 'sufficiently flagrant to warrant such a sanction and to deter those who might be tempted to engage in dilatory conduct ...' " (citations omitted)). *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991) (rejecting argument that "sanctions must be timely in order to have the desired deterrent effect").

B. The *Ehrenhaus* Factors Weigh in Favor of Entry of Default Judgment Against Defendant Salt Lake County.

For consideration of default judgment as a discovery sanction, the Tenth Circuit Court of Appeals has provided "a non-exclusive list of sometimes-helpful 'criteria' or guide posts the district court may wish to 'consider' in the exercise of what must always remain a discretionary function." *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1323 (10th Cir. 2011).

> We have . . . suggested various factors a district court may wish to consider when deciding whether to exercise its discretion to issue a dismissal sanction: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions."

Id. (quoting *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir.1992)).

1. Plaintiffs Have Been Highly Prejudiced by Defendants' Many Serious Discovery Abuses.

The failures and refusals by Defendants and Defendants' counsel to provide information in response to discovery requests, including when ordered by the court, has prejudiced Plaintiffs because (1) the close of fact discovery is pending and Defendants have withheld vital information, documents, and the identities of witnesses until such a late date that Plaintiffs cannot adequately conduct discovery; (2) Plaintiffs' counsel has been forced to spend extraordinary time and resources to ferret out the truth from Defendants; and (3) Plaintiffs and their counsel have frequently been placed in the dilemma of either seeking relief from the Court for Defendants' discovery abuses or engaging in other activities necessary to prepare the case for trial—all of which aids Defendants' efforts to delay the proceedings and obstruct discovery. *See, e.g., EBI Securities Corp., Inc. v. Hamouth*, 219 F.R.D. 642 (D. Colo. 2004) ("Without these documents, EBI could not pursue other key discovery, such as taking Mr. Hamouth's deposition. The Hamouth Defendants' refusal to produce this information and documents even in the face of an order compelling them to do so added to this prejudice by further delaying this action and causing EBI to incur additional fees and costs.").

2. The Willful Failure by Defendants and Defendants' Counsel to Comply with a Court Order Is Per Se Interference with the Judicial Process.

Defendants' assertions that "but for Plaintiffs [sic] rush to court, there would be" no "interference with the judicial process," are contrary to holdings of the Tenth Circuit Court of Appeals:

> The second factor, interference with the judicial process, also supports the district court's action. When he wilfully failed to comply with a direct court order, Ehrenhaus flouted the court's authority. As Judge Sparr noted in his order dismissing the case, "If this debtor could ignore court orders here without suffering the consequences, then [the district c]ourt cannot administer orderly justice, and the result would be chaos."

Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992) (citation omitted) (alterations in original).

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.' " *In re Standard Metals Corp.*, 817 F.2d 625, 628–29 (10th Cir.1987), *modified on other grounds sub nom Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383 (10th Cir. 1987). (Defendants' Memorandum misleadingly omits from the definition of "willful failure" that "no wrongful intent need be shown."[4])

[4] Defendants' Opposition [ECF 112], 11.

The "courts that have concluded that the failure to comply with a discovery order was not willful have emphasized the *inability* of the party to comply with the order." *Id.* at 629 (emphasis added). Here, Defendants and Defendants' counsel have not contended they were *unable to comply* with the Court's Order. Their failure to comply with the Court's Order was "willful," or, at the very least, inexcusably reckless, and *must* be sanctioned.

> [W]here gross professional negligence has been found that is, where counsel clearly should have understood his duty to the court the full range of sanctions may be marshalled. Indeed, in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where, as in this case, they are clearly warranted.

Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2nd Cir. 1979) (cited with approval by *Joplin v. Southwestern Bell Telephone Co.*, 671 F.2d 1274, 1276 (10th Cir. 1982).

3. Defendants and Defendants' Counsel Are Culpable Because They Have Offered No Justification for Their Disregard of the Court's Unambiguous Order for an Entire Month After It Was Issued.

"Defendants' counsel concede . . . . counsel failed to read the Order closely enough, and incorrectly assumed the [documents produced *prior* to the Court's Order] satisfied the Court's directive."[5] Nothing in the record reflects that

[5] Defendants' Opposition [ECF 112], 9.

Defendants or Defendants' counsel did *anything* in the one-month period after the Court's Order to attempt to comply with the Court's Order. Indeed, Defendants' statement of "Pertinent Facts" skips from February 22, 2019, the date of the Court's Order, to March 22, 2019, the date on which Plaintiffs' counsel inquired of Defendants' counsel about the records they had failed to produce.

"A court order puts an attorney and his client directly on notice of the specific behavior that is demanded of them." *Tom v. S.B., Inc.*, 280 F.R.D. 603, 611 (D.N.M. 2012). The failure to produce records could not have been due to mere inadvertence because the portion of the order that Defendants and Defendants' counsel disobeyed was specifically contested, at length, by the parties.[6]

It strains believability for Defendants' counsel to contend that the lawyers who repeatedly argued the point failed to notice that the Court ruled against them. At minimum, the disregard of this Court's Order was reckless and displayed flagrant disregard for Defendants' duty to *diligently* comply.[7]

[6] Plaintiffs' Motion [ECF 105], 8–10 ¶¶ 1–7.

[7] *See, e.g., Catheter Connections, Inc. v. Ivera Med. Corp.*, No. 2:14-CV-70-TC, 2015 WL 93881, at *3 (D. Utah Jan. 7, 2015) (unpublished) ("A party will not be held in contempt if it was 'reasonably diligent and energetic in attempting to accomplish what was ordered.' " (citation omitted)).

III. The Totality of Vexatious Discovery Abuses Warrants Entry of Default Judgment.

The Court should "consider the full record" in determining the appropriateness of default judgment.[8] Plaintiffs' motions for sanctions [ECF 97, 98, and 105] describe a history of abuse—vexatiousness, dilatoriness, and obstruction—that has permeated all methods of discovery:[9]

1) Refusing to provide witnesses' contact information and only providing the District Attorney's phone number and address;[10]

2) Refusing to answer whether Defendants' counsel would accept service of subpoenas directed to witnesses for whom only the District Attorney's phone number and address were provided;[11]

3) Obstructing and delaying Plaintiffs' deposition of Defendant Ron Seewer for nearly two months, without any justification or explanation;[12]

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[8] *See National Hockey League v. Met. Hockey Club, Inc.*, 427 U.S. 639 (1976).
[9] *George v. Hamilton, Inc. v. Everett Co., Inc.*, 104 F.R.D. 106, 110 (W.D. Penn. 1985) (entering default judgment sanction and noting "[t]hree methods of discovery have been employed" and "[t]he history of dilatoriness permeated all of them"). *See also Michigan Window Cleaning Co. v. Martino*, 173 F.2d 466 (6th Cir. 1949) (affirming default judgment sanction where "[a]t every stage of the proceedings [the movants] were harassed by dilatory tactics.").
[10] Anderson Declaration [ECF 97-1], 1–6, 69–70.
[11] *Id.*, 1–6.
[12] *Id.*, 6–8.

4) Submitting interrogatory answers without verifications, which answers were later disclaimed by those supposedly answering the interrogatories; [13]

5) Providing lone signed verification pages in connection with answers that at least one Defendant had not read;[14]

6) Providing false interrogatory answers that failed to disclose extensive discipline of Defendant Frederickson and Defendant Harris at the Salt Lake County Jail for major instances of misconduct;[15]

7) Failing to timely inquire about who communicated with Lisa Ostler and taking more than five months after Plaintiffs' discovery requests to disclose that Scott Sparkuhl communicated with Lisa and other inmates through their intercom buttons throughout the night before Lisa's death;[16]

8) Obstructing deposition testimony by making thousands of baseless objections, which, according to Defendants' own calculations were raised at rates as alarmingly high as more than two objections for every three questions asked of a deponent and totaled as many as 508 objections for a single deponent.[17]

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[13] *Id.*, 8.
[14] *Id.*, 8–11.
[15] *Id.*, 67–69.
[16] *Id.*, 14–18.
[17] Defendants' Memorandum in Opposition [ECF 116], 8.

9) Repeatedly making inappropriate commentary during depositions with the obvious intent and effect of coaching witnesses;[18]

10) Repeatedly giving improper instructions to deponents to refrain from answering questions when no privilege was involved;[19]

11) Misrepresenting to the Court, under penalty of perjury, that Defendants' counsel did not coach witnesses and was careful to have witnesses answer questions when a privilege was not asserted.[20]

12) Failing to produce documents—including the "Inmate Handbook" and a list of individuals invited to provide information in a Morbidity and Mortality Review relating to Lisa's Death—that were in Defendants' possession, were within the scope of Plaintiffs' requests for documents, were not identified on a privilege log, and were of central importance to Plaintiffs' discovery efforts;[21]

13) Bizarrely grabbing Plaintiffs' counsel by the shoulders at a deposition;[22]

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[18] Declaration of Ross C. Anderson ("Second Anderson Declaration") [ECF 146-1], 7–26.
[19] Second Anderson Declaration [ECF 146-1], 550–60.
[20] Declaration of Jacque Ramos [ECF 118], ¶¶ 4, 6–7, 14, 19–20.
[21] Anderson Declaration [ECF 97-1], 70–72 ¶¶ 68–71; Declaration of Walter Mason, ¶¶ 2–11.
[22] Anderson Declaration [ECF 97-1], 69–70, ¶ 67.

14) Filing a document bearing Mr. Anderson's electronic signature without any authorization by Mr. Anderson;[23]

15) Reviewing a document during a deposition that Plaintiffs had identified as inadvertently produced attorney work product;[24] and

16) Disobeying the Court's Order to produce, by a date certain, medical records for all individuals Defendants identified in response to Plaintiffs' Interrogatory No. 8.

CONCLUSION

The failure by Defendants and Defendants' counsel to exercise even minimal diligence in complying with the Court's Order and with rules governing litigation practice must be significantly sanctioned. Otherwise, they and future litigants will believe they are free to similarly disregard other orders of this Court. Also, a significant sanction is necessary to communicate to attorneys from the Office of the Salt Lake County District Attorney that disregard of this Court's orders and applicable rules of procedure will carry serious consequences.

[23] *Id.* at 72–73 ¶¶ 72–73.
[24] Mason Declaration [ECF 98-1], 2–4 ¶¶ 1–4.

DATED this 3rd day of May 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(b)(2)(C), I certify that the foregoing PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS AND TO HOLD SALT LAKE COUNTY AND DEFENDANTS' COUNSEL IN CONTEMPT FOR FAILURE TO COMPLY WITH THE COURT'S ORDER contains 2,469 words, excluding the items that are exempted from the word count under DUCivR 7-1(b)(2)(C).

DATED this 3rd day of May 2019.

LAW OFFICES OF ROCKY ANDERSON

/s/ Walter M. Mason
Walter M. Mason
Attorney for Plaintiffs