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 WRITTEN DISCOVERY AND DISCLOSURES

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

Judge Bruce S. Jenkins

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

INTRODUCTION

Plaintiffs seek justice for the unnecessary death of Lisa Ostler, Plaintiffs' beloved mother and daughter. Throughout discovery in this matter, Plaintiffs have been repeatedly delayed and obstructed from discovering the truth about what happened to Lisa because Defendants and Defendants' counsel—through inattention, carelessness, unprofessionalism, lack of accountability, flagrant disregard of their responsibilities, and willful dilatoriness, vexatiousness, and obstruction—have reduced the discovery process to a shell game that is impracticably expensive and oppressive to Plaintiffs and Plaintiffs' counsel.[1]

Defendants' months-long vexatious discovery abuses have cost Plaintiffs and Plaintiffs' counsel enormously in time and money. They have also prevented and obstructed Plaintiffs from conducting reasonable and necessary discovery to prepare for trial. Defendants make light of their misconduct, characterizing it as a "recitation of slights" for "varying degrees of mishaps."[2] Understating their misconduct in such

[1] *Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1322 (10th Cir. 2011) (affirming dismissal discovery sanction and noting "Discovery is not supposed to be a shell game, where the hidden ball is moved round and round and only revealed after so many false guesses are made and so much money is squandered.").

[2] Defendants' Memorandum in Opposition [ECF 120] ("Defendants' Memorandum"), 6, 9.

a fashion, with a cavalier disregard of the rules and belittling the serious impact their discovery abuses have had on Plaintiffs and Plaintiffs' counsel, further emphasizes the need for severe sanctions.

ARGUMENT

I. The Vexatious Discovery Abuses by Defendants and Defendants' Counsel Were Unjustified and Merit Substantial Sanctions.

A. The Failures by Defendants and Defendants' Counsel to Abide by the Federal Rules of Civil Procedure Were Unjustified.

Defendants assert it is Plaintiffs' burden to show that the discovery abuses by Defendants and Defendants' counsel were *not* substantially justified.[3] Defendants cite no authority and are incorrect. The burden of showing substantial justification under Rule 37, Federal Rules of Civil Procedure, is upon the party who failed to meet its discovery obligations.[4] Defendants had no substantial justification (1) for their frivolous motions for protective orders [ECF 80 and 83], (2) for their baseless HIPAA objections, necessitating a successful motion to compel [ECF 46], or (3) for

[3] Defendants' Memorandum [ECF 120], 9.

[4] *See, e.g., Wickware v. Manville*, 676 F. App'x 753, 765 (10th Cir. 2017); *Hirpa v. IHC Hosps., Inc.*, 50 F. App'x 928, 932 (10th Cir. 2002) ("Our analysis will focus exclusively on whether the district court abused its discretion in determining that the Hospital met its burden of demonstrating, under Rule 37(c)(1), that the failure to disclose the existence of the autopsy slides was substantially justified and harmless.").

their egregious discovery abuses described in Plaintiffs' three motions for sanctions [ECF 97, 98, and 105].

1. Defendants and Defendants' Counsel Provide No Justification for Their Refusal to Provide Contact Information for Witnesses or Even Answer Whether Defendants' Counsel Would Accept Service of Subpoenas on Their Behalf.

Under Rule 26(a)(1)(A), Federal Rules of Civil Procedure, a party must provide the "the name and, if known, *the address and telephone number*" of witnesses. "[D]isclosure of an attorney's address . . . is not sufficient."[5] Defendants and Defendants' counsel flout, first, the plain language of the rule, and second, the clear authority cited in Plaintiffs' Motion [ECF 98]. With no citation to *any* authority, Defendants and Defendants' counsel say it is "commonplace" to fail to disclose the witnesses' contact information and that "some courts have recently begun to question, and even depart from that practice."[6] That statement is untrue.

[5] *See, e.g., Hartman v. Am. Red Cross,* No. 09-1302, 2010 WL 1882002, *1 (C.D. Ill. May 11, 2010) (unpublished).

[6] Defendants' Memorandum [ECF 120], 6.

The text of Rule 26(a)(1)(A), since it was amended in 1993, as well as courts applying the rule *since at least 1996* in this circuit,[7] established the explicit duty to disclose known addresses and phone numbers.

Just as with Defendants' initial disclosures, Defendants' interrogatory answers failed to identify witnesses' addresses and phone numbers.[8]

The prejudice to Plaintiffs from not having the benefit of those witnesses' addresses and phone numbers was compounded when Defendants' counsel refused, for weeks at a time, to answer whether Defendants' counsel would accept service of subpoenas directed toward those witnesses.[9] After weeks of seeking an answer from Defendants' counsel, Plaintiffs were finally informed Defendants' counsel would *not* accept service on behalf of four witnesses.[10] Plaintiffs were left with no means to discover information from those witnesses, which caused harm to Plaintiffs (1) by

---

[7] *See, e.g., Dixon v. Certainteed Corp.*, 164 F.R.D. 685, 689 (D. Kan. 1996) (Interpreting Rule 26 as amended in 1993 and stating "[CertainTeed] has not disclosed, however, the addresses or telephone numbers of current employees. . . . Identification of individuals pursuant to Fed.R.Civ.P. 26(a)(1) includes providing their addresses and telephone numbers, if known. The rule expressly states as much.").

[8] Declaration of Ross C. Anderson ("Anderson Declaration") [ECF 97-1], 7 ¶¶ 1–3; 75–76 ¶¶ 81–82.

[9] Anderson Declaration [ECF 97-1], 8–12 ¶¶ 4–12.

[10] Anderson Declaration [ECF 97-1], 9 ¶¶ 7–8.

not allowing Plaintiffs to timely acquire information from those witnesses that could be built upon in further discovery; and (2) forcing Plaintiffs' counsel to expend time and resources addressing Defendants' inadequate disclosures and unjustifiable refusals to provide information.[11] Plaintiffs' counsel has been tenacious and, eventually, after tremendous delay and expense, was able to conduct many depositions—but that does not repair the harm done to Plaintiffs.

2. There Can Be No Justification for Defendants' Counsel Providing Interrogatory Answers That Were Not Verified and That Included Incorrect Answers and Answers at Least One Defendant Had Never Seen Before Her Deposition.

Defendant Harris testified the first time she saw her final interrogatory answers was during her deposition. Defendants do not contradict that fact.[12] Defendants do, however, blatantly misrepresent Defendant Harris's testimony by saying she testified she "could not recall at the time of her deposition whether she

[11] Anderson Declaration [ECF 97-1], 11–12, ¶ 12. *See also Saria v. Massachusetts Mut. Life Ins. Co.*, 228 F.R.D. 536, 540 (S.D.W. Va. 2005) ("This sparring wastes the parties' own valuable discovery time and ultimately forces the court to clean up a mess which could have been altogether avoided.").

[12] Anderson Declaration [ECF 97-1], 15 ¶ 26. Iris Pittman testified she emailed the "final version" to Ms. Harris, but does not state on what date or whether that occurred before or after Ms. Harris's deposition. Declaration of Iris Pittman [ECF 122], 3 ¶ 10. The "Pertinent Facts" described in Defendants' Memorandum [ECF 120] 4 ¶ 3 state the communication occurred in "late September," but does not refer to any declaration testimony supporting that purported "fact."

had, in fact, reviewed the proposed final answers prior to signing her verification."[13] Defendant Harris's testimony, including "there are things on here that I did not answer," unequivocally expressed she *had not* seen the answers prior to her deposition.[14]

Defendants do not dispute the answers to interrogatories submitted by Defendants Harris, Frederickson or Tucker were not verified when they were served on Plaintiffs, in violation of Rule 33(b)(5), nor have they ever explained the inappropriate forms of verification used on behalf of Defendants, which were not made personally but were made in Defendants' "capacities" of their employment.[15] *See Saria v. Massachusetts Mut. Life Ins. Co.*, 228 F.R.D. 536, 540 (S.D.W. Va. 2005) ("The failure to meet the simple requirement of providing verification can only be seen as a flagrant disregard of these Rules, Advisory Notes, and case precedents."); *Cabales v. United States*, 51 F.R.D. 498, 499 (S.D.N.Y. 1970), *aff'd*, 447 F.2d 1358 (2d Cir. 1971) (unsigned and unverified document "does

[13] Defendants' Memorandum [ECF 120], 5 ¶ 10.

[14] Anderson Declaration [ECF 97-1], 15 ¶ 26 ("Q. . . . until today you haven't seen Exhibit 2 [Answers to Interrogatories] with the answers to those interrogatories; is that correct? A. That is correct.").

[15] *See, e.g.*, Anderson Declaration [ECF 97-1], 296.

not qualify as an answer" to interrogatories). The inappropriate form of the verifications led to further distraction during the deposition of Todd Booth, as reflected in ECF 146-1 at pages 13–14.

Defendants have provided no justification for the false answers submitted on behalf of Defendants Harris and Frederickson that failed to disclose their extensive disciplinary histories. Each of their interrogatory answers denied *any* disciplinary actions taken against them.[16] Those statements were wholly belied by documents produced by Defendants' counsel on *the same day* and constituted a glaring violation by Defendants' counsel of Rule 26(g)(1)(B)(i).[17]

"Pertinent Facts" 9 and 10 of Defendants' Memorandum also misrepresent the testimony of Defendant Tucker—who testified, with respect to his answers to interrogatories, "I didn't write that," "I just misread it," "[t]hat sounds like my friend's statement," and "I don't recall [if the statement is untrue]."[18]

[16] Anderson Declaration [ECF 97-1], 73 ¶¶ 75–76.

[17] Anderson Declaration [ECF 97-1], 73 ¶ 77.

[18] Anderson Declaration [ECF 97-1], 11–13 ¶ 29; 252–23; Defendants' Memorandum [ECF 120], 5 ¶¶ 9, 10 (listing questions then stating Frederickson and Tucker "responded affirmatively").

3. There Is No Justification for the Failure by Defendants and Defendants' Counsel to Make Timely Inquiry Regarding Basic, Critical Facts, Such as Who Communicated with Lisa.

Defendants provide no evidence that they, or their counsel, conducted diligent investigation to comply with their responsibilities in discovery in this matter. They state it was "daunting" to determine "who may have come into contact" with Lisa. However, it could not have been "daunting" for Defendants to refer to the logs in their possession, which identify the employees who were in the Jail's Central Control on the night of April 1, 2016, to determine who received communications from Lisa the night on which Plaintiffs' Complaint describes Lisa repeatedly pressing the emergency button in her cell.[19]

Similarly, Defendants' counsel failed, for months, to provide the "Inmate Handbook" that witnesses testified was, or should have been, provided to Lisa, and which Defendants' counsel falsely indicated to Plaintiffs' counsel did not exist "in paper copy." [20]

[19] *See* Anderson Declaration [ECF 97-1], 21–24 ¶¶ 36–40.

[20] Anderson Declaration [ECF 97-1], 70–72 ¶¶ 68–71.

Defendants argue the Salt Lake County Jail is a large organization and it is difficult to communicate with its employees.[21] Defendant Salt Lake County cannot escape accountability on that basis; it "is charged with knowledge of what its agents know, or what is in records available to it. . . ."[22]

As the Tenth Circuit Court of Appeals has explained, counsel *personally* have a duty to ensure the accuracy of disclosures and discovery responses:

> "[T]rial counsel must exercise some degree of oversight to ensure that [a client's employees, including in-house counsel] are acting competently, diligently and ethically in order to fulfill their responsibility to the Court [with respect to discovery]." "Counsel has an obligation to assure that the client complies with discovery obligations and court orders" and, thus, "*[c]areful inquiry by counsel* is mandated in order to determine the existence of discoverable documents and to assure their production." *See generally* Fed.R.Civ.P. 26(g)(1)(A) (by signing disclosures required under Rule 26(a), counsel certifies that "to the best of [his] knowledge, information, and belief *formed after a reasonable inquiry*," a disclosure "is complete and correct as of the time it is made" (emphasis added)).

Sun River Energy, Inc. v. Nelson, 800 F.3d 1219, 1229 (10th Cir. 2015) (emphasis and alterations in original) (citations omitted).

---

[21] Defendants' Memorandum [ECF 120], 6.

[22] *Oklahoma v. Tyson Foods*, Inc., 262 F.R.D. 617, 629 (N.D. Okla. 2009) (quoting 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2024 (3d ed. 1998)).

4. Defendants' Counsel Have Not Justified the Use of a Document Identified by Plaintiffs' Counsel as Attorney Work Product.

The text of Rule 26(b)(5)(B), Federal Rules of Civil Procedure, required Defendants' counsel to "promptly return, sequester, or destroy" a document that Plaintiffs' counsel identified as inadvertently produced attorney work product. Instead, three days after being informed of the inadvertent production, Defendants' counsel brought the document to the deposition of Plaintiff Cal Ostler and read it to herself while questioning him.[23] Defendants' counsel obviously knew she was looking at a document that was identified as inadvertently produced because, when confronted about her use of the document, her response was to argue as follows: "I have not discussed anything that was contained on that document today, but I have an ability to ferret out the privilege, to ask questions with respect to whether that privilege is sound."[24]

5. Defendants' Counsel Admit They Had No Reason to Believe Mr. Anderson Authorized the Use of His Electronic Signature.

[23] Mason Declaration [ECF 98-1], 2 ¶¶ 1–2.

[24] *Id*., 2–4 ¶ 2.

The sworn testimony of Defendants' counsel is that Mr. Anderson "took only the Stipulated Motion" and did not take the draft proposed order.[25] Neither did Ms. Ramos "take" the proposed order from her assistant.[26] Because he did not receive the proposed order, Mr. Anderson could not have reviewed it nor authorized Defendants' counsel to affix his electronic signature to it. Mr. Anderson "first saw the proposed order three hours *after* it was filed with the Court" with his signature and the false certification regarding his supposed authorization to affix his signature to the document.[27]

6. In Addition to the Written Discovery Abuses Described in Plaintiffs' Motion, Defendants Failed to Produce, Until April 21, 2019, the Names of Individuals Who Were Invited to a Morbidity and Mortality Review Regarding Lisa's Death.

Defendants have, in all avenues of discovery, attempted to thwart Plaintiffs' discovery of information relating to the Morbidity and Mortality Review of Lisa's death.[28] Only days ago, with the window for fact discovery quickly closing, Defendants provided the names—but no other identifying information—regarding

[25] Declaration of Jacque Ramos [ECF 121], 7 ¶ 23.

[26] Declaration of Iris Pittman [ECF 122], ¶ 19.

[27] Anderson Declaration [ECF 97-1], 72, ¶ 73.

[28] Declaration of Walter Mason [ECF 147-1], 1–6 ¶¶ 2–11.

24 individuals who were invited to the Morbidity and Mortality Review of Lisa's death.[29] That document had never been identified in a privilege log.[30] If Defendants contended the document was privileged, "the correct course of action was to come forward and claim this privilege, not to remain silent . . . ." *Reyes-Santiago v. JetBlue Airways Corp.*, 932 F. Supp. 2d 291, 298 (D. Puerto Rico 2013) (entering default judgment as sanction for numerous discovery abuses).

Because of Defendants' dilatoriness in disclosing those individuals' names, Plaintiffs are foreclosed from first propounding written discovery about those individuals then deposing those determined to have relevant info. Characteristically, Defendants have not provided those individuals' contact information, which would allow Plaintiffs to speak with the witnesses directly.

CONCLUSION

The pervasive pattern of dilatoriness, obstruction, recklessness, and vexatious discovery abuses by Defendants and Defendants' counsel warrants a sanction of default judgment or an order excluding evidence and witnesses and establishing certain facts as true. In either case, Defendants or Defendants' counsel should be

[29] *Id.*, 2–3 ¶ 7.

[30] *Id.*, 3 ¶ 8.

ordered to pay the costs and attorneys' fees incurred during discovery and in connection with Plaintiffs' three motions for sanctions.

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 REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SANCTIONS FOR DISCOVERY ABUSES RELATING TO WRITTEN DISCOVERY AND DISCLOSURES contains 2,500 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