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 Plaintiff

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

CALVIN DONALD OSTLER, as personal representative of the Estate of Lisa Marie Ostler, Plaintiff, v. HOLLY PATRICE HARRIS, ZACHARY PAUL FREDERICKSON, TODD ALLAN BOOTH, RONALD PAUL SEEWER, JR., BRENT LEE TUCKER, and SALT LAKE COUNTY, a political subdivision of the State of Utah, Defendants.	**PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANTS FOR FAILURE TO PRESERVE ELECTRONICALLY STORED EMAILS AND RADIO COMMUNICATION RECORDINGS RELATING TO LISA OSTLER** Case No. 2:18-cv-00254-001 Judge Bruce S. Jenkins

Pursuant to Fed. R. Civ. P. 37(e)(1) and (2), Plaintiff moves the Court to sanction Defendants for the blatant violations by Salt Lake County ("County") and Defendants' counsel of their duty to preserve electronically stored emails and radio communication recordings relating to Lisa Ostler ("Lisa").

Under Rule 37(e), sanctions are proper if electronically stored information should have been preserved in anticipation of litigation, the information was lost because a party did not take "reasonable steps" to preserve the information, and the information "cannot be restored or replaced through additional discovery."

Here, as of at least April 7, 2016, the County was on notice that litigation regarding Lisa's death was imminent and that it had a duty to preserve *all* electronically stored information related to Lisa, including "[e]-mail correspondence to, from, or about [Lisa]" and "audio recordings" "of or about [Lisa]."[1] Defendants' counsel[2] did not conduct any effective follow-up regarding the Litigation Hold Letter, and the County, pursuant to admitted, deliberate, evidence-destroying

[1] *See* April 7, 2016, Letter ("Litigation Hold Letter") from the Salt Lake County District Attorney's Office ("D.A.'s Office"), Exhibit "A" to the Declaration of Walter Mason ("Mason Decl."), Exhibit "1" hereto; Deposition of Kathy Berrett ("Berrett Depo."), Exhibit "B" to Mason Decl., 65:2–5.

[2] Counsel have a duty, beyond providing a litigation hold letter, to ensure preservation of all evidence. *Browder v. City of Albuquerque*, 187 F.Supp.3d 1288, 1295 (D. N.M. 2016).

customs, did *nothing* to preserve highly relevant emails about Lisa and radio recordings. As a result, that crucial evidence, once existing, is now irretrievably lost.

I. IN VIOLATION OF THEIR DUTY TO PRESERVE ELECTRONICALLY STORED EVIDENCE, THE COUNTY INTENTIONALLY DESTROYED, AND DEFENDANTS' COUNSEL PERMITTED THE DESTRUCTION OF, HIGHLY RELEVANT EMAILS AND RADIO RECORDINGS.

A. The County Admits it Failed to Preserve at Least Four Emails Reflecting Lisa's Communications About Her Medical Condition and at Least One Email Identifying Key Witnesses.

After issuance of the Litigation Hold Letter, the County had the duty and capacity to preserve all emails relating to Lisa before they were permanently destroyed.[3] As testified to by Kathy Berrett, the County's designated witness,[4] even if an email user, such as a housing officer or nurse, *deleted* emails about Lisa then emptied the "deleted" folder, the email would be accessible for 180 days, and if the email user took even one further step and "purged" the "deleted-deleted" folder, the email would potentially *still* have been available for up to 30 days.[5]

Despite its duty and ability to preserve emails, the County, including the D.A.'s Office, did *nothing* to *ensure* the emails of guards and nurses regarding Lisa

[3] Berrett Depo., 30:20–33:22.

[4] Mason Decl., ¶ 3, Exhibit "B."

[5] Berrett Depo., 73:15–76:22.

were preserved.[6] Rather, the County had a custom of *not* preserving the emails of any guards or nurses relating to in-custody deaths.[7] By custom, retention was entirely discretionary.[8] Astoundingly, the County contends it was the responsibility of the guards and nurses to preserve their emails relating to Lisa, yet admits no one informed them to preserve emails regarding Lisa.[9] Further, the County and the Salt Lake County Jail ("Jail") did not designate *anyone* as being ultimately responsible for preserving such emails.[10] The County even admits the leadership of the Jail knew that guards and nurses commonly sent emails about detainees, yet failed to do *anything* to ensure such emails about Lisa were preserved.[11]

---

[6] *Id.*, 32:9–33:5; 33:13–22; 36:8–11; 39:21–40:9; 46:5–11; 57:14–22; 62:24–63:11; 65:23–66:12; 67:1–24; 77:4–17; 92:8–18.

[7] *Id.*, 32:17–35:1 (testifying hold on emails of guards or nurses must be ordered by Division Administrator, but it was the County's custom for those administrators to *not* place a hold on *any* guards' or nurses' emails in the event of an in-custody death); 46:5–11; 58:14–18; 62:10–16; 63:23–64:7; 77:18–23.

[8] *Id.*, 35:2–15; 36:20–37:3; 40:13–18; 41:19–23; 42:23–43:19; 44:16–21; 45:6–18.

[9] *Id.*, 58:14–63:5; 92:8–12.

[10] *Id.*, 77:24–78:16.

[11] *Id.*, 72:25–73:14.

According to routine practices at the Jail, *which Defendants misleadingly failed to disclose in response to written discovery*,[12] guards sent emails to sergeants and nursing supervisors each time a detainee did not accept a meal tray.[13] The County admits failing to preserve four such emails corresponding to four of Lisa's meals ("Missed Meal Emails").[14] Those emails would have contained "the communications by Lisa Ostler to the Housing Officer about why she was refusing the meal."[15]

Depriving Plaintiff of that immensely relevant evidence is severely prejudicial because it goes to the critical issue of what Defendants knew about, and the obviousness of, Lisa's condition. Plaintiff contends that Lisa *must* have communicated to guards her extreme pain and distress and her urgent need for medical assistance. Defendants, on the other hand, contend the obviously incomplete

---

[12] Plaintiffs propounded the interrogatory: "Describe in detail the practices and policies of the Salt Lake County Metro Jail when an Incarcerated Person does not eat one or more meals." Mason Decl., ¶ 5, Exhibit "D." In total misdirection from the truth, the answers to that interrogatory did not disclose the mandatory, widespread custom of sending emails about missed meals. *Id. See also infra* n.21. Plaintiff only learned of this practice, by chance, when deposing Officer William Harris, who is not a party to this action. Mason Decl., ¶ 6, Exhibit "E."

[13] Berrett Depo., 47:2–22.

[14] *Id.*, 51:11–23.

[15] *Id.*, 50:1–6.

record reflects a "lack of any complaints of abdominal pain by Lisa Ostler."[16] Defendants cannot benefit from their failure (or the failure of their counsel) to preserve evidence by asserting, *after* spoliation, that the largely spoliated evidence does not reflect that Lisa complained about abdominal pain.

Not only were those highly relevant emails destroyed, to the prejudice of Plaintiff, that destruction was *intentional*.

> Q. So, despite an instruction from the District Attorney's Office to preserve all e-mails, it was the custom at the jail in April of 2016 to *deliberately not* retain transitory e-mails; is that correct?
>
> A. That's correct.
>
> Q. And transitory e-mails included e-mails reflecting that an inmate missed a meal?
>
> A. Yes.[17]

No one knows what was in the Missed Meal Emails solely because the County and the D.A.'s Office wrongfully failed to preserve them. *Nowhere* is there any document reflecting the information contained in those spoliated emails, including

[16] Defs.' Opp. Pl.'s Mot. Disqualify Thomas D. Fowlkes as Expert Witness [ECF 201], at 12.

[17] Berrett Depo., 91:17–25 (emphasis added). *See also id.*, 84:21–85:10.

the sender, recipients, and time of the emails or "the communications by Lisa Ostler to the Housing Officer about why she was refusing the meal."[18]

The County also admits it failed to preserve an email ("Move List Email") reflecting the names of numerous key eyewitnesses[19]—detainees who were transferred out of Unit 5C at the same time as Lisa, who likely observed Lisa's obvious severe medical condition during the period for which the County failed to preserve video recordings.[20] Again, *Defendants misleadingly failed to disclose the existence of such an email in response to discovery*.[21] Because of the spoliation of the Move List Email, almost all of those witnesses' identities are unknown to Plaintiff. Plaintiff's counsel learned of two of those names for the first time on

[18] *Id.*, 29:5–30:4.

[19] *Id.*, 51:24–52:9.

[20] *See generally*, Plaintiff's Mot. for Sanctions for Failure to Preserve Video [ECF 203].

[21] Plaintiffs requested the production of all emails "that refer in any way to any part of the events of [Lisa's] incarceration" or her "medical condition." Mason Decl., ¶ 7, Exhibit "F." Plaintiffs' request included an instruction regarding documents that once were, but no longer are, in Defendants' possession. *Id.* However, Defendants did not disclose that the Movement List Email or the Missed Meal Emails ever existed or were destroyed. *Id.*

January 8, 2020,[22] after requesting that Defendants' counsel comply with the Court's order of nearly a year earlier that Defendants "identify the person."[23] Defendants' counsel falsely represented to the Court that Defendants *had* furnished those names.[24]

B. The County Admits It Failed to Do Anything to Preserve All Radio Transmission Recordings That Could Have Contained Communications Directly About Lisa.

Zelma Farrington, the County's designated Rule 30(b)(6) witness,[25] testified the County was able to preserve radio recordings,[26] the County is unaware of any radio channels that are not recorded,[27] and radio recordings are automatically retained for one year.[28] Despite all of that, and despite the instruction by the D.A.'s

---

[22] Mason Decl., ¶ 8, Exhibit "G."

[23] Hearing, January 22, 2019, [ECF 54], 96:7–25.

[24] THE COURT: Have you furnished those names to counsel?

MS. RAMOS: Yes. . . .

Id., 80:25–81:2.

[25] Mason Decl., ¶ 9, Exhibit "H."

[26] Deposition of Zelma Farrington ("Farrington Depo."), Exhibit "I" to Mason Decl., 58:23–59:5; 60:9–11.

[27] Farrington Depo., 12:4–11.

[28] *Id.*, 11:16–12:3; 12:12–15.

Office to preserve all audio recordings (but without any effective follow-up by Defendants' counsel), the County and its staff did *nothing* to ensure all radio recordings that related to Lisa were preserved.

> Q. Are you aware of anything done by Salt Lake County to preserve any radio records relating to Lisa Ostler?
>
> A. No. I am not.[29]

Testimony of the County's employees reflect that Lisa's obvious extreme medical condition was widely known in the Jail, despite there being no log of such communications.[30] Accordingly, the radio recordings during the time Lisa was incarcerated likely contained communications specifically about Lisa and her medical condition.

The destruction of the radio recordings is highly prejudicial to Plaintiff because the parties contest what was known and obvious to Jail staff about Lisa's

---

[29] *Id.*, 62:6–9.

[30] For example, Defendant Frederickson testified Sergeant Beasley "inform[ed] the room" of guards that "there was a female" on Unit 8C, Lisa Ostler, "that had been pushing her button all night" and to "be aware of her and keep an eye on her." Deposition of Zachary Frederickson, Exhibit "J" to Mason Decl., 92:7–93:2. Defendant Frederickson also testified that Defendant Harris told him that Lisa had "been crying and screaming all night." *Id.*, 100:21–101:6, 102:3–5. An employee in Central Control, Scott Sparkuhl, testified he was briefed on 4/1/2016 that Lisa "had been repeatedly calling in for medical care, medical attention," and "that she'd been doing this for several days." Deposition of Scott Sparkuhl, Exhibit "K" to Mason Decl., 41:16–25.

medical condition. Defendants cannot be permitted to destroy the radio recordings, then, on the basis there are no recordings, argue that no records reflect that Jail staff were communicating about Lisa's obviously serious medical condition.

Further, the County and its employees *deliberately* chose not to retain the radio recordings.[31] The County contends preserving that evidence "would not be a function" for the County because those records were possessed by Unified Police Department ("UPD").[32] However, a party's obligation to preserve evidence is not limited because the information is in the possession of a third party. *See, e.g., GenOn Mid-Atlantic, LLC v. Stone & Webster, Inc.*, 282 F.R.D. 346, 355 (S.D.N.Y. 2012) (spoliation sanction appropriate where party "had *either* the legal right or the practical ability to obtain [a third party's] documents" (emphasis in original)). Moreover, the County's justification shows that the County, as a matter of practice and custom, intentionally did nothing to obtain those records from UPD.

[31] Richard Bell, in fact, ordered the preservation of radio recordings from part of the morning Lisa was found unresponsive, *but for no other time*. Mason Decl., ¶ 13, Exhibit "L."

[32] Farrington Depo., 12:16–22; 58:9–59:5, 60:1–11.

II. THE COUNTY'S FAILURE TO PRESERVE EMAILS AND RADIO RECORDINGS RELATING TO LISA WAS INTENTIONAL; ACCORDINGLY, ESPECIALLY IN LIGHT OF THE DECEIT AND OBFUSCATIONS OF THE COUNTY AND ITS COUNSEL, AND THEIR BLATANT VIOLATIONS OF THEIR DUTY TO PRESERVE, THE COURT SHOULD ENTER DEFAULT JUDGMENT AGAINST THE COUNTY.

Under Rule 37(e)(2), "upon finding that the party acted with the intent to deprive another party of the information's use in the litigation," the Court may order an adverse inference or enter default judgment. Since the 2015 amendment to Rule 37, courts have routinely found *intentional* spoliation in circumstances far less egregious than the destruction of evidence in this matter.

For example, in *O'Berry v. Turner*, No. 7:15-CV-00064-HL, 2016 WL 1700403, *4 (M.D. Ga. Apr. 27, 2016) (unreported), the court found that printing information, storing it in a filing cabinet, allowing people unfamiliar with the documents to assist moving the files to a new office location, and counsel's failure to appropriately follow up with the client amounted to "[s]uch irresponsible and shiftless behavior" that "can only lead to one conclusion—that [the parties] acted with the intent to deprive [the adverse party] of the use of this information at trial." *See also Roadrunner Transp. Servs., Inc. v. Tarwater*, 642 F. App'x 759, 759 (9th Cir. 2016) (unreported) (affirming default judgment sanction); *Global Material Techs., Inc. v. Dazheng Metal Fibre Co.*, No. 12 CV 1851, 2016 WL 4765689, at *9

(N.D. Ill. Sept. 13, 2016) (unreported) ("In short, defendants lied. Their dishonesty leads me to conclude that, when defendants discarded one source of electronic evidence and failed to preserve others, they did so deliberately . . . .").

Here, in line with a long pattern of obstruction, delay, and misrepresentations,[33] (1) Defendants' counsel misleadingly failed to disclose the existence and deletion of the emails about missed meals and detainee movements, (2) Defendants' counsel misrepresented to the Court that information in the Move List Email (the identity of witnesses) had been disclosed to Plaintiff's counsel, (3) and the County intentionally allowed, and Defendants' counsel did not prevent, the destruction of highly relevant emails and radio recordings. Such blasé disregard of the truth and the duty to preserve evidence must be sanctioned.

Plaintiff requests the following sanctions, commensurate with the level of immense prejudice to Plaintiff and the misconduct by the County and Defendants' counsel:

Pursuant to Rule 37(e)(2), for the intentional spoliation of radio recordings and emails relating to Lisa, Plaintiff urges the Court to enter default judgment as to

[33] *See* Plaintiff's motions for sanctions, filed as ECF 97, 98, 105, and 203.

liability against the County, or, in the alternative, instruct the jury it must presume the radio recordings and emails were unfavorable to Defendants.

Additionally, the Court is urged, pursuant to Rule 37(e)(1), to order that (1) Plaintiffs may present evidence to the jury about the notice provided to the County and its employees to preserve evidence and the subsequent destruction of that evidence; (2) Defendants may not present evidence that Jail staff were unaware of Lisa's obviously serious medical condition; (3) Defendants may not present evidence regarding what Lisa did or did not communicate to Jail staff in connection with her medical condition, including, specifically, Defendants may not argue or present evidence that the Jail's records do not reflect that Lisa complained of abdominal pain; (4) based upon the destruction of the Detainee Movement Email, Defendants may not present evidence regarding how Lisa appeared or what Lisa said immediately before, immediately after, or during her movement from Unit 5C to Unit 8C.

Respectfully submitted this 16th day of January 2020:

LAW OFFICES OF ROCKY ANDERSON

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

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 *Plaintiff's Motion for Sanctions Against Defendants for Failure to Preserve Electronically Stored Emails and Radio Communication Recordings Relating to Lisa Ostler* contains 2,498 words, excluding the items that are exempted from the word count under DUCivR 7-1(a)(3)(C).

DATED this 16th day of January 2020:

LAW OFFICES OF ROCKY ANDERSON

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