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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 SPOLIATION OF MEDICAL RECORDS OF LISA OSTLER AND OTHER DECEASED INMATES** Case No. 2:18-cv-00254-001 Judge Bruce S. Jenkins

> *A court does justice by finding truth. That search requires evidence. Intentionally destroying evidence, then, is more than a devious litigation strategy. It is a lethal attack on a court's purpose, and must be responded to in kind.*
>
> - U.S. District Judge Carlton W. Reeves, *TLS Management & Marketing Services, LLC, v. Mardis Financial Services, Inc.*, No. 3:14-CV-00881-CWR-LRA, 2018 WL 3673090, *1, (S.D. Miss. January 29, 2018)

Plaintiff respectfully moves the Court to sanction Salt Lake County ("the County") for the grave violations of its duty, and the duty of Defendants' legal counsel,[1] to preserve medical records of Lisa Ostler and other deceased inmates, whose records were ordered by the Court to be provided to Plaintiff.

Specifically, Plaintiff moves the Court, pursuant to Rule 37(e)(2), to enter the default of the County, and to enter judgment as to liability, or, in the alternative, for a negative-inference jury instruction for the intentional and bad faith failure by the County to preserve access to records that may be, as Defendants have represented, "critical," "highly relevant," "necessary," and "probative of claims and/or defenses in this matter."[2]

Also, pursuant to Rule 37(e)(1), Plaintiff urges the court to fashion appropriate sanctions, including: (1) Plaintiff should be permitted to present evidence to the jury

[1] "Counsel for the parties have a continuing responsibility to ensure that the parties preserve relevant information. This responsibility obligates counsel to do more than simply 'notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information.' Counsel must . . . 'take affirmative steps' to . . . continually ensure that the party is preserving relevant evidence." *Browder v. City of Albuquerque*, 187 F. Supp. 3d 1288, 1295 (D.N.M. 2016) (citations omitted).

[2] Joint Motion For Extension of Deadline [Etc.] ("Motion for Extension") [ECF 172], at 2; Expedited Unopposed Short Form Discovery Motion ("Defendants' Motion for KaZee Subpoena") [ECF 180], at 3.

regarding: (a) the County's loss of access to medical records relating to Lisa and other deceased inmates and (b) the effect on Plaintiff of the loss of access to the medical records; (2) Plaintiff shall be entitled to argue any inferences that Plaintiff seeks to have the jury draw from the County's loss of access to the records; and (3) the County shall pay to Plaintiff a reasonable attorneys' fee in connection with (a) the efforts by Plaintiff's counsel to obtain the missing medical records and to obtain information regarding the failure to preserve the medical records and (b) the filing of this motion and memorandum.

The failure by the County and by Defendants' lawyers to preserve and produce the medical records of Lisa and other deceased inmates is part and parcel of a culture at the Jail of hiding or covering up vital information[3] and a widespread pattern in this case of abuses of the civil justice system by Defendants and their counsel.[4]

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[3] For instance, the Jail utilizes a Tiger Text system for communications among medical personnel, which *self-deletes messages so no one can access them*. Deposition of Todd Riser, Exhibit "A" to Anderson Decl., Exhibit "1" hereto, 145:5–22; Deposition of Richard Bell (March 25, 2019) ("Bell March 25 Depo."), Exhibit "B" to Anderson Decl., 175:10–176:2). Also, during the Morbidity and Mortality ("M&M") review process, witnesses to what occurred prior to in-custody deaths are often not interviewed (and were not interviewed in the "review" of Lisa's death), Bell March 25 Depo., 64:11–65:21; 77:10–78:24; 81:16–82:16; Deposition of Zachary Frederickson, Exhibit "C" to Anderson Decl., 48:20–25, those participating in the review are instructed not to make any written notes, and no written reports or minutes are generated during the M&M process. Deposition of Richard Bell (May 20, 2019) ("Bell May 20 Depo."), Exhibit "D" to Anderson Decl., 110:13–112:13; Deposition of Todd Wilcox, Exhibit "E" to Anderson Decl., 99:1–24.

[4] *See, e.g.*, Motion for Sanctions re Failure to Preserve Video Recordings [ECF 203]; Motion for Sanctions re Failure to Preserve Emails and Radio Communication Recordings [ECF 206]; Motion for Sanctions re Deposition Abuses [ECF 97]; Motion for Sanctions re Written Discovery and Disclosures [ECF 98]; Motion for Sanctions re Failure to Comply with the Court's Order [ECF 105].

In short, the spoliation of highly relevant medical records, by rendering inaccessible what was readily accessible after a duty to preserve arose, is another volume in a virtual encyclopedia of abuses of the civil justice system by Defendants and their counsel. These abuses have terminally infected this matter and destroyed any chance of utilizing crucial evidence that was once in the hands of the County, the preservation of which should have been ensured by the Defendants' lawyers, to establish the truth. [5]

The many abject failures by the County and the Office of the Salt Lake County District Attorney ("D.A.'s Office") to ensure the preservation of relevant evidence in this tragic matter call out for full accountability and for severe sanctions.

I. THE INTENTIONAL SPOLIATION OF MEDICAL RECORDS BY THE COUNTY COMPELS SEVERE SANCTIONS PURSUANT TO RULE 37(e)(1) AND (2).

A. The County Knew of Imminent Litigation Soon After Lisa's Death and Before the Spoliation of Medical Records.

On April 6, 2016, Lisa's father sent a letter to then-Sheriff James M. Winder, demanding that he and the County "maintain all records, including any video records, in this matter."[6] Almost immediately thereafter, the D.A.'s Office sent a litigation hold letter to several Jail officials, including Sheriff Winder. That letter ("Litigation Hold Letter")

[5] "Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. . . . [W]hen critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures—and our civil justice system suffers." *United Medical Supply Co., Inc. v. United States*, 77 Fed. Cl. 257, 258 (Fed. Cl. 2007).

[6] Deposition of Rocky Finocchio, Exhibit 4 and 133:6–134:4, Exhibit "F" to Anderson Decl.

was dated April 7, 2016, and showed the subject: "Re: *Calvin Ostler vs Salt Lake County;* **request for preservation of evidence (In-custody death of Lisa Ostler, April 03, 2016) ****RESPONSE REQUIRED BY 04/12/2016****" (Emphases in original.) The letter explicitly directed Jail staff to preserve *all* evidence relating to Lisa, and emphasized the duty of the County to preserve it.[7]

B. In Violation of Its Duty to Preserve All Medical Records, the County Destroyed Access to the Evidence and Repeatedly Concealed, and Misrepresented Facts With Respect to, the Existence of the Records.

Instead of Jail staff preserving the documents described in the Litigation Hold Letter, and instead of legal counsel at the D.A.'s Office meeting their duties to collect and ensure the preservation of the medical records, the County allowed part of the Jail's medical records[8] to be rendered inaccessible by canceling its contract with KaZee, Inc. ("KaZee"),[9] an administrator of the Electronic Health Record ("EHR") system utilized by the Jail,[10] and irresponsibly and perhaps illegally refused to either (1) pay a subscription fee that would allow perpetual access to the records or (2) print and scan the emails in the

[7] *Id.*
[8] Deposition of Kathy Berrett, Exhibit "G" to Anderson Decl. (statement of Bridget Romano), 94:12–14; Defendants' Motion for KaZee Subpoena [ECF 180], at 2.
[9] The County cancelled its contract with KaZee in 2018. *See* Letter from Bridget Romano, dated August 15, 2019, Exhibit "H" to Anderson Decl., ("Romano Letter of August 15, 2019").
[10] Expedited Unopposed Short Form Motion re Subpoena to KaZee [ECF 180], at 2; Motion for Extension, 1–2.

administrative file of the EHR system, so the County would retain them.[11]

During the course of this litigation, on May 14, 2019, nearly nine months after Plaintiff requested the production by Defendants of all records (including medical records) relating to Lisa,[12] Defendants' counsel provided to Plaintiff's counsel—*without excuse, almost a month after the documents were provided to Defendants' counsel* by Richard Bell ("Bell") on April 18, 2019,[13]—a memorandum written by Bell, with attached written statements about Lisa received from Brent Tucker ("Tucker") and Colby James ("James") (collectively the "Bell Memorandum").[14] Tucker and James were two Jail nurses who were informed, shortly before Lisa was found unresponsive and not breathing, that she had a medical problem, but who both failed and refused to see and evaluate Lisa.

Only after finally being apprised of the Bell Memorandum were Plaintiff's counsel informed by Defendants' counsel that the Bell Memorandum was found among some "unmarked" files in Bell's office and that the memorandum is part of the KaZee files.[15] Depending on whose statement on behalf of the Defendants is to be believed, the KaZee files are now apparently out of the reach of the County—and, hence, Plaintiff.

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[11] KaZee's Objections to Subpoena, Exhibit "I" to Anderson Decl., ("KaZee's Objections to Subpoena") at 2.
[12] Plaintiffs' First Set of Requests for Production of Documents, Exhibit "J" to Anderson Decl., at 6, 8, requests numbered 1 and 15.
[13] Bell May 20 Depo., 44:16–45:14, and Exhibit 3.
[14] Letter from Jacque Ramos, dated May 14, 2019 ("Ramos May 14 Letter"), Exhibit "K" to Anderson Decl. The Bell Memorandum, provided to Plaintiff's counsel on May 14, 2019, as part of Defendants' Eighth Supplemental Initial Disclosures, is attached as Exhibit 3 to Bell May 20 Depo.
[15] Ramos May 14 Letter; Bell May 20 Depo., 45:15–46:8.

Defendants' counsel represented by letter dated August 15, 2019, as follows: "When in 2018, the limits of the Pearl system failed to keep up with the Jail's present needs, the system was taken offline and **all of the files** created and/or maintained in the Pearl system were transferred to an encrypted server that KaZee maintains, and **also moved into a large data file that the Jail maintains**."[16]

Amber Waite's September 16, 2019, Declaration states just the opposite: "To the extent any additional medical records—which may include administrative emails sent by or between medical personnel—may exist, *those records are not in the possession of the Salt Lake County Jail* . . . . But any such, [sic] additional records may be in in [sic] the care, custody, and control of Kazee [sic] Inc., a third-party administrator of Salt Lake County's prior electronic medical records database ("Pearl")."[17]

The County, through its counsel, issued a facially invalid subpoena [ECF 178-1] on KaZee on May 17, 2019 [ECF 178-2], then purported to negotiate another means of obtaining access to the documents from KaZee.

As a justification for requesting yet another two-month delay for the previously established deadlines for expert reports and everything else in the Court's scheduling order, Defendants' counsel admitted that *documents about Lisa may not have been preserved by the County* when the Jail changed electronic medical records software systems/providers.[18]

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[16] Romano Letter of August 15, 2019, (emphasis added).
[17] Declaration of Amber Waite, dated September 20, 2019 (unpaginated), ¶ 5 [ECF 177] (emphasis added).
[18] Motion for Extension, at 1–2.

Defendants admitted the information once accessible to the County, but apparently made inaccessible by the County after its duty to preserve arose, "may be *critical* to the parties' expert witness reports,"[19] "*highly relevant* and *necessary* for the completion of the expert witness reports,"[20] and "probative of claims and/or defenses in this matter."[21]

Endeavoring to persuade this Court to grant yet another major delay in the deadlines for submission of expert witness reports and everything else remaining to be done in this matter, Defendants' counsel represented to Plaintiff's counsel and the Court on *August 29*, 2019, that "KaZee has *been engaged* by Defendant Salt Lake County to reconstruct the former Pearl database and to copy and produce the requested information so Salt Lake County can determine whether additional medical records exist relating to Lisa Ostler and certain other incarcerated people who died in custody . . . ."[22] However, the County clearly had *not* "engaged" KaZee to provide the records made inaccessible through the actions and inactions of the County and its counsel. The work order prepared by KaZee on *August 26*, 2019, three days before the Defendants' representation to the Court, reflects that the work would require six weeks and that KaZee would *not* do the work unless an outstanding balance of $30,116.36 was paid by the County, in addition to $37,500 for the new work.[23]

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[19] *Id.*
[20] *Id.*, at 2 (emphasis added).
[21] Defendants' Motion for KaZee Subpoena [ECF 180], at 3.
[22] Motion for Extension, at 2 (emphasis added).
[23] A copy of the work order is attached as Exhibit "L" to Anderson Decl.

The County served yet another subpoena on KaZee,[24] which clearly appears to be a ruse in a misleading attempt to show the County was trying to access the documents that it had rendered inaccessible. First, by the terms of the subpoena, it allowed only 11 to 15 days for compliance, which was obviously insufficient since KaZee had stated on the work order that the work would take six weeks to complete. Also, although the County submitted a check for $37,500 with the subpoena and falsely referenced an "agreement" by KaZee, the amount was, as KaZee had already made clear, insufficient—and there was *no agreement*. (If there *were* an "agreement," why has the County not enforced it?)

KaZee objected to the subpoena, saying, among other things, that "Salt Lake County has, at each juncture, ignored KaZee's professional advice and recommendations on *how to continue to protect and have ongoing access to historical patient records*. Now, however, Salt Lake County seeks to put the burden on KaZee to correct Salt Lake County's mistakes."[25]

After engaging in the pretense of subpoenaing KaZee, Defendants' counsel have now unilaterally decided they will not seek to compel KaZee's compliance because Defendants' counsel and the County have "decided under the current circumstances the cost substantially outweighs the need here."[26] She continued as follows:

[24] A letter from Jacque Ramos, referencing an "agreement," accompanied by the second subpoena directed to KaZee, is attached as Exhibit "M" to Anderson Decl.
[25] KaZee's Objections to Subpoena (emphasis added).
[26] Email from Jacque Ramos, dated October 11, 2019, Exhibit "N" to Anderson Decl.

> We intend to file with the court a notice of the objection and our decision to not challenge the objection given time constraints, burden, and unreasonable cost to be incurred in doing so in a foreign jurisdiction.[27]

Contrary to that representation, Defendants' counsel have *not* filed with the Court any notice of the objection and the Defendants' unilateral decision to essentially give up on trying to access the records that *were* all within the access of the County and which the County and its counsel permitted to become inaccessible, notwithstanding its admitted duty to preserve access to those records. Defendants' counsel have also not suggested any other means it will seek to gain access to the evidence. It is as if they are now simply shrugging off the entire problem, caused solely by the County, and cavalierly refusing to seek access to the documents they were ordered by the Court to produce. The end result: Plaintiff, once again, has been denied highly relevant evidence, once in the possession of the County, but now unavailable due to the bad-faith, irresponsible action and inaction of the County and its counsel.

The unilateral decision of Defendants to end any efforts to obtain access to the KaZee documents violates this Court's Order dated February 22, 2019 [ECF 77], at page 2, regarding the production of medical records kept by the Jail for each person identified in response to Plaintiffs' Interrogatory No. 8. The Court ordered the records be produced and that "[i]f such records once existed but no longer exist, a jail official is to state why they no longer exist." Almost six months after that Order, at a hearing on August 9, 2019,

[27] *Id.*

the Court stated to Defendants' counsel: "Tell your client that they – the Court expects your client to comply with the order . . . and they should keep counsel informed, and counsel should keep them informed. . . . If they don't they may be [on] . . . the inside looking out of their own facility."[28]

Never has the Court permitted Defendants or their counsel to unilaterally decide they will *not* obtain access to the medical records—which they *had* when their duty to preserve arose but which they *lost* of their own accord—permitting them to just give up the effort to re-gain access and deny Plaintiff the evidence they have described as "critical," "highly relevant," "necessary," and "probative."

CONCLUSION

The County had a duty to preserve access to *all* the medical records, including those in the KaZee system; the County intentionally failed to preserve or regain access and failed to preserve the documents in that system; and the County has conceded that the currently inaccessible documents may be "crucial," "highly relevant," and "probative." For its deliberate, bad-faith, reckless decisions, actions, and inaction resulting in the lack of access by Plaintiff to the documents, severe sanctions must be imposed.

Respectfully submitted this 18th day of January 2020:

LAW OFFICES OF ROCKY ANDERSON

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

[28] Transcript of August 9, 2019, hearing [ECF 175], 56:18–19, 21–22, 24-57:1.