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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 FOR FURTHER VIOLATIONS OF THIS COURT'S ORDER OR, IN THE ALTERNATIVE, SANCTIONS FOR DEFENDANTS' ABUSE OF THE SUBPOENA POWER** Case No. 2:18-cv-00254-001 Judge Bruce S. Jenkins

Plaintiff respectfully urges the Court to enter default judgment as to liability against Defendant Salt Lake County ("County") and to fashion other appropriate sanctions, including an order of contempt of court, compelled by the County's appalling continued disobedience of the Court's Order,[1] for its failure to identify Sean Anderson ("Sean") and failure to produce medical records relating to him and his death. Never before seeing the subpoena issued by Defendants' counsel on KaZee, Inc., ("KaZee"), long after the discovery deadline, have Plaintiff's counsel *ever* been provided by Defendants the name or any information about the apparent in-custody death of Sean. That constitutes a glaring and additional contumacious violation of this Court's explicit orders.[2]

If, as Defendants' counsel represented in a letter to KaZee and its counsel, Sean and the circumstances surrounding his death are, for some unexplained reason, *not* within the scope of the Court's Order, Plaintiff urges the Court to fashion appropriate sanctions against the County and its counsel for their abuse of the subpoena power by misleading the Court (which was not provided a copy of the subpoena, although Defendants' counsel represented they had provided it) into approving a subpoena for information regarding deceased inmates, including Sean

[1] Order Granting in Part Plaintiffs' Short Form Discovery Motion to Compel ("Order") [ECF 77].
[2] Order [ECF 77]; Hearing, August 9, 2019 [ECF 175], 56:18–57:1.

Anderson, who Defendants' counsel has contended is "not the subject of the litigation," and, hence, wholly inappropriate for inclusion in a subpoena in *this matter*. If Defendants' counsel were correct about the irrelevance of Sean's in-custody death (which seems impossible), then they inappropriately utilized a subpoena in this matter for reasons unconnected with this action.

INTRODUCTION

The Court's clear, straightforward Order [ECF 77] of February 22, 2019, has been repeatedly violated by Defendants, as already described in two motions.[3] Now, it appears either that (a) Defendants, in yet another significant way, continue to be, and have been since March 2019, in violation of that Order by failing to identify Sean Anderson and produce records related to him and his death or (b) Defendants abused the subpoena power of this Court, misleading it into issuing an order allowing the subpoena of documents that are *not* relevant to this action.

In either case, this instance of misconduct of Defendants and their counsel is one more major transgression in a long line of abuses of the civil justice system. Throughout this litigation, Plaintiff has been thwarted from discovering the truth about the death of Lisa Ostler ("Lisa") and the customs of the County due to the

[3] Motion for Sanctions and to Hold Defendant Salt Lake County and Defendants' Counsel in Contempt [ECF 105]; Motion for Sanctions for Violations of the Court's Order and Failures to Supplement Written Discovery Responses [ECF 208].

actions and inactions of Defendants and their counsel, obstructing justice by destroying evidence,[4] destroying access to evidence,[5] and wrongfully withholding evidence.[6]

STATEMENT OF RELEVANT FACTS

On September 18, 2019, Defendants' counsel, Jacque Ramos, emailed to Plaintiff's counsel a draft Joint Short Form Discovery Motion to Allow Issuance and Service of Subpoena to KaZee, Inc.[7] In that email, Ms. Ramos stated as follows:

> I believe we have previously discussed with you that Salt Lake County intends to gather medical record information from KaZee, Inc. which may include *medical information of additional persons whose identity and records are not subject to the court's February 22, 2019 Order and are outside the scope of discovery in this matter*. Given the substantial cost to Salt Lake County, it is economical and expeditious to seek the records for all individuals, including those that fall outside the scope of discovery, through one action (i.e. this subpoena) rather than piecemeal. However, *the records of those limited number of individuals will not be produced to you*.[8]

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[4] Motion for Sanctions for Failure to Preserve Electronically Stored Video Recordings of Lisa Ostler [ECF 203]; Motion for Sanctions Against Defendants for Failure to Preserve Electronically Stored Emails and Radio Communication Recordings Relating to Lisa Ostler [ECF 206].

[5] Motion for Sanctions for Spoliation of Medical Records of Lisa Ostler and Other Deceased Inmates [ECF 207].

[6] *See supra* n.3.

[7] September 18, 2019, Email from Jacque Ramos, Exhibit "A" to Declaration of Walter Mason, attached hereto as Exhibit "1."

[8] *Id.* (emphases added).

In the same email, Ms. Ramos included a proposed order,[9] which suggested the Court would order that "Defendants' [sic] may issue and serve the subpoena upon KaZee, Inc. commanding production of Lisa M. Ostler's and certain other incarcerated person's [sic] medical records *as information discoverable under Rule 26*." (Emphasis added.)

In light of the incompatibility of Defendants saying that the medical records of other detainees were "outside the scope of discovery" and yet requesting the Court order that the records are "information discoverable under Rule 26," Plaintiff's counsel promptly wrote to Defendants' counsel as follows:

> You state in your email that the documents responsive to the subpoena "may include medical information of additional persons whose identity and records are not subject to the court's February 22, 2019 Order and are outside the scope of discovery in this matter." You further state that you do not intend to produce those documents to us.
>
> Then, in contradiction of those statements, you propose an order that commands production of those records "as information discoverable under Rule 26."
>
> You can't have it both ways. Either the documents are discoverable in this matter, and thus the proper subject of a subpoena and subject to disclosure to us, or they are not discoverable and are not proper subjects of your subpoena.
>
> We can't support deceiving or misleading the Court, which this appears to be.[10]

[9] Defendants' Proposed Order, Exhibit "B" to Mason Decl.
[10] September 18, 2019, Email from Walter Mason, Exhibit "C" to Mason Decl.

Defendants' counsel replied the following day, curiously contending that "[n]o one is attempting to deceive the court" and that "the County's foremost desire is to compel" the production of medical records "for Lisa Ostler and any person covered by the Court's discovery order entered February 2019." Ms. Ramos then represented that the subpoena would be "for the production of records discoverable in this case" and that the "County will separately seek to have KaZee honor its commitment and verbal promises to the Jail to also produce records for persons not covered by the Court order and who are not connected to this litigation."[11]

Satisfied with Ms. Ramos's assurances, Plaintiff's counsel stipulated to Defendants' filing of the motion and proposed order, which Defendants filed as ECF 178 and 178-5. In that motion, Defendants "respectfully request[ed] this court enter an order allowing the issuance of the attached subpoena."[12] However, Defendants did *not* attach the subpoena.[13]

Never disclosed to Plaintiff by Defendants' counsel, the subpoena served by

[11] September 19, 2019, Email from Jacque Ramos, Exhibit "D" to Mason Decl.
[12] Expedited Unopposed Short Form Discovery Motion to Allow Issuance and Service of Subpoena to KaZee, Inc. for Production of Certain Medical Records [ECF 178], at 3.
[13] Defendants did not attach the subpoena about which they were seeking leave to serve, but they *did* attach an *earlier* invalid subpoena [ECF 178-1], dated May 17, 2019, along with KaZee's objection to that subpoena.

Defendants on KaZee was *not* limited to the records of persons Defendants identified as required by the Court's Order [ECF 77]. Instead, the subpoena commanded production of medical records related to a list of individuals, one of whom, Sean Anderson, had *never* been previously identified by Defendants.[14] Neither have Defendants produced any of his records in this action.[15]

KaZee produced to Plaintiff's counsel the subpoena served on it by Defendants' counsel and a letter from Defendants' counsel, which identified "Sean Anderson" in a list of persons who "are not the subject of the litigation."[16] Contradictorily, the subpoena attached to that letter commanded production of records relating to Sean.[17]

After realizing that Defendants' counsel had subpoenaed records related to a previously undisclosed "Sean Anderson," Plaintiff's counsel located a newspaper article discussing a "Sean Anderson" who was found unresponsive in his cell at the Salt Lake County Metro Jail and whose age appeared to match that of the "Sean Anderson" identified in Defendants' subpoena. That article stated as follows:

> Documents show [Sean] Anderson was arrested just after 5:30 p.m. June 29 [2017]. He was booked into the jail at 10 a.m. the next day.

[14] Mason Decl., ¶ 6.
[15] *Id.*
[16] September 25, 2019, Letter from Jacque Ramos to KaZee, Inc., Exhibit "E" to Mason Decl., at 1–2.
[17] *Id.* at 11.

> Jailers noticed he was unresponsive in his cell at 2:42 p.m. and he was taken to a hospital, where he was declared dead at 3:33 a.m. July 1 [2017].[18]

Although Defendants have never before disclosed Sean Anderson's name or any information or documents relating to him, if the description in that article is true, then Sean Anderson fits squarely in the Court's order, which required as follows:

> Defendants shall, within 20 days of this order, identify: . . . each person who died while in the custody of a Salt Lake County jail, or within five (5) days of being released from the custody of a Salt Lake County jail (as reflected in any records of Salt Lake County), within the five-year period prior to January 22, 2019.[19]

ARGUMENT

If, as is apparent, Defendants are, and have been for many months, in violation of the Court's Order [ECF 77] because they have not identified, nor produced medical records relating to, Sean Anderson, then the severest sanctions available under Rule 37(b) are appropriate. In choosing a terminal sanction, the Court should consider, "on the record," the following factors, which "do not constitute a rigid test": (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)

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[18] Mark Shenefelt, *Mysteries of Ogden man's death in SLC jail trouble family*, STANDARD EXAMINER, December 12, 2017. A copy of that article, obtained from the Internet, is attached as Exhibit "F" to Mason Decl.

[19] Order [ECF 77], at 2–3.

"whether the court warned the party in advance" that a terminal sanction "would be a likely sanction for noncompliance;" and (5) "the efficacy of lesser sanctions." *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992) (citations omitted).

Here, the time to conduct fact discovery and the time to prepare expert reports has long expired; thus, Plaintiff has been precluded from using information relating to Sean Anderson to build his case—including demonstrating the patterns and practices in place at the Salt Lake County Metro Jail.[20] Defendants' interference with the judicial process has been severe. Their inexcusable failure to comply with the Court's clear order has resulted now in three motions for sanctions and repeated stern admonitions from the Court, still unheeded by Defendants.[21]

The culpability of Defendant Salt Lake County and its counsel is obvious and appalling; they have identified Sean Anderson in their subpoena to KaZee, reflecting that they well know about the circumstances of his death, yet they have knowingly refused to include any information about him in any of their disclosures pursuant to the Court's Order [ECF 77], which was issued in February of 2019. The Court has even threatened to jail Defendants for continued violations of the Court's Order,

[20] Scheduling Order [ECF 88] (setting fact discovery cut-off as May 31, 2019); Scheduling Order [ECF 173] (setting deadline to submit expert witness reports as December 14, 2019).
[21] Hearing, August 9, 2019 [ECF 175], 56:18–57:1.

which has apparently had no effect on the County or their counsel. The County has been more than fairly warned that severe sanctions will be considered by the Court. It is clear the threats of lesser sanctions have not adequately deterred the County or its counsel from continued blatant violations of the Court's orders.

In the alternative, if the Court determines that the failure of Defendants to identify Sean Anderson and produce medical records concerning him is somehow not a violation of the Court's Order [ECF 77], then it is apparent (1) that Defendants and their counsel have misled Plaintiff and the Court in connection with seeking an order authorizing the issuance of a subpoena[22] and (2) abused the Court's subpoena power by demanding the production by KaZee of documents that Defendants contend are irrelevant to this action and which Defendants had no intention of producing to Plaintiff.

Rule 26(g), Fed. R. Civ. P., requires that every discovery request be accompanied by the signature of counsel, which is a certification that, among other

[22] Defendants' Proposed Order Granting Unopposed Short Form Discovery Motion to Allow Issuance and Service of Subpoena to KaZee, Inc. for Production of Certain Medical Records [ECF 178-5] (" . . . the Court HEREBY ORDERS: Defendants may issue and serve the subpoena upon KaZee, Inc. commanding production of . . . medical records *as information discoverable under Rule 26*."); September 19, 2019, Email from Jacque Ramos (stating the County seeks to subpoena medical records for "any person covered by the Court's discovery order entered February 2019" and the "County will separately seek . . . records for persons not covered by the Court order and who are not connected to this litigation.").

things, the discovery request is "not interposed for any improper purpose." *See also Allender v. Raytheon Aircraft Co.*, 220 F.R.D. 661, 666 (D. Kan. 2004) (applying certification that discovery is "not interposed for any improper purpose" to the issuance of subpoena). If a certification violates that rule without substantial justification, the court "*must* impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." Fed. R. Civ. P. 26(g)(3) (emphasis added).

Defendants' issuance of the subpoena to KaZee to obtain records regarding Sean Anderson for the County's benefit while withholding those documents from Plaintiff was blatantly for an improper purpose. Accordingly, the certification violated Rule 26(g). There can be no substantial justification for that violation, especially where Plaintiff's counsel confronted Defendants' counsel regarding the wrongfulness and deceit of using the Court's authority to issue a subpoena for records Defendants contend are outside the scope of discovery and irrelevant to this action.

CONCLUSION

The gamesmanship, contempt of court, and deceit of Defendants and their counsel is clear. They have on, one hand, sought medical records of Sean Anderson from KaZee and on the other hand have failed and refused to identify him to Plaintiff

or produce to Plaintiff the records in their possession about him, in violation of the Court's repeated orders. Such knowing failure to follow the Court's Order has been occurring since the time of the Court's Order, and has continued until the date of this Motion, even after the Court's warning that Defendants may find themselves on the inside of their own facility if they continue to violate the Order. Accordingly, Plaintiff respectfully urges the Court to fashion appropriate sanctions, including entry of default judgment as to liability.

Respectfully submitted this 27th 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 for Further Violations of This Court's Order or, in the Alternative, Sanctions for Defendants' Abuse of the Subpoena Power* contains 2,483 words, excluding the items that are exempted from the word count under DUCivR 7-1(a)(3)(C).

DATED this 27th day of January 2020:

LAW OFFICES OF ROCKY ANDERSON

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