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 minor children of Lisa Marie Ostler through their adoptive parents and next friends, CALVIN DONALD OSTLER and KIM OSTLER,

Plaintiffs,

v.

HOLLY PATRICE HARRIS, ZACHARY PAUL FREDERICKSON, TODD ALLAN BOOTH, TODD RANDALL WILCOX, M.D., RONALD PAUL SEEWER, JR., BRENT LEE TUCKER, JAMES M. WINDER, PAM LOFGREEN, RICHARD BELL, JOHN DOE, whose true name is unknown, and SALT LAKE COUNTY, a political subdivision of the State of Utah,

Defendants.

PLAINTIFFS' MOTION FOR SANCTIONS FOR DISCOVERY ABUSES RELATING TO DEPOSITIONS AND MEMORANDUM IN SUPPORT

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

Judge Bruce S. Jenkins

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PLAINTIFFS' MOTION FOR SANCTIONS FOR DISCOVERY ABUSES RELATING TO DEPOSITIONS

> *Attorneys should be prepared to go to the court if they encounter obstructionist tactics.*[1]
>
> *Judges should impose sanctions for abuse of the litigation process.*[2]

Based upon the relentless misconduct by Defendants' counsel related to depositions in this matter, Plaintiffs move the Court to enter an order (1) requiring Defendants or their counsel to pay the costs of all depositions taken by Plaintiffs, Plaintiffs' attorneys' fees incurred in taking the depositions, and Plaintiffs' attorneys' fees incurred in connection with the abusive deposition practices of Defendants' counsel, including fees incurred in bringing this Motion and (2) requiring Defendants' counsel to record and provide, for the benefit of members of the Utah State Bar, an instructional video, approved by the Court, describing proper conduct and objections during depositions, as addressed by this Motion.[3] Such an

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[1] Eric Miller, *Lawyers Gone Wild: Are Depositions Still a "Civil" Procedure?*, 42 Conn. L. Rev. 1527, 1557 (2010).

[2] American Bar Association Commission on Professionalism, *'. . . In the Spirit of Public Service:' A Blueprint for the Rekindling of Lawyer Professionalism*, reprinted in 150 F.R.D. 525, 531 (E.D. Pa. 1993).

[3] *See Sec. Nat. Bank of Sioux City, Iowa v. Abbott Labs.*, 299 F.R.D. 595, 610 (N.D. Iowa 2014), *rev'd sub nom. Sec. Nat. Bank of Sioux City, IA v. Day*, 800 F.3d 936 (8th Cir. 2015), (imposing training-video sanction and collecting cases imposing "outside-the-box" sanctions).

order would be an exercise of the Court's authority pursuant to its "'well-acknowledged' inherent power . . . to levy sanctions in response to abusive litigation practices"[4] and its authority pursuant to 30(d)(2), Federal Rules of Civil Procedure.[5]

Further, because of the pervasive pattern of discovery abuses and the contempt for all applicable rules exhibited by Defendants' counsel in this matter, described here and in Plaintiffs' Motion for Sanctions for Discovery Abuses Relating to Written Discovery and Disclosures ("Plaintiffs' Second Motion for Sanctions"), Plaintiffs urge the Court to strike Defendants' Answer [ECF 75],[6] or, at the least, to enter an order prohibiting similar misconduct by Defendants' counsel and warning that if it occurs in the future, the Court will consider striking Defendants' Answer and entering judgement as to liability in favor of Plaintiffs.

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[4] *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 765 (1980). *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991) ("[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct."); *Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1357 (10th Cir. 1985).

[5] "The court ***may impose an appropriate sanction***—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent."

[6] As described here and in Plaintiffs' Second Motion for Sanctions, such a sanction is within the Court's inherent authority and its authority under the following Federal Rules of Civil Procedure (emphasis added): 37(c)(1) (the court . . . ***may impose other appropriate sanctions***, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi) [***including "striking pleadings in whole or in part" and "rendering a default judgment***"]); 26(g)(3) ("the court . . . ***must impose an appropriate sanction*** . . . ."); 30(d)(2).

MEMORANDUM IN SUPPORT

Plaintiffs move for sanctions after many months of expensive, time-consuming litigation abuses, including on-going obstructions, improper interruptions in depositions, coaching of deposition witnesses, and *thousands* of baseless deposition objections. The consequences of these abuses have been the inability to fairly examine deponents, enormous delays (requiring two amended scheduling orders), significant expenses, and hundreds of hours spent by Plaintiffs' lawyers.

Defendants' counsel have fundamentally interfered with the fair ascertainment of the truth.

> Modern instruments of discovery. . . . make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent.[7]

> One of the purposes of the discovery rules in general, and the deposition rules in particular, is to *elicit the facts* of a case before trial. Another purpose is to *even the playing field* . . . thereby tending to *prevent trial by surprise*. Depositions serve another purpose as well: the memorialization, the *freezing, of a witness's testimony* at an early stage of the proceedings, before that witness's recollection of the events at issue either has faded or has been altered by intervening events, other discovery, or the helpful suggestions of lawyers.[8]

[7] *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).
[8] *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (emphasis added).

Instead of the fair, helpful process envisioned by the drafters of the Federal Rules of Civil Procedure, the conduct of Defendants' counsel has reduced depositions in this matter to mere gamesmanship and puppeteering.

> A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. *There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers*. The witness comes to the deposition to testify, *not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record*.[9]

There must be accountability and complete restitution for the egregious abuses by Defendants' counsel.

I. Defendants' Counsel Made Thousands of Baseless Deposition Objections, Improperly Coached Witnesses, and Wrongfully Instructed Witnesses to Refuse to Provide Non-Privileged Information, Resulting in Costly Protraction of the Depositions and Indefensible Obstacles to Obtaining Information from Deponents.

Defendants' counsel severely obstructed testimony of *every* witness deposed by Plaintiffs with, cumulatively, thousands of baseless objections, often with the purpose and effect of coaching the witnesses.[10] The objections comprise a veritable, and redundant, encyclopedia of improper interjections.

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[9] *Id.*, at 528 (emphasis added) (footnote omitted).
[10] Declaration of Ross C. Anderson ("Anderson"), attached hereto as Exhibit "A", ¶¶ 53–66.

For example, Ms. Ramos interrupted the deposition of Defendant Seewer approximately 373 times, raising approximately 570 objections.[11] Similarly, Ms. Ferarra interrupted the deposition of Heather Beasley approximately 245 times, raising approximately 470 objections.[12] In merely five of the seventeen depositions in this matter so far, Defendants' counsel interjected objections approximately 1,159 times, raising approximately 1,850 objections, almost all of which were improper.[13]

The objections of Defendants' counsel constituted "disputatious grandstanding"[14] without any legal basis. They include the following:[15]

a. Specious objections of "calls for speculation."[16]

> Q. **Did you see** any indication, any objective indication, that Lisa Ostler was suffering from abdominal pain?
> MS. RAMOS: Objection. Calls for speculation.

[11] Anderson, ¶ 53 and Exhibit 47.
[12] *Id*.
[13] *Id*.
[14] *Van Pilsum v. Iowa State Univ. of Science & Tech.*, 152 F.R.D. 179, 181 (S.D. Iowa 1993) ("The 'objections' made were for the most part groundless, and were only disputatious grandstanding.").
[15] Examples here are included in Anderson at ¶¶ 54–66.
[16] Anderson, ¶ 55.

Q. When the inmates talked to you about Lisa, **do you recall** anything they told you about why they thought she needed medical assistance?
A. No.
MS. RAMOS: Objection. Foundation.
THE WITNESS: No.
MS. RAMOS: Calls for speculation. Go ahead.

b. Objections as to "foundation," when the questions were obviously foundational questions.[17]

Q. And are you trained about whether or not it's appropriate to use profanity with inmates?
A. Yes.
Q. And what has that training been?
MS. RAMOS: Objection. Foundation.

Q. **Did you know** after all the time that you've worked at the jail whether other inmates were allowed to go into somebody else's cell?
MS. RAMOS: Objection. Foundation.

Q. It has an event number 27943269.
A. Yes.
Q. And **do you know** what that refers to?
A. No.
MS. RAMOS: Objection. Foundation. Go ahead.

[17] Anderson, ¶ 54.

A. That's my understanding, yes, it has happened.
Q. How many times **do you know** of that happening?
MS. RAMOS: Objection. Foundation.

c. Facially erroneous objections that questions were "vague."[18]

Q. Were you ever terminated from any of your jobs?
MS. RAMOS: Objection. Vague.

Q. What was her complexion like?
MS. RAMOS: Objection. Vague.

Q. Do you recall participating in any interview of any employees relating to the death of Lisa Ostler?
MS. RAMOS: Objection. Vague.

d. Objections that questions had been "asked and answered," even when prior questions were different or prior answers were evasive.

Ms. Ramos even *instructed witnesses not to answer* because questions were purportedly "asked and answered," [19] in violation of Rule 30(c)(2), which provides "[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under

[18] Anderson, ¶ 56.
[19] Anderson, ¶ 57.

Rule 30(d)(3)."[20] As one court fittingly stated, "the determination as to *whether certain discovery is cumulative . . . is for the court to make*. Defense counsel took it upon herself to make this determination at the depositions . . . . *That was simply improper*."[21]

Ms. Ramos improperly instructed witnesses to refuse to answer as follows:[22]

> MS. RAMOS: -- Rocky, you've asked this five times. He's answered your question. Move on, please. **I will instruct him not to answer.**
>
> Q. Well, if you would have taken it, you would have charted it; is that correct?
> MS. RAMOS: Objection. Asked and answered**. I'm going to instruct him not to answer**. . . .

[20] *See also Redwood v. Dobson*, 476 F.3d 462, 468, 470 (7th Cir. 2007) (censuring lawyer who instructed witness not to answer irrelevant question about whether he had engaged in homosexual conduct); *First Tennessee Bank v. Federal Deposit Ins. Corp.*, 108 F.R.D. 640, 640 (E.D. Tenn. 1985) ("It is well-settled that counsel should never instruct a witness not to answer a question during a deposition unless the question seeks privileged information or unless counsel wishes to adjourn the deposition for the purpose of seeking a protective order from what he or she believes is annoying, embarrassing, oppressive, or bad faith conduct by opposing counsel.").
[21] *Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 533–34 (M.D. Pa. 2002) (emphasis added).
[22] Anderson, ¶ 57.

e. Objections that questions "call for expert opinion" when the questions simply sought *the witnesses'* opinion or understanding.[23]

> Q. And **do you know how** a Housing Officer is to differentiate between an inmate who's suffering from drug withdrawal and one suffering from a serious abdominal medical condition?
> MS. FERRARA: Objection. Foundation; calls for a legal or expert opinion.

f. Objections that questions "assume facts not in evidence" when the questions contained *no assumptions at all*.[24]

> Q. And if you'd been told that Lisa Ostler had been ringing the intercom bell all night asking for a nurse, would you have gone immediately to her cell and examined her?
> MS. RAMOS: Objection. Calls for speculation; assumes facts not in evidence; asked and answered.

g. Instructions not to answer questions based on a purported attorney client privilege when the questions did not seek disclosure of *any communication*.[25]

[23] Anderson, ¶ 58.
[24] Anderson, ¶ 59.
[25] Anderson, ¶ 60.

h. Objections that questions "mischaracterize testimony" when they did not reference testimony at all.[26]

> Q. And did you take part in the drafting and promulgation of that policy?
> MS. RAMOS: Objection. Mischaracterizes testimony. Go ahead.

i. Objections that questions were "compound" when they contained a single inquiry.[27]

> Q. Do you have any disagreement with what Zachary Frederickson stated there?
> MS. FERRARA:· And I'll object based on the fact that it's a compound question . . . .

j. Objecting that questions were "beyond the scope" of depositions when the questions sought the witnesses' personal knowledge about relevant matters.[28]

> Q. **Was it your practice** that in April of 2016, if you examined an inmate and cleared them to stay in the unit, that you would subsequently look up their chart?

[26] Anderson, ¶ 61.
[27] Anderson, ¶ 62.
[28] Anderson, ¶ 63.

> MS. RAMOS: Objection. Calls for speculation and beyond the scope of this fact witness.

k. Inappropriate commentary,[29] including gratuitous instructions not to speculate[30] and to answer "if you can," with the obvious intent of coaching the witness.[31]

"Instructions to a witness that they may answer a question 'if they know' . . . are raw, unmitigated coaching, and are *never* appropriate. This conduct, if it persists after the deposing attorney requests that it stop, is misconduct and sanctionable." [32] For example, Ms. Ramos has stated as follows:[33]

> A. . . That sounds like my friend's statement.
> Q. What friend?
> A. Co-worker.

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[29] *See* Fed. R. Civ. P. 30(c)(2); DUCivR 30-1 ("Objections that state more than the basis of the objection and have the effect of coaching the witness are not permitted and may be sanctionable."); *Jones v. J.C. Penney's Dept. Stores*, 228 F.R.D. 190, 198 (W.D.N.Y. 2005).

[30] Gregory P. Joseph, *Depositions, Techniques, Problem Areas and Special Situations*, in CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS (Sol Schreiber ed., 1996), at 19 ("A well-prepared witness will have been told not to speculate and will heed this instruction from his or her counsel (usually by saying something like 'I could only speculate'). You want, and are entitled to, incompetent evidence (including hearsay and speculation) that appears reasonably calculated to lead to the discovery of admissible evidence." (citing Fed. R. Civ. P. 26(b)(1))).

[31] Anderson, ¶¶ 64, 66.

[32] *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, No. 11-2075 (D. Kansas January 5, 2012) (emphasis in original) (unpublished).

[33] Anderson, ¶ 64.

> Q. Who's your co-worker?
> A. I don't know how to answer that.
> MS. RAMOS: **Would you be guessing?**
> THE WITNESS: Yes.
> MR. ANDERSON: Okay. Let's quit with the coaching.
> MS. RAMOS: **I'm not coaching. I'm just helping.**
>
> Q. And who was the attorney?
> MS. RAMOS: **Don't guess.**
> * * *
> MS. RAMOS: All right. **I instruct you not to speculate**.

II. In Addition to Objections Raised in Depositions, Defendants' Counsel Has Engaged in a Pattern of Unprofessional Conduct.

First, Defendants' counsel obstructed and delayed—for nearly two months—the deposition of Ron Seewer.[34] Second, bizarrely, Ms. Ramos physically grabbed Plaintiffs' counsel, Mr. Mason, by both shoulders during a deposition break and spoke adamantly to him inches from his face in the presence of three witnesses.[35] When confronted about the conduct, Ms. Ramos misrepresented what happened.[36]

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[34] Anderson, ¶¶ 13–22.
[35] Anderson, ¶ 67. *See also* Preamble, Utah Standards of Professionalism and Civility ("Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently.").
[36] Anderson, ¶ 67. *See also* Rule 8.4, Utah Rules of Professional Conduct ("It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty . . . or misrepresentation.").

CONCLUSION

Plaintiffs have been severely prejudiced by many months of discovery abuses by Defendants' counsel. Plaintiffs respectfully request the Court to impose appropriate sanctions to make clear that such violations of the rules and standards of professionalism are not tolerated and to provide fair restitution to Plaintiffs and their counsel.[37]

DATED this 14th day of March 2019.

LAW OFFICES OF ROCKY ANDERSON

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

[37] Defendants' counsel must be provided notice of the sanctions being considered. *Sec. Nat. Bank of Sioux City, IA v. Day*, 800 F.3d 936, 944 (8th Cir. 2015).

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 Motion for Sanctions for Discovery Abuses Relating to Depositions and Memorandum in Support contains 2,499 words, excluding the items that are exempted from the word count under DUCivR 7-1(a)(3)(C).

DATED this 14th day of March 2019.

LAW OFFICES OF ROCKY ANDERSON

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