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 FOR VIOLATIONS OF THE COURT'S ORDER AND FAILURES TO SUPPLEMENT WRITTEN DISCOVERY RESPONSES** Case No. 2:18-cv-00254-001 Judge Bruce S. Jenkins

Pursuant to Fed. R. Civ. P. 37(b)(2)(A) and (c)(1), based upon repeated violations of this Court's Order [ECF 77], the misrepresentations by Defendants and Defendants' counsel, and repeated failures to supplement discovery responses, Plaintiff urges the Court to fashion appropriate sanctions, including orders (1) entering default judgment as to liability against Salt Lake County ("County"); (2) prohibiting Defendants from introducing evidence of the medical records of detainees or of the training provided to County employees; (3) prohibiting Defendants from introducing evidence regarding any communications to or from the County's employees; (4) prohibiting Defendants from arguing or introducing evidence that Defendant Ron Seewer was not responsible to assess Lisa Ostler ("Lisa") on the afternoon of April 1, 2016, pursuant to protocols at the County Jail ("Jail"); and (5) requiring Defendants to pay Plaintiff's reasonable attorneys' fees in connection with bringing this Motion and in connection with efforts to obtain the information subject of this Motion that Defendants were long ago required to produce.

INTRODUCTION

In repeated violations of the order of this Court and of Defendants' duty to supplement their written discovery responses, Defendants have withheld critical documents for many months, including medical records of Lisa and other deceased detainees. Having no adequate explanation for these delays, Defendants' counsel repeatedly misled Plaintiff and the Court about the nature of the documents and the reasons they were withheld. Those records were not produced to Plaintiff until after already violating this Court's Order [ECF 77] and, in some instances, several months after the fact

discovery deadline, to the immense prejudice of Plaintiff. Accordingly, the Court should impose appropriately severe sanctions for these blatant abuses of the discovery process.

ARGUMENT

I. THIS COURT ORDERED DEFENDANTS TO PRODUCE MEDICAL RECORDS OF CERTAIN PEOPLE WHO DIED IN THE JAIL'S CUSTODY, INCLUDING LISA, YET DEFENDANTS REPEATEDLY FAILED TO PROVIDE THAT INFORMATION AND HAVE REPEATEDLY MISLED PLAINTIFF AND THIS COURT.

When a party violates a discovery order, Rule 37(b)(2)(A) permits the Court to determine an appropriate sanction, including default judgment. The Court's discretion is limited in that the "sanction must be both 'just' and 'related to the particular "claim" which was at issue in the order to provide discovery.'" *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) (citations omitted). 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) "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." *Id.* at 921 (citations omitted).

After four months of efforts by Plaintiff's counsel to obtain critical evidence to establish the practices and customs at the Jail that led to Lisa's death, including propounding written discovery,[1] meeting and conferring with opposing counsel regarding

[1] Plaintiffs' First Set of Interrogatories, Exhibit "A" to Declaration of Walter Mason ("Mason Decl."), Exhibit "1" hereto, at 6–7, Interrogatories 8–9.

their baseless objections,[2] filing a motion to compel,[3] arguing the motion before this Court,[4] and being required to contest the content of the proposed order,[5] this Court ordered, on February 22, 2019, as follows:

> In response to Plaintiffs' Interrogatory No. 9, Defendants shall, within 20 days of this order, produce the medical records kept by the Jail for each person identified in response to Plaintiffs' Interrogatory No. 8. . . . If such records once existed but no longer exist, a Jail official is to state why they no longer exist.[6]

Despite the clarity of that Order, Defendants repeatedly violated it by withholding existing documents, spoliating evidence, and failing to state why records no longer exist. The Court's order required Defendants to produce medical records of *all* persons "identified in response to Plaintiffs' Interrogatory No. 8," which included those whose deaths were the subject of legal action within the prior ten years ("10-Year List") and those who died within the prior five years ("5-Year List"). Defendants first flagrantly violated that order by failing to produce *any* records concerning the people on the 10-Year List, requiring Plaintiffs to again seek relief from the Court.[7]

To Plaintiff's substantial prejudice, that was only the beginning of Defendants'

---

[2] Motion to Compel [ECF 46], at 2, 3 n.7.
[3] *Id.* at 1–3.
[4] Hearing, January 22, 2019 [ECF 54].
[5] Defendants' Objection [ECF 63]; Plaintiffs' Objection [ECF 66]; Plaintiffs' Substitute Proposed Order [ECF 66-1].
[6] Order Granting in Part and Denying in Part Plaintiffs' Short Form Discovery Motion ("Order") [ECF 77], ¶ 6 (footnote omitted).
[7] Motion for Sanctions and to Hold Defendant Salt Lake County and Defendants' Counsel in Contempt [ECF 105].

violations of the Order, resulting in not only wasted time and other resources, but the deprivation of vital evidence. Contrary to the declarations of Defendants' counsel that Defendants had "produced *all medical records* of individuals who died within the last five years while in the custody of the jail"[8] and that Defendants produced "*all* of the overlooked records,"[9] Defendants had failed to produce thousands of pages of highly relevant medical records, including those that were later disclosed, long after they were due, as follows:

(1) On May 14, 2019, Defendants disclosed twelve Medical Examiner reports, which Defendants' counsel misrepresented "were not part . . . of the jail records that were required to be previously disclosed to Plaintiffs."[10]

(2) On May 14, 2019, Defendants finally disclosed a critical component of *Lisa's* medical records.[11] Defendants' counsel provided no explanation for withholding the document for nearly a month after Richard Bell provided it to them (many months after it was to have been produced to Plaintiff's counsel), during which time the deadline for propounding written discovery expired.[12]

(3) On August 9, 2019, Defendants produced yet another previously undisclosed Medical Examiner report.[13]

---

[8] Declaration of Jacque M. Ramos [ECF 68], at 2 ¶ 3a (emphasis added).
[9] Declaration of Bridget K. Romano [ECF 113], 8 ¶ 28 (emphasis added).
[10] May 14, 2019, Letter from Jacque Ramos, Exhibit "B" to Mason Decl., at 1.
[11] Motion for Sanctions for Spoliation of Medical Records [ECF 207], 5, nn.13–15.
[12] *Id.*; Scheduling Order [ECF 88] (fact discovery cutoff of May 31, 2019).
[13] August 7, 2019, Letter from Bridget Romano, Exhibit "C" to Mason Decl., at 5; August 9, 2019, Email from Iris Pittman, Exhibit "D" to Mason Decl., at 1.

(4) On September 9, 2019, more than three months after the close of fact discovery and nearly six months after the deadline set in the Court's Order [ECF 77], Defendants produced an astonishing **1,888 pages** of medical records relating to people identified on the 5-Year List.[14] These records were only produced after Plaintiff's counsel requested certification that the previously produced records were complete.[15] Before disclosing the records, Defendants' counsel made the following misrepresentations:

a. Jacque Ramos misrepresented to the Court that the issue of whether Defendants had produced all medical records they had been ordered to produce concerned merely whether they had produced records relating to *previous* incarcerations that occurred *long before* the individuals' deaths.[16]

b. Bridget Romano, in a letter to Plaintiff's counsel, reiterated Ms. Ramos's contention, stating "with respect to [persons who were incarcerated multiple times], *we have produced records related to the inmates' actual deaths*, but given their number, not all the records associated with every period of incarceration."[17]

Even if those excuses had been based on the truth, they reflect the contumacious attitude of Defendants and their counsel that they presume to decide how much of the Court's Order

[14] Mason Decl., ¶ 6.
[15] July 28, 2019, Letter from Walter Mason, Exhibit "E" to Mason Decl., at 1; July 30, 2019, Letter from Jacque Ramos, Exhibit "F" to Mason Decl., at 2; July 30, 2019, Email from Walter Mason, Exhibit "G" to Mason Decl.
[16] Hearing, August 9, 2019 [ECF 175], 36:24–37:18.
[17] August 15, 2019, Letter from Bridget Romano, Exhibit "H" to Mason Decl., at 3 (emphasis added).

they will obey and what documents they will unilaterally withhold from production. But, to make matters even worse, their excuse was deceitful. Directly at odds with the contentions of Defendants' counsel that the missing records concerned prior incarcerations of the deceased individuals, long before their deaths, many of the belatedly produced records *actually* concerned events *within days* of the deaths of sixteen of the twenty-one individuals, and for three others, events within three months of their deaths.[18] The excuses offered by Defendants' counsel for their wholesale violations of the Court's Order ring hollow, indeed, after comparing their description of the documents they unilaterally and unjustifiably withheld with the documents themselves.

Defendants' production of thousands of pages of records at such a late date proves Defendants' violation of the Court's Order [ECF 77] of February 22, 2019, which required production of the documents within twenty days. *See, e.g., Trevor v. Icon Legacy Custom Modular Homes, LLC*, 217 A.3d 496, 510 (Vt. 2019) (party's certification "proven false" by subsequent production of responsive documents).

Even after the Court threatened to jail Defendants if they did not comply with the Order,[19] Defendants further violated the Order by rendering inaccessible an entire category of highly relevant documents. The staff at the Jail used a back-channel system to communicate about the circumstances of Lisa's death (and, one can only presume, the

[18] Mason Decl., ¶ 6.
[19] Hearing, August 9, 2019 [ECF 175], 56:18–57:1.

deaths of other detainees).[20] Rather than preserve *all* records created through that back-channel, as they were obliged to do, Defendants systematically destroyed, and the District Attorney's Office has permitted the destruction of, all access to that entire system of communication.[21]

Sanctions are further warranted by the repeated misrepresentations by Defendants and their counsel, including those regarding (1) Defendants' obligations under that Order,[22] (2) the nature of the documents withheld,[23] (3) the reasons medical records were withheld,[24] (4) whether the County maintained an electronic copy of *all* medical records,[25] and (5) the status of the County's negotiations and agreements with KaZee, Inc.[26]

II. DEFENDANTS VIOLATED THEIR DUTY TO TIMELY SUPPLEMENT DISCOVERY RESPONSES, DEPRIVING PLAINTIFF OF INFORMATION REGARDING (A) WHO WAS RESPONSIBLE FOR MANDATORY ASSESSMENTS OF LISA, (B) WHAT TRAINING WAS PROVIDED TO EMPLOYEES AT THE JAIL, AND (C) WHAT EVIDENCE DEFENDANTS AND THEIR EXPERT INTENDED TO RELY UPON ABOUT LISA'S MEDICAL HISTORY.

Sanctions are warranted under Fed. R. Civ. P. 37(c)(1) because Defendants failed to supplement written discovery responses "in a timely manner," Fed. R. Civ. P.

---

[20] Motion for Sanctions for Spoliation of Medical Records [ECF 207], 5–6, nn.13–17.
[21] *Id*. at 5–9.
[22] Hearing, August 9, 2019 [ECF 175], 37:15–18 ("So should we provide the medical records expanding over the last ten years of these individuals? I don't believe that was the purpose nor the benefit of what this Court ordered us to do."); 56:6 ("THE COURT: The order says what it says.").
[23] *See supra*, 5–6.
[24] *See supra*, 4–6.
[25] Motion for Sanctions for Spoliation of Medical Records [ECF 207], 5–6, nn.15–17.
[26] *Id.* at 7–8, nn.22–26.

26(e)(1)(A), and their failure was neither harmless nor substantially justified. *Poitra v. Sch. Dist. No. 1 in the Cty. of Denver*, 311 F.R.D. 659, 668 (D. Colo. 2015) (non-moving party has burden to show substantial justification).

Despite Plaintiffs' discovery requests,[27] Defendants failed to disclose—until October 4, 2019, months after the close of fact discovery—a highly material nursing shift log, which Defendants, inconsistently, contend reflects Defendant Seewer was not responsible to perform a mandatory withdrawal assessment for Lisa.[28] Defendants' counsel, attempting to explain the failure to produce the log, misleadingly stated as follows:

- "As to why this assignment log was neither identified nor produced earlier, I was informed by medical staff that the Jail does not treat it as a reliable log."[29]

- "As for '[w]ho made the determination not to provide the log for production to [you] and when was that determination made . . .', I can only surmise."[30]

- "Nothing in the information provided to this Office, and that I in turn provided to you supports" the conclusion that "prior to September 2019, someone at the Jail located the assignment log, and intentionally determined not to produce it."[31]

The preceding statements, besides being facially inconsistent, are belied by the

[27] Plaintiffs' Second Request for Production of Documents, Exhibit "I" to Mason Decl., at 6, request no. 18.
[28] *Compare* Deposition of Ron Seewer, ("Seewer Depo.") Exhibit "J" to Mason Decl., 100:7–13 (contending Oxbow Nurse was responsible), 214:23–216:13 (admitting Seewer was the C-Pod Nurse); Defendants' Amended Responses to Requests for Admissions, Exhibit "K" to Mason Decl., at 4 (Seewer was *not* the C-Pod Nurse), 17 (assessments mandatory); Deposition of the County's Designated 30(b)(6) Witness Todd Riser, Exhibit "L" to Anderson Decl., 96:9–98:12 (stating C-Pod Nurse was responsible).
[29] October 4, 2019, Letter from Bridget Romano, Exhibit "M" to Mason Decl., at 2.
[30] January 7, 2020, Letter from Bridget Romano, Exhibit "N" to Mason Decl., at 2.
[31] January 14, 2020, Letter from Bridget Romano, Exhibit "O" to Mason Decl.

facts. Defendant Seewer testified he reviewed the log prior to his deposition, dated January 15, 2019.[32] Further, Defendants referenced the log in answers to written discovery dated June 3, 2019.[33] Thus, it is false to say no one reviewed the log prior to September 2019 and decided not to produce it.

Despite Plaintiffs' discovery requests, Defendants failed to disclose what training was provided to employees at the Jail until May 14, 2019.[34] Defendants' counsel misrepresented to the Court that Plaintiffs' discovery requests propounded in August 2018 only sought information about training "specific to those defendants that were in the complaint at the beginning."[35] That was untrue.[36]

Despite Plaintiffs' discovery requests,[37] Defendants failed to disclose, until after the expert discovery period,[38] medical records of Lisa that Defendants obtained through subpoena and provided to their designated expert witness. Defendants' counsel misleadingly, and bizarrely, attempted to cast their failure to produce the documents as a

[32] Seewer Depo., 141:21–142:9, 214:23–215:6.
[33] Defendants' Responses to Requests for Admission, Exhibit "P" to Mason Decl., at 8–9, response to request no. 10.
[34] Exhibit B to Mason Decl., at 1 (Defendants produced pages SLCo Ostler 024114–026379); Defendants' Eighth Supplemental Initial Disclosures, Exhibit "Q" to Mason Decl. (identifying contents of those documents as training materials).
[35] Hearing, August 9, 2019 [ECF 175], 32:12–14.
[36] Plaintiffs' Request for Production of Documents, Exhibit "R" to Mason Decl., at 8, request no. 14. ("All Documents reflecting the training provided to staff, . . .").
[37] *Id.* at 6 (request no. 1 sought all documents "consisting of" medical records pertaining to Lisa); 7 (request no. 10 sought all documents "provided to any expert witness"); 8 (request no. 15 sought all documents that "refer" to Lisa).
[38] December 23, 2019, Email from Jacque Ramos, Exhibit "S" to Mason Decl., at 1.

result of Defendants not having "notice" the records were not produced to Plaintiff,[39] even though Defendants' counsel categorized those documents, in a list of what they provided to their expert witness, as "subpoenaed, not produced in discovery."[40] In other words, they produced the documents to their expert, but not to Plaintiff.

Defendants' failure to produce information is neither substantially justified nor harmless; therefore, Defendants must be precluded from using the information. Fed. R. Civ. P. 37(c)(1). However, such a sanction alone is no deterrent. *Estakhrian v. Obenstine*, No. CV11-3480-FMO, 2016 WL 6868178, at *12 (C.D. Cal. Feb. 29, 2016) (unpublished) (precluding use of evidence is not a "real sanction" if party would not rely on that evidence). Accordingly, Defendants should be further sanctioned as sought in this Motion and in a manner appropriately fashioned by the Court.

CONCLUSION

The unremitting discovery abuses, violations of the Court's order, spoliation, and misrepresentations by Defendants and their counsel warrant—and justice requires—severe sanctions, equal in degree to the prejudice to Plaintiff, the obvious culpability of Defendants and their counsel, and the severity of the abuses to the civil justice system.

[39] December 20, 2019, Letter from Jacque Ramos, Exhibit "T" to Mason Decl., at 3.
[40] Dr. Fowlkes's Response to Subpoena Duces Tecum (prepared by Defendants' counsel), Exhibit "U" to Mason Decl., at 2.

Respectfully submitted this 21st day of January 2020:

LAW OFFICES OF ROCKY ANDERSON

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