

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

Cindy A. Roth, Richard D. Roth,
the Estate of Jason S. Roth, by its personal
representative, Cindy A. Roth,

Plaintiffs,

v.

United States of America,

Defendant.

Civil Action No.: 6:15-cv-04988-HMH

**PLAINTIFFS' MOTION
FOR SANCTIONS**

NOW COME Plaintiffs Cindy A. Roth, Richard D. Roth, the Estate of Jason S. Roth, by its personal representative, Cindy A. Roth (collectively "Plaintiffs"), by and through their undersigned counsel, respectfully move this Court to sanction the Veterans Affairs Administration ("VA") pursuant to the Court's inherent powers, *Chambers v. Nasco, Inc.*, 501 U.S. 32, (1991), and Fed. R. Civ. P. 11. In support of this motion and filed contemporaneously herewith, Plaintiffs rely on and incorporate their Memorandum in Support as if fully rewritten.

As explained in further detail in Plaintiffs' Memorandum in Support, Plaintiffs request that this Court grant this motion and order sanctions which should include striking the Defendant's Answer and awarding Plaintiffs reasonable attorneys' fees and costs of filing the instant motion. Additionally, and perhaps most importantly, this Court should direct the acting U.S. Attorney to deliver these pleadings to the U.S. Attorney General so that the Department of Justice can determine if it should conduct an investigation and, if so, whether it should be nationwide in its scope. Finally, if the Court deems it necessary, Plaintiffs request that this Court order discovery as to Terri Stults, Evan Wilcher, a representative of the VA who is knowledgeable about the VA's computer systems and document retention policy, and all VA individuals with knowledge of the

matters related to the identified wrongdoing and who assisted in the preparation of the Declarations.

The Plaintiffs request a hearing on this serious matter.

Respectfully submitted,

NEXSEN PRUET, LLC

s/ William W. Wilkins

WILLIAM W. WILKINS (FED. ID. NO. 4662)

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Attorneys for Plaintiffs

May 25, 2017
Greenville, South Carolina

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

Cindy A. Roth, Richard D. Roth,
the Estate of Jason S. Roth, by its personal
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Plaintiffs,

v.

United States of America,

Defendant.

Civil Action No.: 6:15-cv-04988-HMH

**MEMORANDUM IN
SUPPORT OF PLAINTIFFS'
MOTION FOR SANCTIONS**

Plaintiffs Cindy A. Roth, Richard D. Roth, the Estate of Jason S. Roth, by its personal representative, Cindy A. Roth (collectively “Plaintiffs”), by and through their undersigned counsel, respectfully submit this Memorandum in Support of Plaintiffs’ Motion for Sanctions.

INTRODUCTION

Plaintiffs have discovered what could be fraudulent conduct and a cover-up by the Veterans Affairs Administration (“VA”). If true, the VA has committed fraud on the Court and intentionally deceived the United States Attorney’s Office (“USAO”), Plaintiffs, and their counsel.

One of Plaintiffs’ claims for medical malpractice is that, as Plaintiffs’ expert has testified, the VA deviated from the applicable standard of care when it failed to contact Jason’s father—his designated care partner—when Jason did not show up for an August 12, 2013 appointment with his psychiatrist, Dr. Katherine Larson (“Dr. Larson”). The VA has defended against this claim by disputing the standard of care articulated by Plaintiffs. The VA argues that the standard of care only required it to attempt to telephone Jason and send him a letter notifying him that he missed his appointment and asking him to reschedule. In order to prove that it met *its* claimed standard of care, the VA produced a letter in discovery that it claimed was *the* “no-show” letter sent to Jason

after he missed his August 12, 2013 psychiatric appointment (the “‘No-Show’ Letter”). A true and correct copy of the “No-Show” Letter is attached as *Exhibit A*. The August 12, 2013 appointment was Jason’s last scheduled appointment before he took his life.

The “No-Show” Letter was not sent to Jason, but rather addressed to and sent to another veteran who lived in a different state and whom the VA claims also missed an appointment on August 12, 2013—the same day Jason did not appear for his scheduled appointment. The VA intentionally redacted the name and address of the veteran to whom the “No-Show” Letter was actually sent. As discussed below, a close review of the “No-Show” Letter and the words and letters that can be seen behind the redaction demonstrates conclusively that the letter was not sent to Jason.¹

This motion addresses the VA’s conduct with respect to the “No-Show” Letter.

BACKGROUND²

The following events are critical to Plaintiffs’ Motion for Sanctions:

- **August 12, 2013:**
 - Jason does not appear for his 3:00 p.m. appointment with Dr. Larson.
 - At 3:27 p.m., Sherry Bailey (“Ms. Bailey”), filling in for Dr. Larson’s assistant, Terri Stults (“Ms. Stults”), noted in Jason’s record that he did not appear for his appointment scheduled for 3:00 p.m. (Roth 542, attached as *Exhibit B*). When this entry was made, Ms. Bailey had not been instructed to send a “no-show” letter. No evidence produced by the VA indicates that

¹ In fact, Plaintiffs’ counsel was able to determine what they believe are the other veteran’s name and his address, which makes clear that the letter was not sent to Jason. For the sake of that veteran’s privacy, Plaintiffs’ counsel requests to disclose that information to the Court in-camera. As discussed below, Defendant now admits, through Ms. Stults’ Declaration, that the letter was not sent to Jason. (Declaration of Terri Stults ¶ 5). A true and correct copy of the Declaration of Terri Stults is attached as *Exhibit C*. Ms. Stults’ Declaration was provided to Plaintiffs after this issue was brought to the attention of the USAO.

² To avoid repetition, Plaintiffs incorporate the factual background as set forth in their Response in Opposition to Defendant’s Motion for Summary Judgment (ECF No. 50).

she was ever instructed to send a “no-show” letter, and no applicable protocol or directive would have provided that she do so at that time.

- At 3:46 p.m., by making an electronic note in Jason’s record, Dr. Larson instructs her regular assistant, Ms. Stults—who was not at work that day—to send a “no-show” letter to Jason. (Roth_59, attached as *Exhibit D*).
- **August 19, 2013**: Seven days later, Ms. Stults acknowledges receipt of Dr. Larson’s instruction to send Jason a “no-show” letter. (*Id.*). She later admits she did not send the letter, but assumed Ms. Bailey did. (Terri Stults Dep. p. 19, ln. 10-17, attached as *Exhibit E*).
- **November 12, 2014**: Fifteen months later, the VA issues its Outpatient No-Show Policy in which it mandates that the VA shall send a letter to a veteran who fails to appear for an outpatient appointment. The VA’s mandate is attached as *Exhibit F*.
- **November 10, 2016**: Plaintiffs’ counsel re-noticed the deposition of Ms. Stults for December 1, 2016. Plaintiffs’ counsel had initially noticed Ms. Stults’ deposition on October 24, 2016 for November 8, 2016, but it had to be rescheduled.
- **November 29, 2016**: The “No-Show” Letter is printed, presumably by Ms. Stults.³ The “No-Show” Letter was not produced at this time, however.
- **December 1, 2016**: Plaintiffs’ counsel takes the deposition of Ms. Stults.
 - Notwithstanding the fact that she was not at work at the time, Ms. Stults testified that a “no-show” letter was sent to Jason after he missed his August 12, 2013 appointment. Ms. Stults later stated: “my coworker took care of it on the 12th and automatically sent a no-show letter. We are mandated to send those no-show letters.” (*Ex. E* p. 17, ln. 19-21).
 - As of August 12, 2013, the VA had not issued the mandate requiring it to send “no-show” letters.
 - At the time of Ms. Stults’ deposition, the VA had not produced the “No Show” Letter in discovery.

³ After viewing time-stamps on several documents that the VA produced, Plaintiffs’ counsel believes that the “No-Show” Letter was printed on November 29, 2016. (*Ex. G*, Roth_539 (top right corner of page)). These time-stamps can be seen at the top of the produced documents. When looking at the “No-Show” Letter, the time-stamp reads 11/29/2016, which indicates the exact date when the “No-Show” Letter was printed because several other documents produced at the same time of the “No-Show” Letter have the same dates on them. (*Id.*, Roth_540-42 (middle top of page)).

- **December 22, 2016**: The VA produced the “No-Show” Letter purportedly sent to Jason for failure to attend his August 12, 2013 appointment along with several pages of Jason’s records. (Roth 539-42, attached as *Exhibit G*). The addressee was redacted.
- **January 4, 2017**: Dr. Amanda Salas, Plaintiffs’ standard of care expert, was deposed by Defendant’s counsel.
 - Counsel for Defendant represented to Plaintiffs’ expert that the “No-Show” Letter *was sent to Jason* because he missed his August 12, 2013 appointment. Specifically, counsel stated, “they [*i.e.*, the VA] were able to pull the letter off the computer, the computer-generated, and produce it in discovery within the last week or two.” (Dr. Amanda Salas Dep. p. 212, ln. 10-13 attached as *Exhibit H*).
 - Dr. Salas testified that sending a letter and attempting to call Jason would satisfy a standard of care. Specifically, Dr. Salas stated, “[w]ell, the fact that [the VA] sent a letter and attempted to call [Jason], [the VA] would be encouraged to do, so that would not be a breach.” (*Id.* at p. 143, ln. 22-24).
- **March 21, 2017**: Dr. Ronald Maris, the VA’s standard of care expert, was deposed and testified that the VA called Jason *and sent him a letter* after he missed his August 12, 2013 appointment. Specifically, Dr. Maris stated that “[s]he wrote a letter. She actually sent [Jason] a letter. She called [Jason].” (Dr. Ronald Maris Dep. p. 71, ln. 3-4, attached as *Exhibit I*). Dr. Maris also stated, “[b]ut she did call, she did write a letter” (*Id.* at ln. 24).
- **April 10, 2017**: In its memorandum in support of its Motion for Summary Judgment, the VA’s counsel claimed that the VA sent Jason the “No-Show” Letter after he missed his August 12, 2013 appointment, stating that “Dr. Larson attempted to telephone [Jason] and then asked that a no-show letter be sent. *And it was.*” (ECF No. 49-1 at 21, attached as *Exhibit J*) (emphasis added). In support of that statement, Defendant attached the “No-Show” Letter as an exhibit. (*Id.*, n. 60).
- **May 15, 2017**: Defendant’s Motion for Summary Judgment was granted in part and denied in part by the Court. (ECF No. 62).
- **May 18, 2017**: Plaintiffs’ counsel notified Defendant’s counsel of what appears to be misconduct by the VA and of their obligation to bring it to the Court’s attention. Defendant’s counsel asked for 24-48 hours to provide Plaintiffs’ counsel with an explanation regarding the “No-Show” Letter.
- **May 19, 2017**: Defendant’s counsel provided Plaintiffs’ counsel with a Declaration of Terri Stults. (*Ex. C*). Plaintiffs will address Ms. Stults’ Declaration in a separate section below.

- **May 22, 2017:** Defendant's counsel provided Plaintiffs' counsel with the Declaration of Evan Wilcher ("Mr. Wilcher"), Acting Chief of the VA's Business Office. A true and correct copy of the Declaration of Evan Wilcher is attached as **Exhibit K**. Plaintiffs will address Mr. Wilcher's Declaration in a separate section below.

After the VA made the unequivocal statement ("**And it was.**") to this Court relying on the "No-Show" Letter to prove that it satisfied its standard of care in its memorandum in support of its Motion for Summary Judgment, and while preparing for upcoming mediation, undersigned counsel began to go back through all of the relevant documents in this litigation, including the redacted "No-Show" Letter. While doing so, undersigned counsel discovered two very disturbing facts. First, the "No-Show" Letter indicated that the veteran to whom it was sent missed an appointment scheduled for 9:00 a.m. on August 12, 2013. Jason's appointment was scheduled for 3:00 p.m. that same day. Second, when viewing the "No-Show" Letter and adjusting the zoom and brightness of the document on a computer, it became apparent that the "No-Show" Letter was sent to a different veteran whose identity became faintly visible even though the VA had attempted to totally conceal it through redaction.

It appears to Plaintiffs' counsel that the VA produced the "No-Show" Letter in an effort to make it appear that it was *the letter* purportedly sent to Jason. The basis for this position is as follows. First, the veteran to whom the letter was sent purportedly missed his appointment at the VA in Greenville, South Carolina on August 12, 2013. This was the same location and day that Jason missed his appointment. Second, the "No-Show" Letter was produced among a group of documents pertaining exclusively to Jason. (**Ex. G**, Roth_539-42). Finally, and as noted above, counsel for Defendant specifically stated at the deposition of Dr. Salas that the VA was "able to pull the letter off the computer, the computer-generated, and produce it in discovery." (**Ex. H** p. 212, ln. 10-12). It is only now that Plaintiffs' counsel has brought this disturbing information to

the VA's attention that it has taken the position that this letter was produced only as an example of what Jason's "No-Show" Letter would have looked like. (*Ex. C* ¶ 5). Contrary to what the VA now claims through Ms. Stults' declaration, this series of events would lead a reasonable person to believe that the redaction was intended to deceive, not to create an exemplar. The declarations provided by the VA after Plaintiffs brought this issue to its attention only reinforce this conclusion.

DECLARATION OF TERRI STULTS

On May 18, 2017, Plaintiffs' counsel notified Defendant's counsel of the VA's potentially fraudulent conduct regarding the "No-Show" Letter. Defendant's counsel requested 24-48 hours to provide Plaintiffs' counsel with an explanation, and Plaintiffs' counsel agreed to allow the VA time to explain its conduct. Thereafter, on May 19, 2017, Plaintiffs' counsel received the Declaration of Ms. Stults, in which she attempted to explain her conduct with regard to the "No-Show" Letter. Upon review, it is abundantly clear to Plaintiffs' counsel that numerous assertions in Ms. Stults' Declaration either lack credibility or are patently false.

Ms. Stults was deposed on December 1, 2016. In the Declaration, Ms. Stults stated, "[a]fter *my deposition* in this case I agreed to provide Assistant United States Attorney Terri Bailey with a copy of the letter I was instructed to send Jason Roth after he missed his August 12, 2013 mental health appointment. *Upon searching for that letter* I realized that I could not reprint a copy of that letter since [Jason] is now deceased." (*Ex. C* ¶ 3-4) (emphasis added). It is clear from several time-stamps on Roth_539-42 that in preparation for her December 1, 2016 deposition, the "No-Show" Letter and several other documents were printed on November 29, 2016. (*See* time-stamps on *Ex. G*). These time-stamps show that Ms. Stults had already searched for Jason's "no-show" letter a few days *before* her deposition. Thus, at the time of her deposition, Ms. Stults was already aware that a "no-show" letter to Jason could not be found in the VA's computer system. This is contrary

to what Defendant's counsel subsequently stated on January 4, 2017 during Dr. Salas' deposition, and in the memorandum in support of the motion for summary judgment.

Ms. Stults also stated, "[i]n place of that letter I therefore reprinted a letter that was sent to a different veteran who also missed an appointment on August 12, 2013. I never intended that letter to be taken or accepted as a true copy of the letter that was sent to [Jason]." (*Ex. C* ¶ 5). Plaintiffs' counsel finds this explanation less than credible. If all Ms. Stults intended to do was produce a letter that "was only meant to serve as an example of the type of letter that was sent to [Jason]," then she did not need to go through the trouble to search for and print a "no-show" letter that was sent to a different veteran on the *same date* as the date of Jason's missed appointment. *Id.* In addition, Ms. Stults' Declaration clearly states that she reprinted this letter *after* her deposition. The time stamp of November 29, 2016 plainly demonstrates that her statement is not true.

The statements contained in Ms. Stults' Declaration are, at best, lacking credibility and, at worst, pure fiction. This Court's determination as to the appropriateness of sanctions and the severity of such should take into consideration the farfetched explanations contained in the Declaration of Terri Stults and the lengths to which the VA has gone to cover up its misconduct.

DECLARATION OF EVAN WILCHER

In an attempt to explain the VA's conduct surrounding the "No-Show" Letter, on May 22, 2017, Defendant's counsel provided Plaintiffs' counsel with the Declaration of Evan Wilcher, Acting Chief of the VA's Business Office.⁴ Mr. Wilcher stated that "no-show" letters "are not generated from a template or note title within the electronic medical record and therefore are not part of the patient's medical record." (*Ex. K* ¶ 3). Rather, Mr. Wilcher states in his Declaration that

⁴ Defendant's counsel first indicated that a second declaration would be forthcoming from the VA's Associate Director. Instead of producing a declaration from the VA's Associate Director, the VA produced a declaration from the Acting Chief of the VA's Business Office.

these letters are printed in the mail room and mailed to the veteran's address of record. (*Id.*). Assuming this is true, it is clear that the VA does not keep electronic copies of the "no-show" letters. This fact makes the production of the "No-Show" Letter even more troubling, for it is clear that there is no possible way for the VA to ever represent that it has produced an historical copy of a "no-show" letter—*as it has done here*. Rather, the VA can only go back into the system and apparently recreate a copy of a "no-show" letter by accessing a patient's or doctor's schedule on a given date, clicking a box for a no-show, and then clicking another box to print a letter.

These discoveries compel counsel to bring this matter to the Court's attention and move for the severest sanctions possible due to the gravity of the misconduct and the fact that such misconduct is capable of repetition in South Carolina and elsewhere. Not only should this misconduct be sanctioned severely, but this Court should direct the acting U.S. Attorney to deliver these pleadings to the U.S. Attorney General so that the Department of Justice can determine if an investigation should be commenced and, if so, whether such investigation should be limited to South Carolina or whether it should encompass the entire nationwide VA system to determine if this type of conduct is widespread and pervasive. *See United States v. Bartko*, 728 F.3d 327, 342 (4th Cir. 2013) (directing the Clerk of Court to serve a copy of the opinion upon the Attorney General of the United States and the Office of Professional Responsibility for the Department of Justice in order to conduct an investigation into the discovery practices of the U.S. Attorney's Office for the Eastern District of North Carolina). Furthermore, if this Court deems it necessary, it should order discovery as to Ms. Stults, Mr. Wilcher, a representative of the VA who is knowledgeable about the VA's computer systems and document retention policy, and all VA individuals with knowledge of the matters related to the identified wrongdoing and who assisted in the preparation of the Declarations.

ANALYSIS

A. This Court Should Sanction the VA Pursuant to its Inherent Powers

In *Chambers v. Nasco, Inc.*, the United States Supreme Court made clear that the existence of statutes and rules designed to empower courts with the ability to sanction parties and counsel for inappropriate action does not displace the Court’s inherent power to impose sanctions for bad faith conduct. 501 U.S. 32, 46 (1991); *see also In re Jemsek Clinic, P.A.*, 850 F.3d 150, 157 (4th Cir. 2017). Furthermore, the Court is not precluded from sanctioning bad-faith conduct by means of its inherent power simply because the actions could also be sanctioned under a statute or rule. *Nasco*, 501 U.S. at 50; *see also In re Jemsek*, 850 F.3d at 157. Importantly, this inherent power “extends to a full range of litigation abuses.” *Nasco*, 501 U.S. at 46.

Bad faith is “[d]ishonesty of belief or purpose.” BLACK’S LAW DICTIONARY 149 (8th ed. 2004). Given the VA’s production of the intentionally redacted “No-Show” Letter that it knew was sent to a veteran other than Jason for missing an appointment, the VA was clearly dishonest in its belief or purpose. Because the Court denied the VA’s Motion for Summary Judgment, it did not need to rely on the authenticity of the “No-Show” Letter. But, nonetheless the VA urged the Court to do so. As such, the VA’s conduct should be characterized as nothing less than bad faith.

B. This Court Should Sanction the VA Pursuant to FED. R. CIV. P. 11⁵

While we do not allege that the USAO was involved in the VA’s misconduct, the fact that Defendant’s counsel signed the Memorandum in Support of its Motion for Summary Judgment subjects the USAO to Rule 11 Sanctions. Rule 11 states, in relevant part:

By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual

⁵ The USAO is also subject to South Carolina rules and law with respect to sanctions, including Rule 11 of the South Carolina Rules of Civil Procedure. *See* 28 U.S.C. § 530B.

contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate or employee. . . . A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation.

FED. R. CIV. P. 11. The USAO relied on the “No-Show” Letter in its Memorandum in Support of its Motion for Summary Judgment, which was a signed pleading submitted to this Court. Because the “No-Show” Letter was clearly not sent to Jason as the VA claimed, this filing violates Rule 11(b)(3) because the factual contentions regarding the “No-Show” Letter have no evidentiary support.

These representations are exactly the type of conduct for which Rule 11 exists and is intended to combat. As such, Plaintiffs respectfully seek sanctions from this Court pursuant to Rule 11 that are severe enough not only to remedy the potential harm to Plaintiffs and this Court, but also to deter this type of future conduct and punish the VA for its litigation abuse. *See In re Kunstler*, 914 F.2d 505, 524 (4th Cir. 1990) (holding that the primary purpose of Rule 11 is “to deter attorney **and litigant misconduct** . . .”) (emphasis added); *see also Brubaker v. City of Richmond*, 943 F.2d 1363, 1374 (4th Cir. 1991) (holding that the purposes of Rule 11 include “compensating the victims of the Rule 11 violation, as well as **punishing present litigation abuse** . . .”) (emphasis added).

C. Requested Relief

Plaintiffs' counsel seeks an order from this Court imposing sanctions against the VA. Such sanctions should include striking the Defendant's Answer and awarding Plaintiffs reasonable attorneys' fees and costs of filing the instant motion. Additionally, and perhaps most importantly, this Court should direct the acting U.S. Attorney to deliver these pleadings to the U.S. Attorney General so that the Department of Justice can determine if it should conduct an investigation and, if so, whether it should be nationwide in its scope.⁶ Finally, as previously stated and if the Court deems it necessary, Plaintiffs request that this Court order discovery as to Ms. Stults, Mr. Wilcher, a representative of the VA who is knowledgeable about the VA's computer systems and document retention policy, and all VA individuals with knowledge of the matters related to the identified wrongdoing and who assisted in the preparation of the Declarations.

CONCLUSION

This matter could not be more serious. It implicates the VA's conduct to cover-up its failure to care for veterans in accordance with its sole mission. This Court should impose the most severe sanctions in order to punish such misconduct and deter repetitive conduct in the future.

The Plaintiffs request a hearing on this serious matter.

[signature page follows]

⁶ In 2013, which was the year Jason committed suicide, the VA estimated that 22 veterans committed suicide each day. This problem is not getting materially better, as an average of 20 veterans committed suicide each day in 2014. *See* VA: Startling number of veterans still committing suicide, CBS News (July 7, 2016 11:14 AM), <http://www.cbsnews.com/news/va-startling-number-of-veterans-still-committing-suicide/>; *see also* Suicide rate among young male vets spikes: VA, CBS News (January 10, 2014 4:19 AM), <http://www.cbsnews.com/news/va-startling-number-of-veterans-still-committing-suicide/> (stating that “[t]here has been a sharp increase in the suicide rate among the youngest U.S. male veterans, and a smaller but still significant jump among women who served in the military, the Department of Veterans Affairs said . . .”).

Respectfully submitted,

NEXSEN PRUET, LLC

s/ William W. Wilkins

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Attorneys for Plaintiffs

May 25, 2017

Greenville, South Carolina

Exhibit A

11/29/2016
[REDACTED]

[REDACTED]

Dear [REDACTED]

We have been informed that you failed to keep the following appointment (s):

Date/Time: MONDAY AUG 12, 2013 9:00 AM
Clinic: WJB G MH PRESCRIBER 4
Telephone: 864.299.1600 Telephone Ext.: 2837

Failure to keep appointments directly impacts our availability to meet other patients needs. If you wish to reschedule, please call so that we may take care of your needs.

To better serve our veterans, the VA offers telephone advice services that are available 24 hours a day, 365 days a year. For prescription "refills" please call (toll free) 1-800-293-8262.

Please call (toll free) 1-888-651-2683 to obtain information on:
(examples)--questions or concerns you may have on your care
prescription is past the expiration date
prescription says "no refills remaining"

Sincerely,

Greenville VA Outpatient Clinic
41 Park Creek Drive
Greenville, SC 29605-4270

Exhibit B

Expanded Profile Nov 29, 2016@13:42:57 Page: 2 of 5
Patient: ROTH, JASON S (3903) Outpatient
Appointment #: 1 Clinic: WJB G MH PRESCRIBER 4

+

*** Appointment Event Log ***

Event	Date	User
-----	-----	-----
Appt Made	AUG 01, 2013	STULTS, TERRI LEA
Check In		
Check Out		
Check Out Entered		
No-Show/Cancel	AUG 12, 2013@15:27:58	BAILEY, SHERRY K

Checked Out:
Cancel Reason:
Cancel Remark:
Rebooked Date:

+ Enter ?? for more actions

Select Action:Next Screen//

Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

CINDY A. ROTH, RICHARD D. ROTH,)	
the Estate of Jason S. Roth, by its)	
personal representative, Cindy A. Roth,)	
)	
Plaintiff,)	
)	Civil Action Number: 6:15-CV-04988-HMH
vs.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

DECLARATION OF TERRI STULTS

I, TERRI STULTS, make the following declaration in lieu of affidavit pursuant to 28 U.S.C. § 1746. :

1. This declaration is made upon my personal knowledge and I am competent to give this declaration in all respects.

2. I am employed by the Department of Veterans Affairs ("VA") as an Advanced Support Assistant with the Mental Health Department, Greenville VA Outpatient Clinic, which is attached to Dorn VA Medical Center.

3. After my deposition in this case I agreed to provide Assistant United States Attorney Terri Bailey with a copy of the letter I was instructed to send Jason Roth after he missed his August 12, 2013 mental health appointment.

4. Upon searching for that letter I realized that I could not reprint a copy of that letter since Mr. Roth is now deceased.

5. In place of that letter I therefore reprinted a letter that was sent to a different veteran who also missed an appointment on August 12, 2013. I never intended that letter to be taken or accepted as a true copy of the letter that was sent to Mr. Roth. It was only meant to serve as an example of the type of letter that was sent to Mr. Roth.

6. After reprinting the example letter I redacted it to remove the veteran's name and address as that letter pertained to a patient unrelated to Mr. Roth. I then sent the letter to Ms. Bailey by email.

7. I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 19th day of May, 2016 in Greenville, South Carolina.

May 19, 2017
Date



Terri Lea Stults
Advanced Medical Support Assistant
Department of Veterans Affairs

Exhibit D

Progress Notes

Printed On Feb 20, 2016

Tried to reach pt today as he no-showed his appt. Pt's phone is disconnected.
Terri, please send this veteran a letter. Thank you.

/es/ KATHERINE ANDRA LARSON
Psychiatrist

Signed: 08/12/2013 15:46

Receipt Acknowledged By:

08/19/2013 11:46 /es/ TERRI LEA STULTS
PROGRAM SUPPORT ASSISTANT

LOCAL TITLE: FORM LETTER GOPC
STANDARD TITLE: PRIMARY CARE LETTERS
DATE OF NOTE: JUL 01, 2013@12:26 ENTRY DATE: JUL 01, 2013@12:26:27
AUTHOR: MLADY,LISA EXP COSIGNER:
URGENCY: STATUS: COMPLETED

JASON S ROTH
101 FAUST PLACE
TRAVELERS REST, SOUTH CAROLINA 29690

Dear Mr. ROTH:

This letter is being mailed to you in that attempts to contact you by telephone were not successful.

Your xray of your spine has been reviewed, and shows that joint spaces have been maintained.

If you are willing to try Physical Therapy for evaluation and treatment of your low back pain, please contact the TAP line or The Greenville VA.

Sincerely,

LISA MLADY
RN

Greenville VA Outpatient Clinic

PATIENT NAME AND ADDRESS (Mechanical Imprinting, if available)
ROTH,JASON S
101 FAUST PLACE
TRAVELERS REST, SOUTH CAROLINA 29690

VISTA Electronic Medical Documentation
Printed at COLUMBIA, SC VAMC

Exhibit E

Terri Stults

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

- - -

CINDY A. ROTH, RICHARD D. ROTH :	:	
the Estate of Jason S. Roth, :	:	
by its personal representative, :	:	
Cindy A. Roth, :	:	
Plaintiff, :	:	CIVIL ACTION NO.:
vs. :	:	6:15-cv-04988-HMH
UNITED STATES OF AMERICA, :	:	
Defendant. :	:	

DEPOSITION OF TERRI STULTS

DATE TAKEN: December 1, 2016

TIME BEGAN: 11:20 a.m.

TIME ENDED: 12:05 p.m.

LOCATION: Nexsen Pruet
55 E. Camperdown Way, Suite 400
Greenville, South Carolina

REPORTED BY: Tami I. Watters, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
(803) 212-0012

Terri Stults

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U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY'S OFFICE
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terri.bailey@usdoj.gov
Representing the Defendant

Terri Stults

1 Katherine Larson --

2 That's one of your providers/doctors,
3 Larson; is that right?

4 A Yes.

5 Q Mental Health Telephone and Encounter
6 Note. She writes -- just tell me if I'm right.
7 I'm now on VA_59: Tried to reach patient today as
8 he no-showed his appointment. Patient's phone is
9 disconnected. Terri, please send this veteran a
10 letter. Thank you.

11 She's talking to you?

12 A Right.

13 Q Signed Katherine Andra Larson, 8/12/2013;
14 is that right?

15 A Yes.

16 Q Receipt acknowledged by you?

17 A August the 19th.

18 Q 2013?

19 A And my coworker took care of it on the
20 12th and automatically sent a no-show letter. We
21 are mandated to send those no-show letters.

22 Q Okay. Let me -- I know you want to
23 volunteer information --

24 A I'm sorry.

25 Q That's okay. So how does -- so she's

Terri Stults

1 A Uh-huh. And she's down in Florida now.

2 Q Sherry, S-H-E-R-R-Y?

3 A R-R-Y, K-A-Y, Bailey, B-A-I-L-E-Y.

4 Q Would you have a conversation with
5 Ms. Bailey?

6 A No. I looked and I saw that she already
7 no showed him. And part of the no show, it says do
8 you wish to print a no-show letter, and we always
9 do yes and send a no-show letter.

10 Q So you assume a no-show letter was sent?

11 A I ask -- well, we always send one.

12 Q So you don't independently know? You
13 just assume?

14 A Uh-huh.

15 Q That's a yes or no answer?

16 A I assumed, because we are mandated to
17 send it.

18 Q Okay. What was the -- what was going on
19 at that time that caused a seven-day delay in you
20 acknowledging --

21 A I could have been out on vacation.

22 Q But do you remember? I'm asking.

23 A I do not remember.

24 Q So August -- I mean, it's summer. It's
25 vacation time.

Exhibit F

WM. JENNINGS BRYAN DORN
DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER
COLUMBIA, SOUTH CAROLINA

Medical Center Memorandum No. 544-11-20

November 12, 2014

OUTPATIENT NO-SHOW POLICY

1. **PURPOSE:** To establish the responsibility and procedure for scheduling outpatient appointments and reviewing cases of patients who fail to keep scheduled clinic appointments.
2. **SCOPE:** This policy applies to the Wm. Jennings Bryan Dorn Department of Veterans Affairs Medical Center and the community-based outpatient clinics (CBOCs).
3. **POLICY:** Patient access to clinical appointments is important to utilization, which relies on patients reporting for clinic appointments when scheduled. While patients may sometimes forget appointments, actions should be taken to acknowledge the No-Show and consequences decided for multiple or consecutive No-Shows.
4. **PROCEDURES:** Service Chiefs are responsible for the implementation of procedures in scheduling outpatient clinic appointments.
 - a. Patients are asked to report to their clinic appointments 15 minutes before their appointment time for nursing assessments and processing. If a patient reports more than 15 minutes after their scheduled appointment time, a clinical assessment will be performed and the patient will be worked in later that day or may be asked for a desired date to be rescheduled. For patients failing to report for an appointment (no-show):
 - (1) A no-show letter will be sent to the patient by the Health Technician, Medical Support Assistant or Clerk, explaining the No-Show policy and instructing them to call in if they wish to reschedule their appointment. Patients will receive an automated no-show call.
 - (2) Patients who fail to report for an appointment a second consecutive time will be referred to the appropriate clinical staff for medical record review and documentation in CPRS (i.e. CPRS no-show template). Physicians must annotate the record if the patient should be informed that failure to continue medical treatment may have serious adverse consequences. No-show appointments will not be auto rebooked. If the patient was consulted from

Medical Center Memorandum No. 544-11-20

November 12, 2014

another service or clinic for a new enrollee, that consult can be discontinued and the referring provider will be notified. If the patient was an established patient, the clinical provider will decide, based on review of patient's record, whether the consult should be discontinued or remain active and rescheduled.

Note: No Show protocol for OEF/OIF/OND patients:

Operation Enduring Freedom (OEF)/Operation Iraqi Freedom (OIF), and Operation New Dawn (OND) patients: After the OEF/OIF/OND patient fails to report for a clinic appointment the second consecutive time **and** it is clearly documented in the medical record that both appointments were scheduled according to the patient's availability or preference, the patient's OEF/OIF/OND Case Manager (or the OEF/OIF/OND Program Office) must be notified.

(3) Established patients who fail to report for a third consecutive appointment will be reviewed by the clinician and either the consult will be discontinued or referred back to the referring provider to re-consult.

(a) Primary Care patients will not receive medication renewals or other services until appointment has been met. Patients failing to be seen within the PC stop code within 24 months will be discharged from the Provider's panel.

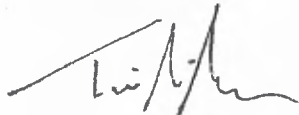
(b) Specialty Care patients, the Provider will review the patient medical record annotating the third consecutive no-show (using the CPRS no-show template) and discontinue the consult/discharge from Specialty Clinic.

(4) Patients who fail to report for their appointments (no-shows) will not be overbooked without approval from the clinical health care provider.

5. REFERENCE: VHA Directive 2009-070, VHA Outpatient Scheduling Processes and Procedures.

6. RESCISSION: None.

7. FOLLOW-UP RESPONSIBILITY: Chief of Staff. This policy is due for review annually on the anniversary date and for re-issue IN March 2017, in accordance with procedures established in Medical Center Memorandum 544-00-1.



Timothy B. McMurry
Medical Center Director

Exhibit G

11/29/2016

[REDACTED]

Dear [REDACTED]

We have been informed that you failed to keep the following appointment (s):

Date/Time: MONDAY AUG 12, 2013 9:00 AM
Clinic: WJB G MH PRESCRIBER 4
Telephone: 864.299.1600 Telephone Ext.: 2837

Failure to keep appointments directly impacts our availability to meet other patients needs. If you wish to reschedule, please call so that we may take care of your needs.

To better serve our veterans, the VA offers telephone advice services that are available 24 hours a day, 365 days a year. For prescription "refills" please call (toll free) 1-800-293-8262.

Please call (toll free) 1-888-651-2683 to obtain information on:
(examples)--questions or concerns you may have on your care
prescription is past the expiration date
prescription says "no refills remaining"

Sincerely,

Greenville VA Outpatient Clinic
41 Park Creek Drive
Greenville, SC 29605-4270

Appt Mgt Module
Patient: ROTH, JASON S (3903)
Total Appointment Profile

Nov 29, 2016@13:42:28
MT: NOT REQ
* - New GAF Required

Page: 1 of 1
Outpatient
08/12/13 thru 08/12/13

	Clinic	Appt Date/Time	Status
1	Wjb G Mh Prescriber 4	08/12/2013@15:00	No-show

Enter ?? for more actions

- | | | |
|-----------------------|-------------------------|----------------------------|
| CI Check In | CD Change Date Range | DX Diagnosis Update |
| UN Unscheduled Visit | EP Expand Entry | DL Wait List Display |
| MA Make Appointment | EF Print EF | DE Delete Check Out |
| CA Cancel Appointment | RT Record Tracking | WD Wait List Disposition |
| NS No Show | PD Patient Demographics | CP Procedure Update |
| DC Discharge Clinic | CO Check Out | PC PCMM Assign or Unassign |
| AL Appointment Lists | EC Edit Classification | RG Pre registration menu |
| PT Change Patient | PR Provider Update | RR Recall Reminder Action |
| CL Change Clinic | WE Wait List Entry | SC Print Scheduling Letter |

Pre-Register Date: Apr 18, 2013

Select Action: Quit//

Expanded Profile
Patient: ROTH, JASON S (3903)
Appointment #: 1

Nov 29, 2016@13:42:48

Page: 1 of 5
Outpatient
Clinic: WJB G MH PRESCRIBER 4

*** Appointment Demographics ***

Name: ROTH, JASON S	Clinic: WJB G MH PRESCRIBER 4
ID: 489-02-3903	Date/Time: AUG 12, 2013@15:00
Status: NO-SHOW	
Purpose of Vst.: SCHEDULED	
Length of Appt: 30	Appt Type: REGULAR
Lab:	Elig of Appt: SERVICE CONNECTED 50% to
X-ray:	Overbook: NO
EKG:	Collateral Appt: NO
Other: 3 mo; 3/330pm appts; pt ca 3.11/4.23; dr larson sl 8.1	
Enrolled in this clinic: NO	

+ Enter ?? for more actions

Select Action:Next Screen//

Expanded Profile
Patient: ROTH, JASON S (3903)
Appointment #: 1

Nov 29, 2016@13:42:57

Page: 2 of 5
Outpatient
Clinic: WJB G MH PRESCRIBER 4

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+
*** Appointment Event Log ***
Event      Date      User
-----
Appt Made  AUG 01, 2013  STULTS, TERRI LEA
Check In
Check Out
Check Out Entered
No-Show/Cancel  AUG 12, 2013@15:27:58  BAILEY, SHERRY K

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Checked Out:
Cancel Reason:
Cancel Remark:
Rebooked Date:

```

+ Enter ?? for more actions

Select Action:Next Screen//

Exhibit H

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

CINDY A. ROTH, RICHARD D. ROTH,
the Estate of Jason S. Roth, by its
personal representative, Cindy A. Roth,

Plaintiffs,

vs. CASE NO. 6:15-CV-04988-HMH

UNITED STATES OF AMERICA,

Defendant.

DEPOSITION OF: AMANDA B. SALAS, M.D.

DATE: January 4, 2017

TIME: 10:29 a.m.

LOCATION: 1441 Main Street, Suite 500
Columbia, SC

TAKEN BY: Counsel for the Defendant

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC Hilton Head, SC Myrtle Beach, SC
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Columbia, SC Greenville, SC Charlotte, NC
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APPEARANCES OF COUNSEL:

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CINDY A. ROTH, RICHARD D. ROTH,
the Estate of Jason S. Roth, by its
personal representative, Cindy A. Roth:

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(INDEX AT REAR OF TRANSCRIPT)

1 said that at the time they weren't doing it, and
2 then Dr. Larson did make the phone call.

3 If I could help you understand my words
4 on that paragraph, just so you know, if you read to
5 the last sentence, it says, Ms. Walker left a
6 message for a tentatively scheduled appointment in
7 March. That means that I am referring to his last
8 appointment -- and this is probably my lack of
9 clarity -- referring to everything before March and
10 that she had called and left a message for the
11 March tentative appointment. So if that's
12 ambiguous, I apologize for that.

13 Q. So was there an issue here?

14 A. No, I was just clarifying that,
15 because --

16 Q. So that wasn't a breach of the standard
17 of care in your eyes?

18 A. In terms of the fact that they sent a
19 letter and they --

20 Q. Attempted to call.

21 A. -- attempted to call?

22 Well, the fact that they sent a letter
23 and attempted to call, they would be encouraged to
24 do, so that would not be a breach.

25 Q. Now, Paragraph 13 really talks about

1 will give you a chance to ask the question.

2 BY MS. BAILEY:

3 Q. -- and receipt acknowledged by Terri
4 Stults on August the 19th. That's on Page 59.

5 MR. WILLIAMS: Is there a question?

6 THE WITNESS: That's documented and
7 Terri stated in her deposition that she believes
8 she did send a letter.

9 BY MS. BAILEY:

10 Q. And in fact they were able to pull the
11 letter off the computer, the computer-generated,
12 and produce it in discovery within the last week or
13 two.

14 MS. BAILEY: I sent it to you.

15 MR. WILLIAMS: Object to the form.

16 MS. BAILEY: Okay.

17 MR. WILLIAMS: It's a statement on the
18 record. It's not a question, but --

19 BY MS. BAILEY:

20 Q. Well, there's testimony that the letter
21 was sent. If that was done, that would have been
22 adequate, wouldn't it have?

23 MR. WILLIAMS: Object to form.

24 THE WITNESS: Not necessarily, in my
25 opinion.

Exhibit I

Ronald Maris, Ph.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

- - -

CINDY A. ROTH, RICHARD D. ROTH,	:	
THE ESTATE OF JASON S. ROTH, BY	:	
ITS PERSONAL REPRESENTATIVE,	:	
CINDY A. ROTH,	:	
	:	
Plaintiffs,	:	
	:	Case No.
vs.	:	
	:	6:15-cv-04988-HMH
UNITED STATES OF AMERICA,	:	
	:	
Defendants.	:	

DEPOSITION OF RONALD MARIS, PH.D.

DATE TAKEN: Tuesday, March 21, 2017

TIME BEGAN: 10:55 a.m.

TIME ENDED: 2:52 p.m.

LOCATION: The Residence of Ronald Maris
9 Poachers Lane
Columbia, South Carolina

REPORTED BY: Cynthia First, RPR, CRR, CCP
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
803-212-0012

Ronald Maris, Ph.D.

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Representing the Defendant

Ronald Maris, Ph.D.

1 patient is not taking his medication, should that
2 psychiatrist do something about it?

3 A It's very tricky. She wrote a letter.
4 She actually sent him a letter. She called him.

5 One of the issues in this case is whether or not she
6 should have called his father and said, "Look, he's
7 not taking his medications. As his health care
8 partner, I want to make you aware of that."

9 That's complicated. This guy is, what, a
10 24-year-old adult male. He's not a kid. There's
11 HIPAA restrictions. You can't just call up the
12 health care partner and tell him something. There's
13 confidentiality things you have to work around.

14 Plus, he didn't have a particularly good
15 relationship with his father at times. And his
16 father -- it's interesting. His father wouldn't
17 take psychiatric medication. If you read his
18 deposition, his father said, "I'm not taking that
19 stuff. I don't believe in it."

20 So what good would it be to tell his
21 father who doesn't believe in psychiatric
22 medications himself? So there are lots of related
23 issues here.

24 But she did call, she did write a letter,
25 she did make changes and monitor his medications.

Exhibit J

At her deposition Dr. Salas clarified that this refers to the period of time after Dr. Larson had adjusted his medication on January 11, 2013, giving him a six-month supply.⁵⁸ When he was a no-show on August 12, Dr. Larson attempted to telephone him and then asked that a no-show letter be sent.⁵⁹ And it was.⁶⁰ Dr. Larson's actions were in compliance with the VA Outpatient No-Show Policy formalized a year later, November 12, 2014.⁶¹ Dr. Salas agreed that the attempted telephone call and the letter was proper, and not a breach of the standard of care.⁶²

Alleged Breach of Standard of Care. Dr. Salas contends that compliance with the VA policies is insufficient and that under these circumstances, she would have contacted the family or have stopped the prescription.⁶³ Of course, we found out during discovery that Mr. Roth quit taking the psych meds which had the same effect as cancelling the prescriptions.

Dr. Salas' testimony that Dr. Larson breached the standard of care when she failed to notify Mr. Roth's parents of the missed appointment is belied by Dr. Salas' own experience: "I can't recall a specific case where there was an adult patient missing an appointment and calling the parents."⁶⁴

⁵⁸ Ex. 1, Med. Rec., Roth_VA_75 – 76.

⁵⁹ Ex. 1, Med. Rec., Roth_VA_59.

⁶⁰ Ex. 10, Roth_539.

⁶¹ Ex. 8, Outpatient No-Show Policy, Medical Center Memorandum No. 544-11-20. Roth_VA_543.

⁶² Ex. 3, Salas Dep., p. 143.

⁶³ Ex. 3, Salas Dep., p. 204.

⁶⁴ Ex. 3, Salas Dep., p. 200, 208.


Exhibit K

for the appointment and the Medical Support Assistant selects yes to print a "no-show" letter. Mental Health no-show letters are keyed to print in the mail room. The printed letters are then mailed to the Veteran's address listed in the demographics section on file in the electronic medical record. These letters are not generated from a template or note title within the electronic medical record and therefore are not part of the patient's medical record. Furthermore, the VISTA software does not allow staff to reproduce letters for deceased Veterans. National VISTA software—the VA's electronic medical records program—is coded this way as a fail-safe to prevent families of deceased Veterans from receiving no-show letters for appointments that are scheduled to take place after a Veteran has passed away in the event that those appointments are not cancelled.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19 day of May, 2017 in Columbia, SC.

May 22, 2017
Date


Evan Wilcher
Acting Chief Business Office
Department of Veterans Affairs