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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

**PASTOR STEVE
SMOTHERMON,**

Plaintiff,

v.

KEITH HODGE, an individual;
KEVIN HODGE, an individual;
HODGETWINS, LLC, a Nevada
limited liability company;

Defendants.

Case No.: 2:25-cv-01858-APG-BNW

**PLAINTIFF'S REPLY IN
SUPPORT OF THEIR MOTION
FOR LEAVE TO FILE FIRST
AMENDED COMPLAINT AND TO
MODIFY SCHEDULING ORDER**

**(First Request to Extend Amendment
Deadline)**

Defendants' Opposition rests on a single premise — that Plaintiff slept on facts he possessed all along — and Defendants' own exhibits refute it. Defendants served initial disclosures that produced not one document; swore under oath in May that they held “absolutely zero” responsive materials; refused to confer until late April; promised at the May 4 conference to supplement within a week and did not; and then, as the June 16 amendment deadline arrived, made the sworn, case-specific admission and produced the documents on which the new claims depend. Having withheld the operative facts until the deadline had effectively passed, Defendants

1 cannot recast their own conduct as Plaintiff’s lack of diligence.

2 The Opposition is also internally irreconcilable, in ways established by
 3 Defendants’ own filing. Defendants’ declaration swears counsel disclosed the
 4 specific incognito search on May 4 (Green Decl. ¶ 9), yet the letter they offer to
 5 memorialize that conference states only a general “practice” employed by
 6 Defendants unrelated to this matter (*id.* Ex. 6), and the very letter of Plaintiff’s
 7 counsel that Defendants chose to attach as their own Exhibit 4 records that the
 8 search-specific fact was “asserted for the first time” on June 10, 2026. Defendants
 9 swear they stood ready to produce financial records on a narrower request (*id.* ¶¶ 13-
 10 15), while their own verified discovery response (*id.* Ex. 7) refused to produce them
 11 at all. A party may not prove its opponent’s lack of diligence with evidence that
 12 disproves its own account.

13 Finally, the bulk of the Opposition — six pages contending the new claims
 14 lack actual malice and commercial use — asks the Court to decide the merits on a
 15 motion for leave. Those are quintessential fact questions for a jury, not pleading
 16 defects. Good cause, excusable neglect, and Rule 15(a)’s liberal amendment policy
 17 each favor amendment.

18 **I. PLAINTIFF SATISFIES RULE 16(b) GOOD CAUSE**

19 Rule 16(b)’s good-cause standard “primarily considers the diligence of the
 20 party seeking the amendment.” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d
 21 604, 609 (9th Cir. 1992). Good cause exists where a deadline “cannot reasonably be
 22 met despite the diligence of the party seeking the [amendment].” *Id.* This Court
 23 found good cause on materially identical facts in *Circus Circus LV, LP v. AIG*
 24 *Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1279 (D. Nev. 2021): where “many critical
 25 facts were not available until” the opponent’s discovery responses — “behind-the-
 26 scenes” facts the movant “could not have been aware of” — good cause is satisfied
 27 even though “some of these facts were available ... at the beginning of th[e]

litigation.” That is exactly this record.

A. Defendants’ own exhibits defeat their “incognito timeline” argument.

Defendants’ lead argument is that Plaintiff knew of Kevin Hodge’s incognito search “well over one month” before the deadline. The argument fails on Defendants’ own evidence, on three independent grounds.

First, the written record Defendants submitted shows only a general practice, not the search at issue. The sole contemporaneous writing Defendants offer is the May 29, 2026, letter their declaration says “remind[ed] [Plaintiff’s counsel] of what was discussed during the meet and confer.” Green Decl. ¶¶ 10-11 & Ex. 6. That letter states only that Defendants’ “practice is to browse in incognito mode,” which was offered to explain why no search logs survived. A general habit is not a case-specific fact, and it is not a basis on which Plaintiff could plead a new claim consistent with Rule 11.

Second, Defendants’ own Exhibit 4 confirms June 10 was the first case-specific disclosure. Defendants attached to their declaration Plaintiff’s June 30, 2026 letter, which states that “[i]n their June 10, 2026, Second Amended Response to Interrogatory No. 5, Defendants asserted for the first time that the search was conducted ‘in incognito mode.’” Green Decl. Ex. 4. Defendants thus placed into this record Plaintiff’s own contemporaneous statement that the search-specific admission first appeared on June 10 — corroborated by the sworn interrogatory response itself.

Third, the participant’s sworn account directly refutes ¶ 9. Plaintiff’s counsel, who participated in the May 4 conference, declares that the conference addressed only the deficiencies in Defendants’ disclosures and Defendants’ agreement to supplement, and that Defendants’ counsel did not state that the search was performed in incognito mode or disclose any other case facts. Westbrook Decl. ¶¶ 3-4. Paragraph 9 is therefore not merely uncorroborated, it is contradicted by Defendants’

own Exhibit 6, which recites only a general “practice” and affirmatively disputed, on personal knowledge, by the only other participant in the conference. On a motion for leave, a factual dispute of this kind is resolved in favor of amendment, not against it. And in all events, an oral, unsworn remark at a discovery conference would not be competent evidence on which Plaintiff could, consistent with Rule 11, plead a new claim turning on Defendants’ state of mind; Plaintiff acted properly relying on the sworn, case-specific admission of June 10.

Defendants’ reliance on *Johnson* underscores the point. There, leave was denied because the movant ignored “clear and repeated signals” in the opponent’s *sworn* answer and interrogatory responses. *Johnson*, 975 F.2d at 609. Here the sworn signals ran the other way: Defendants’ verified May responses represented that no responsive documents existed at all.

B. The documentary basis for the commercial-use element came only in Defendants’ June production.

Defendants argue that because Krisha Mason works for Plaintiff, Plaintiff must have known the right-of-publicity and unjust-enrichment facts from the outset. Not so. It is true that Defendants’ May 29 First Supplemental Disclosure identified Ms. Howerton and described, in general terms, a customer-support contact from Ms. Mason concerning the post. But a Rule 26(a) witness description is not the documentary proof of the channel through which that contact ran and it was the document, produced later, that supplied a Rule 11 basis to plead the statutory “commercial use” element. Defendants did not produce the Bates-stamped Howerton–Mason email (HODGE000136–000138) until their Amended Responses to Requests for Production on June 11, 2026 — five days before the deadline. In all events, the decisive new fact driving the amendment’s timing is the sworn incognito admission of June 10; the right-of-publicity and unjust-enrichment claims are part of the same amendment that fact compelled, and their supporting document issued

1 the next day. These are precisely the “behind-the-scenes” facts *Circus Circus* holds
 2 a party “could not have been aware of” until production. 525 F. Supp. 3d at 1279.

3 **C. Defendants manufactured the untimeliness they now invoke.**

4 Defendants ask the Court to attribute the late filing to Plaintiff while ignoring
 5 their own role in creating it. On April 9, 2026, Defendants’ Rule 26(a)(1) disclosures
 6 produced no documents. On May 22, 2026, Defendants swore they possessed zero
 7 responsive documents. When Plaintiff pressed the deficiencies, Defendants refused
 8 to confer until the May 4 conference when defense counsel “expressly agreed to
 9 supplement the disclosures within one week” — a promise Defendants did not keep.
 10 Yet Defendants now boast that they “produced approximately twelve times as many
 11 documents as Plaintiff.” Opp. at 3. Documents that supposedly did not exist in May
 12 were produced by the dozens in June. A defendant cannot manufacture the movant’s
 13 untimeliness through its own withheld and belated production and then invoke that
 14 untimeliness to defeat amendment. To reward that sequence would convert Rule 16
 15 into a tool for the party that controls the evidence to run out the amendment clock.

16 **D. Defamation per se and unjust enrichment are not defeated by the diligence**
 17 **objection.**

18 Defendants argue that the per se and unjust-enrichment amendments plead
 19 “no new facts.” That misunderstands each.

20 Defamation per se is a characterization of the existing defamation claim, not
 21 a new cause of action. Under Nevada law, “[i]f the defamation tends to injure the
 22 plaintiff in his or her business or profession, it is deemed defamation per se, and
 23 damages will be presumed.” *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 484, 851 P.2d
 24 459 (1993). The proposed amendment adds no operative facts; it characterizes the
 25 same August 22, 2025, publication — falsely depicting a Christian pastor as a
 26 corporate executive who “spearhead[ed] ‘woke’ ... initiatives” — as injuring
 27 Plaintiff in his “profession, trade, [and] calling,” with damages presumed. Proposed

1 FAC ¶ 69. A new legal theory resting on the same operative facts shares a “common
 2 core of operative facts” and relates back under Rule 15(c)(1)(B). *Williams v. Boeing*
 3 *Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008); *Richardson v. HRHH Gaming Senior*
 4 *Mezz, LLC*, 99 F. Supp. 3d 1267, 1274 (D. Nev. 2015) (relation back “liberally
 5 applied,” reaching claims proved “by the same kind of evidence” (discussing
 6 *Santana v. Holiday Inns, Inc.*, 686 F.2d 736 (9th Cir. 1982)). The Rule 16 diligence
 7 inquiry therefore does not reach the per se characterization at all.

8 Unjust enrichment rests on the same commercial-nexus proof as the right-of-
 9 publicity claim. It depends on the same June 11 production that supplied the
 10 documentary basis for the commercial-use element (Section II.B), and its timeliness
 11 rides with that claim.

12 **E. Plaintiff was diligent in discovering the basis and in moving to amend.**

13 Diligence has two components: diligence in discovering the basis for
 14 amendment, and diligence in seeking amendment once the basis is discovered.
 15 Plaintiff satisfies both. He served written discovery in April, pressed three meet-and-
 16 confer letters, and could not have uncovered the sworn incognito admission sooner
 17 because Defendants withheld it and denied the existence of responsive documents
 18 under oath. Once the basis materialized on June 10-11, Plaintiff moved on July 1,
 19 2026 — roughly two weeks later — nothing like the seven-month, unexplained delay
 20 that defeated good cause in *Torres v. Rothstein*, No. 2:19-cv-00594-APG-EJY, 2021
 21 WL 41306 (D. Nev. Jan. 5, 2021). *Chavez-Herrera*, on which Defendants rely,
 22 denied leave only because that movant already possessed the operative facts and “did
 23 not specifically request” the late-produced documents, which “were not necessary”
 24 to move earlier. *Chavez-Herrera v. Shamrock Foods Co.*, No. 2:19-cv-01327-GMN-
 25 BNW, 2024 WL 3493952 (D. Nev. July 19, 2024). Here Plaintiff did request the
 26 materials — repeatedly — and was met with sworn denials.

F. Defendants’ possession-of-the-facts authorities are inapposite.

Defendants’ authorities deny leave only where the movant already held the operative facts. *Chavez-Herrera* (facts long possessed; late documents “not necessary”); *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 765 (9th Cir. 2017) (no diligence where amendment rested on facts “known ... long before the deadline”); *SiteLock LLC v. GoDaddy.com LLC*, No. CV-19-02746-PHX-DWL, 2020 WL 6135189 (D. Ariz. Oct. 19, 2020) (no good cause where “new claims are premised on information that was in the possession of the movant before the amendment deadline”). Each is distinguished on the same ground: the operative facts here — the sworn incognito admission and the commercial-nexus document — were in *Defendants’* exclusive possession, and Plaintiff pressed for them repeatedly against sworn denials.

III. PLAINTIFF ALSO SATISFIES LR 26-3 EXCUSABLE NEGLECT

Because the motion was filed after the June 16, 2026, deadline, LR 26-3 requires both good cause and excusable neglect, analyzed under the four *Pioneer* factors. *Branch Banking*, 871 F.3d at 764-65 (tying the LR 26-3 showing to the *Pioneer/Bateman* factors); *Pioneer Inv. Servs. Co. v. Brunswick Assocs. LP*, 507 U.S. 380, 395 (1993). Each favors Plaintiff. (1) *Prejudice*: none cognizable — the new claims arise from the same August 22, 2025 post, discovery is open until September 18, 2026, and Defendants are already deposing the very witnesses central to the new claims (Section IV.C). (2) *Length and impact of delay*: roughly two weeks, with no impact on any fixed trial date. (3) *Reason for the delay*: Defendants’ empty disclosures, sworn denials, and belated production — a reason lying with Defendants, not Plaintiff, and thus outside Plaintiff’s control. (4) *Good faith*: Plaintiff moved promptly on receiving the triggering disclosures and offered to resolve the collateral financial-records dispute by stipulated protective order. This District found excusable neglect for a one-week-late filing on a weaker reason where

the opponent's time was not shortened and no prejudice appeared, *Est. of Taschek v. Fid. Life Ass'n*, 740 F. Supp. 3d 1072 (D. Nev. 2024); the reason factor is stronger here because the delay lay with Defendants.

IV. THE RULE 15(a) FACTORS DEFENDANTS INVOKE FAVOR AMENDMENT

Once good cause is shown, leave "shall be freely given when justice so requires," and may be denied only for a substantial reason such as undue delay, bad faith, repeated failure to cure, undue prejudice, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962); accord *Circus Circus*, 525 F. Supp. 3d at 1278-79. None applies.

A. No undue delay or bad faith — and Defendants' own authority cuts against them.

Defendants rely on *Kantor v. Kantor*, 116 Nev. 886, 891-93, 8 P.3d 825 (2000), which affirmed denial of leave for dilatoriness and undue delay where the supporting facts were in the movant's possession and amendment was sought on the eve of trial. That is the opposite of this record: the reckless-disregard evidence grounding the punitive prayer — the sworn incognito admission — was not in Plaintiff's possession; Defendants withheld it until June 10, and discovery does not close until September 18, 2026. Where an amendment is "predicated on facts [the movant] only recently learned in the discovery process," it "was not motivated by bad faith or the result of undue delay." *Circus Circus*, 525 F. Supp. 3d at 1280.

Defendants' contrary account is itself internally contradicted. Their declaration swears counsel offered on May 4 to produce financials on a narrower request with a protective order (Green Decl. ¶¶ 13-15), but their verified Response to RFP No. 9 (*id.* Ex. 7) refused production outright — "will not be produced absent a protective order[,] ... Plaintiff does not have permission of the Court." Plaintiff cannot be faulted for not narrowing a request Defendants had already refused under oath.

B. No cognizable prejudice.

Defendants complain that amendment would extend discovery and note they have “used 17 of their permissible 25 interrogatories” and tailored discovery to the original pleading. But the new claims arise from the same August 22, 2025, post, and Defendants are already deposing the very witnesses (Krisha Mason and Michael Morin) central to those claims. Any incremental discovery “could be remedied by an extension of the discovery period,” which “need not necessarily stand in the way of permitting amendment.” *Circus Circus*, 525 F. Supp. 3d at 1280. And “the need to respond to an amended complaint does not constitute undue prejudice.” *Burch v. HCA Healthcare, Inc.*, No. 2:25-cv-01408-JAD-MDC, 2026 WL 1662639 (D. Nev. June 8, 2026). Eight unused interrogatories and two months of open discovery are capacity, not prejudice.

C. No futility — Defendants improperly litigate the merits on a pleading motion.

“Futility is evaluated under the same standard that governs a motion to dismiss under FRCP 12(b)(6),” and denial on futility grounds is “generally disfavored.” *Burch*, 2026 WL 1662639. Each of Defendants’ futility arguments turns on a disputed fact that cannot be resolved on the pleadings:

False light / actual malice. “[T]he issue of ‘actual malice’ ... cannot be properly disposed of by a motion to dismiss;” it is subjective and proved by evidence beyond the publication. *Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002). Reckless disregard exists where a defendant “entertained serious doubts as to the truth of the statement, but published it anyway.” *Wynn v. Associated Press*, 140 Nev. Adv. Op. 56, 555 P.3d 272 (2024). The proposed pleading alleges reckless disregard plausibly and then some: Defendants concede that when they searched “Steve Smotherman,” “nearly every result contained the photo of [Plaintiff]” (Opp. at 2); Defendants published a specific factual narrative and photograph, conducted the

1 search so that “no record” survived, never performed a reverse-image search to
2 confirm identity, and issued no retraction.

3 *Right of publicity / commercial use.* Whether the monetized channel and
4 merchandising operation constitute “commercial use” is a fact question; indeed,
5 NRS 597.790 provides that “the issue of whether a use is directly connected with
6 commercial sponsorship is a question of fact.” The commercial-speech classification
7 Defendants press is “fact-driven, due to the inherent difficulty of drawing bright
8 lines,” *X Corp. v. Bonta*, 116 F.4th 888, 926 (9th Cir. 2024), and the *Bolger* factors
9 are “important guideposts, but they are not dispositive,” *Ariix, LLC v. NutriSearch*
10 *Corp.*, 985 F.3d 1107, 1115-17 (9th Cir. 2021). Defendants’ concession that their
11 account “is monetized” (Opp. at 14) supports plausibility; it does not defeat it. Their
12 *Bolger/Dex Media* analysis is a merits argument for trial.

13 *Punitive damages / conscious disregard.* Whether Defendants acted with the
14 “culpable state of mind” NRS 42.005 requires is a fact question that cannot be
15 resolved on the pleadings. *InjuryLoans.com, LLC v. Buenrostro*, 529 F. Supp. 3d
16 1178 (D. Nev. 2021); *Tesla, Inc. v. Tripp*, 487 F. Supp. 3d 953 (D. Nev. 2020).
17 Defendants’ contention that Mr. Hodge “did not know” the photo was wrong is
18 contradicted by their own “nearly every result” concession.

19 **D. The right-of-publicity remedy is grounded in the statute; Plaintiff**
20 **withdraws the fee reference.**

21 Plaintiff does not press an attorneys’ fee entitlement under NRS 597.810 and
22 will conform the pleading accordingly; the claim’s viability does not depend on it.
23 The statute expressly authorizes the remedies on which the claim rests — “[a]ctual
24 damages, but not less than \$750,” and “[e]xemplary or punitive damages” for a
25 knowing unauthorized use, NRS 597.810(1)(b) — together with injunctive relief.
26 Any request for fees is reserved to the extent authorized by other applicable law. A
27 single, correctable remedial reference does not render a claim futile.

V. DEFENDANTS' EVIDENTIARY SHOWING DOES NOT SUPPORT DENIAL

Defendants ask the Court to take “judicial notice” that an incognito search today yields the same results (Opp. at 2), relying on a Google image search Defendants’ counsel himself performed on July 11, 2026 (Green Decl. ¶ 4 & Ex. 2). Search-engine results are not adjudicative facts subject to judicial notice: Rule 201(b) reaches only facts “not subject to reasonable dispute,” requiring “[a] high degree of indisputability.” Fed. R. Evid. 201(b) & advisory committee note. Google search results “changed, modified, and revised over time” fail that test; where “the material sought to be noticed is merely the contents of a Google search result, more caution is required,” and such results are at most “evidence of what was in the public realm at the time.” *Cheval Int’l v. SmartPak Equine, LLC*, No. CIV. 14-5010-JLV, 2015 WL 798968 (D.S.D. Feb. 26, 2015); accord *Ruiz v. Gap, Inc.*, 540 F. Supp. 2d 1121 (N.D. Cal. 2008). At most such notice reaches a source’s existence, not the truth of the matter asserted. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018); *Lee v. City of Los Angeles*, 250 F.3d 668, 688-90 (9th Cir. 2001). A search run by interested counsel eleven months after the events cannot establish what Kevin Hodge’s August 22, 2025 search returned. Any present-day result is also shaped by the litigation’s own public footprint — including the case page Defendants’ counsel maintains about this very lawsuit, which republishes Plaintiff’s photograph and the parties’ filings — not by the August 2025 search Defendants actually performed. The declaration’s diligence assertion (¶ 9) and financial-records account (¶¶ 13-15) are uncorroborated characterizations of oral exchanges — each contradicted both by Defendants’ own attached writings (Exhibit 6 recites only a general “practice;” the verified Response to RFP No. 9, Exhibit 7, refused production outright) and by the sworn declaration of the attorney who participated in the May 4 conference (Westbrook Decl. ¶¶ 3-5).

VI. CONCLUSION

The sole reason Plaintiff could not move to amend before June 16, 2026 is that Defendants served empty disclosures, denied the existence of responsive documents under oath, delayed conferral, and made the dispositive admission and produced the supporting documents only as the deadline passed. Good cause, excusable neglect, and Rule 15(a)'s liberal amendment policy all favor amendment. Plaintiff respectfully requests that the Court modify the Scheduling Order and grant leave to file the First Amended Complaint.

Respectfully submitted this 22nd day of July, 2026.

/s/ Nicole A. Westbrook

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*Attorneys for Pastor Steve
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 22, 2026, I caused the foregoing document to be electronically filed with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document was served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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