

G. Michael Jackson, State Bar No. 1894
Nicole A. Westbrook, *pro hac vice*
JONES, DAVIS & JACKSON, P.C.
25350 Magic Mountain Parkway, Suite 300
Valencia, CA 91355
Telephone: (661) 481-2220
Facsimile: (661) 836-7711
Email: mjackson@jonesdavis.com
nwestbrook@jonesdavis.com

Attorneys for Plaintiff Pastor Steve Smothermon

**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 OPPOSITION TO
DEFENDANTS' MOTION FOR
SANCTIONS**

Plaintiff Pastor Steve Smothermon respectfully submits this Opposition to Defendants' Motion for Sanctions (ECF No. 72).

I. INTRODUCTION

Defendants' Motion should be denied for two independent reasons.

First, the Motion is procedurally barred. Discovery motions in this District — including motions for sanctions — will not be considered unless the movant first holds a two-way conference in person, by telephone, or by video, and attaches a declaration describing that conference. Letters, emails, and voicemails do not count. Defendants did not hold that pre-filing conference on this Motion. Their August 20 email asked whether a meet-and-confer was even needed. On August 25, 2026,

1 Plaintiff's counsel raised conferral dates; the next day, without a two-way
2 conference, Defendants filed. The Motion contains no conferral certification. The
3 Court should deny it without prejudice on that ground alone.

4 Second, the Motion fails on the merits. A missing Rule 33 oath is a curable
5 defect. The ordinary remedy is an order to verify, typically on a motion to compel
6 — not exclusion. The delay is documented. Pastor Smothermon underwent lumbar-
7 fusion surgery on July 1, 2026. His treating physician has confirmed in writing that
8 he is confined to bed rest, is medicated, cannot sit at a computer or concentrate, and
9 cannot participate in litigation activity until early November 2026 at the earliest.
10 That letter is already before the Court on Plaintiff's pending motion to modify the
11 scheduling order (ECF No. 67). Defendants' remaining theory — that Interrogatory
12 Nos. 3 and 9 are false because a non-party's deposition differs — is a credibility
13 dispute for summary judgment or trial, not a basis for discovery sanctions.

14 II. RELEVANT BACKGROUND

15 Defendants requested verification of Pastor Smothermon's interrogatory
16 responses by letter dated June 19, 2026 (ECF No. 72-2), again by letter dated August
17 13, 2026 (ECF No. 72-3), and by follow-up email dated August 20, 2026. That email
18 stated: "If we need to have a meet and confer, provide me dates early next week
19 when you are available." ECF No. 72-4. On August 24, 2026, Plaintiff's counsel
20 replied that Pastor Smothermon "is not able to verify his responses right now due to
21 his medical condition." *Id.*

22 Pastor Smothermon underwent major back surgery on July 1, 2026, including
23 removal and vertebra-replacement fusion of L5-S1 with nerve decompression. His
24 treating physician, Dr. Diego Gonzalez, confirmed in writing that Pastor
25 Smothermon is limited to bed rest, should not be sitting upright in front of a
26 computer/camera for any period of time, is on medications that would make it
27 difficult to sit, concentrate, or remain wakeful, and is unable to attend any hearings

1 by Zoom, or other type of video, audio or in-person proceeding whether involving
2 court or deposition testimony or any interview, or otherwise be interviewed for any
3 reason, with the soonest possible return being early November 2026.

4 On August 17, 2026 — before Defendants filed this Motion — Plaintiff
5 moved to modify the Scheduling Order to extend the discovery cut-off, expressly on
6 the ground that his post-surgical incapacity prevents not only Plaintiff’s deposition
7 but his ability to assist counsel in the very case preparation and follow-up that the
8 remaining discovery requires. That motion attaches Dr. Gonzalez’s letter and
9 remains pending. ECF No. 67.

10 Defendants filed this Motion on August 26, 2026. Green’s declaration recites
11 earlier telephone discussions and a June assurance that verifications would follow.
12 ECF No. 72-1 ¶¶ 6–7. Those discussions are not a pre-filing conference on this
13 Motion. After the August 24 medical explanation, there was still no two-way
14 conference on verification or the claimed misrepresentation. On August 25,
15 Plaintiff’s counsel asked about conferral dates. Green proposed August 26, placed
16 one unanswered call, and filed. *Id.* ¶ 9. No completed face-to-face, video, or
17 telephone conference on this Motion occurred.

18 **III. LEGAL STANDARD**

19 A motion for discovery sanctions must satisfy this District’s meet-and-confer
20 requirement. Under LR IA 1-3(f), to meet and confer means to communicate directly
21 and discuss in good faith the issues required under the particular rule. The duty is
22 reciprocal. It may be satisfied only by a face-to-face meeting, telephone conference,
23 or video conference. “The exchange of written, electronic, or voice-mail
24 communications does not satisfy this requirement.” LR IA 1-3(f). “Failure to make
25 a good-faith effort to meet and confer before filing any motion to which the
26 requirement applies may result in denial of the motion.” LR IA 1-3(f)(4). Local Rule
27 26-6(c) adds that “[d]iscovery motions will not be considered unless the movant (1)

1 has made a good-faith effort to meet and confer as defined in LR IA 1-3(f) before
 2 filing the motion, and (2) includes a declaration setting forth the details and results
 3 of the meet-and-confer conference about each disputed discovery request.” LR 26-
 4 6(c).

5 On the merits, the party seeking sanctions bears the initial burden of
 6 establishing a discovery failure. If Rule 37(c)(1) applies, the burden then shifts to
 7 the responding party to show that any failure was substantially justified or is
 8 harmless. *Lankford v. Taylor*, No. CV-17-02797-PHX-DWL, 2021 WL 1515504, at
 9 *5, *7–8 (D. Ariz. Apr. 16, 2021). Courts weigh prejudice or surprise, the ability to
 10 cure, the likelihood of trial disruption, and bad faith or willfulness. *Munn v. Hotspur*
 11 *Resorts Nev., Inc.*, No. 2:19-cv-00693-GMN-NJK, 2020 WL 7323345, at *2 (D.
 12 Nev. Oct. 20, 2020). The key factors on exclusion are prejudice and the availability
 13 of lesser sanctions, and courts are “leery” of exclusion absent a significant possibility
 14 of prejudice. *Id.* at *5.

15 IV. ARGUMENT

16 A. *The Motion is procedurally barred because Defendants never held the required*
 17 *meet-and-confer conference.*

18 A discovery motion fails at the threshold if the movant did not try to resolve
 19 the dispute without the Court. *Cardoza v. Bloomin’ Brands, Inc.*, 141 F. Supp. 3d
 20 1137, 1145-46 (D. Nev. 2015). In this District that means two-way communication
 21 on each contested request, in a genuine effort to avoid judicial intervention. *Id.* The
 22 rule has a certification prong and a performance prong: the movant must say who,
 23 where, how, and when the parties conferred, and must actually confer in good faith.
 24 *Limtiaco v. Auction Cars.Com, LLC*, No. 2:11-cv-00370-MMD-CWH, 2012 WL
 25 5179708, at *2-3 (D. Nev. Oct. 17, 2012). Letters are an “inadequate means.” Both
 26 Rule 37(a)(1) and the local rule require more. *Id.* at *3 n.1.

27 Defendants satisfied neither prong. The Motion has no conferral certification.

1 That gap was never closed. Plaintiff’s counsel raised conferral dates on August 25;
 2 defense counsel proposed the next day, placed one unanswered call, and filed
 3 anyway. A one-way, unanswered call is not the direct dialogue LR IA 1-3(f)
 4 requires. The June 19 and August 13 letters and the August 20 email do not cure that
 5 defect. “The exchange of written, electronic, or voice-mail communications does not
 6 satisfy this requirement.” LR IA 1-3(f). Defendants’ August 20 email asked whether
 7 a conference still needed to be scheduled.

8 This District recently denied a sanctions motion without prejudice for the
 9 same conferral defect. *Zookin v. CSAA Gen. Ins. Co.*, No. 2:23-cv-01976-JCM-
 10 MDC, 2024 WL 5298061, at *1–2 (D. Nev. Dec. 16, 2024). The court reminded the
 11 movant that writings do not count and that conferral means a face-to-face meeting,
 12 telephone conference, or video conference. *Id.* at *1. The duty is reciprocal. Failure
 13 may result in denial. *Id.* at *2. *See also Elias v. Wynn Las Vegas, LLC*, No. 2:23-cv-
 14 02111-ART-BNW, 2025 WL 458026, at *1–2 (D. Nev. Feb. 11, 2025) (Weksler,
 15 M.J.) (emails do not count; a new motion requires a new conference). The same
 16 result follows here.

17 Urgency is not an excuse. Even on an emergency motion, a real attempt to
 18 resolve the dispute is more important, not less, and urgency does not skip conferral.
 19 *Cardoza*, 141 F. Supp. 3d at 1144-45. Filing the day after Plaintiff’s counsel raised
 20 dates, while ECF No. 67 was already pending, treated conferral as a box to check
 21 rather than an effort to resolve the dispute. *Id.* at 1145–46. The Motion should be
 22 denied without prejudice on this ground alone.

23 *B. The verification delay is substantially justified and, in any event, is a curable*
 24 *defect for which sanctions are not the remedy.*

25 Even on the merits, a missing oath does not warrant sanctions. Unverified
 26 answers are incomplete. The defect is cured by serving a verified response. A
 27 missing oath is a defect in the answer, not a Rule 26(a) or 26(e) disclosure failure.

1 Fed. R. Civ. P. 33(b)(3), (5); Fed. R. Civ. P. 37(a)(3)(B)(iii), 37(a)(4). The vehicle
 2 is a motion to compel, not Rule 37(c)(1) preclusion. *Cf. Lankford*, 2021 WL
 3 1515504, at *7–8 (where the dispute arises under Rule 33 rather than Rule 26(a) or
 4 26(e), the remedy is Rule 37(a)(3)(B), not Rule 37(c)(1)). Defendants skipped that
 5 step.

6 They also overstate the defect. Only answers must be verified by the party.
 7 Objections are signed by counsel. Fed. R. Civ. P. 33(b)(3), (5). Of eight responses
 8 to the First Set, four contain substantive answers that require his oath (Nos. 1, 3, 5,
 9 and 8); two are pure objections (Nos. 2 and 6); and two state that investigation is
 10 ongoing (Nos. 4 and 7). The “functional equivalent of no answer” label sweeps in
 11 the objections. The missing oath reaches the answers, not the entire set. Green states
 12 Plaintiff has answered five sets and verified none. ECF No. 72-1 ¶¶ 2–3. The same
 13 medical bar applies to every unverified answer. The oaths will be served when he
 14 can review and swear to them.

15 The delay is substantially justified. His physician has forbidden the very act
 16 verification requires: sitting, concentrating, and participating in litigation. That is
 17 already in the record on ECF No. 67. It is not gamesmanship.

18 This District has refused Rule 37(c)(1) exclusion where there was no trial date,
 19 no willfulness, and no new category of information. *Munn*, 2020 WL 7323345, at
 20 *4–5. The delay here is surgeon-documented incapacity, not defiance of a compel
 21 order. Defendants have not shown a failure that warrants exclusion.

22 *C. The alleged misrepresentation is a credibility dispute for the merits, not a basis*
 23 *for discovery sanctions.*

24 Defendants’ second theory — that Interrogatory No. 3 and Interrogatory No.
 25 9 are false because Mason’s deposition differs — does not support preclusion.
 26 Interrogatory No. 3, as served and as filed at ECF No. 72-5, states that on August
 27 22, 2025, Mason discovered the post and brought it to Plaintiff’s attention.

1 Defendants' Motion quotes August 12. That is not what the response says.
 2 Interrogatory No. 9 adds that Plaintiff instructed Mason to contact Defendants. ECF
 3 No. 72-6. Mason testified she did not speak with him about the Post. ECF No. 72-7
 4 at 21:23–22:7, 50:2–6.

5 Rule 37(c)(1) polices a party's failure to disclose or supplement under Rule
 6 26(a) or 26(e). It does not decide which witness is right. A conflict with a non-party's
 7 testimony is for impeachment under Rule 33(c), and for Rule 26(e) supplementation
 8 once Pastor Smothermon can participate. Fed. R. Civ. P. 26(e), 33(c), 37(c)(1).

9 Exclusion is disfavored without a significant possibility of prejudice. The key
 10 factors are prejudice and lesser sanctions. *Munn*, 2020 WL 7323345, at *5. No trial
 11 date is set. Pastor Smothermon has not been deposed. Defendants already have
 12 Mason's testimony and the August 22, 2025 email at HODGE000136–000138.
 13 Cross-examination will be available when he recovers. Defendants have not shown
 14 the willfulness that this kind of preclusion requires. *Id.* at *2, *5.

15 *D. Defendants' own disproportionate interrogatory practice undercuts their request*
 16 *for sanctions.*

17 Defendants have served seven sets of multi-part interrogatories under a
 18 Scheduling Order that caps each party at twenty-five. ECF No. 49; ECF No. 72-1 ¶
 19 2. Every interrogatory served counts against that limit. Rule 33's cap exists because
 20 interrogatories "can be costly and may be used as a means of harassment." *Walker*
 21 *v. Lakewood Condo. Owners Ass'n*, 186 F.R.D. 584, 586 (C.D. Cal. 1999). Volume
 22 goes to proportionality. It does not turn a curable, medically documented delay in
 23 verifying answers into case-shaping sanctions.

24 *E. No fee award is warranted.*

25 Defendants seek fees under Rule 37(a)(5), Rule 37(d)(3), and inherent
 26 authority. A motion filed before a good-faith attempt to obtain the discovery without
 27 court action does not support fees to the movant. Fed. R. Civ. P. 37(a)(5)(A)(i). An

award is also withheld if it would be unjust. Fed. R. Civ. P. 37(a)(5)(A)(iii). Rule 37(d)(3) does not apply. Answers were served; they lack a verification. This District has charged fees *to the party that skipped consultation* and forced an unnecessary brief. *Limtiaco*, 2012 WL 5179708, at *4–5. Pastor Smothermon’s incapacity, and Defendants’ failure to hold the required pre-filing conference on this Motion, independently make an award to Defendants unjust.

V. CONCLUSION

The Court should deny the Motion without prejudice. If the Court addresses verification at all, any deadline should wait until Pastor Smothermon is medically able to review and swear to his responses, consistent with ECF No. 67.

Respectfully submitted this 3rd day of September, 2026.

/s/ Nicole A. Westbrook

Nicole A. Westbrook

G. Michael Jackson Esq.

JONES, DAVIS & JACKSON, P.C.

*Attorneys for Pastor Steve
Smothermon*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 3, 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.

Marc J. Randazza, NV Bar No. 12265

1 Ronald D. Green, NV Bar No. 7360
2 Alex J. Shepard, NV Bar No. 13582
3 RANDAZZA LEGAL GROUP, PLLC
4 8991 W. Flamingo Rd., Ste. B
5 Las Vegas, NV 89147

6 *Attorneys for Defendants*
7 *Keith Hodge, Kevin Hodge, and Hodgetwins, LLC*

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/s/ Nicole A. Westbrook