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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 limited liability company,

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES AND PRODUCTION OF DOCUMENTS AND ESI, FOR APPOINTMENT OF A NEUTRAL FORENSIC EXAMINER, AND FOR ATTORNEY'S FEES

Defendants Keith Hodge, Kevin Hodge, and Hodgetwins, LLC (collectively, "Defendants") oppose Plaintiff's Motion to Compel Discovery Responses and Production of Documents and ESI, for Appointment of a Neutral Forensic Examiner, and for Attorney's Fees under Rule 37(a)(5) (ECF No. 77) (the "Motion"). Plaintiff failed to comply with the Local Rules of the Court. He also seeks information that does not exist, information that Defendants have already provided, and information that is disproportionate to the needs of the case. Plaintiff's Motion should be denied in full. Defendants also seek an award of their attorneys' fees pursuant to Fed. R. Civ. P. 37(a)(5)(B).

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MEMORANDUM OF POINTS AND AUTHORITIES

1.0 INTRODUCTION AND RELEVANT FACTS

Defendants made a Facebook post about former Cracker Barrel executive Steve Smotherman. *See* Declaration of Kevin Hodge ("Hodge Dec.") at ¶ 3. Defendant Kevin Hodge did a Google search for Steve Smotherman's photograph to include with the Facebook post. *See id.*, at ¶ 4. The Google search returned numerous images of Plaintiff Steve Smothermon. *See id.*, at ¶ 6. Searching for Steve Smotherman returns mostly images of Steve Smothermon. *See id.* In fact, even major news organizations caption photos of Steve Smothermon as Steve Smotherman. *See* KOAT News 7 Image, attached to the Declaration of Ronald Green ("Green Dec.") as **Exhibit 1.** Given how similar the two names are, and the fact that they are linguistically identical, there is a rich environment for an error, and this is not the first time Smotherman has been used when referring to Plaintiff. *See id.*

Mr. Hodge did not know what Steve Smotherman looked like. He selected an image for the post that turned out to be Steve Smothermon. *See* Hodge Dec. at ¶¶ 7-8. A few hours after the post went up, Plaintiff's agent contacted Defendants' customer service team by email and telephone, informing them that the Facebook post contained the wrong image. *See id.*, at ¶ 12. Defendants' customer service team took the post down a few hours after it went up. *See id.*, at ¶ 13. Plaintiff sent no preservation demand and made no lawsuit threat with his takedown requests, so the post itself, and all information about it, disappeared after 30 days pursuant to standard Facebook procedure. *See* "How to Find Deleted Posts on Meta Business Suite," Graphed.com (Dec. 21, 2025), attached to the Green Dec. as **Exhibit 2**.[1] Even Legacy Church's counsel, Thomas Carroll (who sent a demand over the post) admitted under oath that nothing he sent could have been construed as a preservation notice. *See* Deposition Transcript of Thomas Carroll, at 34:5-35:23, attached to the Green Dec. as **Exhibit 3**. So, the Defendants took down the post as they were asked, deleted it, and never thought about it again until being served with this lawsuit. In the

[1] https://www.graphed.com/blog/how-to-find-deleted-posts-on-meta-business-suite, accessed on Sept. 14, 2026.

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meantime, Facebook purged whatever "metadata" the Plaintiff thinks might exist. However, even if that data still existed, it is highly unlikely it would be relevant to the case.

There are no real disputed facts regarding the incident that served as the impetus for this case.

Plaintiff has understood that the case is weak since its inception, which is why Plaintiff's counsel got very angry when she was informed that there was no insurance in place. *See* Westbrook Letter to Randazza, dated April 21, 2026, attached to the Green Dec. as **Exhibit 4**. An insurance carrier might have made a "nuisance value" or "costs of defense" offer. When that came off the table, Plaintiff's counsel shifted to trying to concoct a spoliation theory, hoping for victory by sanctions, instead of prevailing on the merits.

Plaintiff has demanded the information referenced in the Motion since the beginning of discovery. *See* Green Dec., at ¶ 2. Defendants have explained that since the post was deleted, and no copies preserved, that there *is nothing to give the Plaintiff in discovery about the post.* Nevertheless, Defendants have tried to resolve these demands by asking Plaintiff's counsel what she hopes to gain through the unavailable information, because Defendants might be willing to stipulate to it to resolve the debate. *See* Green July 24, 2026, Letter to Westbrook, attached to the Green Dec. as **Exhibit 5;** Green July 31, 2026, Letter to Westbrook, attached to the Green Dec. as **Exhibit 6**. Plaintiff has never addressed those requests in good faith, and Defendants' attempts to compromise have gone nowhere. *See* Green Dec., at ¶ 3. Plaintiff preferred to roll the dice with a Motion, hoping for undeserved sanctions rather than stipulate to establish the facts he claims to seek. In fact, during one meet and confer conference, when Defense counsel offered to stipulate, Plaintiff's counsel responded that she did not want a stipulation; she wanted the "facts." *See* **Exhibit 5**. Considering a stipulation would have provided her with the "facts" she wanted uncontested, she wanted to increase Defendants' costs more than she wanted "facts."

Plaintiff is either not entitled to the information requested in his Motion to Compel, or what he wants no longer exists (or never existed) and can never be recovered. Defendants have explained what they no longer have and why, as well as why they are declining to provide certain information

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to him. Plaintiff has ignored them and kept pushing for it anyway. The Motion should be denied, recognized for what it is, and the Defendants should be granted fees for having to oppose it.

2.0 ARGUMENT

2.1 The Motion is almost completely Artificial Intelligence Generated

The Motion seems like it was written by someone with no real grasp of the concepts. There is good reason for that. It is almost entirely automatically generated by an AI. When this motion was run through an AI checker, it showed that 69% of it was AI generated. *See* Pangram Report of ECF No. 77 attached to the Green Dec. as **Exhibit 7**. However, that is a deceptive number, since that credits the words in the header and the service footer as human generated. If we eliminate non-substantive titles and service lists, the document contains 4,108 substantive words. Of those, 3,080 are flagged as AI generated. The Motion fails to engage with the actual facts and law because it was not written by a lawyer, but rather by an algorithm.

2.2 Plaintiff did not comply with the Local Rules

Plaintiff did not bother complying with the Court's rules when filing his Motion. The Local Rules require discovery motions to "set forth in full the text of the discovery originally sought and any response to it." LR 26-6(b). In place of doing so, Plaintiff attached nearly 120 pages of exhibits to his Motion. This does not comply with the Local Rule and, by itself, provides reason to deny Plaintiff's Motion.

In *Safety Nat'l Cas. Corp. v. Bender*, Case No. 2:23-cv-00437-CDS-MDC, 2024 U.S. Dist. LEXIS 131880, at *3-4 (D. Nev. July 11, 2024), the court denied movant's motion to compel in part because he did not set forth the text of his discovery requests and the responses to them in the motion. Instead, he attached "over a hundred pages of documents consisting of correspondence and written discovery" to his motion. *Id.* The court stated that it was "not the responsibility of the Court to sift through the parties' discovery to root for issues and disputes" and denied the motion. *Id*. That would be appropriate here.

Here, Plaintiff did the exact same thing. Instead of setting forth the discovery requests and responses in his Motion, he attached "over a hundred pages of documents consisting of

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correspondence and written discovery," making the Court and Defendants sift through it to identify the disputes he discusses in his Motion.

2.3 Defendants served compliant Rule 26(a)(1) initial disclosures

Defendants served their initial disclosures upon Plaintiff on April 9, 2026. On April 21, 2026, Plaintiff's counsel sent a meet and confer letter to Defense counsel regarding those initial disclosures. *See* **Exhibit 4**. That letter alleged that Defendants' initial disclosures: (1) failed to identify "any native browser histories, search logs, internal emails, text messages, or Slack communications regarding the drafting, publication, and eventual removal of the defamatory Facebook post"; (2) did not disclose an insurance policy; and (3) contained vague witness descriptions. *Id.*

In response, Defendants served First Supplemental Disclosures. *See* First Supplemental Disclosures, attached to the Green Dec. as **Exhibit 8**. The First Supplemental Disclosures expanded the witness descriptions, confirmed that there was no applicable insurance policy, and added an email exchange between Smothermon's employee and Defendants' customer service team that Defendants had just obtained from their customer service contractors. *See id.* Simultaneously, Defendants' counsel sent a letter to Plaintiff's counsel explaining that the documents sought by Plaintiff did not exist; Defendants did not have "native browser histories, search logs, internal emails, or Slack communications." Green Letter to Westbrook, dated May 29, 2026, attached to the Green Dec. as **Exhibit 9**. They never have had this type of information, and no amount of motion practice will create it. Nevertheless, anything they might prove, the Defendants are most likely prepared to admit. One of the Defendants did a search on his phone, copied and pasted a photo into a Facebook post. Precisely what millions of people do every day, not one of them creating a forensic log of their thumb movements.

2.3.1 Witness descriptions

With regard to witness descriptions, Plaintiff's counsel was silent about them from April 21, 2026, until her most recent (almost entirely AI generated) meet and confer letter, sent on August 25, 2026. *See* Westbrook Letter to Randazza, dated August 25, 2026, attached to the Green

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Dec. as **Exhibit 10**; Green Dec., at ¶ 4. In that letter, for the first time in four months, Plaintiff's counsel (or rather ChatGPT) contended that the "witness descriptions remain boilerplate and do not identify each witness's role in the editorial, verification, and publication process." **Exhibit 10**. See also, Pangram report, attached to the Green Dec. as **Exhibit 11**.[2]

Meanwhile, Defendants' witness descriptions, contained in their First Supplemental Disclosures, were more than adequate and specified each witness's role in the publication of the Facebook post. Specifically, Kevin Hodge drafted the post, selected the photograph to be included with the post, and published the post. *See* **Exhibit 8**. What more could be expected? A member of Defendants' customer service team, Kylie Howerton, took the post down and communicated with Plaintiff's employee about the post. *See id.* There is no more information to provide. Plaintiff knows this and has known it for months.

On August 27, 2026, Plaintiff's and Defendants' counsel held a telephonic meet and confer conference and discussed Ms. Westbrook's August 25, 2026, letter. Defense counsel asked Ms. Westbrook if he could record the call, and Ms. Westbrook responded that he could. *See* Green Dec. at ¶ 5. Regarding witness descriptions, Mr. Green stated, "If you provide me with the witnesses [where] you don't think our descriptions are adequate, I'll take a look at it. But given the information in your letter, I just don't know what you're looking for." *See* Partial Transcript of August 27, 2026, Call, attached to the Green Dec. as **Exhibit 12**.

Mr. Green then explained his knowledge and his clients' knowledge regarding the roles that their third-party customer service team took in the takedown of the Facebook post, and Ms. Westbrook seemed satisfied with his response. *See* Green Dec., at ¶ 8.. She never followed up with Mr. Green before she filed the Motion. *See id.* As it currently stands, Defendants have informed Plaintiff what they know about the roles the individuals on their third-party customer support team played. *See id.*, ¶ 9. They know who spoke to and communicated with Plaintiff's employee about getting the post taken down (Kylie Howerton). *See* **Exhibit 8**. They know the identity of the person

[2] This is relevant, because it appears that rather than engaging with the material and the case, opposing counsel continues to simply outsource both the writing and the analysis to artificial intelligence, running up the bills, but not actually doing anything productive.

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that actually took the post down (Clayton Cunningham). *See* Fifth Supplemental Disclosures, attached to the Green Dec. as **Exhibit 13**.

Plaintiff chose not to depose any of the individuals on Defendants' third-party customer support team. In fact, he chose not to take any depositions at all. *See* Green Dec., at ¶ 10. He cannot use witness descriptions to try to make up for a lack of diligence in the discovery period.

Federal Rule of Civil Procedure 26 only "require[s] parties to provide to other parties 'the name … of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses.'" *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 861 (9th Cir. 2014), *quoting* Fed. R. Civ. P. 26(a)(1)(A)(i). Defendants did this, and after they did, it was on Plaintiff to "conduct discovery of what those witnesses would say on relevant issues." *Ollier*, 768 F.3d at 862. Plaintiff elected not to do this, but that does not mean that Defendants are then obligated to provide more information than required by Rule 26. The vague demand from Plaintiff for more elaborate witness descriptions should be denied.

2.3.2 Documents and ESI

Regarding "responsive documents" that Plaintiff insists Defendants "will not disclose," Defendants have been telling Plaintiff's counsel for months that the documents that she is seeking do not exist. She keeps demanding them anyway, and now she has brought this non-existent dispute to the Court. On May 29, 2026, nearly four months ago, Defense counsel wrote to Smothermon's counsel: "I told you during our meet and confer that there were no additional documents. As we discussed, [Defendants] do not have the 'native browser histories, search logs, internal emails, or Slack communications regarding the drafting, publication, and eventual removal' of the Facebook post that you demanded." **Exhibit 9**. None exist. None ever existed. To the extent that anything once existed in Facebook data, that information was deleted by Facebook months ago.

Defendants do not have the documents demanded by Plaintiff for two reasons: First, Kevin Hodge's practice is to browse in incognito mode. This is standard practice, and Defendants admit

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to taking significant satisfaction when Plaintiff's own expert witness stated in his report that he "used private, or incognito, browsing while logged out of [his] account to remove personalization associated with [his] own account and browsing history." See Report of Istvan Jonyer, at 20, attached to the Green Dec. as **Exhibit 14**. Kevin Hodge does not log into his Google account on his phone. This left him with no record of the search.[3] *See* Second Amended Responses to Plaintiff's First Set of Interrogatories, attached to the Green Dec. as **Exhibit 15**. Nevertheless, what would a record show? 1. Search for Steve Smotherman. 2. Hover over image of Steve Smothermon, thinking it was Steve Smotherman. 3. Copy image. 4. Paste image into Facebook post. 5. Hit "post." 6. Hours later, someone else deletes the post. 7. The end.

Second, Plaintiff's employee and Plaintiff's counsel both contacted Defendants about taking the post down. *See* Krisha Mason Email, attached to the Green Dec. as **Exhibit 16**; Thomas Carroll Facebook Message, attached to the Green Dec. as **Exhibit 17**. Neither the employee nor the attorney threatened a lawsuit or demanded preservation. *See id.* During Plaintiff's counsel's deposition, Mr. Carroll admitted that his message did not ask the Hodgetwins to retain documents, search histories, analytics, or communications regarding the Facebook message. *See* **Exhibit 3** at 34:25-351:13.

All Plaintiff's representatives asked Defendants to do was take the Facebook post down because it contained the wrong picture. Defendants complied. Because they deleted the Facebook post as Plaintiff requested, all information about the Facebook post disappeared from Defendants' Facebook account within 30 days. *See* Defendants' Responses to Plaintiff's Third Set of Interrogatories, at 3, attached to the Green Dec. as **Exhibit 18**; **Exhibit 2**.

Defendants' witness descriptions comply with the Rules. They produced all documents and information that they have. The actions of Plaintiff's agents caused Defendants to lose access to

[3] Defendants have informed Plaintiff's counsel on numerous occasions for the past four months that Mr. Hodge uses incognito mode while logged out of his account to perform searches because it ensures that his search results will not be biased by prior searches that he performed while signed into his Google account. *See* Green Dec. at ¶ 16. Plaintiff's counsel has refused to accept that explanation and insists use of incognito mode proves that Defendants were trying to cover their tracks. *See id.* Plaintiff's own expert agrees with Defendants.

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much of the information Plaintiff now demands. Defendants cannot produce what they do not have. The Motion should be denied.

2.4 Defendants do not possess much of what Plaintiff requests

Defendants have already informed Plaintiff's counsel on numerous occasions that much of what she is seeking does not exist. Defendants cannot produce what they do not have. Much of what Plaintiff demands in his Motion was requested solely to harass Defendants, as it does not contain the information he claims to want.

2.4.1 Google Web & App Activity/Takeout Export

In the August 25, 2026, meet and confer letter that Plaintiff sent before filing the instant Motion, he states that he wants a Google Web & App Activity/Takeout Export because "[w]hen a user is signed into a Google account, Web & App Activity records searches to that account's 'My Activity' regardless of incognito mode, and the account holder can export those records through Google Takeout." *See* **Exhibit 10**. In the instant Motion, Plaintiff Smothermon provided no justification for why he is attempting to compel a full Google Web & App Activity/Takeout Export. He just demands that the Court compel it. This does not meet his burden of providing a "meaningfully developed argument" as to why he is entitled to the information he seeks to compel. *Carmen v. Am. Trust Fin. Servs., Inc.*, Case No. 2:22-cv-01974-APG-NJK, 2024 U.S. Dist. LEXIS 162159, at *2 (D. Nev. Sept. 9, 2024).

Defendants have explained to Plaintiff on multiple occasions that Kevin Hodge was not signed into a Google account when he performed the search, obviating any arguable need for these documents. *See* Defendants' Response to Interrogatory No. 8, Plaintiff's Second Set of Interrogatories, at 3, attached to the Green Dec. as **Exhibit 19**; Defendants' Response to Requests for Admission Nos. 10, 11, 12, and 13, Responses to Plaintiff's Second Set of Requests for Admission, at 2-3, attached to the Green Dec. as **Exhibit 20**. The export would not have the information Plaintiff seeks. Requiring Defendants to provide it would be futile and a waste of everyone's time. Considering Plaintiff did not attempt to justify his demand for this information to the Court, he presumably knows this already.

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2.4.2 Native Photograph File

On August 22, 2025, Kevin Hodge drafted a Facebook post about Cracker Barrel's Steve Smotherman. *See* Hodge Dec., at ¶ 3. He wanted to place a photograph of Mr. Smotherman into the post, so he performed a Google search for Steve Smotherman. *See id.*, at ¶ 4. The search returned several photographs of the same person, who Mr. Hodge assumed was Steve Smotherman. *See id.*, at ¶¶ 6-8. He copied the photo from his Google search and pasted it into his Facebook post. *See id.*, at ¶ 9. That is the extent of his involvement with the photograph at the heart of the case. *See id.*, at ¶ 14.

He does not have the native file. *See id*., at ¶ 15. He never had a native file. The photo existed in his clipboard for a few minutes. So, he cannot produce the native file. Plaintiff's counsel and Defendants' counsel have discussed this issue on numerous occasions over the course of the entire discovery period. Defendants cannot produce what they do not have and have no ability to obtain. Plaintiff's counsel knows this.

2.4.3 Meta Business Suite Export and Audit Log

Plaintiff demands a complete Meta Business Suite Export and Audit Log. He seeks this information to examine "how far the Post spread." Motion at 10. Defendants would love to provide this information to Plaintiff, as they are quite sure the information would be extremely helpful to them. However, this information simply does not exist anymore because Plaintiff's agents demanded that Defendants delete the Facebook post but did not demand that they preserve information regarding the post. *See* **Exhibits 3, 16, and 17**.

Defendants have scoured their Facebook records. *See* Hodge Dec., at ¶ 16-17. Their counsel, Marc Randazza, has done so as well. *See* Declaration of Marc Randazza ("Randazza Dec."), at ¶¶ 2-3. No information about the August 22, 2025, Facebook post exists on Meta's servers. This was the expected result. After a Facebook post is deleted, the deleting party has "30 days to restore a deleted post. After this period, the post is permanently deleted from Meta's servers, along with all its associated likes, comments, and shares." **Exhibit 2**.

Defendants have explained this to Plaintiff's counsel on numerous occasions. Most recently during the meet and confer conference on August 27, 2026, where Mr. Green explicitly told Ms. Westbrook that Defendants objected to the Business Suite and Audit Log production because there is "nothing surviving from the posts in question" on Facebook's servers. *See* **Exhibit 12**. Defendants have scoured their Facebook account seeking information about the post; their counsel has done the same. This information no longer exists and cannot be produced.

2.4.4 Internal and Third-Party Communications about the Post

In his First Set of Requests for Production of Documents, Plaintiff asked Defendants for all "internal communications … between or among Keith Hodge, Kevin Hodge, and any employees or agents of Hodgetwins, LLC regarding the creation, drafting, and publication of the August 22, 2025, Facebook Post." *See* Amended Response to Plaintiff's First Set of Requests for Production of Documents, at 3, attached to the Green Dec. as **Exhibit 21**. Defendants responded that they had no responsive documents. *See id.*

In those First Requests, Plaintiff also asked for all internal communications regarding "the discovery of the misidentification in the Facebook Post, the decision to remove the post, and the actual removal of the post," and Defendants again responded that they had no responsive documents. *Id.* Finally, Plaintiff asked for all communications with third parties regarding the Facebook Post, and Defendants produced the email from Krisha Mason asking them to take the post down. *See id.*

That Krisha Mason email, and Plaintiff's counsel's direct message, are the only communications regarding the Facebook post that Defendants have. *See* Hodge Dec., at ¶ 18. Defendants have confirmed this several times. *See* Green Letter to Westbrook dated July 1, 2026, attached to the Green Dec. as **Exhibit 22**; **Exhibit 5** (stating that "the Hodgetwins' conversations with [its third-party customer-service team] were done over the phone and not via email").

The documents Plaintiff seeks do not exist. There is nothing to compel.

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2.4.5 Revenue, Monetization, and Engagement Data

Defendants have already given Plaintiff all information that they have about the revenue derived from the Facebook post, as well as monetization and engagement data about the Facebook post. Specifically, in response to a discovery request, Keith Hodge provided a declaration providing "as much information as [he could] regarding money generated by" the Facebook post. *See* July 29, 2026, Declaration of Keith Hodge, at ¶ 4, attached to the Green Dec. as **Exhibit 23**. In it, he stated that the Facebook post "probably earned around $20 to $40." *Id.* at ¶ 8. He also explained that he could not give a more precise answer because Plaintiff demanded that Defendants delete the post, and Defendants cannot access that information for deleted posts. *See id.* at ¶ 9. This information does not exist, and Plaintiff has known that it does not exist for nearly two months.

2.4.6 Response re: Preservation Steps

Plaintiff's meet and confer letter alleged that his counsel's Facebook message and/or his employee's takedown email attached a duty to preserve that arose on August 22, 2025. *See* **Exhibit 10** at 4. On this basis, he demanded that Defendants provide a "substantive supplemental response" regarding preservation efforts. *Id.* During the parties' meet and confer call, Ms. Westbrook did not bring up preservation at all. *See* Green Dec. at ¶ 11.

In the Motion to Compel for the first time, Plaintiff appears to claim that Meta Business Suite will still have information regarding the deleted post. *See* ECF No. 77 at 12. This is not true. After thirty days, Meta permanently deletes the post from its servers, along with all information regarding that post. *See* **Exhibit 2**. Plaintiff instructed Defendants to delete the post. Defendants did as Plaintiff asked and cannot complain now that they complied.

Defendants took no preservation steps. They have been upfront about this, as acknowledged by Plaintiff. *See* ECF No. 77 at 12. Plaintiff's counsel testified that his message contained no preservation requirements, and Plaintiff's employee's email contained no preservation requirements either. *See* **Exhibits 3, 16, and 17**. There is nothing to compel here.

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2.4.7 Privilege Log

During the meet and confer conference, Ms. Westbrook asked "What about the privilege log?" Mr. Green responded, "I don't think we're withholding anything based on privilege. I will make sure of that, and if we are, I will do a privilege log for you." **Exhibit 12**. Defendants are not withholding any documents on the basis of privilege. *See* Green Dec., at ¶ 13. Nothing to compel.

2.5 Defendants have responded to Plaintiff's second and third sets of discovery

Plaintiff asks this Court to compel "complete, verified supplemental responses to Plaintiff's Second and Third Sets of written discovery." ECF No. 77 at 2. However, he does not say what is allegedly incomplete or why, vaguely asserting that Defendants "swore under oath that no responsive documents existed, then produced more than 100 pages." *Id.* at 5. However, Plaintiff otherwise provides no indication as to what responses he believes are incomplete. Plaintiff's Second and Third Sets of Requests contain a total of twenty-three requests for production, fifteen interrogatories, and twenty-five requests for admission and expects Defendants and this Court to guess which ones he takes issue with.

As discussed, this Court's rules require "[a]ll motions to compel discovery" to "set forth in full the text of the discovery originally sought and any response to it." LR 26-6(b); *see also Ricci v. Cabrera*, Case No. 2:23-cv-02089-RFB-BNW, 2026 U.S. Dist. LEXIS 73537, at *4-5 (D. Nev. Apr. 2, 2026). Plaintiff's Motion shows why. Defendants have no idea what Plaintiff seeks to compel here, how their responses are allegedly insufficient, or why they are insufficient. If Defendants cannot glean what Plaintiff's issues with the responses are, the Court will not be able to do so either. Plaintiff fails to comply with the Local Rule and simultaneously demonstrates why the Local Rule exists. The Motion should be denied.

2.6 There is no basis to appoint a forensic examiner

Plaintiff asks for a forensic examiner ostensibly because he does not believe Defendants when they state that they do not have many of the documents he is seeking. *See* ECF No. 77 at 12-13. However, he has no evidence that Defendants' responses are dishonest (they are not); his attorneys are just trying to make up for the fact that they never took any depositions. This is not

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sufficient grounds for this extraordinary relief, and his demand should be denied.

When a party "indicates that a reasonable search was undertaken for documents and that no responsive documents were found (or that all responsive documents were produced), such representations will generally carry the day." *PlayUp, Inc. v. Mintas*, 350 F.R.D. 47, 52 (D. Nev. 2022). The ability to "inspect an opposing party's computers or other electronic devices is by no means a matter of right." *Id.*, citing *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003). A forensic examination is inappropriate unless "there are 'serious questions' about the reliability and completeness of the materials produced," *Id.*, citing *Bass Underwriters, Inc. v. Kono*, Case No. 2:22-cv-00138-RFB-EJY, 2025 U.S. Dist. LEXIS 59266, at *7 (D. Nev. Mar. 30, 2025), "or about the 'candor' of the producing party's assertions." *Id.*, *citing Ignite Spirits, Inc. v. Consulting by AR, LLC*, Case No. 2:21-cv-01590-JCM-EJY, 2022 U.S. Dist. LEXIS 144307, at *3 (D. Nev. Aug. 11, 2022).

Plaintiff "bears the burden of showing that [a forensic examination] is warranted based on the circumstances of a particular case." *See PlayUp*, 350 F.R.D. at 53. This Court, and all courts within the Ninth Circuit, "have expressed reluctance in allowing forensic examination of an opposing litigant's electronics." *Id.* As such, a "forensic examination is 'an extraordinary remedy that requires substantial support.'" *Id.*, *quoting Bass Underwriters*, 2025 U.S. Dist. LEXIS 59266, at *4. A forensic examination is warranted only upon a "strong showing" that the opposing party has defaulted on its discovery obligations. *Id.*

In determining whether a forensic examination is warranted, courts consider whether the examination will reveal relevant information that is proportional to the needs of the case. *See id.* This requires an examination of "the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* at 54. When personal devices are involved, the Court should also consider "privacy interests." *Id.* at 53-54.

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The merits of Plaintiff's request for a forensic examiner are demonstrated by the seriousness with which he addressed the required analysis described above, which is from the case he cited. He skipped it almost entirely. While admitting that the appointment of a forensic examiner is "an extraordinary remedy that requires substantial support," he barely devotes one page to it. ECF No. 77 at 12-13, *citing PlayUp*, 350 F.R.D. at 53. It took Defendants more than one page to provide this Court with the standard by which it should evaluate Plaintiff's demand. Regarding the argument he does make, every single point can be refuted.

With regard to Request for Production No. 20, Plaintiff already had the Kylie Howerton/Krisha Mason email when Defendants responded to that Request, so they obviously were not making any attempt to hide it from them. *See* Green Dec., at ¶ 14-15. Regarding Interrogatory No. 11, while Kevin Hodge did indeed perform the search on his iPhone, Defendants have consistently stated that there are no records of that search because he performed it in incognito mode while not signed into a Google account. *See* Hodge Dec., at ¶ 5. Plaintiff knows this and still implies there is some insidious explanation for Mr. Hodge having no record of the search. This is bad faith and, by itself, justifies denial of his request.

Defendants' data regarding the Facebook post was lost "as a result of Plaintiff's own actions." ECF No. 77 at 13. Plaintiff's representatives, including his counsel, demanded that Defendants delete the post but not that they preserve any information related to it. And Defendants did attempt to extract data about the post from Facebook but were unable to do so. *See* Hodge Dec., at ¶¶ 16-17; Randazza Dec., at ¶ 2-3. Defendants are not even sure how this is a "changing" representation. They tried to retrieve the information Plaintiff wanted but were unable to do so. They have been consistent on this throughout discovery.

These are Plaintiff's only justifications for what he acknowledges is "an extraordinary remedy." He is not entitled to forensic examination.

Plaintiff does not address the importance of the information he wants from a forensic examination. This is because it is not important. Defendants admit they made the Facebook post. They admit that the post erroneously contained Plaintiff's photo. They admit that Plaintiff's

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employee and his lawyer asked them to take the post down. They admit they took it down when they were asked. The information requested will not help Plaintiff show that Defendants acted with actual malice. Defendants admit that they did not check the metadata for the photo and that they had no idea who Plaintiff was when they made the post. *See* Hodge Dec., at ¶ 7, 10. The information Plaintiff wants will do nothing to help him establish liability or demonstrate damages.

The burden of allowing Plaintiff to go through Kevin Hodge's cell phone strongly outweighs the benefit Plaintiff would get from it. To make matters worse, Plaintiff insists that Defendants bear the full burden of paying for the examiner when Plaintiff cannot justify his request or demonstrate that Defendants were dishonest. Mr. Smothermon has given the Court nothing to indicate that it should not trust Defendants' representations that they performed a reasonable search that did not turn up what he is seeking.

Plaintiff has provided this Court with *nothing* to justify compromising Kevin Hodge's privacy. He has provided the Court with *nothing* to justify forcing Defendants to pay for an examiner. And he has done *nothing* to show that he is entitled to an extraordinary remedy, which would have required more than a single page of lazy analysis. His demand should be denied.

2.7 Defendants are entitled to the fees and costs spent opposing Plaintiff's Motion

The Motion should be denied. Pursuant to Fed. R. Civ. P. 37(a)(5)(B), when it is denied, the Court *must* "require the movant, the attorney filing the motion, or both to pay the party … who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." Plaintiff's Motion was not substantially justified, and there are no circumstances that make an award of Defendants' expenses unjust. In fact, given that it took far longer to *read* the motion than presumably the AI took to write it, and that Plaintiff's counsel could not even be bothered to actually engage with the material, it is especially unjust that the Defendants should have had to respond to this AI produced flotsam in the first place.

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3.0 CONCLUSION

Plaintiff's Motion should be denied. He has not complied with the Local Rules of this Court. Much of the information sought no longer exists due to the actions of Plaintiff and/or his agents. He is not entitled to the remainder of what he seeks. Defendants should be awarded the fees and costs expended opposing Plaintiff's Motion.

Dated: September 17, 2026.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 17, 2026, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I further certify that a true and correct copy of the foregoing document is being served via transmission of Notices of Electronic Filing generated by CM/ECF.

Respectfully submitted,

/s/ Casey T. Spring
Casey T. Spring

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