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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 TO 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

Plaintiff Pastor Steve Smothermon ("Plaintiff") submits this Reply to 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 (ECF No. 98) filed by Defendants Keith Hodge, Kevin Hodge, and Hodgetwins, LLC (collectively referred to as the "Defendants"). In support of this Reply, Plaintiff would show the Court as follows:

ARGUMENT

Reply Point No. 1:

Defendants' Continued Failure to Produce the Metadata

The parties agreed that metadata could be requested and received in this case. In the Joint Discovery Plan and Scheduling Order Submitted in Compliance with LR 26-1-(b) (ECF No. 48), Plaintiff and Defendants agreed that: (i) "The parties will work together to produce native files with metadata where possible and necessary" (ECF No. 48) at ¶ 12; and (ii) "The parties reserve the right to request metadata for electronic documents should any party deem it necessary." (ECF No. 48 at ¶ 13.2.

As stated in Plaintiff's Motion to Compel, two of the categories of Plaintiff's discovery requests that remain outstanding are the native photograph file with its EXIF, IPTC, and system metadata, including the source URL that establishes the image at issue in this case is of Plaintiff and the tracing to its origin and certain emails related to the actions taken by Defendants. As part of Plaintiff's requests for production of documents, Plaintiff requested the following from Defendants regarding the relevant metadata information at issue:

Plaintiff's First Set of Requests for Production of Documents:

- **REQUEST FOR PRODUCTION NO. 1:** Produce the original image file used in the August 22, 2025, Facebook Post in its Native Format with all Metadata intact and unaltered.
- **REQUEST FOR PRODUCTION NO. 2:** Produce all internal communications (including but not limited to emails, text messages, Slack messages, and direct messages) 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 in their Native Format with all Metadata intact and unaltered.
- **REQUEST FOR PRODUCTION NO. 3:** Produce 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 from the Hodgetwins Facebook page in their Native Format with all Metadata intact and unaltered.

- **REQUEST FOR PRODUCTION NO. 4:** Produce all communications with any third parties—including followers, commenters, or media entities—regarding the Facebook Post in their Native Format with all Metadata intact and unaltered.
- **REQUEST FOR PRODUCTION NO. 7:** Produce all documents or communications regarding any "red flags" or doubts expressed by any person prior to publication regarding the accuracy of the photograph or the identity of the person depicted in the Facebook Post in their Native Format with all Metadata intact and unaltered.
- **REQUEST FOR PRODUCTION NO. 8**: Produce all analytics reports, revenue statements, or "insights" data from Meta/Facebook for the period of August 22, 2025, through August 30, 2025, specifically filtered for the Facebook Post in their Native Format with all Metadata intact and unaltered.

Plaintiff's Third Set of Requests for Production of Documents:

- **REQUEST FOR PRODUCTION NO. 13:** [each individual Defendant] The original photograph file used in the Post, in its Native Format with all Metadata (EXIF and system, including Source URL) intact and unaltered.

Because of the claims and issues presented in this case, Plaintiff deemed it necessary to request certain metadata on relevant electronic documents. Simply put, Plaintiff is seeking the native files and the respective metadata to establish the source of the photograph at issue, the authenticity of the documents requested, and the completeness of the notice chain. Thus, consistent with the Joint Discovery Plan and Scheduling Order Submitted in Compliance with LR 26-1-(b) (ECF No. 48), Plaintiff propounded the above-listed requests for production of documents to Defendants.

Defendants, however, have not produced any of the native files or any metadata. Defendants responded to six of the seven above-listed requests for production with the same response: "Defendants are in possession of no documents responsive to this request and will supplement this response if responsive documents are located in the future." Defendants also represented to Plaintiff that they "have not reviewed the metadata." Defendants repeated this claim in their Opposition to Plaintiff's Motion to Compel. (ECF No. 98) at p. 16 ("Defendants admit that they did not check the metadata for the photo. …"). This included Plaintiff's request specifically related to the photograph at issue in this case.

Interestingly, in Defendants' own Sixth and Seventh Sets of Requests for Production to Plaintiff, Defendants adopt Plaintiff's definition of "Metadata" verbatim, including its IPTC and system-metadata categories and the image file's "Source URL," and demanded that Plaintiff produce documents bearing that metadata. Thus, Defendants recognize and acknowledge the importance and probative value of the metadata information. Yet, despite this, Defendants have refused to produce any metadata information.

With respect to the metadata information related to the requested emails, Defendants have not produced any such metadata information. Plaintiff seeks the following emails: the customer-service email in native format, the Hughes communications, and communications with Ms. Mason, Ms. Howerton, and Mr. Rynders concerning the post, with metadata intact. Defendants produced some emails but only in a flattened format and have failed to produce other requested emails in any format. A customer service email through which Nathan Hughes learned of the post at issue in this case and communications between Defendants and Mr. Hughes have not been produced, either in a flattened format or the metadata related to the email. The emails produced by Defendants related to the Mason-to-Howerton notice email were produced, but in a flattened format. A publisher's editorial and verification process and state of mind are proper subjects of discovery in this defamation case. *Herbert v. Lando*, 441 U.S. 153 (1979).

The importance of producing the metadata for the requested documents is because the metadata will reveal the digital fingerprint of the requested picture and emails. The metadata will

expose certain descriptive, technical, and administrative details about the requested documents. These are details that a flattened electronic document does not reveal. As to Defendants' offer to stipulate that the notice email was delivered is not a sufficient substitution to the requested native files and its respective metadata, which go to source, authenticity, and completeness rather than delivery alone. Despite this and despite agreeing to work with Plaintiff to produce native files with metadata where possible and necessary, Defendants have failed to produce the requested metadata. Instead, in their Opposition to Plaintiff's Motion to Compel, Defendants make a self-serving, unsupported claim that "it is highly unlikely [the requested metadata] would be relevant to the case." (ECF No. 98) at p. 3. Defendants' self-serving conclusion is insufficient to deny Plaintiff's request for the metadata information. Accordingly, Defendants should be compelled to produce the requested documents and information in its native format, with all metadata.

Reply Point No. 2:

Defendants' Incognito Mode Argument is Inadequate

In their Opposition to Plaintiff's Motion to Compel, rather that produce the requested search history, Defendants take the position that there are no records of the applicable requested search because Defendants performed the search in incognito mode. The position taken by Defendants as to their "incognito mode" is inadequate.

Defendants' position addresses only local browser history. Private/Incognito mode governs only what the browser writes to the local device; it does not suppress server-side logging by the user's account. When a user is signed in to a Google account, Google's Web & App Activity records the user's searches to the account's "My Activity" regardless of Incognito mode, and that record is exportable by the account holder through Google Takeout. Defendants' representation that they have no record of the search speaks only to local browser artifacts; it does not address the account-side activity data, which is within Defendants' possession, custody, and control under Rule 34 because Defendants can retrieve it from their own Google account.

Additionally, if Defendants intend to take the position and argue to the fact finder in this case that Defendants conducted their searches in incognito mode and those searches resulted in

showing Plaintiff Pastor Smothermon, instead of Smotherman, which was the alleged cause of Defendants' mistake, then Defendants should be required and compelled to produce proof of their searches. The requested search history is relevant because it could confirm that the search is not there and/or it could confirm that Defendants did not use incognito mode.

Defendants' "no documents" responses to Plaintiff's requests for production are, accordingly, incomplete and their "incognito mode" excuse is inadequate; therefore, Plaintiff requests that Defendants be compelled to produce the requested documents and information.

Reply Point No. 3:

The Appointment of a Neutral Forensic Examiner is Warranted

Plaintiff has requested that the Court appoint a neutral examiner in order to image and search the devises (*e.g.*, the iPhone 16 Pro Max) and accounts used to create, source, or remove the Post at issue in this case (under a protocol that protects privileged and irrelevant material. The appointment of a forensic examiner is appropriate in this case because Defendants' sworn representations keep changing; therefore, Defendants' representations cannot be trusted to certify that Defendants' own devices and accounts have been fully searched. *See PlayUp, Inc. v. Mintas*, 350 F.R.D. 47, 52-53 (D. Nev. 2025) (noting an examiner is appropriate when there are "serious questions" about the "candor" of the production or the "reliability and completeness of the materials produced.").

In their Opposition to Plaintiff's Motion to Compel, Defendants argue against the appointment of a neutral forensic examiner because it is Defendants' position that Plaintiff does not have evidence that Defendants' responses are dishonest. Defendants are mistaken in their position. In their responses to Plaintiff's discovery requests, Defendants answered that they were "in possession of no documents responsive" to communications with Mason, Howerton, and Hughes, Defs.' 2d Set RFP Resps. No. 20 (July 30, 2026), then Bates-stamped the ticket thread as HODGE000136–000138. They then disclosed only Plaintiff-side documents under Rule 26(a)(1). Defendants also swore that Kevin Hodge ran the search on "his iPhone 16 Pro Max," which he "still uses," Defs.' 2d Set Interrog. Resps. No. 11, while claiming no search records exist, *id.* No.

8. In one August 10 verification Defendants said documents "are being produced contemporaneously," Defs.' 3d Set Interrog. Resps. No. 17, and that engagement data "was lost as a result of Plaintiff's own actions," *id.* Nos. 18, 20. Counsel then wrote that Defendants "attempted to extract data about the post from Facebook but were unable to do so." Letter from Ronald D. Green to Nicole A. Westbrook (July 31, 2026). Where a party's discovery responses contain discrepancies or inconsistencies, forensic imaging is warranted. *Ameriwood Indus. v. Liberman*, No. 4:06CV524-DJS, 2006 WL 3825291, at *4 (E.D. Mo. Dec. 27, 2006).

A forensic examination is warranted only upon a "strong showing" that the opposing party has defaulted on its discovery obligations. *See PlayUp, Inc.*, 350 F.R.D. at 53. The actions of Defendants, as described and detailed herein, establish that Defendants have defaulted on their discovery response obligations. As explained *supra*, Defendants have attempted to sidestep the issues and are trying to avoid production of the requested metadata and other requested documents. Defendants have not produced any of the requested documents in their native format or any metadata. Defendants responded to the applicable and relevant requests for production with the same response: "Defendants are in possession of no documents responsive to this request and will supplement this response if responsive documents are located in the future." Defendants also represented to Plaintiff that they "have not reviewed the metadata." Defendants repeated this claim in their Opposition to Plaintiff's Motion to Compel. (ECF No. 98) at p. 16 ("Defendants admit that they did not check the metadata for the photo. …"). This included Plaintiff's request specifically related to the photograph at issue in this case. Thus, Defendants' pattern of conduct and the circumstances of this case warrant the appointment of a neutral forensic examiner. If Defendants have admittedly stated that they have chosen not to review the metadata and have not checked for it, then it is appropriate to appoint a forensic examiner to conduct the search and do the review that Defendants voluntarily refuse to do themselves.

The central issue at stake in this case involves the photograph used and the Post where the photograph was used, and the emails related to the posting and removal of the Post. A forensic examination will reveal the relevant information related to the central issue in this case; especially

since Defendants will not do so voluntarily, despite the agreement reached between the parties in the Joint Discovery Plan and Scheduling Order Submitted in Compliance with LR 26-1-(b) (ECF No. 48). Finally, the appointment of a forensic examiner goes to the importance of the discovery and the resolution of the issues in this case.

With respect to Defendants' concern that the device at issue involves the personal device of one of the defendants and any related privacy concerns, Plaintiff has no issue and no opposition to the Order Appointing a Forensic Examiner to include an order that protects the privacy of the owner of the device regarding the disclosure of any private, non-relevant information.

CONCLUSION

As stated in Plaintiff's Motion to Compel, the evidence that will decide this case is in Defendants' hands, and their shifting, ever-changing, and incomplete discovery has kept it there. Plaintiff cannot prove Defendants' knowledge, the reach of the Post, or the authenticity and completeness of the requested documents without the records Defendants control. The Court should not permit Defendants' stonewalling to defeat the claim on the merits. Plaintiff respectfully requests that the Court grant Plaintiff's Motion to Compel (ECF No. 77) in full.

Respectfully submitted this 24th 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 24, 2026, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which served all counsel of record, including:

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