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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 MOTION TO COMPEL DEFENDANTS TO PAY EXPERT WITNESS ROBERT J. FISHER'S REASONABLE DEPOSITION FEE UNDER FED. R. CIV. P. 26(b)(4)(E)**

Defendants chose to depose Plaintiff's retained expert, Robert J. Fisher, for a full seven hours. They did so with his fee schedule in hand. Having taken the deposition, they now refuse to pay for it — offering roughly one quarter of the stated rate and insisting that payment must await the outcome of a motion to exclude. The governing rule does not permit that. Federal Rule of Civil Procedure 26(b)(4)(E) requires that the party seeking discovery "pay the expert a reasonable fee for time spent in responding to discovery," and the court "must require" that payment absent manifest injustice. *Miller v. Sawant*, 114 F.4th 1071, 1074 (9th Cir. 2024). Defendants concede the rule applies and concede that, as "the party seeking discovery," the obligation is theirs. Plaintiff respectfully asks the Court to order Defendants to pay Mr. Fisher's reasonable deposition fee of $6,825.

RELEVANT FACTS

1. Plaintiff retained Robert J. Fisher of Fisher & Associates, Inc. as an expert witness in this action under a written Expert Witness Agreement effective June 10, 2026. A true and correct copy of the Agreement is attached as **Exhibit A**.

2. The Agreement sets Mr. Fisher's deposition rate at $975 per hour, with a four-hour minimum. That rate was disclosed to Defendants before they elected to take his deposition; Defendants' own correspondence quotes it from Mr. Fisher's expert report.

3. Defendants issued a subpoena and took Mr. Fisher's deposition on August 6, 2026, in Los Angeles, California. The deposition lasted seven hours.

4. Seven hours at the disclosed rate of $975 per hour yields a deposition fee of $6,825. Defendants acknowledge that $6,825 is the sum Mr. Fisher billed.

5. By letter dated October 1, 2026, Defendants' counsel refused to pay the fee at this time, took the position that "[p]ayment now is premature," and stated that Defendants will move to exclude Mr. Fisher's opinions under Federal Rule of Evidence 702 before any fee is paid. A true and correct copy of that letter is attached as **Exhibit B**. In the same letter, Defendants proposed paying a rate of $250 per hour.

6. Defendants do not contend they are unable to pay. To the contrary, their counsel represents that sums "under $10,000 are typically paid around here from petty cash."

MEET-AND-CONFER CERTIFICATION

Pursuant to LR 26-6(c) and LR IA 1-3(f), undersigned counsel certifies that the parties met and conferred in good faith regarding the matters raised in this Motion by via email and letters, and were unable to resolve the dispute without the Court's intervention. The details of that conference are set forth in the accompanying Declaration of Counsel.

ARGUMENT

A. Rule 26(b)(4)(E) requires Defendants, as the party that took the deposition, to pay Mr. Fisher a reasonable fee.

Rule 26(b)(4)(E) is mandatory. Unless manifest injustice would result, "the court must require that the party seeking discovery… pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A)." *Miller v. Sawant*, 114 F.4th 1071, 1074 (9th Cir. 2024). The obligation falls on the party that noticed and took the deposition. *Id*. at 1076. In this Circuit, that obligation extends to reasonable deposition-preparation time as well as time on the record, because the rule reaches all "time spent in responding to discovery." *Id*.

There is no dispute about who bears the obligation here. Defendants noticed the subpoena and took the deposition. And Defendants concede the point in writing: they agree that Rule 26(b)(4)(E) applies and acknowledge that "the obligation belongs to 'the party seeking discovery,' which is Keith Hodge, Kevin Hodge, and Hodgetwins, LLC." The only question is whether they must pay now. They must.

B. Defendants' Rule 702 motion neither excuses nor defers the obligation to pay.

Defendants' sole stated reason for withholding payment is that they intend to move to exclude Mr. Fisher under Rule 702, and that "[p]ayment now is premature." The Ninth Circuit has squarely rejected that logic. An objection to the admissibility of an expert's opinions under Rule 702 and *Daubert* "does not obviate" the deposing party's "obligation to pay… a reasonable fee under Rule 26," because the rule reaches an expert whose opinions may be presented at trial. *Miller v. Sawant*, 114 F.4th 1071, 1075 (9th Cir. 2024). The court "generally must order a party to pay for the cost of deposing its adversary's expert *regardless of whether the expert's opinion ultimately is presented at trial.*" *Id*. A district court therefore need not resolve a *Daubert* motion before ordering payment under Rule 26(b)(4)(E). *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 884 (7th Cir. 2020).

Defendants' position is foreclosed. The fee is owed for the time the expert spent responding to the deposition Defendants chose to take, whether or not his opinions are later admitted, limited, or withdrawn. Defendants may pursue their Rule 702 motion but it provides no basis to withhold the deposition fee that Rule 26(b)(4)(E) makes presently due.

C. The claimed fee of $6,825 is reasonable.

A reasonable fee is the second of the rule's two textual limits — the fee must be "reasonable," and its award must not work "manifest injustice." *Miller v. Sawant*, 114 F.4th 1071, 1076 (9th Cir. 2024). This Court determines reasonableness using the familiar factors: the expert's area of expertise; the education and training required; the prevailing rates of comparable experts; the nature, quality, and complexity of the discovery; the fee charged to the retaining party; the fees the expert traditionally charges; and any other balancing consideration. *Farace v. Am. Airlines, Inc.*, No. 2:10-CV-00724-KJD, 2011 WL 3841438 (D. Nev. Aug. 29, 2011). An "expert's hourly rate for professional services is presumptively a reasonable hourly rate for deposition." *Id*.

Mr. Fisher's claimed fee satisfies that standard. The $975 hourly rate is the rate fixed in his written Agreement and the same rate Defendants had in hand, through his report, before they elected to depose him. It is the rate charged to the retaining party — a factor that cuts in favor of reasonableness, not against it. *Farace v. Am. Airlines, Inc.*, No. 2:10-CV-00724-KJD, 2011 WL 3841438 (D. Nev. Aug. 29, 2011). And the fee is charged for time actually spent: seven hours on the record, which exceeds the Agreement's four-hour minimum, so no minimum-charge question arises. The appropriate measure of deposition compensation is "a reasonable hourly rate for the time actually spent in the deposition." *Id*. Seven hours at $975 is $6,825.

D. No manifest injustice excuses payment.

The manifest-injustice exception is a "stringent standard" available only where the party seeking discovery is "indigent" or where payment "would create an undue hardship."

Harris v. San Jose Mercury News, Inc., 235 F.R.D. 471, 473 (N.D. Cal. 2006). It is "satisfied only in extraordinary circumstances." *Crabtree v. Experian Info. Sols., Inc.*, 948 F.3d 872, 884 (7th Cir. 2020). Nothing of the sort is present. Defendants are represented commercial parties whose counsel describes sums under $10,000 as payable "from petty cash." The exception does not apply.

Nor does Defendants' reference to their Rule 68 offer of judgment change the analysis. Whatever bearing an offer of judgment may have on the ultimate allocation of costs between the parties at the end of the case, it does not suspend the deposing party's present, mandatory duty under Rule 26(b)(4)(E) to pay the expert whose deposition it took. *Miller v. Sawant*, 114 F.4th 1071, 1074 (9th Cir. 2024).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order compelling Defendants to pay Robert J. Fisher's reasonable deposition fee of $6,825 within fourteen (14) days plus interest at the statutory rate, together with such other relief as the Court deems just.

Respectfully submitted this 10th day of November, 2026.

/s/ Nicole A. Westbrook
Nicole A. Westbrook
G. Michael Jackson
JONES, DAVIS & JACKSON, P.C.

Attorneys for Pastor Steve Smothermon

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2026, I caused the foregoing document to be electronically filed with the Clerk of the Court using CM/ECF, which served all counsel of record through Notices of Electronic Filing, including:

Marc J. Randazza, NV Bar No. 12265
Ronald D. Green, NV Bar No. 7360
Alex J. Shepard, NV Bar No. 13582
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/s/ Nicole A. Westbrook

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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 **DECLARATION OF NICOLE A. WESTBROOK IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DEFENDANTS TO PAY EXPERT WITNESS ROBERT J. FISHER'S REASONABLE DEPOSITION FEE UNDER FED. R. CIV. P. 26(b)(4)(E)**

I, Nicole A. Westbrook, declare as follows:

1. I am an attorney of record for Plaintiff Pastor Steve Smothermon in this action. I make this declaration in support of Plaintiff's Motion to Compel Payment of Expert Witness Robert J. Fisher's Reasonable Deposition Fee. I have personal knowledge of the facts stated here and, if called, could testify competently to them.

2. Attached as **Exhibit A** is a true and correct copy of the Expert Witness Agreement between Robert J. Fisher / Fisher & Associates, Inc. and Pastor Steve Smothermon, effective June 10, 2026, setting Mr. Fisher's deposition rate at $975 per hour.

3. Mr. Fisher's fee schedule, including the $975 hourly deposition rate, was disclosed to Defendants in connection with his expert report before Defendants noticed and took his deposition.

4. Defendants noticed and took Mr. Fisher's deposition on August 6, 2026. The deposition lasted seven hours. Mr. Fisher's resulting deposition fee is $6,825 (seven hours at $975 per hour).

5. Attached as **Exhibit B** is a true and correct copy of the October 1, 2026, letter from Defendants' counsel, Marc J. Randazza, to Mr. Fisher, copied to Plaintiff's counsel, stating Defendants' position that payment is "premature" and declining to pay the fee at this time.

6. Pursuant to LR 26-6(c) and LR IA 1-3(f), counsel for the parties met and conferred by email and letter as referenced above regarding the matters raised in the Motion. Despite a good-faith effort, the parties were unable to resolve or narrow the dispute without the Court's intervention.

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

Executed on November 10, 2026.

/s/ Nicole A. Westbrook

Exhibit 2

FISHER & ASSOCIATES, INC.
4607 Lakeview Canyon Road, Suite 210
Westlake Village, California 91361

EXPERT WITNESS AGREEMENT

This agreement sets forth the terms and conditions by which Robert J. Fisher ("RJF") will serve as an expert witness to Pastor Steve Smothermon of Legacy Church ("Smothermon") in the case of Pastor Steve Smothermon v Keith Hodge, Kevin Hodge and Hodgetwins, LLC. RJF will provide expert witness counsel and services as an independent contractor and not as an employee or agent of Smothermon. The authorized signatures below attest to the agreement of both parties to all terms and conditions contained in this document.

1. By mutual agreement, the working relationship will commence on June 10, 2026. Should Smothermon terminate the relationship prior to the end of the litigation, it will remunerate RJF for any fee and expenses incurred at that point in time in five (5) calendar days.

2. Fee Structure

Fisher & Associates, Inc. ("F&A") will bill for RJF's expert witness counsel and services on both an hourly fee and flat rate basis, as follows:

- Case preparation to include: meetings, consultations, document review, research, evaluation/analysis, expert witness report, expert report rebuttals, etc. — $900 per hour
- Depositions (four hour minimum) — $975 per hour
- Trial Testimony
  - Half day rate — $5,000
  - Full day rate) — $8,000
- Testimony Delays

  Should severe delays occur while RJF is in court prepared to testify or his appearance is postponed when he is at the court, his time will be billed at (only during normal working hours). — $300 per hour
- Travel Time (Negotiable on out-of-state travel depending on number of hours or days required for travel.) — $250 per hour

3. Billing Procedures/Requirements

Work will commence when the executed agreement and an advance retainer are received. F&A will require payment for its services and expenses as follows:

- An advance retainer in the amount of $13,500 will be required with the executed Agreement. The retainer will be applied to F&A's last statement in this engagement. This will be issued due to completion of service in the case, termination (by any one of the Parties), or work stoppage due to non-payment, or any other reason or conclusion of our engagement. Should the amount owed at that time be less than amount of the advance retainer, F&A will rebate the difference back to Smothermon within five days.

- Beginning with the commencement of work, F&A will bill Smothermon for the services of RJF either at the conclusion of each 30-day period or when 15 hours of service has been provided, whichever comes first. The statements are payable upon receipt. Should the statement not be paid within 10 days, F&A reserves the right to stop work until the (1) statement is paid in full and/or (2) withdraw as the expert in this assignment.

- If the services of RJF end for any reason prior to the conclusion of the litigation, Smothermon agrees to remit payment within 15 days for services already provided at that time, whether for any outstanding statement that had not yet been paid and/or for a final statement for services performed but had not yet been billed at that point.

- Any unpaid fees (above the initial retainer amount paid) owed for RJF's services must be paid prior to his testimony at a trial or arbitration hearing as well as the fee for that testimony. For depositions, the payment of four hours is required prior to testimony. Any time over four hours will be billed after the testimony and payment would be required in 15 days.

- The fees to be paid to F&A are not contingent on any outcome of the litigation and payment of the fees is not to be tied to, or dependent on, the receipt of any funds that may be awarded in the litigation (e.g. settlement, trial verdict).

- F&A reserves the right to terminate this agreement if payment obligations are not met by Smothermon.

4. RJF will keep confidential, and use only for purposes of performing the services, any or all information which is received from Smothermon for the performance of his service which Smothermon identifies as proprietary information and not to be disclosed.

5. If there is a dispute between RJF and Smothermon related to payment of services, the jurisdiction for resolution of the dispute will be in Los Angeles County in the State of California and under California law.

6. In respect to the expert witness counsel and services which RJF provides for this case, it is understood by both parties that he cannot guarantee any specific results from them or from any testimony he may provide as he does not have control of the ultimate legal decision in the case.

The above terms, conditions and stipulations are agreed upon by both parties. The affixing of their signatures below registers their acceptance and the agreement is binding.

FISHER & ASSOCIATES, INC.

Robert J. Fisher — Date: 6/12/26

PASTOR STEVE SMOTHERMON

Date: 6/10/26

RANDAZZA
LEGAL GROUP

Marc J. Randazza, JD, MAMC, LLM
Licensed in AZ, CA, FL, MA, NV

1 October 2026

Via Email and U.S. Mail

Robert J. Fisher
<pr4biz@fisherpr.com>
Fisher & Associates, Inc.
4607 Lakeview Canyon Road, Suite 210
Westlake Village, California 91361

Re: August 6, 2026, deposition payment issue

Dear Mr. Fisher:

I received your email about your payment for the August 6, 2026, deposition. I am surprised. For starters, I never received any request from Ms. Westbrook.[1] Even if I had this as the first inquiry from you, it was, shall we say, overly blustery and ill advised.

This letter responds to your inquiry and proposes a resolution. I am copying Plaintiff's counsel because some of this requires Plaintiff's input, so it is equally addressed to them.

Your email calls me unprofessional, sets a deadline, threatens a bar complaint, and makes vague threats about some kind of public relations "consequences." In other words, it is all misplaced aggression that did not achieve your goals, nor even advance them.

A short note asking whether my office received your statement would have drawn a prompt reply. And given the amount in play, I might not have even bothered to concern myself with your accusations – sums under $10,000 are typically paid around here from petty cash. But since your email (falsely) accused me of telling Ms. Westbrook that we had refused to pay,[2] and contained your risible threats, this went to my desk for greater scrutiny.

And now we have a fight on our hands. We recommend you obtain independent counsel to review this letter and to advise you of your rights.

Our position is mischaracterized.

Your email says that Jones & Keller told you I am refusing to pay, and that Ms. Westbrook has tried to collect from me. If that is what you were told, you were not told the truth.

I wish I could say that surprised me. Ms. Westbrook has, on several occasions in this case, given dishonest accounts of conversations with my office. So here we are again. I would rely on nothing she tells you unless you can confirm it yourself. We have had our disagreements with her co-counsel, Mr. Jackson, but we have never found (nor sensed)

[1] None of her emails seem to reach my inbox directly.
[2] I have never spoken with Ms. Westbrook about your bill.

any cause to question his integrity. If you communicate with us through Plaintiff's counsel in the future, I suggest you do it through him.

Defendants are not refusing to pay you.

Your email assumes that Defendants will not pay. That is not entirely accurate. Nevertheless, the payment is not going to come as smoothly as you would probably like.

Defendants agree that Rule 26(b)(4)(E) applies, and if we need to bring this before the Court, they will pay what the Court determines they owe. Defendants will move to exclude your opinions, and they will put the testimony described below in front of the Court. After that, if we succeed and the Court adjusts your bill downward, we will know the amount actually owed. Then, we will determine who actually has to pay it.

Defendants expect that Plaintiff will be the one who ends up bearing this cost, due to his rejection of an offer of judgment under Fed. R. Civ. P. 68.

The applicable rules.

Your email cites NRCP 26(b)(4)(E) and NRCP 37. These rules are not relevant to us as this case is in federal court. The federal rule reads: "Unless manifest injustice would result, the court must require that the party seeking discovery . . . pay the expert a reasonable fee for time spent in responding to discovery." Fed. R. Civ. P. 26(b)(4)(E)(i). There are four factors we will present to the Court for consideration.

First, we believe the obligation belongs to "the party seeking discovery," which is Keith Hodge, Kevin Hodge, and Hodgetwins, LLC. I do not personally owe you anything.

Second, "a reasonable fee" is owed. The rule has "textual limitations on recoverable fees: namely, that fees must be 'reasonable,' and their award must not result in 'manifest injustice.'" *Miller v. Sawant*, 114 F.4th 1071, 1076 (9th Cir. 2024).

Third, if it goes before the Court, the party seeking payment needs to persuade the Court as to what is reasonable. "The party seeking reimbursement of their expert witness fees has the burden of demonstrating to the court that the expert's rate and fee are reasonable." *Se-Kure Controls, Inc. v. Vanguard Prods. Grp., Inc.*, 873 F. Supp. 2d 939, 955 (N.D. Ill. 2012); *accord New York v. Solvent Chem. Co.*, 210 F.R.D. 462, 468 (W.D.N.Y. 2002).

Fourth, as cited above, payment is not due if "manifest injustice would result."

The rate you contracted for with the Plaintiff is one thing, but we will ask the Court to set a different rate. "[W]hile plaintiff may contract with any expert of plaintiff's choice and, by agreement, that expert may charge unusually high rates for services, the discovery process will not automatically tax such unreasonable fees upon the defendant." *Bowen v. Monahan*, 163 F.R.D. 571, 574 (D. Neb. 1995); *see also Anthony v. Abbott Labs.*, 106 F.R.D. 461, 465 (D.R.I. 1985). If the Court sets a reasonable fee below the contract rate, the retaining party may be responsible for the balance. *Reed v. Binder*, 165 F.R.D. 424, 428 n.3 (D.N.J. 1996) ("Where the expert charges more than what a court determines is a

'reasonable' fee, the party retaining that expert must pay the amount over and above the 'reasonable' rate."); *AP Links, LLC v. Russ*, No. CV 09-5437 (JS) (AKT), 2015 U.S. Dist. LEXIS 167887 at *3-4 (E.D.N.Y. Dec. 15, 2015) (retaining party is responsible for paying its expert and may then seek "reimbursement for 'reasonable fees'"). So you might, eventually, get paid the full amount you seek. However, we do not expect that you will be paid with a single check, but rather a portion from the Defendants for the "reasonable" portion of your fees, and then the "unreasonable" portion will come from Mr. Smothermon.

Any motion requires an initial meet and confer. LR 26-6(c); LR IA 1-3(f). I am prepared to have that conversation with Plaintiff's counsel should one ever be requested.

Payment now is premature.

Defendants intend to move to exclude your opinions under Federal Rule of Evidence 702. We recognize that *Miller* does not guarantee that we do not need to pay you if you are excluded, but the *Miller* panel left that open. "We do not decide, however, whether a party may still recover fees under Rule 26(b)(4)(E) if his expert has already been precluded from testifying under *Daubert*." *Miller*, 114 F.4th at 1075 n.2.

If the Court excludes your opinions, we will then find out if fees are owed at all for the deposition of an "expert" who is found to not be one, and then whether making my clients pay would be "manifest injustice." If the Court admits your opinions, we will still have a dispute about the amount owed. Deciding the fee now would make the parties have two rounds of briefing over a little $6,825 question.

Also, if an expert report omits the basis for its opinions (as we believe yours did) and the other side must depose the expert to discover them, courts can tax the expert costs to the party that offered him instead of the other party. *Reed*, 165 F.R.D. at 429–31 (applying Fed. R. Civ. P. 37(c)(1)). Defendants' motion to exclude will include that issue.

Defendants served an offer of judgment under Rule 68. If the judgment Plaintiff finally obtains "is not more favorable than the unaccepted offer," Plaintiff "must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d). We think it is appropriate to wait to find out who has to pay you in the end, rather than money going back and forth.

We believe your opinions will most likely be excluded.

Your deposition went badly. At times, I found myself feeling almost sad to watch it. The transcript will be relevant to the fee because courts weigh "the nature, quality and complexity of the discovery responses provided," and it is the core of the forthcoming motion to exclude. *Edin v. Paul Revere Life Ins. Co.*, 188 F.R.D. 543, 546 (D. Ariz. 1999). What follows is a partial list of issues we will be raising. I quote your testimony and the August 14, 2026, rebuttal report of Defendants' expert, Eric Rose ("Rose Rep."). You may recall that you, yourself, independently suggested Mr. Rose as a person whose opinion should be valued. (Fisher Dep. 86:4-93:10.)

- Your report has no method. It rests on four sayings that you call "the basis of many of my conclusions and opinions." (Fisher Rep. at 27.) You agreed that people have heard them since childhood and need no professional training to know them. (Fisher Dep. 295:18–22.) Mr. Rose: "They are not evidence, and standing alone they are not a methodology." (Rose Rep. at 6.) If you relied on proverbs and sayings, then what exactly are you an expert on? Why did we need you?
- The research your report describes does not exist. The report says you reviewed treatises and academic studies from Harvard, Duke, and Cornell. (Fisher Rep. at 22.) Asked to name one, you answered: "Well, there -- there isn't any." (Fisher Dep. 94:11–16.) I appreciate your candor under oath, but this guts your report.
- You have no peer-reviewed publications, and you told me that "[t]his peer review stuff is BS." (*Id.* 84:20–22.) Mr. Rose, on your claim that unnamed colleagues validated your approach: "That is not peer review. It is a claim about peer review, offered on faith." (Rose Rep. at 5.)
- Your factual claims were not really yours. The "study" you cite was done by Plaintiff's lawyers. You "didn't see the study itself," did not verify any of it, and have no idea about its methodology. (Fisher Dep. 140:6–8, 141:16–20.) When I asked if you "adopted a study designed by the lawyers who hired you, whose author you can't name, using a method you can't describe," you said: "Yeah, that's fair." (*Id.* 141:21–25.) When it came to the issue of "metadata" you said you were "just writing what they told you to write,"[3] and later said, "I was reporting what their study found." (*Id.* 267:3–7, 265:24–25.) Mr. Rose calls this "functioning as a conduit for someone else's advocacy." (Rose Rep. at 6.) That puts it quite well, I think.
- You did not know the case. You prepared with a one-hour call and by rereading your report. (Fisher Dep. 7:22–8:10.) Asked what happened here, you testified that "[t]his case is about Crate & Barrel," and you used that name a dozen times. (*Id.* 108:17–25, 109:23–24; *see also id.* 110:17-20, 111:18-21, 172:15-19, 240:15-19, 244:1-4, 245:7-9, 254:1-4, 308:23-24.) You even affirmed that they "sell furniture,"[4] meaning it wasn't a transcription error. This case actually involves Cracker Barrel, a restaurant chain.

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[3] Fisher Dep. 267:3–7.
Q. So this statement that says "metadata identified the image's origin as a website affiliated with Legacy Church," you're just writing what they told you to write?
A. You're right.
Q. Not what you found?
A. Yeah. They --
Q. Okay.
A. No.

[4] Fisher Dep. 109:23–24: "We sell furniture, Crate & Barrel."

- The entire case is about a photo, and you have never seen it. "I've never seen the picture." (*Id.* 187:2–4.) For all you know, the picture was of Wayne Newton.
- You have no evidence of harm. You interviewed no one. (*Id.* 129:14–130:4.) You do not know how many people saw, shared, liked, or commented on the photo. (*Id.* 135:6–14.) When you were asked to provide evidence for any of your assertions, you said, "I have no evidence." (*Id.* 312:14–19.) We asked about your "word of mouth" theory: "Well, I don't have any evidence." (*Id.* 259:6–8.) Mr. Rose wrote: the theory "is asserted, not demonstrated," and you never identify "a single third party who received, forwarded, discussed, or acted on the post." (Rose Rep. at 3.)
- You never established a baseline. Asked how you measured Plaintiff's reputation before the post, you said: "I didn't because I wasn't on the case before then." (Fisher Dep. 298:6.) Your report says you "did not see any information of a negative nature" about him. (Fisher Rep. at 29.) Mr. Rose: "That representation is not accurate." (Rose Rep. at 9.) His media-monitoring report found negative coverage from December 2024, eight months before the post. (*Id.* at 10.) When I handed you the press coverage and offered you time to read it, you said that you were not interested. (Fisher Dep. 275:3–5.) We believe an expert who has no interest in any contrary information is not an "expert;" he is a guy with a bachelor's degree who fancies himself an expert on defamation law, with no qualifications.
- All your numbers are unexplained or are not yours. Of the $2.65 million to $5.589 million damages range, you testified: "No, it's not my number." (*Id.* 365:5–9.) Mr. Rose: "The number simply appears." (Rose Rep. at 20.) Your report gives a $325,000 to $350,000 repair budget and says you "will not delineate" it (Fisher Rep. at 41–42); your explanation was, "I didn't choose to put it in there," and the breakdown reached my office on the day of the deposition. (Fisher Dep. 353:6–7, 358:19–20.) Mr. Rose: "A single blended number with no components behind it is not a budget. It is a guess dressed up as one." (Rose Rep. at 21.) You also testified that the result would not change with the facts: "I don't know that it matters whether it was up two years or two months." (Fisher Dep. 325:17–18.)
- Your one piece of original research was a Google search with no date and no documentation. (*Id.* 218:16–219:6.) Of that search you said: "The gal out there could have done the same thing as I do." (*Id.* 280:11–13.) Mr. Rose checked your tally of the results: "Four plus two plus four is ten, not six." (Rose Rep. at 15.) And again, your candor is appreciated – it is true, the "gal" at the front desk was probably just as qualified to render an opinion as you are.
- You disowned your own conclusions. Of the finding that Defendants showed "extreme carelessness," you said: "It's a personal opinion. It's not expert opinion." (Fisher Dep. 304:11–12.) Your report does the same with its ultimate conclusion. After stating that Plaintiff suffered "irreparable reputation harm," it says: "This is my personal opinion based on my experience and expertise as a communication expert." (Fisher Rep. at 44.) If it is not an expert opinion, we will argue it has no purpose here.

- You conceded the defense. Asked whether Defendants did this on purpose, you said: "No. I don't believe they did it on purpose at all." (Fisher Dep. 170:21–22.) Your report says they "had every right" to publish about the Cracker Barrel executive, that they removed the photograph "[t]o their credit," and that **the first result of your own search for "Steve Smotherman" was Plaintiff**. (Fisher Rep. at 29, 30, 43.)
- Your report says that Plaintiff lost no book sales, media interviews, or speaking engagements, that no parishioner complained, and that the church's income rose (Fisher Rep. at 19–20), and you admitted: "I don't think I addressed them." (Fisher Dep. 318:19.) You reported that a court said that your work "lays out the bare minimum in terms of support." (Fisher Rep. at 37.) But you say that like it is a good thing! Your report's damages sentence says that "they have determined" the range. (*Id.* at 42.) And it admits that the search-engine component of your ersatz "repair program" is "unlikely" to change anything. (*Id.* at 40.) Then what would it do?
- Judge Kaplan excluded you, and your report does not fully disclose that. It says instead that your methodology "has been accepted and validated by both federal and state courts." (Fisher Rep. at 22.) *Carroll v. Trump*, No. 22-cv-10016, 2023 U.S. Dist. LEXIS 52011 (S.D.N.Y. Mar. 27, 2023) (excluding your testimony for unreliability); *Carroll v. Trump*, No. 20-cv-07311-LAK, 2023 U.S. Dist. LEXIS 179828 (S.D.N.Y. Oct. 5, 2023) (excluding your testimony for forming opinions without relevant experience). Mr. Rose looked at your testimony in that case as well as this one and came to the obvious conclusion that your testimony "track[s] the position of whichever party retained him, rather than a fixed, reliable methodology." (Rose Rep. at 18.) Rose demonstrates that your report "falls well short of the standards ordinarily applied by reputation management professionals" and is in places "advocacy dressed in the language of expertise." (*Id.* at 3.)

Two documents that you claimed to rely on (and then claimed not to) are worth mentioning. The first is Ms. Westbrook's Feb. 25, 2026, letter to her client, prominently marked "PRIVILEGED AND CONFIDENTIAL: ATTORNEY-CLIENT COMMUNICATION." Your report lists it as something you reviewed, and you block-quoted it. But you falsely identified it as a letter from Ms. Westbrook to me, thus leading to the loss of the privilege of the party that retained you. (Fisher Rep. at 16, 22.) At deposition you insisted that "[t]here's no attorney-client in it. It's a letter from one attorney to another attorney," and then when backed into a corner, you admitted that "obviously there's an error there of some sort." (Fisher Dep. 145:15–17, 147:6–7.) Meanwhile, you relied upon that privileged letter and used it in your report thus, either intentionally causing a break in privilege, or carelessly doing so (PASTORSTEVE 000053-000055.)

The second is the "study." This is AI-generated slop handed from one lawyer at Plaintiff's firm to another marked "CONFIDENTIAL ATTORNEY-CLIENT WORK PRODUCT" and titled "Plaintiff's Image Analysis Brief." (PASTORSTEVE 000056–000059.) As a statement on the law of defamation and actual malice, it is complete rubbish. You readily adopted its conclusions without reading, or even seeing, it.

By building your report on these two documents, you made them an issue in this case. You assisted in the stripping of any privilege. That's not good form.

Exclusion.

Defendants' motion to exclude you will likely be granted. You are free to think otherwise, of course, but this is our assumption. We believe your opinion is thin and inadmissible, and it is consistent with the shoddy work you have done in other cases, of which Mr. Rose made us well aware.

An order excluding you, entered on this transcript, will not be to your advantage in this case or in any other forum. We believe it will lead to a stark reduction in what, if anything, is "reasonable." You told me that your "integrity and . . . reputation is more important than any isolated case." (Fisher Dep. 71:5–6.) You should seek independent advice as to how damaging the order of exclusion we will seek will be to your rates.

Defendants will file the motion because they have no other choice. If Ms. Westbrook decides not to sacrifice you to this case and pulls you as a witness, we believe that would be best for all. But that is between her and her client and you (and, again, you should seek independent counsel).

Defendants will contest your rate.

In the caselaw we will present, courts consider the witness's expertise, the training required, prevailing rates for comparable experts, the quality of the discovery responses, the fee charged to the retaining party, and the fees the expert traditionally charges. *Edin*, 188 F.R.D. at 546; *Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493, 495–97 (S.D. Iowa 1992).

Your report sets two rates: $900 an hour for the work you did for Plaintiff, and $975 an hour, with a four-hour minimum, for deposition testimony. (Fisher Rep. at 3.) "[C]ourts most often reduce expert fee requests when the expert seeks to charge the opposing party a higher rate than the expert charges the retaining party." *EEOC v. Johnson & Higgins, Inc.*, No. 93 Civ. 5481 (LBS) (AJP), 1999 U.S. Dist. LEXIS 478 at *3-4 (S.D.N.Y. Jan. 21, 1999) (collecting cases); *see also Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 646 (E.D.N.Y. 1997); *Borel v. Chevron U.S.A. Inc.*, 265 F.R.D. 275, 277 (E.D. La. 2010); *Walker v. Spike's Tactical, LLC*, No. 2:13-cv-01923-RFB-PAL, 2015 U.S. Dist. LEXIS 1125 (D. Nev. Jan. 2, 2015). Mr. Rose has been retained in more than forty reputation matters, has "never been excluded from testifying as an expert in any proceeding," and is compensated at $700 an hour. (Rose Rep. at 2.) You testified that the audit assessment in your proposed repair program was priced on "20 hours by someone charging $250 an hour," and that you "know what people charge out in the field." (Fisher Dep. 356:9–10, 359:2–3.) And in *Miller*, the experts were between $250 and $495/hr. 114 F.4th at 1076.

We believe a reasonable rate for your testimony is $250 an hour at best. You gave this figure yourself as what people "charge out in the field" (Fisher Dep. 359:2–3) in your deposition. We think it is a bit high for what you did, but we would agree to that rate.

A proposal for the plaintiff.

Preparing, briefing, and arguing the motion to exclude your testimony will cost my clients money. If that motion never needs to be filed, because Plaintiff comes to his senses and pulls your testimony to avoid the embarrassment and a fight over what seems inevitable, my clients will save at least $10,000.

Defendants propose the following cost-saving measure to Pastor Smothermon. If Plaintiff withdraws you as an expert (with a formal stipulation) and your report from this case (same), Defendants will just pay the bill and consider themselves ahead financially, even if you do not deserve the payment. But withdrawal is a condition of the compromise with Smothermon.

So that no one misunderstands this idea: It is addressed to Plaintiff, because whether to pull you as a witness is Plaintiff's decision. That is why his counsel is copied. We do not ask you to, nor suggest that you, change, qualify, modify, disavow or redraft anything you said under oath. And it is not a condition of your being paid: if Plaintiff foolishly chooses to stand on your opinions, Defendants will file their motion, and your fee will be addressed as ordered by the Court.

The reference to a bar complaint.

You said that unless $6,825 is paid by your deadline, "a complaint will be filed with the Nevada Bar Association," and it closes by telling me that "there will be consequences."

You also wrote that your public relations firm represented several Las Vegas law firms, that you know "the legal community there," that you have written for the Clark County Bar Association's publication (which I bet you can't even name), and that you spent more than fifty years as a "professor communicator" (whatever that is). I guess you want me to think that you can damage my reputation if I do not pay. If you want to go down that path, I can guarantee you that it will not be to your advantage, but I will enjoy that fight.

A bar complaint would not decide whether a fee is owed or what rate is reasonable. In a demand for payment, your threat accomplishes nothing. It is my hope Plaintiff's counsel did not put you up to it, as they should know it is unethical to threaten a bar complaint to gain an advantage in a civil dispute.

You can file any bar complaint that you think is warranted. But, we will not pay you until at least a few important questions are answered by the court, or through mutual agreement.

We are not there yet. And your bizarre and extortionate threats have made it certain that we will not be there for a bit longer.

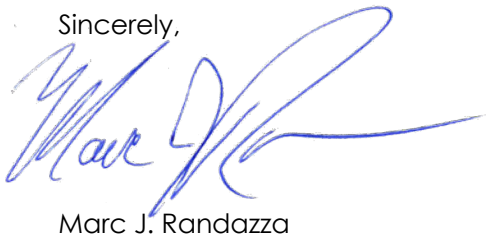
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We invite feedback from the Plaintiff. And if you'd like to compromise your bill at what is actually an hourly rate that we think is reasonable, we're willing to consider that. But we think it would be more to the Plaintiff's (and your) advantage if they simply abandoned trying to convince anybody that you're a proper expert.

Sincerely,



Marc J. Randazza

cc: Nicole A. Westbrook, Esq. and G. Michael Jackson, Esq. (via email).