

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF MISSISSIPPI**

Will McRaney,

Plaintiff,

v.

The North American Mission Board of the  
Southern Baptist Convention, Inc.,

Defendant.

Case No. 1:17-cv-00080-GHD-DAS

**MEMORANDUM IN SUPPORT OF  
PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF  
DISCOVERY MATERIAL FROM DEFENDANT**

Pursuant to Federal Rules of Civil Procedure 26 and 37, Plaintiff files this memorandum in support of its motion to compel the production of discovery material from Defendant.

## **BACKGROUND**

### **Plaintiff's 2017 Complaint**

In April 2017, Dr. Will McRaney filed a lawsuit in Mississippi state court against the North American Mission Board of the Southern Baptist Convention, Inc. ("NAMB") (the "2017 Complaint"). The 2017 Complaint was removed by NAMB to federal court. *See* Doc. 1-1. NAMB filed an answer to the 2017 Complaint in May 2017 (Doc. 3), and an amended answer in November 2018 (Doc. 47).

The 2017 Complaint made claims for interference with business relationships, defamation, and intentional infliction of emotional distress, and alleged past and *ongoing* misconduct and harm. *See* Doc. 1-1 (Complaint ¶ XIV: NAMB "*has continued* a course of conduct designed to interfere with the business and contractual relationships of Plaintiff McRaney and various third parties.") (emphasis added).<sup>1</sup>

### **Dismissal of Plaintiff's Lawsuit Against NAMB and Reinstatement by the Fifth Circuit**

After McRaney's state court lawsuit was removed to federal court, NAMB convinced this Court to dismiss the complaint for lack of subject matter jurisdiction. A multi-year appellate process then ensued, during which the Fifth Circuit reversed and reinstated McRaney's case, and

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<sup>1</sup> Plaintiff has moved for leave to file an Amended Complaint. *See* Doc. 148. The Amended Complaint (Doc. 148-1) sets forth no new causes of action and, like the 2017 Complaint, asserts damages for (1) economic harm, (2) non-economic harm, and (3) punitive damages, based on allegations related to (1) Dr. McRaney's termination by non-party BCMD, as well as (2) NAMB's post-termination conduct. *See* Doc. 1-1 (Complaint ¶ XIV: NAMB "*has continued* a course of conduct designed to interfere with the business and contractual relationships of Plaintiff McRaney and various third parties.") (emphasis added).

the Supreme Court of the United States denied NAMB's request for review.

### **Proceedings in the District Court Since July 2021**

More than four years after the 2017 Complaint was filed, the parties returned to this Court, in July 2021, to commence discovery and adjudicate the merits of McRaney's complaint against NAMB.

On August 23, 2021, Magistrate Judge Sanders conducted a case management conference, after which he entered a case management order. *See* Doc. 82. Since issuance of the case management order, the parties have been engaged in written discovery, and two depositions have occurred—one noticed by Plaintiff, and one noticed by Defendant. Plaintiff's expert reports were timely served on September 30, 2022. *See* Doc. 133 & 134.<sup>2</sup> Discovery is currently scheduled to conclude on December 30, 2022. *See* Doc. 111. Motions (other than motions *in limine*) must be filed by January 13, 2023. *See* Doc. 111. A jury trial is set for April 10, 2022. *See* Doc. 96.<sup>3</sup>

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<sup>2</sup> Defendant did not make any expert disclosures on or before October 28, 2022—its deadline to do so. *See* Doc. 111.

<sup>3</sup> On Wednesday, October 26, 2022, counsel for NAMB emailed Plaintiff's counsel, proposing an extension of the discovery deadline. Counsel for the parties conferred by phone on Friday, October 28, 2022, and Plaintiff's counsel agreed (subject to the Court's approval) to an extension of the discovery deadline and deadline for motions—to January 30, 2023 and February 13, 2023 respectively—without altering any other deadlines, including the final pretrial conference or trial date. The parties are conferring about a submission to the Court.

## ARGUMENT

NAMB is intentionally withholding from production to Plaintiff several categories of discovery material responsive to Plaintiff's discovery requests. For the reasons explained below, Plaintiff respectfully requests that the Court order NAMB to promptly produce these discovery materials.

### **1. The Court Should Order NAMB to Produce Material Responsive to Requests for Production #7 and #9 in Plaintiff's Second Set of Requests for Production**

On May 9, 2022, Plaintiff served Defendant with his Second Set of Requests for Production. *See* Exhibit 1. NAMB acknowledges it is withholding documents responsive to Requests 7 and 9. *See* Exhibits 2, 3.

#### **A. Request #7**

**REQUEST NO. 7:** All documents in Your possession, custody or control mentioning, referring to, describing, or using, the phrase "supporting organization."

Although not included as a defense in its original Answer (Doc. 3), NAMB's Amended Answer contends that "at the time of Plaintiff's execution of the Separation Agreement and Release, [it] was one of the 'supporting organizations'" of BCMD (Doc. 47 at 2), and it moved for partial summary judgment on the theory that NAMB was released in the Separation Agreement.<sup>4</sup> *See* Doc. 80 at 4-5 (citing Section 5, "General Release," of the Separation Agreement).<sup>5</sup>

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<sup>4</sup> Based on the same argument, NAMB contends it is shielded from "punitive damage and intentional infliction of emotion distress claims" in Count VI. Doc. 80 at 4.

<sup>5</sup> Section 15 of the Agreement provides: "All suits, proceedings and other actions relating to, arising out of or in connection with this Agreement *shall* be brought *exclusively*" in the courts of Maryland. *See* Doc. 37-1 at 7 (emphasis added); *see also* Doc. 49 at 2 n.2 (NAMB acknowledging the Separation Agreement's "forum selection clause"). NAMB's motion for partial summary judgment violated that mandatory forum selection provision, and is among the reasons why any re-filed motion for partial summary judgment must be denied. *See* Doc. 86 at 4 n.2.

The Court denied NAMB's motion for partial summary as premature, explaining:

The Court agrees with the Plaintiff that discovery, *including discovery related to the subject of the Defendant's pending motion for partial summary judgment*, should be completed prior to the Court considering the Defendant's pending motion, which seeks dispositive resolution of one or more of the Plaintiff's claims. Accordingly, the Court shall deny the Defendant's presently pending motion, pending the completion of discovery.

January 12, 2022 Order (Doc. 93 at 1) (emphasis added).

NAMB is flouting the Court's Order by refusing to produce documents responsive to Request #7, which pertains directly to "the subject of the Defendant's pending motion for partial summary judgment," and to NAMB's four related affirmative defenses. *See* Doc. 47 at 2-3 (Affirmative Defenses 4-7).

The term "supporting organization," upon which NAMB's entire argument rests, is undefined in the Separation Agreement. But, as described in the Declaration of Charles Lindsay, CPA, "supporting organization" is a well-known term in the world of non-profit organizations, including many religious organizations, with a specific and clear meaning. *See* Doc. 85-1 (Declaration of Charles R. Lindsay, CPA at ¶¶ 6-8).

In its Reply in support of its motion for partial summary judgment, NAMB conceded it is not a "supporting organization" as the term is ordinarily used in the world of non-profit organizations, including many religious organizations. *See* Doc. 89 at 8 ("NAMB does not contend — and has never contended — it is a supporting organization under the [Internal Revenue Code]."); *see also* Doc. 100 at 3 ("During oral argument, counsel for NAMB conceded that NAMB is not asserting as a defense that NAMB is a 'supporting organization' as defined by the IRS . . ."). Instead, NAMB contended it was a "supporting organization" of BCMD because it claims to have provided financial and non-financial support to BCMD. Doc. 89 at 4-5.

Plaintiff's experts have explained some of the reasons why it makes no sense for NAMB to contend it was a "supporting organization" of BCMD at the time the Separation Agreement was executed. *See* Doc. 133-1 at 13; Doc. 134-1 at 16-18. But Plaintiff is entitled to full discovery from NAMB in order to test and refute NAMB's assertion it was a "supporting organization" of BCMD. That discovery includes how the term "supporting organization" is used by NAMB and in communications with NAMB. NAMB concedes it has such documents, but will not produce them because they purportedly are not relevant. NAMB's relevance argument is preposterous given it has asserted four affirmative defenses based on the argument it was a "supporting organization" of BCMD.

NAMB should be ordered to promptly produce all documents responsive to Request #7. If NAMB refuses or fails to do so, Plaintiff requests entry of an order striking NAMB's Affirmative Defenses 4-7 (Doc. 47 at 2-3), and precluding NAMB from re-filing a motion for partial summary judgment on this issue.

**B. Request #9**

**REQUEST NO. 9:** Any agreement(s) You have entered into with any individual or organization that you believe limits or constrains, in any way, the ability or authority of any such individual or organization to speak, write or comment about Plaintiff, about NAMB, or about this case (including but not limited to any severance agreements, non-disclosure agreements, non-disparagement agreements, or "cooperation agreements").

NAMB does not contend Request #9 is irrelevant or otherwise objectionable. Instead, it is withholding responsive documents on the basis of a Work Product assertion. *See* Exhibits 2, 3.

NAMB's amended privilege log describes the withheld document as follows (*see* Exhibit 4 at 6): "Four agreements between NAMB and certain NAMB employees prepared by counsel for NAMB and entered into for the purpose of facilitating the exchange of information related to this litigation between those employees and counsel for NAMB."

The assertion of Work Product here is unfounded. Request #9 calls for agreements which NAMB believes “limits or constrains” the “ability or authority” of any “individual or organization to speak, write or comment about Plaintiff, about NAMB, or about this case.” The portion of any agreement between NAMB and any employee or other third-party which has this effect is not “Work Product”—it is a muzzle. *Adams v. Mem'l Hermann*, 973 F.3d 343, 349 (5th Cir. 2020) (“The work-product doctrine insulates a lawyer's research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses’ statements from an opposing counsel’s inquiries. It protects materials prepared in anticipation of litigation, whether those materials were prepared by the attorney or by agents of the attorney.”). Plaintiff is entitled to know how witnesses or potential witnesses are constrained in their ability to speak or provide testimony in this case.

NAMB should be ordered to promptly produce all documents responsive to Request #9.

## **2. NAMB’s Has Failed to Produce Documents From NAMB’s Trustees**

All of Plaintiff’s discovery requests to NAMB defined NAMB to include “all present and former directors, officers, board members . . . .” *See, e.g.*, Exhibits 1, 5. NAMB did not object to this definition in any of its responses to Plaintiff’s discovery requests. As this Court and the Fifth Circuit have explained, “as a general rule, when a party fails to object timely to interrogatories, production requests, or other discovery efforts, objections thereto are waived.” *Employers Mutual Casualty Co. v. West*, 2017 WL 1283755, at \* 1 (N.D. Miss. 2017) (Sanders, J.) (quoting *In re United States*, 864 F.3d 1153, 1156 (5th Cir. 1989)).

At all times relevant to this case, NAMB has had a Board of Trustees. As a former Chairman of NAMB’s Board recently testified in this case—pursuant to a deposition request *from NAMB*—the Board has ultimate responsibility for running NAMB, and was “kept abreast and apprised” about this case. Exhibit 6 (D. Wood Deposition Tr. at 161); *see also* Exhibit 7 at 3 (D.

Wood Deposition, Pl. Exh. 9: stating NAMB’s Board of Trustees was “fully engaged and informed” throughout the “situation” concerning Plaintiff). Given the role of NAMB’s Board, it is unsurprising that NAMB’s own privilege log lists at least four NAMB Trustees on responsive documents withheld by NAMB on the basis of an asserted privilege. *See* Exhibit 4. Thus, it is clear at least some NAMB Trustees had documents responsive to Plaintiff’s discovery requests. Yet NAMB refuses to produce responsive documents from its Trustees—and NAMB appears to have taken no steps to preserve or collect them. *See* Exhibit 8.

Plaintiff requests an order directing NAMB to (i) describe, under oath, its efforts to preserve, collect and produce responsive documents from NAMB Trustees—or acknowledging and explaining its failure to do so, and (ii) immediately undertake the collection and production of responsive documents from NAMB Trustees, to be completed by a date selected by the Court.

**3. NAMB’s Has Failed to Produce Text Messages Responsive to Plaintiff’s Discovery Requests**

Each of Plaintiff’s document requests to NAMB defined “Documents” as having “the same meaning as used in Rule 34 of the Federal Rules of Civil Procedure, and shall be construed in its broadest sense” including all “form of stored or recorded information, whether on film, tape, disks, cards, computer memories, cloud storage, *mobile phones or devices . . .*” *See, e.g.,* Exhibits 1, 5 (emphasis added). This definition obviously encompasses text messages.

NAMB did not object to this definition in any of its responses to Plaintiff’s documents requests. As this Court and the Fifth Circuit have explained, “as a general matter, when a party fails to object timely to interrogatories, production requests, or other discovery efforts, objections thereto are waived.” *Employers Mutual Casualty Co.*, 2017 WL 1283755 at \* 1 (quoting *In re United States*, 864 F.3d 1153, 1156 (5th Cir. 1989)).



NAMB nevertheless has failed to produce any text messages—and appears to have taken no steps to preserve or collect them.

Plaintiff requests an order directing NAMB to (i) describe, under oath, its efforts to preserve, collect and produce responsive text messages (including from its Trustees)—or acknowledging and explaining its failure to do so, and (ii) immediately undertake the collection and production of responsive text messages, to be completed by a date selected by the Court.

**4. NAMB’s Has Refused to Provide Discovery Responses Seeking Material or Information Created After January 1, 2017**

Plaintiff’s Complaint asserts claims for interference with business relationships, defamation, and intentional infliction of emotional distress, and alleged at the time it was filed **both** past and *ongoing* misconduct and harm. *See* Doc. 1-1 (Complaint ¶ XIV: NAMB “*has continued* a course of conduct designed to interfere with the business and contractual relationships of Plaintiff McRaney and various third parties.”) (emphasis added).

Plaintiff’s discovery responses to NAMB have likewise made clear that the Complaint alleges ongoing conduct and harm. *See* Doc. 151-1 (Plaintiff’s Interrogatory Responses) at 3, 8, 11 and 12 (“The harm to Plaintiff by Defendant continued to cause damages after the filing of Plaintiff’s complaint, and damages are ongoing.”); *id.* at 12 (“NAMB’s actions concerning Plaintiff occurred over an extended period of time, and are ongoing.”)

Consistent with these allegations, all of Plaintiff’s discovery requests to NAMB define the “Relevant Time Period” as January 1, 2013, through and including the present.

NAMB, however, refuses to produce responsive documents created after January 1, 2017. NAMB’s purported justification is this Court’s February 16, 2022 discovery order. *See* Exhibit 9 at 2 (stating “NAMB is withholding responsive documents based on its objections,” including the objection that the Requests “seek information outside the scope of the Relevant Time Period as set

forth in the Court’s February 16, 2022 discovery order in this case (doc. no. 100)”). In that Order, addressing a few specific document requests, the Court deemed that the “relevant period” was between January 1, 2013 and January 1, 2017. Doc. 100 at 3. Plaintiff submits that was an error by the Court because it failed to account for the fact—as explained above—that the Complaint, filed in April 2017, alleged *ongoing* misconduct and harm. Preventing Plaintiff from obtaining discovery about alleged misconduct and harm during and after 2017 deprives him of his rights under the Federal Rules of Civil Procedure and the Due Process Clause of the Fifth Amendment. While the February 2022 Order addressed only specific document requests, Plaintiff respectfully requests that the Court reconsider that interlocutory Order insofar as it denied Plaintiff responsive documents created after January 1, 2017.

But leaving aside this error, NAMB has engaged in impermissible self-help by turning an order about a limited number of document requests into a protective order applicable to *all* discovery requests served by Plaintiff. That is plainly improper. If NAMB wanted a broadly applicable protective order it should have requested one. It made no such request—and the Court has not issued any such ruling.

NAMB’s categorical refusal to produce documents created after January 1, 2017 is also one-sided. NAMB has served Plaintiff will substantial and burdensome discovery requests seeking documents and information created after January 1, 2017. NAMB’s document requests and interrogatories to Plaintiff contain no date limitation. *See* Exhibits 10 and 11. While some of NAMB’s discovery requests are inherently time-limited (for example asking about documents from before Plaintiff was terminated by BCMD in 2015), many of NAMB’s requests are not, and clearly call for the production of documents created after January 2017. Moreover, NAMB has served discovery on Plaintiff *expressly* seeking the production of documents created after January

1, 2017. For example, NAMB asked for—and received—Plaintiff’s state and federal tax returns from 2013 “to the *present*.” See Exhibit 10 (RFP 16) (emphasis added). In accordance with NAMB’s broad, temporally unlimited requests, Plaintiff has produced—and NAMB has readily accepted—hundreds of documents created after January 1, 2017.

In fact, not content with the egregiously asymmetrical discovery to date, NAMB has now filed a motion to compel a further Interrogatory response from Plaintiff about his “affiliation” with numerous websites that did not exist until after January 2017. See Doc. 145 at 19 (demanding further response from Plaintiff to Interrogatory 22, because he “could be utilizing these additional platforms . . . to discuss this case and the issues he has raised.”).

NAMB’s one-sided approach to discovery is also evident from a subpoena it issued to a third-party, Robert (Bob) Rodgers, in which it requested, without any time-period-limitation: “All documents in Your possession, custody, or control mentioning, referring to, or related to this lawsuit or the facts, allegations, and/or defenses alleged therein, including but not limited to Your communications (including emails) with Will McRaney and others regarding the same.” See Exhibit 12 at 5. Upon receiving the subpoena, Mr. Rodgers asked counsel for NAMB via email: “What are the dates of concern that I must include in the documents that I provide to your firm[?]” Counsel for NAMB responded: “Any documents in your possession responsive to the subpoena request should be produced.” See Exhibit 13. Based on NAMB’s representation about the relevant time period, Mr. Rodgers collected and produced to NAMB nearly 1,800 pages of documents created after January 1, 2017.

NAMB’s attempt to have it both ways certainly resembles gamesmanship. But it is even worse than that. NAMB *knows* that Plaintiff’s April 2017 Complaint alleged *ongoing* misconduct and harm. NAMB knows it because the Complaint says so. But NAMB is attempting to rewrite

Plaintiff's pleading, and to convince the Court to go along in depriving him of discovery relevant to his *actual* allegations. Plaintiff urges the Court to reject NAMB's reimagination of the Complaint, and NAMB's self-serving discovery position.

NAMB should be ordered to promptly produce all documents responsive to Plaintiff's requests previously withheld on the basis that they were created after January 1, 2017.<sup>6</sup>

**5. NAMB's Assertion of Work Production Protection Back to Some Unspecified Point in 2014 is Unsubstantiated**

Although Plaintiff's Complaint was filed in April 2017, NAMB is invoking Work Product as a basis for refusing to produce responsive documents back to some (unspecified) point in 2014. *See* Exhibit 4 (NAMB's privilege log). In order to evaluate the propriety of this Work Product assertion extending back years before this lawsuit, Plaintiff has asked NAMB to identify the *possible* future litigation "related" to this case for which aiding that *possible* litigation was the "primary motivating purpose" for the creation of the documents in 2014, 2015 and early 2016, over which NAMB now asserts Work Product protection. NAMB has not identified that possible future litigation. *See* Exhibit 14 (relevant email correspondence).

Plaintiff requests an order directing NAMB to identify and describe, under oath, the possible future litigation "related" to this case for which aiding that possible litigation was the

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<sup>6</sup> After NAMB stated it intended to notice the deposition of former NAMB Board of Trustee member Danny Wood, Plaintiff's counsel sent Mr. Wood a document subpoena. Counsel for NAMB served as legal counsel for Mr. Wood in responding to the subpoena, and produced only nine pages of documents. *See* Exhibit 15 (D. Wood deposition, Pl. Exh. 2). Towards the end of Mr. Wood's September 28, 2022, deposition, counsel for NAMB revealed, on the record, that—*without* asserting an objection in Mr. Wood's written response—counsel for NAMB and Mr. Wood had unilaterally limited Mr. Wood's document production to exclude documents created after January 2017. Exhibit 6 (Wood Dep. Tr. at 102-03). Following that disclosure, Mr. Wood testified he had located three responsive text messages that were not (and still have not been) produced to Plaintiff. Exhibit 6 (Wood Dep. Tr. at 105:9-15). He also testified that he found responsive emails from 2017 or later, which were not produced (and still have not been) produced to Plaintiff. Exhibit 6 (Wood Dep. Tr. at 105-110).

“primary motivating purpose” for the creation of the documents in 2014, 2015 and early 2016, over which NAMB now asserts Work Product protection.

\* \* \* \*

For the foregoing reasons, Plaintiff’s Motion to Compel should be granted.

October 31, 2022

Respectfully Submitted,

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