

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

THE NATIONAL ASSOCIATION OF
BOARDS OF PHARMACY,

Plaintiff

vs.

THE BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA
and FLYNN WARREN, JR.,

Defendants

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CASE NO. 3:07-CV-84 (CDL)

O R D E R

The Court presently has pending before it Plaintiff's motions to compel discovery and Defendants' motions for protective order.¹ These motions arise from a disagreement as to the scope of discovery permitted by the Court relating to Defendants' motions to dismiss for lack of subject matter jurisdiction. For the following reasons, Plaintiff's motions (Docs. 77, 79) are denied, and Defendants' motions (Docs. 88, 90) are granted.

In an attempt to determine expeditiously whether this Court has subject matter jurisdiction, the Court stayed all proceedings on the merits of the underlying claims until it ruled upon Defendants' motions to dismiss for lack of subject matter jurisdiction.

¹Plaintiff filed a separate Motion to Compel against each Defendant, but the substance of each motion is essentially the same. Likewise, each Defendant filed a separate Motion for Protective Order, but the substance of each motion is essentially the same.

Accordingly, the Court limited initial discovery in this phase of the case to issues relevant only to subject matter jurisdiction and established an abbreviated schedule for conducting such discovery. Plaintiff subsequently propounded initial discovery requests to Defendants. Defendants objected to many of the requests, contending that they exceeded the scope of permissible discovery. Plaintiff now moves to compel responses to the requests, and Defendants seek a protective order to prevent Plaintiff from obtaining the requested information.

The central issue in the discovery dispute is whether Defendants are mounting a "facial" or "factual" challenge to the Court's subject matter jurisdiction. If the attack is "facial," then the Court will accept the allegations in Plaintiff's complaint as true and thus discovery is not needed to "prove" those allegations. On the other hand, if the attack is "factual," then Plaintiff arguably may be entitled to broader discovery to "prove" the facts that support subject matter jurisdiction. Regrettably, the parties have wasted substantial time and resources fighting over an issue that their briefs reveal they agree upon.

Defendants state in their response briefs that they will mount a "facial attack" on subject matter jurisdiction, and therefore, the allegations of Plaintiff's Complaint shall be taken as true, and no discovery is necessary. (Def.'s Resp. Brief in Opp'n to Pl.'s Mot. to Compel, p. 6; Def.'s Mem. in Opp'n to Pl.'s Mot. to Compel, p. 2.)

Plaintiff acknowledges in its reply brief that if Defendants are restricting their challenge to subject matter jurisdiction to a "facial challenge," then the discovery it seeks to compel is not relevant to such a challenge. (Pl.'s Reply to Def.'s Mot. for Protective Order and Resp. in Opp'n to Pl.'s Mot. to Compel 10.)

The foregoing exchange resolves the discovery dispute. Defendants have represented to the Court that they intend to mount a "facial challenge" to subject matter jurisdiction. Plaintiff acknowledges that the discovery that it seeks to compel is not relevant to respond to such a challenge. Accordingly, Plaintiff's motions to compel (Docs. 77, 79) are denied, and Defendants' motions for protective order (Docs. 88, 90) are granted.

The Court notes that this unnecessary discovery dispute has delayed the briefing schedule on Defendants' motions to dismiss for lack of subject matter jurisdiction. The Court further notes that Plaintiff in the interim has filed an amended and restated complaint. The Court assumes that Defendants will seek to dismiss Plaintiff's amended complaint based upon lack of subject matter jurisdiction and that their attack will be a facial one.

Based on the foregoing, Defendants shall file responsive pleadings and/or a motion to dismiss Plaintiff's amended and restated complaint on or before November 16, 2007. Defendants shall indicate in their responsive pleadings whether their motion to dismiss for lack of subject matter jurisdiction is restricted to a "facial

attack" on subject matter jurisdiction. If Defendants' challenge is limited to a "facial one," then the parties shall have until November 30, 2007 to complete any necessary discovery that is relevant to a "facial challenge" to subject matter jurisdiction. Defendants shall have until December 14, 2007 to file any briefs in support of their motions to dismiss for lack of subject matter jurisdiction. Plaintiff shall then have until January 4, 2008 to file its response. Defendants shall have until January 18, 2008 to file their replies.²

IT IS SO ORDERED, this 6th day of November, 2007.

S/Clay D. Land

CLAY D. LAND

UNITED STATES DISTRICT JUDGE

²If Defendants do not limit their jurisdictional challenge to a facial one, then the parties are ordered to confer in good faith to resolve the discovery dispute or at a minimum narrow the issues that the Court must decide. If the dispute is not resolved, Plaintiff shall be permitted to renew its previously filed motions to compel, and the Court will address the arguments regarding those issues in due course. Since additional discovery will likely be permitted if Defendants insist upon a factual challenge to jurisdiction, the parties are ordered to file a joint proposed amended scheduling order on or before November 30, 2007 if Defendants decide to mount a factual challenge. In addition to any amended deadlines, this proposed amended scheduling order shall include a specific description of any remaining discovery disputes that need to be decided by the Court.