

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

THE NATIONAL ASSOCIATION OF)
BOARDS OF PHARMACY,)
)
Plaintiff,)
)
v.)
)
THE BOARD OF REGENTS OF THE)
UNIVERSITY SYSTEM OF GEORGIA and)
FLYNN WARREN, JR.,)
)
Defendants.)
)

CIVIL ACTION NO: 3:07-CV-84 (CDL)

**PLAINTIFF’S MOTION TO COMPEL RESPONSES TO FIRST REQUEST FOR
ADMISSIONS, FIRST INTERROGATORIES, AND FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS AND THINGS TO
DEFENDANT FLYNN WARREN JR.**

Pursuant to FED. R. CIV. P. 37 and Local Rule 37, Plaintiff National Association of Boards of Pharmacy (“NABP”) moves this Court to compel Defendant Flynn Warren Jr. (“Warren”) to fully respond to NABP’s First Request for Admissions, First Interrogatories, and First Request for Production of Documents and Things. In support thereof, NABP relies upon all filings of record in this case, the Memorandum of Law filed herewith, and Warren’s Responses to NABP’s First Request for Admissions, First Interrogatories, and First Request for Production, attached as Exhibits 1, 2, and 3 hereto.

By way of background, on September 5, 2007, pursuant to this Court’s Orders of August 21 and 27, 2007 permitting the parties to conduct limited discovery related solely to the jurisdictional issues raised in this case, NABP propounded nineteen Requests for Admission, sixteen Interrogatories, and eleven Requests for Production of Documents and Things

(collectively “Discovery Requests”) to Warren. In response, Warren produced essentially nothing. Specifically, Warren provided no substantive response to seventeen of nineteen Requests for Admission (Nos. 1-17), instead objecting to each on the grounds that the Request was “not related solely to subject matter jurisdiction but instead goes to the merits of the case in violation of the Court’s Orders of August 21, 2007 and August 27, 2007.” See Warren’s Responses to NABP’s First Request for Admissions, attached as Exhibit 1. Warren also produced *no* documents in response to NABP’s eleven Requests for Production, and objected to *all* eleven Requests on the same “beyond the scope of jurisdictional discovery” basis.¹ See Warren’s Responses to NABP’s First Request for Production of Documents and Things, attached as Exhibit 2. Finally, Warren did not give *any* factual response to thirteen of sixteen Interrogatories (all except Nos. 7, 8, and 15), and objected to fifteen of sixteen (all except No. 7)² on the same “beyond the scope of jurisdictional discovery” basis. See Warren’s Responses to NABP’s First Interrogatories, attached as Exhibit 3.

Upon receiving Warren’s “responses,” NABP immediately sent a letter to Warren on the evening of September 21, 2007. See NABP’s September 21, 2007 letter to Warren, attached as Exhibit 4. In its September 21st letter to Warren, NABP outlined why the Discovery Requests

¹ In addition to this “beyond the scope” objection, Warren added to his Response to Document Request No. 6 that he had no documents in his possession within the scope of Request No. 6. Because this was the only Request to which Warren added this reply, presumably he *does* have documents in his possession within the scope of the other ten Document Requests, but has simply withheld them on the basis of his “beyond the scope” objection.

² However, even Warren’s Response to Interrogatory No. 7 was limited by his “beyond the scope” objection, as Interrogatory No. 7 asked Warren to identify all facts that he relied on for any response to an NABP Request for Admission that was other than an unqualified admission. Because Warren had objected to seventeen of the nineteen NABP Requests for Admission and provided no substantive response for them, he only responded to Interrogatory No. 7 regarding the one Request for Admission that he denied.

that it had propounded *were* relevant to the jurisdictional issues in this case. The relevant portion of NABP's September 21st letter to Warren is quoted below in full:

All of the Requests to Produce, Requests for Admission, and Interrogatories that you have objected to as beyond the scope of jurisdictional discovery were drafted to procure evidence relating to at least the following issue: to what extent was the infringement in this case intentional? Given that there are two defendants in this case, this intent inquiry necessarily has two components: 1) to what extent was Warren's conduct intentional; and 2) to what extent did others in the faculty/administration at the University of Georgia College of Pharmacy and/or the Board of Regents of the University System of Georgia share in that intent (or, conversely, were Warren's infringements the random and unauthorized acts of a "rogue" professor).

In short, this intent element falls within the scope of jurisdictional discovery because it applies to our analysis of whether the Copyright Remedy Clarification Act ("CRCA") constitutes appropriate Section 5 legislation under the Fourteenth Amendment as applied to the facts of this case. As you are aware, in analyzing whether the Patent Remedy Act ("PRCA") constituted appropriate Section 5 legislation under the 14th Amendment, the Supreme Court in *Florida Prepaid* analyzed three separate issues: 1) the legislative history of the PRCA; 2) the availability of state law remedies; and 3) whether the PRCA swept too broadly (was not "congruent and proportional") because it applied to unintentional acts of patent infringement that, by virtue of their being unintentional, did not constitute "deprivations" of property without due process under *Daniels v. Williams*, 474 U.S. 327 (1986). *Fl. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 636-45 (1999). The court explained its concern on the third point with reference to the legislative history of the PRCA, which stated: "It is not always clear that with all the products that government buys, that anyone is really aware of the patent status of any particular invention or device or product." *Id.* at 645. While our position is that the CRCA is distinguishable from the PRCA on all three counts, our discovery on the intent element goes mainly to the third. The discovery that we seek from Warren is calculated to lead to evidence that relates directly to this issue.

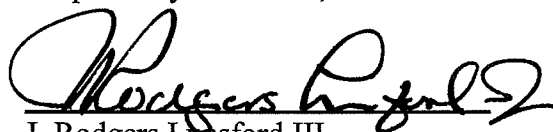
Apparently not satisfied with this explanation, Warren responded by letter on September 25, 2007, continuing to maintain that NABP's Discovery Requests asked for information beyond the scope of the Court's Orders of August 21, 2007 and August 27, 2007. See Warren's September 25, 2007 letter, attached as Exhibit 5. NABP replied on September 26, 2007, providing even *more* support for its position on the matter. See NABP's September 26, 2007

letter to Warren, attached as Exhibit 6. The parties conducted a telephone conference to attempt to resolve their disagreement on September 27, 2007, but no resolution was achieved. Thus, NABP seeks an Order from this Court: 1) directing Warren to fully respond to NABP's Discovery Requests; 2) revising the discovery schedule to allow NABP ample time post-written-discovery-responses to prepare to take necessary depositions; and 3) providing NABP such other and further relief as the Court deems just and proper.

This 4th day of October, 2007.

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Respectfully submitted,

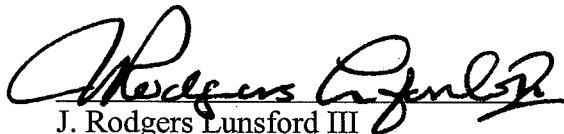


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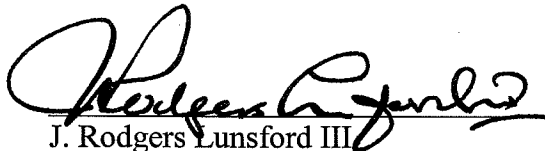
Local Rule 37 Certification

Pursuant to Local Rule 37, I, J. Rodgers Lunsford, hereby certify that during the week of September 21, 2007 to September 27, 2007 I exchanged correspondence with counsel for Defendant Flynn Warren Jr., and on September 27, 2007, I conferred by telephone with counsel for Defendant Flynn Warren Jr., in good faith in an effort to secure the information sought by NABP's discovery without court action.


J. Rodgers Lunsford III

Local Rule 5.1 Certification

Pursuant to Local Rule 5.1, I, J. Rodgers Lunsford, hereby certify that the discovery documents filed as attachments to Plaintiff's Motion to Compel Responses to First Request for Admissions, First Interrogatories, and First Request for Production of Documents and Things to Defendant Flynn Warren Jr. will be used in connection with the proceedings thereon.


J. Rodgers Lunsford III

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Defendants.)

PROPOSED ORDER

The within and foregoing action having come on before the Court on Plaintiff's Motions to Compel, upon consideration, and good cause shown, Defendants, and each of them, shall be, and hereby are, ORDERED to fully respond to Plaintiff's First Request for Admissions, First Interrogatories, and First Request for Production of Documents and Things on or before November ____, 2007.

SO ORDERED this ____ day of _____, 2007.

Clay D. Land
United States District, Judge

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_____)

CERTIFICATE OF SERVICE

This is to certify that on this 4th day of October, 2007, the foregoing “Motion to Compel Responses to First Request for Admissions, First Interrogatories, and First Request for Production of Documents and Things to Defendant Flynn Warren Jr.” was electronically filed with the Clerk of the Court using the Court’s ECF system which automatically generates a Notice of Electronic Filing of such Pleading to the following attorneys of record, and that a copy of the same has also been electronically transmitted to:

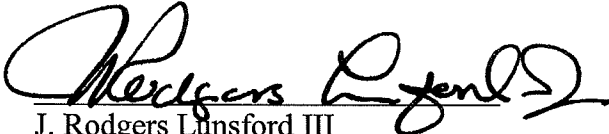
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J. Rodgers Lunsford III

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