



The main discovery dispute at issue is whether the nineteen Requests for Admission, nineteen Interrogatories, and eleven Requests for Production of Documents and Things (collectively "Discovery Requests") propounded by Plaintiff the National Association of Boards of Pharmacy ("NABP") to Defendant the Board of Regents of the University System of Georgia ("Board") are relevant to the subject matter jurisdiction dispute between the parties. Because the relevance of the Discovery Requests to the jurisdictional dispute is addressed in full in NABP's Memorandum of Law in support of its Motion to Compel against Defendant Flynn Warren Jr. ("Warren"), NABP will not rehash that argument herein. Rather, to summarize: 1) the Discovery Requests that the Board has objected to as beyond the scope of jurisdictional discovery were propounded to elicit evidence on at least one of two related factual inquiries (to what extent was the conduct at issue here not "random and unauthorized" and to what extent was the conduct intentional) and 2) as NABP has shown in its Memorandum of Law in support of its Motion to Compel against Warren, both of those factual inquiries are relevant to the immunity issue. Thus, the Board's "beyond the scope of jurisdictional discovery" objections are without merit.

However, while the "beyond the scope of jurisdictional discovery" objection was the Board's main recurring objection, it was not the only one that the Board raised, and was not the only deficiency in the Board's Responses to NABP's Discovery Requests. Each of the additional deficiencies will be addressed herein in turn.

**1. *Ex Parte Young.***

The Board's Responses to Interrogatory Nos. 2, 3, and 4 are deficient in that they only provide the names, and not the duties and responsibilities (as requested) of the relevant individuals. The relevance of the individuals' duties and responsibilities is that under *Ex Parte Young* it is clear that NABP can name as a party in its Complaint an official of the State of

Georgia in their official capacity and seek prospective injunctive relief against that official as a means of precluding the State from resuming its infringing conduct. *E.g., Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). But to do so NABP needs further factual information from the Board to show that the official had some “nexus” to the infringing conduct. *See, e.g., Pennington Seed, Inc. v. Produce Exch. No. 229*, 457 F.3d 1334, 1342-43 (Fed. Cir. 2006). Thus, so that NABP does not have to resort to amending its Complaint to name a bevy of UGA and Board officials in their official capacity (at which point NABP would still need to take discovery on each official’s duty to ward off any summary judgment motion on the “nexus” issue), NABP propounded Interrogatory Nos. 2, 3, and 4 to: 1) identify the individuals that it needed to add to the Complaint under *Young*; and 2) procure evidence supporting the “nexus” requirement thereunder. Thus, the Board should identify not only the individuals but their duties and responsibilities as well, specifically as to those duties and responsibilities that relate to the conduct at issue here. NABP will amend its Complaint, both to add those officials and to add the procedural due process averments addressed in its Memorandum of Law in support of its Motion to Compel against Warren, once it has that information.

**2. All Responsive Documents.**

In the Board’s Response to Request to Produce No. 1, it states that “certain responsive documents” will be produced, and in its Response to Request to Produce Nos. 2, 6, and 9 it states that “responsive documents” will be produced. It does not state that **all** responsive documents will be produced. NABP requests that it do so, or state what documents are being withheld and why.

**3. Time Frame.**

The Board's objections as to time frame are without merit. UGA has offered review courses for the NABPLEX and/or NAPLEX since at least as early as 1988. The 1995 Agreement is an acknowledgement that the conduct of UGA addressed therein was improper. NABP is entitled to compare the pre- and post-1995 conduct in its "intent" analysis, as outlined in its Memorandum of Law in support of its Motion to Compel against Warren.

**4. Conclusion of Law.**

The Board has objected to NABP's Requests for Admission Nos. 12-14, 16, and 17 on the ground that such Requests seek conclusions of law. Such is incorrect. Such Requests seek the application of law to fact, which is a recognized purpose of Requests for Admission and Interrogatories. *See* FED. R. CIV. P. 36(a) and 33(c) and Advisory Committee Notes regarding the 1970 amendments addressing such sections.

**5. Terminology.**

The Board's objection to NABP's use of the terms "NAPLEX Review Course," "NABPLEX Review Course" and/or "MPJE Review Course" to describe courses offered by UGA and/or taught by Warren to prepare students for examinations required for pharmacist licensure, appearing throughout the Board's discovery responses, is not made in good faith. The Board knows well what these terms identify, namely review courses wherein preparations for the NAPLEX, NABPLEX, and/or MPJE examinations occurred, as evidenced by the Board's response to various requests, including its Response to NABP's Interrogatory No. 1:

The Office of Postgraduate Continuing Education and Outreach did not offer courses entitled "NAPLEX Review Course," "NABPLEX Review Course," or "MPJE Review Course." The Review of Pharmacy course included instruction on preparing for the multitude of examinations that are required for pharmacist licensure in Georgia, including instruction on preparing for the NABPLEX (later NAPLEX) and MPJE examinations.

## 6. FERPA.

The Board's objections to Discovery Requests on the basis of the Family Educational Rights and Privacy Act ("FERPA") are overbroad. While FERPA was created for the purpose of protecting the privacy of parents and students, the Act does not preclude the disclosure of the information requested by NABP's Discovery Requests. 34 C.F.R. § 99.2. In responding to NABP's Discovery Requests, the Board could have redacted any information protected by FERPA, while nonetheless providing the responsive information. Moreover, the Board could have provided the requested information as it relates to faculty, administration, and the like from UGA, as such information is not protected by FERPA. *Id.* In accordance with the instructions provided in NABP's Discovery Requests, the Board had an obligation to respond to any Request, or portion thereof, for which no objection was provided, an obligation the Board failed to meet. With respect to information protected by FERPA, NABP requests that the Court issue an Order requiring the disclosure of this information, in accordance with the Act. 34 C.F.R. § 99.31(a)(9).

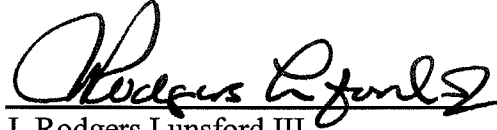
## CONCLUSION

All of the Discovery Requests at issue here were propounded to elicit evidence on at least one of two related factual inquiries: 1) to what extent was the infringement here the result of the random and unauthorized acts of a "rogue" professor; and 2) to what extent was the infringement here intentional (which, given the two defendants, necessarily has two components). As shown in NABP's Memorandum of Law in support of its Motion to Compel against Warren, both of these inquiries are relevant to the immunity issue. Thus, because NABP has demonstrated this relevance, and because the Board's other objections are without merit (as shown above), the Court should grant NABP's Motion to Compel against the Board in full.

This 4th day of October, 2007.

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**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)

**CERTIFICATE OF SERVICE**

This is to certify that on this 4th day of October, 2007, the foregoing “Memorandum of Law in Support of Plaintiff’s Motion to Compel Responses to First Request for Admissions, First Amended Interrogatories, and First Requests for Production of Documents and Things to Defendant the Board of Regents of the University System of Georgia” 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:

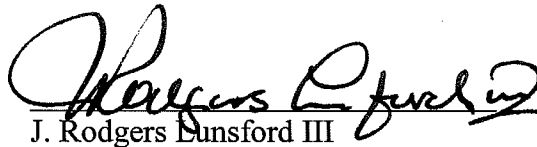
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