

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

_____)	
THE NATIONAL ASSOCIATION OF)	
BOARDS OF PHARMACY,)	
)	
Plaintiff,)	CIVIL ACTION NO: 3:07-CV-84 (CDL)
)	
v.)	
)	
THE BOARD OF REGENTS OF THE)	
UNIVERSITY SYSTEM OF GEORGIA and)	
FLYNN WARREN, JR.,)	
)	
Defendants.)	
_____)	

**THE BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA’S
RESPONSE BRIEF IN OPPOSITION TO NABP’S MOTION TO COMPEL
AND IN SUPPORT OF REGENTS’ CROSS-MOTION FOR PROTECTIVE ORDER**

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INTRODUCTION

In its Minute Order dated August 21, 2007, the Court ordered that discovery is “restricted to the topic of subject matter jurisdiction” in anticipation of The Board of Regents of the University System of Georgia (“Regents”) renewed motion to dismiss on the grounds of sovereign and Eleventh Amendment immunity. (8/21/07 Minute Order). In its August 27, 2007 Order, the Court stated: “the Court has provided the parties with a *limited opportunity* to conduct *discovery related solely to the jurisdiction issue.*” (8/27/07 Order, at 3) (emphasis added).

Despite the limited scope of permissible discovery, the National Association of Boards of Pharmacy (“NABP”) has sought to burden Regents with discovery on the merits of all of NABP’s claims, ranging from the identification of every course Flynn Warren (“Warren”) has taught at the College of Pharmacy over the past twelve years, to seeking admissions that defendants infringed NABP’s allegedly copyrighted test questions. Although Regents has supplied substantial information regarding the pharmacy review courses taught by Warren and the relationship between Regents, the College of Pharmacy, and Warren, Regents has objected to discovery not related to subject matter jurisdiction.

In response, NABP has moved to compel discovery purportedly going to whether Regents’ and Warren’s actions were “intentional” or not “random and unauthorized.” Those issues go to the substance of NABP’s claims for money damages—they have nothing to do with whether Regents or Warren are immune from suit in federal court—the only issue on which this Court has permitted discovery.

Despite alleging “deliberate[] and willfull[]” copyright infringement in its Complaint, ¶ 22, NABP contends that it needs discovery to expose alleged “additional” “egregious” facts so that this Court may decide whether Congress’ purported abrogation of the States’ Eleventh

Amendment immunity in the Copyright Remedy Clarification Act of 1990 (“CRCA”) is constitutional “as applied” to the facts of this particular case. NABP cites no case, however, where a court permitted discovery into the particular facts of the case at bar to retroactively determine whether a past Congressional act was constitutional when enacted. Indeed, the cases on which NABP chiefly relies to argue it is entitled to discovery, *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978 (2004) and *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877 (2006) are not discovery cases at all. Rather, those cases look to the allegations in the complaint to determine the “class of case” at issue and then compare them with a broad statute capable of applying to more than one “class of case.”

Here, NABP’s complaint unequivocally alleges this is a “deliberate[] and willful[]” copyright infringement case, and the CRCA by its own terms applies to only one “class of case”—copyright infringement by the States. Because whether Congress validly abrogated Regents’ Eleventh Amendment immunity is a question of law not fact, the parties and this Court should go no further than the allegations in NABP’s Complaint and the legislative history of the CRCA to determine whether this court has subject matter jurisdiction.

In a consistent line of cases immediately following the Supreme Court’s decisions in *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627, 119 S. Ct. 2199 (1999) and *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999) through as recently as December 2006 (long after the *Lane* and *Georgia* cases on which NABP relies), *every* court that has examined the CRCA has struck it down as an invalid Congressional attempt to abrogate the States’ Eleventh Amendment immunity. *Rodriguez v. Texas Comm’n on The Arts*, 199 F.3d 279 (5th Cir. 2000); *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000); *De Romero v. Inst. of Puerto Rican Culture*, 466 F. Supp.

2d 410, 417-18 (D.P.R. 2006); *Hairston v. North Carolina Agric. & Tech. State Univ.*, 2005 U.S. Dist. Lexis 20442, at *23 (M.D.N.C. Aug. 5, 2005); *Salerno v. City Univ. of New York*, 191 F. Supp.2d 352, 356 (S.D.N.Y. 2001); *Rainey v. Wayne State Univ.*, 26 F. Supp.2d 973, 976 (E.D. Mich. 1998); *Jehnsen v. New York Martin Luther King, Jr. Inst. for Nonviolence*, 13 F. Supp. 2d 306, 311 (N.D.N.Y. 1998). *See also* Board of Regents’ Brief in Supp. of its Mot. to Dismiss for Lack of Subj. Matter Jurisd., at 13-15 [Docket No. 38]. *None* of these cases authorized discovery to determine if the CRCA was constitutional “as applied” to the facts of that case—because the individual facts of the case are irrelevant. It is the constitutional invalidity of the CRCA that is at issue for Eleventh Amendment abrogation, not what Regents and Warren supposedly did.

This Court should deny NABP’s Motion to Compel and should enter a protective order explicitly stating that Regents does not need to further respond to NABP’s pending discovery requests or engage in any discovery that does not go solely to the issue of subject matter jurisdiction.

ARGUMENT

I. Standard for Motion to Compel

Pursuant to the Court’s August 2007 Orders, NABP is only permitted to seek discovery that relates “solely” to the issue of subject matter jurisdiction. The Court correctly limited discovery, because until the threshold issue of immunity is decided, further discovery should not be allowed. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). *See also Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985) (“Unless the plaintiff’s allegations state a claim for violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.”). In any event, NABP is certainly

prohibited from seeking discovery that is not “relevant to the claim or defense of any party....” Fed. R. Civ. P. 26(b)(1).¹

NABP contends that *all* of its requested discovery relates to subject matter jurisdiction, and specifically relates to whether: (1) Regents acted “intentionally” in violating NABP’s alleged copyrights; or (2) Regents’ (and Warren’s) acts were not “random and unauthorized.” Further, NABP states that “the only” issue on “which NABP seeks discovery” is whether the CRCA, “as applied” to the facts of this case, abrogates Regents’ and Warren’s sovereign immunity. (Br. to Comp. Warren, at 3 n.2).

Whether Regents acted “intentionally” or whether its acts were not “random and unauthorized” has nothing to do with subject matter jurisdiction. Rather, whether Congress validly abrogated the States’ Eleventh Amendment immunity is a pure question of law to be decided on the legislative history of the CRCA and the allegations in NABP’s Complaint. (See discussion in Sections III.A. and III.B, below). At most, permissible fact discovery could relate to only two issues: (1) whether Regents is an “arm or instrumentality” of the State; and (2) whether Regents’ (or the State) explicitly waived its immunity from suit in federal court. *See Alden v. Maine*, 527 U.S. 706, 741, 757-58, 119 S. Ct. 2240 (1999). NABP has not moved to compel discovery on either issue. Indeed, NABP has admitted that Regents is an “arm or instrumentality” of the State. (NABP Resp. to Regents’ RFA No. 1, attached hereto as Exhibit A). And NABP has not adduced any evidence (because there is none) that Regents waived its

¹ Because FRCP 26(b)(1) does not permit discovery into unasserted claims, NABP may not obtain discovery that goes to its threatened (but nonexistent) “amended” Complaint. Therefore, the Court cannot order Regents to comply with discovery going to unasserted causes of actions for violation of the Fourteenth Amendment, for example. *See, e.g., Arabian Am. Oil Co. v. Scarfone*, 939 F.2d 1472, 1475 (11th Cir. 1991) (discovery not permissible into claim not in complaint.)

immunity from suit in federal court. (*See* Regents' Resps. to NABP's discovery requests, attached to NABP's Motion to Compel Regents as Exs. 1, 2, and 3).

The discovery which NABP seeks to compel instead goes to the merits of its case. Indeed, despite NABP contention, most of its requests do not even go to whether the defendants' actions were "intentional" or not "random and unauthorized."² Such merits-discovery is therefore outside the scope of NABP's own motion to compel, let alone outside the scope of the Court's August 2007 Orders.

II. Because The Complaint Alleges That Regents and Warren Intentionally Infringed NABP's Copyrights, NABP Does Not Need Discovery On That Issue To Respond to a Motion to Dismiss

NABP's Complaint alleges that Regents and Warren "deliberately and willfully" infringed NABP's copyrights. Complaint, ¶ 22. "Deliberately and willfully" is synonymous with "knowingly and intentionally." *See, e.g., Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1329 (E.D. Pa. 1985) ("I ruled that the infringement by defendants was willful and deliberate in the sense that the actions taken by defendants were done knowingly and intentionally, and with full knowledge of plaintiff's claim of exclusive ownership of the computer system."). Despite its own Complaint's allegations on the issue of "intent," however, NABP contends that it needs discovery on this issue before it can respond to a motion to dismiss. (Br. to Compel Warren, at 12-14). NABP is incorrect.

² *See, e.g.,* NABP's Int. No. 18 ("Do you contend that you have not breached the Settlement Agreement, and if so, state each and every basis for such contention."); NABP's Doc. Request No. 4 ("Produce each and every document or thing that relates to, refers to, constitutes, or evidences the actions the Board of Regents and the University of Georgia took or what they did to comply with, satisfy or fulfill their obligations set forth in the Settlement Agreement, including all actions taken to deter dissemination of actual or purported NABPLEX questions, actual or purported NAPLEX questions, references to, paraphrases to, copies, or summaries of actual or purported NABPLEX and actual or purported NAPLEX question, including any communications relating to the same."); NABP's Request to Admit No. 14 ("Admit that the Settlement Agreement is a valid and enforceable contract under Georgia law.").

Regents will mount a facial attack on subject matter jurisdiction by contending that, in enacting the CRCA, Congress failed to validly abrogate the States' Eleventh Amendment immunity as a matter of law. A defendant has the choice of whether to mount a facial attack on jurisdiction, a factual attack on jurisdiction, or both. *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1237 (11th Cir. 2002). "Facial attacks' on the complaint 'require[] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis for subject matter jurisdiction, and the allegations of his complaint are taken as true for the purpose of the motion.'" *Howland v. Hertz Corp.*, 431 F. Supp. 2d 1238, 1240 (M.D. Fla. 2006) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). If the defendant makes a facial attack on jurisdiction, "then a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion—the court must consider the allegations of the complaint to be true." *Lawrence*, 919 F.2d at 1529. Also, like a Rule 12(b)(6) motion, a district court when confronted with a facial attack is merely construing the law, not deciding factual disputes. *Barnett*, 293 F.3d at 1238.³

Therefore, NABP's allegations of "intentional" conduct in the Complaint are to be taken as true for purposes of responding to a facial challenge to the CRCA, and NABP does not need discovery on this issue. *Lawrence*, 919 F.2d at 1529.

III. Regents' and Warren's "Intent" is Irrelevant to Subject Matter Jurisdiction

Even if the allegations regarding "deliberate[]" and "willful[]" copyright infringement were not sufficient to allege "intentional" conduct, and even if Regents was not mounting a purely facial attack to the CRCA, the issue of defendants' "intent" is irrelevant for a Rule 12(b)(1) motion to dismiss.

³ If Regents were factually attacking jurisdiction, then the Board of Regents would be calling into question the presumption of truthfulness attached to the complaint and NABP would have to prove that the facts it asserts are true. *Barnett*, 283 F.3d at 1238. After a factual attack, the court would conduct an evidentiary hearing and would determine which party's version of the facts are true before ruling on subject matter jurisdiction. *Id.*

A. Because the CRCA’s Legislative History Fails to Pass Constitutional Muster, NABP’s Discovery Requests as to “Intent” are Irrelevant and Futile

1. Because Congress’ Sole Basis for Enacting the CRCA was its Article I Powers, the CRCA Did Not Validly Abrogate the States’ Eleventh Amendment Immunity as a Matter of Law

The CRCA’s legislative history reveals that Congress enacted 17 USC §§ 501(a) and 511 solely pursuant to its Article I powers. *See* H. Rep. No. 101-282(I), at 7 (attached hereto as Ex. B)(invoking and relying on the Copyright Clause of Article I as the basis for “a constitutional abrogation of State sovereign immunity.”). Nowhere in the legislative history did Congress state that it was enacting the CRCA pursuant to its enforcement powers under the Fourteenth Amendment, § 5. *See id.*; *Chavez*, 157 F.3d at 287 n.8 (5th Cir. 1998) (“It may be too much of a leap to infer Congress’s reliance on the Fourteenth Amendment in the [CRCA] when it did not expressly state its intent to legislate on that basis.”), *vacated on other grounds*, 178 F.3d 281 (5th Cir. 1998).

The Supreme Court held in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996) that Congress’ Article I powers can never abrogate a State’s sovereign or Eleventh Amendment immunity from suit in federal court. *Seminole Tribe*, 517 U.S. at 72. This Court should adhere to Congress’ own stated basis for enacting the CRCA and not search for another provision in an attempt to justify the statute. *See Florida Prepaid*, 527 U.S. at 642 n.7 (“Since Congress was so explicit about invoking its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.”). Accordingly, NABP’s requested discovery is irrelevant because, no matter whether Regents’ or Warren’s actions were “intentional” or not, those facts would not save an invalid exercise of Congressional power.

2. Even if Congress Attempted to Exercise its Fourteenth Amendment, § 5 Enforcement Powers (Which it Did Not), the CRCA Did Not Validly Abrogate the States' Eleventh Amendment Immunity as a Matter of Law

The Supreme Court has articulated a 2-part test to determine whether Congress validly abrogated a State's Eleventh Amendment immunity under Congress's Fourteenth Amendment, Section 5 enforcement powers. 1) did Congress unequivocally express its intent to abrogate state sovereign immunity?; and 2) did Congress act pursuant to a valid exercise of power in doing so? *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73; 120 S. Ct. 631 (2000) (citing *Seminole Tribe*, 517 U.S. at 55).

The test for the second prong has been called the "congruence and proportionality" test. *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). It has three parts:

1. Identify with some precision the scope of the constitutional right at issue. *Boerne*, 521 U.S. at 529-30; *Bd. of Trustee of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 365, 121 S. Ct. 955 (2001).
2. Examine whether Congress "identified a history and pattern" of violations of the constitutional rights at issue by the States. *Boerne*, 521 U.S. at 530-33; *Garrett*, 531 U.S. at 368.
3. Examine whether the rights and remedies created by the Congressional act are congruent and proportional to the constitutional rights it purports to enforce and the record of constitutional violations adduced by Congress. *Boerne*, 521 U.S. at 533; *Garrett*, 531 U.S. at 372-373.

Under prong 2 of the *Boerne* test, a statute purporting to abrogate a State's immunity from suit is invalid if Congress fails to find that the States have engaged in a "history and pattern" of violating the constitutional right at issue. *Garrett*, 531 U.S. at 368-70. Here, NABP's Complaint alleges that Regents and Warren have violated NABP's copyrights, namely its test questions. Even assuming that NABP has a constitutional right to be free from unremedied copyright infringement, the CRCA fails to validly abrogate the States' immunities

because Congress did not find that the States have engaged in a “history and practice” of unremedied copyright infringement. *See, e.g., Chavez*, 204 F.3d at 605-06 (CRCA is unconstitutional).

The Supreme Court struck down the CRCA’s two companion statutes, the Patent Remedy Act and the Trademark Remedy Clarification Act (“TRCA”). *See Florida Prepaid*, 527 U.S. at 647 (Patent Remedy Act did not validly abrogate States’ Eleventh Amendment immunity); *College Savings*, 527 U.S. at 691 (TRCA was not a valid abrogation). *Florida Prepaid* said it did so precisely because the legislative history failed the *Boerne* “congruent and proportional” test. *See Florida Prepaid*, 527 U.S. at 647.

Every court that has examined the CRCA since *Florida Prepaid* and *College Savings* has likewise held that CRCA failed to validly abrogate the states’ Eleventh Amendment immunity from suit precisely because the legislative history is devoid of any finding of a “history and pattern” of States’ copyright infringement (intentional or otherwise). *Rodriguez*, 199 F.3d 279; *Chavez*, 204 F.3d 601; *De Romero*, 466 F. Supp. 2d at 417-18 (holding that § 511 was unconstitutional because it did not “effect a valid abrogation of the states’ sovereign immunity.”); *Hairston*, 2005 U.S. Dist. Lexis 20442, at *23 (“the CRCA is not an appropriate exercise of Congress’s enforcement authority... thus the CRCA does not abrogate Defendants’ Eleventh Amendment immunity from money damages for an alleged violation of Plaintiff’s copyright.”); *Salerno*, 191 F. Supp.2d at 356 (dismissing copyright claims against arms of the state because they are immune from suit); *Rainey*, 26 F. Supp.2d at 976 (“There is no question that the Eleventh Amendment bars plaintiff’s federal copyright infringement claim and state law claims against WSU for monetary damages, as these claims would require payments from the State’s coffers”); *Jehnsen* 13 F. Supp. 2d at 311.

NABP asks this Court to ignore this prior body of law and be the first to uphold the CRCA since *Florida Prepaid*. This Court should not do so, and because Regents' and Warren's "intent" is irrelevant to whether the CRCA validly abrogated the States' Eleventh Amendment immunity, NABP does not need any discovery regarding "intent."⁴

B. NABP's "As Applied" Analysis is Inapplicable to the CRCA

NABP makes at least two misstatements of law with respect to its "as applied" analysis. First, NABP incorrectly contends that the Supreme Court has abandoned the *Boerne* "congruent and proportional" test in favor of an "as applied" analysis. (Br. to Compel Warren, at 5). Second, NABP improperly replaces *Lane*'s "as applied" analysis (in which a broad statute capable of more than one application is examined "as applied" to a particular "class of case") with one of NABP's own fabrication (in which a court is supposedly to determine the constitutionality of a statute based on the individualized facts of the specific case at bar). *Id.* Not surprisingly, NABP cites no law for the proposition that this Court may save an otherwise unconstitutional statute merely based on the facts of the particular case at bar. Instead, NABP twists the language from the context of the cases on which it relies to make them seem to say something they do not.

NABP incorrectly asserts that the Supreme Court's test for a valid abrogation of sovereign immunity has changed from *Boerne*'s and *Florida Prepaid*'s "congruence and proportionality" test to an "as applied" analysis. Neither of the two cases on which NABP relies, *Lane* and *Georgia*, stands for that proposition. To the contrary, *Lane* explicitly followed and applied the *Boerne* "congruent and proportional" test and *Georgia* applied it without comment.

⁴ See, e.g., *Toeller v. Wisconsin Dep't of Corr.*, 461 F.3d 871, 879 (7th Cir. 2006) ("whether we know about [Congress' motive in enacting the FMLA was to end sex discrimination] is not the point in the end: what counts is that we see nothing in either the text or legislative history of the FMLA to indicate that Congress found this to be the case") (reversing district court's denial of motion to dismiss on grounds of Eleventh Amendment immunity).

Contrary to NABP’s argument, *Lane* employed the *Boerne* test and examined the legislative history to determine whether Congress found a “history and pattern” of States’ violation of the constitutional right at issue—access to the courts. (The majority found such a finding in the legislative history). *Lane*, 541 U.S. at 529. Only *after* holding that Congress made a finding of a “history and pattern” of depriving constitutional rights did the Court examine the statute “as applied” to the particular “class of case” at issue—the right to have access to the courts. *Id.* at 530. In using an “as applied” approach in *Lane*, the Supreme Court explicitly stated it did so only because the statute at issue in *Lane*, Title II to the Americans with Disabilities Act, was so expansive it could sweep in many different classes of cases.

The *Lane* Court explicitly distinguished Title II—for which an “as applied” approach was appropriate—from the Religious Freedom Restoration Act (the statute at issue in *Boerne*) and the Patent Remedy Act (the statute at issue in *Florida Prepaid*) specifically because those statutes (like the CRCA here) apply to only *one* class of case. *Lane*, 541 U.S. at 530 & n.18:

At the outset, we must determine the scope of that inquiry. Title II—unlike RFRA, the Patent Remedy Act, and the other statutes we have reviewed for validity under § 5—reaches a wide array of official conduct in an effort to enforce an equally wide array of constitutional guarantees.... Moreover, *Garrett* and *Florida Prepaid*, like all of our other recent § 5 cases, concerned legislation that narrowly targeted the enforcement of a *single* constitutional right; for that reason, *neither speaks to the issue presented in this case.*”(emphasis added).

Accordingly, *Lane*’s “as applied” approach did not supplant *Boerne*. Rather, it is an additional step employed *after* first conducting a *Boerne* analysis, and is used only when:

1. The statute at issue is broad enough to encompass more than one class of case; and
2. Only *after* first finding that the legislative history contains a Congressional finding of a “history and pattern” of constitutional violations by the States.

Because the CRCA only encompasses a single class of case (copyright infringement by the States), an “as applied” analysis is inapplicable.

U.S. v. Georgia is not to the contrary. NABP says it is “striking” that the Supreme Court in *Georgia* “assumed, with no discussion, the propriety of the *Lane* ‘as applied’ approach,” and omitted “any discussion of the legislative history of Title II or of whether the ultimate scope of Title II was “congruent and proportional” to its objective. (Br. to Compel Warren, at 9-10). This is not “striking” at all. The Supreme Court thoroughly discussed the legislative history of Title II, and its “congruence and proportionality” in the earlier *Lane* opinion, in which Congress found the States had a “history and pattern” of “den[ying disabled persons] the benefits of the services, programs, or activities of a public entity”—the identical aspect of Title II confronted by both *Lane* and *Georgia*. See *Lane*, 541 U.S. at 529; *Georgia*, 546 U.S. at 153. Moreover, the *Georgia* Court did not engage in a *Boerne* analysis because it did not have plaintiff’s amended complaint before it.

NABP contends that “where an actual constitutional violation is alleged, the ‘congruence and proportionality’ test is unnecessary, and there is no need to examine the legislative history...” (Br. to Compel Warren, at 10). That is incorrect, at least as applied to the “class of case” at issue here. Although Congress may have greater authority to legislate the penalties for “actual constitutional violations,” the CRCA pertains to violations of the Copyright Act, not direct constitutional violations. Further, NABP’s Complaint does not allege a constitutional violation, it merely alleges that the defendants have infringed its copyrights. That being the case, the Court cannot “leapfrog” over the CRCA’s legislative history and ignore the complete absence of any Congressional finding of a “history and pattern” of willful copyright infringement by the States.

In any event—and perhaps most importantly—in *Georgia*, *Lane*, and every other case on which NABP relies, the courts did not permit discovery to aid in an “as applied” analysis. Instead, the courts always looked to the allegations of the complaint. For example, in *Lane*, the Supreme Court determined that Title II was a constitutional abrogation of the state’s immunity under the Fourteenth Amendment § 5 as applied to “the class of cases implicating the accessibility of judicial services.” *Lane*, 541 U.S. at 531. At most, where a complaint’s allegations were vague, the court merely permitted the plaintiff to amend its complaint—it did not permit discovery. *See Georgia*, 546 U.S. at 159 (permitting plaintiff to amend his complaint to refine his allegations of 42 U.S.C. §1983 claims).

IV. Whether Regents’ and Warren’s Acts Were Not “Random and Unauthorized” is Irrelevant to Subject Matter Jurisdiction

NABP contends it also needs discovery to determine whether Regents’ and Warren’s alleged acts were not “random and unauthorized.” The crux of NABP’s “random and unauthorized” argument is that, despite the availability of several state remedies which would make NABP whole, NABP contends that those remedies are not adequate if Regents or Warren deliberately violated NABP’s rights to its copyrighted test questions and were authorized to do so. According to NABP, only *pre*-deprivation due process (such as a pre-copyright infringement hearing) is adequate due process for “deliberate[] and willful[]” copyright infringement. Through this tortured theory, NABP contends that “random and unauthorized” acts relate to subject matter jurisdiction.

The Court need only reach this issue if it first finds that Congress has validly abrogated the states’ Eleventh Amendment immunity from suit. If Congress’ purported abrogation of Georgia’s Eleventh Amendment immunity was invalid, the inquiry ends there and Georgia retains its immunity. If the Court determines that Congress did validly abrogate Georgia’s

Eleventh Amendment immunity, the Court may nonetheless hold it lacks subject matter jurisdiction if Georgia provides due process for the alleged taking of “property.”

In either situation, however, whether Regents’ or Warren’s acts were not “random and unauthorized” is irrelevant to whether Georgia provides adequate remedies for the alleged “deliberate[] and willful[]” “taking” of NABP’s copyrighted material. The existence and adequacy of those remedies are a question of law, not fact. NABP’s “random and unauthorized” discovery is therefore irrelevant to the issue of subject matter jurisdiction.

A. The Fourteenth Amendment Protects Against Deprivation of Property “Without Due Process of Law.”

As made clear in *Florida Prepaid*, a state’s taking of someone’s property does not violate the Fourteenth Amendment. Rather, a state violates the Fourteenth Amendment’s “due process” clause only if it takes property without providing for an adequate remedy. *Florida Prepaid*, 527 U.S at 643.

In addition to rejecting the Patent Remedy Act for Congress’ failure to validly abrogate the States’ Eleventh Amendment immunity, *Florida Prepaid* also rejected the Patent Remedy Act for the independent reason that Florida provided adequate post-deprivation state law remedies. Florida, therefore, provided “due process.” *Id.* at 643-44, & 644 n.9. Florida’s post-deprivation remedies were adequate despite the fact that the complaint alleged *willful* patent infringement and despite the fact that an action for patent infringement (like copyright infringement) can be brought only in federal court.

As in *Florida Prepaid*, Georgia likewise provides for adequate state remedies. For example, Georgia provides for a process by which a person may petition the Georgia legislature for compensation through the Claims Review Board, as provided by O.C.G.A. § 28-5-80, *et seq.* Additionally, Georgia provides for a process by which injured persons may sue Georgia in its

own state courts through the Georgia Tort Claims Act (“GTCA”), as provided by O.C.G.A. § 50-21-20, *et seq.* Further, Georgia has explicitly waived its sovereign immunity from suit—in state court—for actions for breach of written contracts, as provided by Ga. Const. 1983, Art. I, § II, ¶ IX.⁵ By providing these legislative and judicial remedies, Georgia provides for adequate state remedies, and therefore cannot violate NABP’s constitutional due process under the Fourteenth Amendment (even assuming NABP brings such a claim, which it has not).⁶

B. Whether Regents’ or Warren’s Alleged Acts Were Not “Random and Unauthorized” has Nothing to do With the Adequacy of NABP’s Available State Remedies

Despite the existence of Georgia’s “post-deprivation” remedies, NABP contends that “post-deprivation” state remedies are adequate only if they compensate for “random and unauthorized” acts by state actors. (*See Br. to Compel Warren*, at 14). NABP contends that only *pre*-deprivation remedies are adequate for acts that are not “random and unauthorized” i.e., for willful copyright infringement. (*See id.*, at 14-15).

In other words, NABP contends that Georgia’s alleged failure to provide *pre*-infringement procedural due process for alleged “deliberate[] and willful[]” copyright infringement means that Georgia does not provide for adequate “due process”—despite the existence of several post-infringement remedies both for intentional and unintentional acts.

Ridley v. Johns, 274 Ga. 241, 242 (Ga. 2001)(GTCA applies to intentional torts); *Board of*

⁵ Although these state remedies are generally available, the NABP might not be able to take advantage of them due to NABP’s failure to comply with the requirements of those remedies. For example, NABP has not provided *ante litem* notice as required by the GTCA. This in no way makes these state remedies inadequate for purposes of determining whether Georgia provides “due process” for NABP’s alleged injuries.

⁶ Although NABP cannot bring a claim in state court entitled “copyright infringement” due to federal preemption under 17 U.S.C. § 301, state remedies nonetheless exist to compensate NABP for its alleged harm, including claims for breach of contract and misappropriation of trade secrets. *See Nimmer on Copyright*, § 1.01[B][1][a][i] (as to non-preemption of breach of contract claims); § 1.01[B][1][h] (as to non-preemption of trade secret claims). *See also* O.C.G.A. § 10-1-761; *CMAX/Cleveland, Inc. v. UCR, Inc.*, 804 F. Supp. 337, 358-59 (M.D. Ga. 1992)(claim for trade secret misappropriation of copyrighted software not preempted).

Regents of the Univ. Sys. v. Doe, 278 Ga. App. 878, 887 (Ga. Ct. App. 2006) (intentional breach of written contract). NABP’s “random and unauthorized” argument makes no sense and is contrary to controlling Supreme Court precedent.⁷

First and foremost, the cases on which NABP relies for its “random and unauthorized” theory of due process are refuted by (and pre-date) the Supreme Court’s 1999 decision in *Florida Prepaid*. See *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981), *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148 (1982), *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984), and *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990). *Florida Prepaid* cites to two of those cases, *Parratt* and *Hudson*. While acknowledging *Parratt* and *Hudson*, *Florida Prepaid* nonetheless held that Florida provided adequate remedies for *willful* patent infringement (and therefore adequate due process) by providing *post*-deprivation remedies (not pre-deprivation remedies, which NABP incorrectly contends are the only type of remedies that could be adequate). *Florida Prepaid*, 527 U.S. at 644 n.9. Indeed, the adequate state remedies at issue in *Florida Prepaid* included the availability of “a legislative remedy through a claims bill for payment in full” “or a judicial remedy through a takings or conversion claim.” *Id.* As discussed above, Georgia likewise provides for a legislative “Claims Review Board,” as well as judicial remedies through the GTCA and Georgia’s waiver of immunity for suits in state court for breach of written contracts. Accordingly, the Supreme Court has already considered and rejected the very argument that NABP makes here.

The other cases on which NABP relies, *Logan* and *Zinermon*, did not address the constitutionality of a federal statute, let alone the validity of Congress’ abrogation of States’

⁷ By NABP’s own logic, the CRCA itself would constitute a constitutional due process violation—it does not provide for pre-infringement “due process” either. The CRCA purports merely to apply the Copyright Act’s remedies for infringement and make them applicable to the States. The Copyright Act’s remedies consist solely of post-deprivation remedies, such as compensatory damages, attorneys’ fees, and prospective injunctive relief.

immunity from suit. *Logan* concerned itself with a state's failure to follow State *post-* deprivation remedies and procedures. *Logan*, 455 U.S. at 435-36. *Zinermon* was directed solely to the issue of whether the plaintiff stated a claim under 42 U.S.C. § 1983. *Zinermon*, 494 U.S. at 115, 117, 121. As a result, *Zinermon* is even more inapposite than *Logan* because, unlike the relevance of adequate state law remedies at issue here, "state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Zinermon*, 494 U.S. at 124. NABP's cases on this entire "random and unauthorized" issue arise from different areas of the law and are, therefore, completely inapposite.

Finally, even if the absence of "random and unauthorized" acts was relevant to whether NABP has adequate state remedies (and it is not), NABP admits in its motion that "based solely on Warren's own representations" "NABP already possesses certain facts supporting such claims..." (Br. Compel Warren, at 16). Any further discovery on this issue would therefore be cumulative.

V. Regent's Objections on Grounds Other Than Subject Matter Jurisdiction Are Valid

Although all NABP's discovery requests fail because they are not limited to the issue of subject matter jurisdiction, Regents has raised other objections that are equally valid.

A. *Ex Parte Young*

Regents has already provided NABP with the requested information concerning the identities of the officials for Regents.⁸ NABP is not entitled, however, to discovery into an area for which they have not brought a cause of action—namely, injunctive relief against a state

⁸ Regents identified all the deans, assistant deans, and heads of the various departments of the college of pharmacy going back to 1990, including individuals in charge of the office of Postgraduate Continuing Education and Outreach through which Mr. Warren taught his review course (Rsp. to Ints. 2 and 4); identified all members and officials of Regents going back to 1990, as well as their statutorily defined duties (Rsp. to Int 3); and described the relationship between Regents and the University of Georgia, including the College of Pharmacy and the Office of Postgraduate Continuing Education and Outreach.

official. It is a misuse of the judicial system to file a lawsuit without a basis for subject matter jurisdiction and then use the power of the federal court through discovery to identify the state official that NABP potentially could sue.

B. “All” Responsive Documents

NABP’s Request No. 1 seeks “each and every document or thing that relates to, refers to, constitutes or evidences any purpose for any NAPLEX Review course” since 1990. In a spirit of cooperation Regents produced the brochure and course description for the pharmacy review course, as well as accrediting information describing the course from the Association of Continuing Pharmacy Education that accredited the review courses, which information is more than sufficient for the issue of subject matter jurisdiction.

C. Time Frame

NABP seeks information going back to 1990. Even if the Court were to have subject matter jurisdiction, and even if discovery were being allowed on the merits, the statute of limitations for a claim of copyright infringement is only three years (17 U.S.C. § 507(b)), and there would be no justification for reaching back 14 additional years in the past. Additionally, the “contract” on which NABP sues here released all alleged wrongdoing before and including 1995, therefore pre-1995 conduct is irrelevant.

D. Conclusions of Law

NABP asks Regents to admit, *inter alia*, that people who took the NAPLEX were contractually bound not to disclose the content of questions (Request 12), that to do so breached a contractual obligation (Request 13), that the 1995 Settlement Agreement with defendants was a valid and enforceable contract (Request 14), that obtaining or distributing NAPLEX questions constitutes copyright infringement, and that this was known by Regents (Requests 16 and 17).

These requests, in addition to going to the merits of the case rather than subject matter jurisdiction, call for legal conclusions.

NABP's argument for why it needs this information is inconsistent with the NABP's own objections to Regents' Requests to Admit. In response to requests to admit served by Regents that are clearly focused on facts relating solely to the subject matter jurisdiction of the court (*e.g.*, (1) that Regents is an arm, instrumentality, agency or entity of the Georgia; (2) that Regents was created by the Constitution of the State of Georgia or OCGA § 2-03-20; (3) that Regents has not waived its immunity from suit in Federal court for NABP's claims asserted in this litigation; and (5) that the Georgia General Assembly has not explicitly waived Regents' immunity from suit in Federal Court for the claims raised in this lawsuit,) NABP objected on the basis that those requests called for "pure conclusions of law without the application of facts related to the case." (*See* Pl.'s Responses to Regents' Requests for Admission, attached hereto as Ex. A). What is good for the goose is good for the gander, and NABP should not be heard to complain otherwise.

E. FERPA

Some of NABP's discovery was objectionable because it sought student information protected by the Family Educational Rights and Privacy Act ("FERPA") (20 U.S.C. § 1232g; 34 C.F.R. Part 99). FERPA protects the privacy of student education records, and applies to all schools receiving funds under the U.S. Department of Education, including the University of Georgia. FERPA prohibits the release of education records without written consent. *See* 20 U.S.C. § 1232g(b)(1). NABP has requested that Regents identify every student with knowledge of Warren's pharmacy review course (which includes every person who ever took the course)(*see* Pl.'s Interrog. no.1), every student who allegedly obtained credit for assisting in preparations for that course (*see* Pl.'s Interrog no. 15), and every document relating to any such

academic credit (see Pl.'s Document Req. no 8). FERPA prohibits disclosure of this information.

VI. NABP's Goal is To Take Merits Discovery, In Contravention of the Court's August 2007 Orders, Thereby Entitling Regents to a Protective Order

NABP's discovery requests do not seek discovery into whether Regents or Warren have sovereign or Eleventh Amendment immunity and/or have waived such immunity. Instead, NABP's discovery requests seek information concerning the merits of its claims. A brief review of NABP's discovery requests shows this to be true. Indeed, NABP concedes that, if it obtains all the discovery it seeks, it will have exceeded the stage where its Complaint should be dismissed for lack of subject matter jurisdiction and should instead proceed directly to summary judgment. (Br. to Compel Warren, at 12-13 n.7)(“But once such discovery is complete Warren and the Board should file their Motions not as Motions to Dismiss, but as Motions for Summary Judgment, with all required factual support.”)

Pursuant to Fed. R. Civ. P. 26(c), Regents is entitled to a Protective Order prohibiting NABP from conducting any discovery into any issue other than the issue of sovereign or Eleventh Amendment immunity, including without limitation the discovery it seeks to compel in its pending motion, and unless and until this Court holds that this Court has jurisdiction over Regents and Warren, and all appeals of such an order have been denied.

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