

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

THE NATIONAL ASSOCIATION OF )  
BOARDS OF PHARMACY, )

Plaintiff, )

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

Defendants. )

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

**MOTION FOR PROTECTIVE ORDER  
BY DEFENDANT THE BOARD OF REGENTS OF THE  
UNIVERSITY SYSTEM OF GEORGIA**

Subject to and without waiving its objections to the jurisdiction of this Court and its claim of immunity under the Eleventh Amendment to the United States Constitution, and to all other objections and defenses that Defendant may raise in responsive pleadings in this case, Defendant Board of Regents of the University System of Georgia (“Regents” or “Defendant”) hereby moves pursuant to Fed. R. Civ. P. 26(c) for a protective order preventing Plaintiff The National Association of Boards of Pharmacy (“NABP”) from engaging in discovery in conflict with this Court’s Order dated August 21 and 27, 2007, which limited discovery “solely to the jurisdiction issue.” As grounds for this Motion, Defendant shows the following:

1.

Despite the limitations on discovery in the Court's Orders, on September 4, 2007 the NABP served on Regents a first round of comprehensive discovery including 18 interrogatories, 11 requests for production of documents, and 19 requests for admissions covering the substantive

aspects of the case (figures exclude subparts). Regents responded to these requests on September 21, 2007 providing certain basic information that could arguably relate to subject matter jurisdiction and objecting to most of these discovery requests, *inter alia*, as not limited solely to the issue of subject matter jurisdiction but as going to the merits of the case. These responses are the subject of the NABP's Motion to Compel against Regents filed on October 4, 2007. (Docket No. 79). The discovery requests and responses at issue are attached to NABP's Motion to Compel as Exhibits 1, 2, and 3. In discussions among counsel in an attempt to resolve this discovery dispute, counsel for the NABP indicated that the NABP intends to explore in depositions the same scope of information sought in NABP's written discovery.

2.

Thus, in contravention of the Court's Orders, NABP seeks discovery far in excess of the subject matter jurisdictional discovery authorized by this Court. The only two possible areas of fact discovery relevant to subject matter jurisdiction are (a) whether Regents is an "arm and instrumentality" of the State of Georgia, and (b) whether Regents explicitly waived Eleventh Amendment or sovereign immunity. As it turned out, NABP did not truly need discovery pertaining to either. First, NABP admitted, in response to properly limited discovery served by Regents, that Regents is an "arm, instrumentality, agency, or entity of the State of Georgia." (NABP Resp. to Regents' Reqs. for Admission No. 1, attached to Regents' Response<sup>1</sup> as Exhibit "A"). Second, NABP has not sought any evidence (because there is none) showing that Regents has explicitly waived its sovereign or Eleventh Amendment immunities from suit in federal

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<sup>1</sup> "Response" as used here refers to "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."

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

3.

Rather than inquiring into either of these two, potentially legitimate areas of subject matter jurisdictional discovery, the NABP embarked on a course of unbridled merits discovery. (*Id.*) For example, NABP sought the identification of every class Defendant Flynn Warren has taught at the Georgia College of Pharmacy over the past twelve years (not limited to the Review of Pharmacy courses; *see* NABP's Interrog. No. 6), and sought admissions that defendants infringed NABP's allegedly copyrighted test questions (*See* NABP's Reqs. for Admission Nos. 16, 17, 18). It is revealing of NABP's improper purposes to review the following summary of each of NABP's discovery requests,<sup>2</sup> and to stop and ask with respect to each how the request possibly relates to the Eleventh Amendment sovereign immunity issue to which this Court restricted discovery (or ask what would be left for NABP to request in discovery on the merits):

INT. #	SUMMARY OF NABP REQUEST
1	Identify each review course taught by Flynn Warren, including course dates, since 1995
2	Identify College of Pharmacy administrators since 1995
3	Identify every director, official and member of the Board of Regents since 1995
4	Describe College of Pharmacy Office of Postgraduate Continuing Education and Outreach, its relationships, and all individuals who worked for it since 1995
5	Identify every person with knowledge of the pharmacy review courses since 1995
6	Identify each class, course or project taught by Warren since 1995
7	Does Regents contend that Copyright Act preempts all state law claims?
8	Does Regents contend that exclusive venue for breach of contract claims against Regents is in Fulton County Superior Court?
9	Describe actions taken by Regents to comply with Settlement Agreement

<sup>2</sup> "INT" below refers to NABP's interrogatory; "RPD" for NABP's request for production of documents; and "RFA" for request for admission.

10	Identify persons who assisted in review course preparations since 1995
11	Identify persons with knowledge of Settlement Agreement
12	For each response to NABP's requests for admission that is not unqualified admission, state every fact upon which Regents bases its response
13	Identify Warren's compensation for review courses, and roles of Regents, College of Pharmacy and Warren in preparing course materials, payments, and any agreements among any of the foregoing relating to review courses
14	Describe Regents', College of Pharmacy's, or UGA's review and approval of pharmacy review courses since 1995
15	State whether Flynn Warren gave academic credit for assisting in preparing review course, and identify all persons who participated
16	Identify documents exchanged between NABP and Regents regarding alleged infringement
17	Identify extent of disclosure of Confidential documents A and B
18	Does Regents contend that it has not breached the Settlement Agreement, and if so, state bases for that contention?
19	Identify experts that Regents expects to call on subject matter jurisdiction

<b>RPD #</b>	<b>SUMMARY OR NABP REQUEST</b>
1, 9	Every document referring to pharmacy review course at University of Georgia since 1990
2	Every communication between Flynn Warren and UGA, Regents, or Georgia Board of Pharmacy regarding review course
3	Every document showing Regents or UGA remuneration for review courses since 1990
4	Every document showing action by Regents or UGA to comply with Settlement Agreement
5	Every document referring to Settlement Agreement
6	Every document showing UGA's policies or agreements relating to copyrights
7	Every document showing how Regents or UGA review, approve, or evaluate pharmacy review courses
8	Every document reflecting academic credit for assisting in preparing pharmacy review course materials
10	Every notice received by Regents, UGA alleging infringement of NABP copyrights
11	Every document referenced in Regent's responses to interrogatories

<b>RFA #</b>	<b>SUMMARY OF NABP REQUEST</b>
1, 2	Admit Flynn Warren "scope of duty" requests
3-6, 8-9, 16-18	"Admit knowledge or awareness" requests

7	Admit charging for review course:
10	Admit "knew and understood contents of Settlement Agreement"
11-13	Admit NABP's legal relationship with test-takers
14	Admit enforceability of Settlement Agreement
15	Admit UGA asked Warren to teach review course to improve pass rates
19	Admit UGA reviewed and approved review course materials

Although Regents has supplied substantial information regarding the 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.

4.

NABP's motion to compel is based on a convoluted argument that the Supreme Court has abandoned a purported "facial" analysis of a statute's constitutionality for an "as applied" approach in which courts must delve into the specific facts on the case at bar. NABP does not cite a single decision recognizing or accepting their theory. Indeed, the cases on which NABP relies refute it. Further, none of the Supreme Court cases on which NABP relies was a discovery case, none turned on whether or not merits discovery was granted, and none deemed the particular facts of the case at bar relevant to the issue as to whether Congress validly abrogated the States' Eleventh Amendment immunity (other than those facts on the face of the complaint, which alone inform the "class of case" inquiry). What's more, since the Supreme Court's decisions in the Florida Prepaid cases in 1999, every court that has examined the Copyright Remedy Clarification Act (17 U.S.C. §§ 501(a) and 511, on which the NABP seeks to base jurisdiction against Regents) has struck it down as an invalid Congressional attempt to abrogate the States' Eleventh Amendment immunity.<sup>3</sup>

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<sup>3</sup> *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.

5.

For these reasons and those shown in Regent's *Response Brief In Opposition To NABP's Motion To Compel And In Support Of Regents' Cross-Motion For Protective Order*, which Regents incorporates herein by reference, NABP has shown no justification for its demands for merits discovery.

Regents therefore respectfully moves for a Protective Order, to remain in effect until this Court enters an Order deciding whether it has subject matter jurisdiction over this action, until the time to appeal that Order has expired or until all appeals of that Order have been exhausted or denied, which Order (a) prohibits NABP from seeking any further responses to its written discovery requests, (b) prohibits NABP from propounding any additional written discovery, and (c) prohibits NABP from seeking any written, deposition or any other discovery that does not directly address (i) whether Regents is an arm or instrumentality of the State of Georgia, or (ii) whether Regents has explicitly waived its sovereign or Eleventh Amendment immunity.

Regents has attached a proposed Order for the Court's consideration.

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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. Institute for Nonviolence*, 13 F. Supp. 2d 306, 311 (N.D.N.Y. 1998).

Respectfully submitted, this 18<sup>th</sup> day of October, 2007.

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**FED. R. CIV. P. 26(C) CERTIFICATION**

I hereby certify that I have in good faith conferred with counsel for Plaintiff NABP in an effort to resolve these discovery disputes without court action. The efforts to resolve this dispute included exchange of correspondence during the week of September 21, 2007, and a telephone conference call on September 27, 2007.

This 18<sup>th</sup> day of October, 2007.

/s/ Alan E. Lubel  
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