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U.S. DISTRICT COURT
MIDDLE GEORGIA

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

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DEPUTY CLERK

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 (204)

VERIFIED COMPLAINT

Plaintiff National Association of Boards of Pharmacy (“NABP”) for its complaint against defendants, Board of Regents of the University System of Georgia (“Defendant UGA”) and Flynn Warren, Jr., (“Defendant Warren”) (hereinafter collectively referred to as “Defendants”), shows the Court as follows:

PARTIES

1. Plaintiff National Association of Boards of Pharmacy is a non-profit corporation organized under the laws of the State of Kentucky and has a principal office at 1600 Feehanville Drive, Mt. Prospect, Illinois 60056.

2. Defendant Board of Regents of the University System of Georgia governs the University of Georgia and all of its branches, and has its principal place of business and headquarters at 270 Washington Street, S.W., Atlanta, Georgia 30334. The main campus of the University of Georgia is located in Athens, Georgia. Service of process upon Defendant UGA

can be made upon the Associate Vice Chancellor for Legal Affairs, Defendant UGA's agent for service of process, Ms. Elizabeth E. Neely, at her business address: Office of Legal Affairs, Board of Regents of the University System of Georgia, 270 Washington Street, S.W., Atlanta, Georgia 30334.

3. Defendant Warren is a citizen of the State of Georgia, resides at 1081 Lane Creek Circle, Bishop, Oconee County, Georgia 30621, and may be served with process at his residence address.

JURISDICTION

4. This is an action for injunctive relief, damages, profits, punitive damages and attorneys' fees for Defendants' copyright infringement; Defendants' misappropriation of trade secrets and Defendants' breach of contract. This Court has jurisdiction over the subject matter of the within and foregoing action pursuant to the provisions of 28 U.S.C. §§ 1331, 1338 and 1367.

VENUE

5. Venue is appropriate in this Court pursuant to the provisions of 28 U.S.C. §§ 1391(b) and (c), and 28 U.S.C. §§ 1400(a).

FACTS COMMON TO ALL COUNTS

6. NABP was incorporated in 1904 to provide a uniform mechanism of licensure transfer among pharmacists moving from state to state. NABP membership consists solely of the various state Boards of Pharmacy (or other regulatory agency), including the Board of Pharmacy of the State of Georgia. Additionally, international membership includes the governing entities that regulate pharmacists in eight Canadian provinces, the Republic of South Africa, the states of Victoria and New South Wales in Australia, and New Zealand.

7. NABP assists its member state Boards of Pharmacy in fulfilling their statutory mandates to regulate the pharmacy profession in the interest of protecting the public health. NABP member Boards have access to programs and services to assess pharmacists' competency prior to licensure and to verify the ongoing competence of licensed pharmacists. NABP also provides input on new and existing laws and related legal matters, and generally assists in the regulation of the practice of pharmacy for the protection of the public.

8. NABP also provides examination programs to its member Boards that include the North American Pharmacist Licensure Examination™ (“NAPLEX”) and the Multistate Pharmacy Jurisprudence Examination® (“MPJE®”). These programs are intended to assist the member Boards of Pharmacy fulfill their respective statutory mandates to regulate the pharmacy profession in their state in the interest of protecting the public.

9. The NAPLEX is an examination developed by NABP that consists of unique, copyrighted, multiple-choice test questions owned by NABP (the “NABP Examination Questions”) which is utilized by various state Boards of Pharmacy as part of their assessment of competence to practice pharmacy. The NAPLEX was developed over many years beginning in 1952, when the concept of a uniform examination to promote the competent practice of pharmacy among jurisdictions and enhance licensure transfer was identified through meetings of NABP member Boards.

10. The NAPLEX contains 185 NABP Examination Questions. Of these, 150 questions are used to calculate the test score. NABP develops the NAPLEX in compliance with recognized testing standards and practices, and employs stringent measures to ensure that the test is psychometrically sound, legally defensible, and free of bias. Such a process is time consuming

and expensive. Drafting NABP Examination Questions is a learned skill performed by well trained writers. A committee of content experts convenes several times per year to edit items and responses. Once approved, NABP Examination Questions are pre-tested for statistical analysis to ensure that they meet psychometrics standards. Assuming that the NABP Examination Question survives, it is then placed in the “item bank” for use. The item bank is a “pool” of NABP Examination Questions from which the questions are drawn for each administration of the NAPLEX.

11. The NAPLEX is administered via computer at any of over 200 testing centers throughout the country, Monday through Saturday during normal business hours. The currency, validity, and exposure rates of NABP Examination Questions, among other things, are closely monitored to ensure the integrity of the exams.

12. Security concerns regarding the NABP Examination Questions are paramount. The exam is administered under highly secure conditions, commencing with the check-in procedures. All candidates are required to have photo IDs for entry, and digital photos and fingerprints are taken at the test center. Candidates are not allowed to bring any materials into the test center. Once admitted to the exam, the candidates are continuously monitored by proctors, and video cameras are located throughout the test centers. Candidates may use only a calculator and a dry-erase board for notes and calculations, and all such calculators and dry-erase boards are provided at the beginning of the exam and then collected by the test-center personnel at the end. Candidates may NOT write or copy exam questions onto paper, diskettes, CDs, or anything else, nor may they have access to send e-mails or engage in other electronic transmissions. Candidates cannot go back to a test item once an answer has been provided.

Breaks are limited and monitored. To sit for the NAPLEX, candidates must register with NABP and agree and acknowledge that the exam is proprietary, subject to copyright protections, and that activities or behavior that compromise the integrity of the exam will be pursued by NABP and reported to the state Boards of Pharmacy.

13. In the summer of 1994, on the basis of multiple “tips” to NABP, Defendant Warren was identified as an individual possibly gathering NAPLEX items (at the time the exam was referred to as the NABPLEX) through students and otherwise. NABP was told that Warren was asking students to remember NABPLEX items to tell him about them for placement in review course materials. Based on these concerns, NABP undertook an investigation of Warren which ultimately culminated in a 1995 Settlement Agreement, in which Defendant Warren and Defendant UGA agreed to cease and desist all copying, transcribing or other infringing use of NABP copyrighted materials and examination questions. A true and correct copy of the 1995 Settlement Agreement is attached as Exhibit A. Believing the matter to be resolved, NABP stopped monitoring Warren following his submission of review course materials that adhered to the Settlement Agreement.

14. On July 17, 2007 Dr. Walter Steven Pray of Southwestern Oklahoma State University emailed Carmen Catizone, Executive Secretary of NABP, to inform NABP that he had learned that Defendant Warren was, once again, disseminating NABP Examination Questions to students in his review courses. Dr. Pray then relayed his concerns to Dr. Virgil Van Dusen, a fellow faculty member. Dr. Dusen shared with Dr. Pray that a mutual former student, Dr. Alan Spies, had indicated that Samford University recently hired a gentleman to visit and prepare students for the NAPLEX, and that Dr. Spies had concerns regarding this individual’s

sharing of what appeared to be actual questions during the course. Dr. Spies was also concerned about this individual's assertions that students find these questions to be virtually identical to those they later see on NAPLEX. Dr. Pray then personally contacted Dr. Spies on July 13, 2007 and confirmed that the visiting individual was Defendant Warren from the University of Georgia.

15. On July 17, 2007, Dr. Spies forwarded an e-mail to Dr. Pray that had originally been sent by Defendant Warren to a Samford student on June 20, 2007. The subject heading of the email was "New NAPLEX Questions for 2007 Exam," and the text of the email read "new questions on this year's exam that could be forwarded to me." The email also included an attachment that listed hundreds of NABP Examination Questions, apparently sent to Warren by recent examinees, which included comments from Defendant Warren. Having received this material, and immediately recognizing its impropriety, Dr. Pray then contacted NABP.

16. On July 30, 2007, Kerri Hochgesang, one of NABP's attorneys, spoke on the telephone with the continuing education office of the College of Pharmacy at the University of Georgia, which indicated that Ms. Hochgesang could purchase course materials for the "Pharmacy Board Review" class offered by Defendant Warren at the University of Georgia on August 8, 2007 through August 10, 2007 at the College of Pharmacy for \$100.00.

17. On July 31, 2007, Ms. Hochgesang went to the fourth floor of the College of Pharmacy at the University of Georgia in Athens, Georgia, and remitted payment to the UGA Pharmacy Cont. Ed. for the course materials. Ms. Hochgesang was provided with a packet of materials including documents and two CD-ROM disks. Many of the materials contained NABP Examination Questions. A comparison of only a portion of Defendant Warren's materials with

NABP Examination Questions revealed that at least 150 questions are verbatim, nearly verbatim, or substantially similar.

18. Each NAPLEX question that is compromised is no longer valid for measuring the competency of pharmacy graduates through use on the NAPLEX. Instead, these items must be discarded. The cost of generating, validating, and reviewing a single item on the exam is incalculable. Many experts, professionals, and support personnel from around the country are involved in these activities, all at significant cost to the NABP. As a result, the cost of replacing a single item on the NAPLEX could justifiably be estimated in the tens of thousands of dollars.

COUNT I
COPYRIGHT INFRINGEMENT

19. NABP owns valid copyrights in the NABP Examination Questions. A true and correct copy of Certificate of Copyright Registration No. TXul-295-893 for the entire pool of NAPLEX test questions is attached as Exhibit B.

20. Defendants gained access to the examination questions directly through candidates who took the NAPLEX.

21. NABP never granted a license to Defendants or otherwise authorized Defendants to copy, sell, distribute, prepare derivative works from, or otherwise offered to transfer the ownership of the copyrights of the NABP Examination Questions, to which NABP has exclusive rights.

22. The conduct of Defendants constitutes direct and willful infringement of NABP's copyrights, and will cause irreparable harm to NABP unless such conduct is preliminarily and

permanently enjoined. Defendants are continuing to infringe NABP's copyrights and are committing such infringement deliberately and willfully.

23. In addition to direct liability, each Defendant is vicariously and contributorily liable under the Copyright Act for the actions of the other in their joint enterprise. Each Defendant had a financial interest in the success of the UGA Pharmacy Board Review course and an opportunity to exercise control over their coordinated activities.

24. NABP has no adequate remedy at law for Defendants' wrongful conduct for the reason that (a) the NABP Examination Questions are unique and valuable property that have no readily determinable market value; (b) the infringement by Defendants compromises the integrity of the NAPLEX and the licensure of pharmacists in multiple jurisdictions; and (c) Defendants' wrongful conduct, and the damages resulting to NABP and the general public from such wrongful conduct, is continuing. Defendants' acts of copyright infringement have caused NABP irreparable injury and Defendants have the ability to continue to commit these acts. Accordingly, NABP is entitled to injunctive relief pursuant to 17 U.S.C.A. § 502 and to an order under 17 U.S.C.A. § 503 that the infringing items be impounded.

COUNT II
MISAPPROPRIATION OF TRADE SECRETS

25. The NABP Examination Questions are original lists of questions containing technical information used for evaluating the competency of a candidate in the field of pharmacy which are not commonly known by or available to the public.

26. The NABP Examination Questions derive economic and evaluative value from not being generally known and not being readily ascertainable by proper means. The NABP exercises extraordinary efforts to maintain the secrecy of the NABP Examination Questions.

27. Defendants' copying of NABP Examination Questions received from candidates who took the NAPLEX, either by themselves or through their authorized agents, is a theft and an inducement of a breach of a confidential relationship between candidates taking the NAPLEX and the NABP.

28. The foregoing acts of Defendants constitute misappropriation of NABP's trade secrets under O.C.G.A. § 10-1-760 et seq.

COUNT III
BREACH OF CONTRACT

29. The foregoing acts of Defendants as set forth above constitute a breach of the Defendants' 1995 Settlement Agreement with Plaintiff, including the cease and desist provisions contained therein.

WHEREFORE, NABP prays that:

(A) a temporary restraining order issue enjoining and restraining Defendants and all others in active concert or participation therewith:

(1) from presenting or distributing any of NABP's copyrighted examination questions;

(2) from otherwise infringing NABP's copyrights;

(3) from misappropriating NABP's trade secrets;

(4) from benefiting from their misuse, misappropriation, pirating and theft of NABP's copyrights in its examination questions;

(5) to surrender up for impounding by the United States Marshall all documents, handouts, disks, CD-ROMs, computers, e-mails, web-postings, slide shows, books,

advertisements, programs, or similar material containing NABP's copyrighted examination questions.

(B) Defendants and all others in active concert or participation with Defendants be enjoined and restrained during the pendency of this action, and permanently thereafter:

- (1) from distributing NABP's copyrighted examination questions in any form;
- (2) from otherwise infringing NABP's copyrights;
- (3) from benefiting from their misuse, misappropriation, pirating and theft of

NABP's copyrights in its examination questions;

(4) to surrender up for impounding by the United States Marshall all documents, handouts, disks, CD-ROMs, computers, e-mails, web-postings, slide shows, books, advertisements, programs, or similar material containing NABP's copyrighted examination questions.

(C) Defendants be required to account for and pay over to NABP any profits realized by them as a result of the wrongful acts set forth above.

(D) NABP be awarded damages in such amounts as may be determined upon trial or as statutorily provided at NABP's option, punitive damages together with their attorneys' fees, disbursements and the cost of this action.

(E) NABP have such other and further relief as this Court deems just and equitable.

This 3rd day of August, 2007.

Respectfully submitted,

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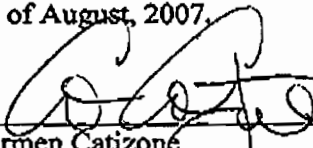
Defendants.

CIVIL ACTION NO.:

VERIFICATION

I, Carmen Catizone, Executive Secretary of the National Association of Boards of Pharmacy, declare under penalty of perjury that I have reviewed this Verified Complaint and that the facts contained therein are true and correct to the best of my knowledge, information and belief.

Executed on this 02 day of August, 2007.



Carmen Catizone
Executive Secretary for the National
Association of Boards of Pharmacy