

**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.)

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

FILED UNDER SEAL

**DEFENDANTS' SPECIAL LIMITED APPEARANCE MOTION TO VACATE
TEMPORARY RESTRAINING ORDER AND FOR RETURN OF SEIZED MATERIALS
DUE TO PLAINTIFF'S VIOLATIONS OF *EX PARTE* ORDER**

Defendants The Board of Regents of the University System of Georgia and Professor Flynn Warren, Jr., subject and without waiving their objections to the jurisdiction of this Court and claim of immunity under the Eleventh Amendment to the United States Constitution and to all other objections and defenses that Defendants may raise in responsive pleadings in this case, appear specially for the limited purpose of moving the Court to vacate its Temporary Restraining Order and Seizure and Impoundment Order (the "Order") entered on August 3, 2007, and to order the return to Defendants of all materials seized pursuant to this Order due to Plaintiff's multiple violations of the Court's Order.

1.

Paragraph 3 of the Court's Order provided:

3. That the Clerk of Court be, and hereby is, directed to seal the within ex parte seizure order, together with the papers submitted in

support thereof, pending the hearing of plaintiff's application to confirm said seizure order, subject to defendants' continued right to inspect said order and the papers upon which it was granted upon presenting to the Clerk of the Court with proper identification.

(Order at 3.) By another order of that same date, this Court ordered that Plaintiff's filings were to be filed under seal. The clear import of these ex parte Orders was that this case was to

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proceed under seal and that all filings and the contents thereof were to be kept confidential. In fact, the statute upon which Plaintiff based its request for the seizure Order provides that:

The court shall take appropriate action to protect the person against whom an order under this subsection is directed from publicity, by or at the behest of the plaintiff, about such order and any seizure under such order.

15 U.S.C. § 1116(d)(6). Also, in Plaintiff's Motion To File Case Under Seal, it represented to the Court that:

The issues in this case could affect the public confidence in pharmacists and the health system in general. If the facts of this case are covered in the media or are otherwise publicly available, there is a significant chance that the confidence of the general public in pharmacists and the dispensation of pharmaceuticals will be impaired.

(Plaintiff's Motion to File Case Under Seal, 8/2/07, p. 2.)

2.

Despite these representations and the confidentiality requirements of the Orders referenced above, on Monday, August 6, 2007 Plaintiff National Association of Boards of Pharmacy issued a public news release touting the issuance by this Court of "an ex parte temporary restraining order and seizure order "and describing the seizure by United States Marshalls of materials and computers from the defendants pursuant to this order. (A true and correct copy of this news release is attached to this Motion as Exhibit A.) The news release from Mr. Carmen A. Catizone, Executive Director of the Plaintiff, was distributed by Plaintiff

throughout the United States, as it was directed to “Executive Officers of State Boards of Pharmacy” and to “Deans of Schools and Colleges of Pharmacy” throughout the country. the news release was also made public on the Plaintiff’s official internet website (www.napb.net) under the “News/Press” link. (A true and correct copy of the “News Release” as it appeared on Plaintiff’s website is attached as Exhibit B to this Motion.) In violation of this Court’s Order sealing this case, the offending news release discloses the existence of the Court’s ex parte Order, the identities of the Defendants, certain of Plaintiff’s factual allegations, and the seizure actions taken by the United States Marshalls pursuant to the order.¹

3.

Having obtained the restraining order under the pretense that the case should be kept confidential, Plaintiff immediately turned around and violated it. As a sanction for Plaintiff’s multiple violations of this Court’s Order in revealing the contents of a sealed record, Defendants respectfully request that the Court vacate its restraining Order and require the return to Defendants’ counsel of materials seized under that Order. There is no threat of any injury to Plaintiff because the materials have all been copied and are in the possession of counsel, and because the University of Georgia has cancelled the Pharmacy Board Review course that had been scheduled for this week and does not plan to conduct the course until further resolution of

¹ Defendants also understand that on August 7, 2007, at the 2007 National Association of Boards of Pharmacy/American Association of Colleges of Pharmacy District III Meeting at the Royal Plaza hotel in Lake Buena Vista, Florida, Plaintiff’s Executive Director Catizone interrupted the proceedings to announce before an assembly not only the existence of this action, but the identities of the Defendants, details concerning the seizure, numerous allegations from the Verified Complaint, and specific items of alleged evidence – all of which this Court had previously ordered sealed in this action.

this dispute. This case can proceed in the normal course pursuant to the Federal Rules of Civil Procedure and the Local Rules of this court.

4.

As further grounds for this motion, Defendants respectfully show that the ex parte seizure was not authorized under 15 USC § 1116(d). That statute governs the seizure of goods in connection with actions under the Trademark Act for the alleged use of a counterfeit mark in connection with the sale, offering for sale or distribution of goods or services. Plaintiff does not allege any trademark violation, and there is no claim that Defendants have used the Plaintiff's trademark on any goods. See generally Waco Intern., Inc. v. KHK Scaffolding Houston Inc., 278 F. 3d 523 (5th Cir. 2002) (no seizure authorized when goods do not contain the allegedly offending trademark).

5.

In the alternative, if the Court decides not to vacate its prior Order, then at the very least Defendants request that the Court modify its Order to again expressly prohibit Plaintiff from making any public comments concerning this case.

Defendants submit this motion for the limited purpose of asking the Court to vacate or modify its temporary restraining Order of August 3, 2007 and subject to all objections, rights and defenses that Defendants have and may assert in this case in their responsive pleadings.

Respectfully submitted this 8th day of August, 2007.

THURBERT E. BAKER
Attorney General
Georgia Bar No. 033887

RAY LERER
Deputy Attorney General

Georgia Bar No. 446962

s/ Denise E. Whitig-Pack (by A E Lubel permission)

DENISE E. WHITIG-PACK

Senior Assistant Attorney General

Georgia Bar No. 558559

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s/ Mary Jo Volkert (by A E Lubel permission)

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Attorneys for Defendants The Board of Regents of
the University System of Georgia and Flynn
Warren, Jr.

EXHIBIT A



National Association of Boards of Pharmacy

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Web Site www.nabp.net

nabp

TO: EXECUTIVE OFFICERS – STATE BOARDS OF PHARMACY
DEANS – SCHOOLS AND COLLEGES OF PHARMACY

FROM: Carmen A. Catizone, Executive Director/Secretary

DATE: August 6, 2007

RE: Materials Seized from University of Georgia College of Pharmacy Following Allegations of Breaches of National Pharmacy Licensure Examination

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Today, Monday, August 6, United States' Marshals seized materials and computers from the University of Georgia College of Pharmacy and the offices and home of Flynn Warren, Jr, clinical professor and assistant dean for student affairs, pursuant to an ex parte temporary restraining order and seizure order from a federal court in the Middle District of Georgia Athens Division.

The action by the federal court follows investigations and complaints by NABP into alleged breaches of the North American Pharmacist Licensure Examination (NAPLEX) and the Multistate Pharmacy Jurisprudence Examination (MPJE) and outline activities of faculty, students, and the University of Georgia College of Pharmacy. NABP is disappointed and appalled that the public trust and health were victimized, the security of the NAPLEX and MPJE breached, and the integrity of the licensure process compromised with the knowledge and at the direction of individuals responsible for educating and preparing students to become competent and ethical pharmacists.

The NABP Executive Committee is evaluating how the actions noted in the findings of the federal court impact the NAPLEX and MPJE and what changes need to occur to ensure the integrity of the NAPLEX and MPJE.

NABP will move aggressively to hold accountable, legally and financially, any and all individuals, colleges and schools of pharmacy, and organizations involved in and responsible for the compromise of the NAPLEX and MPJE examinations. The petitions filed and granted in federal court last week will be amended and expanded to name and act against any and all individuals, colleges and schools of pharmacy, and organizations that have engaged or engage in activities adversely impacting the integrity and security of the NAPLEX and MPJE and violate state and federal laws. NABP will take any action possible to ensure that the public health is protected.

If you have any questions, please contact me via e-mail at exec-office@nabp.net or via phone at 847/391-4400 or 1-800/774-6227. Thank you.

cc: NABP Executive Committee
Advisory Committee on Examinations

EXHIBIT B

News Releases

Materials Seized from University of Georgia College of Pharmacy Following Allegations of Breach of National Pharmacy Licensure Examination

8/6/2007

Today, Monday, August 6, United States' Marshals seized materials and computers from the University of Georgia College of Pharmacy and the offices and home of Flynn Warren, Jr, pursuant to an ex parte temporary restraining order and seizure of a federal court in the Middle District of Georgia Athens Division.

The action by the federal court follows an investigation and complaints by the National Association of Boards of Pharmacy into alleged breaches of the North American Pharmacist Licensure Examination™ (NAPLEX®) and the Multistate Pharmacy Jurisprudence Examination® (MPJE®) and outline activities of faculty, students, and the University of Georgia College of Pharmacy. "NABP is disappointed and appalled that the public trust and health were victimized, the security of the NAPLEX and MPJE breached, and the integrity of the licensure process compromised with the knowledge and at the direction of individuals responsible for educating and preparing students to become competent and ethical pharmacists," said NABP Executive Director Carmen A. Catizone, MS, RPh, DPh.

The NABP Executive Committee is evaluating how the actions noted in the findings of the federal court impact the NAPLEX and MPJE and what changes need to occur to ensure the integrity of the NAPLEX and MPJE.

"NABP will move aggressively to hold accountable, legally and financially, any and all individuals, colleges and schools and organizations involved in, and responsible for, the compromise of the NAPLEX and MPJE. The petitions filed and granted by the federal court last week will be amended and expanded to name and act against any and all individuals, colleges and schools, and organizations that have engaged or engage in activities adversely impacting the integrity and security of the NAPLEX and MPJE and violate state and federal laws. NABP will take any action possible to ensure that the public health is protected," stated Catizone.

The NAPLEX is the standardized examination utilized by all 50 state boards of pharmacy, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands as part of the requirements to obtain a license to practice pharmacy. The MPJE combines federal and state specific law items to serve as the state law examination in 46 participating jurisdictions and is one condition of licensure in those states.

NABP is the independent, international, and impartial Association that assists its member boards and jurisdictions in developing, implementing, and enforcing uniform standards for the purpose of protecting the public health.



National Association of Boards of Pharmacy

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Carmen A. Catizone, MS, RPh, DPh, Executive Director/Secretary

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THE NATIONAL ASSOCIATION OF)
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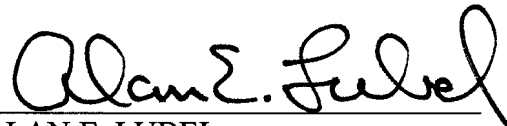
FILED UNDER SEAL

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *Defendants' Special Limited Appearance Motion To Vacate Temporary Restraining Order And For Return Of Seized Materials Due To Plaintiff's Violations Of Ex Parte Order* upon Plaintiff's counsel via e-mail and U.S. Mail with adequate first class postage affixed thereto addressed as follows:

J. Rodgers Lunsford III
Smith, Gambrell & Russell, LLP
Suite 3100, Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592\

This 8th day of August, 2007



ALAN E. LUBEL
Special Assistant Attorney General
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