

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

THE NATIONAL ASSOCIATION OF)
BOARDS OF PHARMACY,)
)
Plaintiff,)

v.)

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

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

FILED UNDER SEAL

**PLAINTIFF’S RESPONSE TO DEFENDANTS’ SPECIAL LIMITED APPEARANCE
MOTION TO VACATE TEMPORARY RESTRAINING ORDER AND FOR RETURN
OF SEIZED MATERIALS**

This action was initiated, and a TRO and impoundment were sought, to ensure that when a customer enters a pharmacy to have a prescription filled, the pharmacist filling the prescription will be qualified to do so, and not licensed merely because he or she was improperly provided the questions to their NAPLEX licensing examination in advance by Defendants. Ignoring such overriding public interest, Defendants have requested that the TRO entered by the Court be lifted, so that Defendants and those in concert with them can return to disseminating actual NAPLEX questions to candidates in advance of the exam. Such relief is wholly dissonant with the harm that Defendants have complained of, and should be denied.

I. Lifting the TRO.

Defendants do not cite to any legal authority for the novel idea that a TRO should be lifted without any analysis of the merits of the case. Specifically, Defendants state at Page 3 of Defendants’ memorandum that Plaintiff NABP “obtained the restraining order under the pretense that the case should be kept confidential.” But this is not true. Rather, NABP obtained the TRO

by meeting its burden regarding likelihood of success of the merits, irreparable harm, balance of the hardships, public interest, etc., factors which Defendants have conveniently ignored. Defendants have done nothing to show that NABP would not have obtained the TRO had it filed every document publicly rather than under seal. Confidentiality had nothing to do with the issuance of the TRO.

More importantly, confidentiality has even less to do with whether the TRO should now be lifted. Defendants' argument asks the Court to allow Defendants and those in concert with them to continue to infringe NABP's copyright, to continue to assist pharmacy students to cheat on their licensing exam, and to continue to allow possibly unqualified candidates to obtain licenses to dispense medication to the public, simply because NABP mistakenly failed to obtain the prior consent of the Court to address concerns voiced regarding the integrity of the NAPLEX exam. This requested relief is not merely disproportionate, it is dissonant. To put it in the terms of this case, Defendants have asked the Court to prescribe the wrong medication for their alleged ailment.

II. Lifting The Impoundment Order.

As with the TRO, the basis for issuance of the Court's impoundment order had little to do with confidentiality concerns but everything to do with the preservation of evidence. Further, Defendants have again provided no analysis as to why return of the impounded materials would do anything to address the publicity harms about which Defendants complain. In fact, it is not clear that return of the impounded material would accomplish *anything*, especially considering that most of the impounded material consisted of electronic files that remain on Defendants' computers and that copies of the same have already been provided to Defendants' counsel. The only thing that would be accomplished by Defendants' requested relief is that it would make it

easier for Defendants to continue to improperly disseminate actual NAPLEX questions to students preparing to take the exam.

III. Defendants Erroneously Attack 15 U.S.C. § 1116(d) As An Incorrect Basis For The Impoundment Order.

Defendants have incorrectly argued that because NABP did not allege trademark violations in this action, the ex parte seizure was not authorized under 15 U.S.C. § 1116(d). As clearly set forth in NABP's Motion for Ex Parte Order on Impoundment and supporting Memorandum, NABP relied on the *Copyright Act and FED. R. CIV. P. 65*, not the Trademark Act, in requesting impoundment of Defendants' infringing materials. The Copyright Act provides:

At any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable, of all copies or phonorecords claimed to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.

17 U.S.C. § 503. NABP was entitled to an ex parte order on impoundment pursuant to express authority of the Copyright Act.

Further, Defendants appear to have misinterpreted NABP's reference to 15 U.S.C. § 1116(d), which serves only as *guidance* for the appropriate procedures and requirements necessary for the granting of an ex parte impoundment order under 17 U.S.C. § 503 and FED. R. CIV. P. 65. Federal Rule of Civil Procedure 65 provides the requirements which must be met in order to obtain injunctive relief, and subsection (b) sets forth specific procedures and requirements necessary to obtain such relief on an ex parte basis. Rule 65(f) specifically states that these procedures are applicable to copyright impoundment proceedings. Moreover, Advisory Committee Notes to the 2001 Amendments to Rule 65 provide the following guidance with respect to ex parte impoundment orders under the Copyright Act:

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. *Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief.*

FED. R. CIV. P. 65, Advisory Committee Notes to the 2001 Amendments (emphasis added).

The drafters of Rule 65 provide unmistakable direction to courts to look at ex parte proceedings under the Trademark Act *for guidance* on the “kinds of showings that support ex parte relief” under the impoundment procedures of the Copyright Act. While not the authority upon which impoundment of copyright infringing materials is based, proceedings under 15 U.S.C. § 1116(d) are relevant and instructive to courts in determining whether or not an ex parte impoundment order is proper. In fact, counsel for Plaintiff specifically called the foregoing to the attention of the Court at the August 3, 2007 hearing. [Tr. p.21, 1.8 through p.22, 1.11.] Based upon the information provided to the Court by NABP on August 3, 2007, NABP has clearly demonstrated the necessity for impoundment, and the data and materials impounded confirm that such is the case. *See* Second Declaration of Kerri Hochgesang filed in support of NABP’s Memorandum in Support of Certification of Seizure filed contemporaneously herewith.

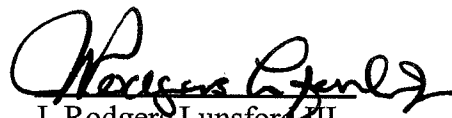
III. Conclusion.

For all of the foregoing reasons, NABP requests that the Court deny Defendants’ request to lift the TRO and order the return of the impounded data and materials so that they may continue to disseminate the questions to the NAPLEX pharmacy licensing exam to candidates in advance of the exam.

This 17th day of August, 2007.

Respectfully submitted,

SMITH, GAMBRELL & RUSSELL, LLP
Suite 3100, Promenade II
1230 Peachtree Street, N.E.
Atlanta, Georgia 30309-3592
Phone: (404) 815-3500
Fax: (404) 815-3509



J. Rodgers Lunsford III
Georgia Bar No.: 461200
rlunsford@sgrlaw.com
Kerri A. Hochgesang
Georgia Bar No.: 358448
khochgesang@sgrlaw.com
Devin H. Gordon
Georgia Bar No.: 141256
dgordon@sgrlaw.com
Todd D. Williams
Georgia Bar No.: 142379
twilliams@sgrlaw.com

Attorneys for Plaintiff The National
Association of Boards of Pharmacy

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.)
_____)

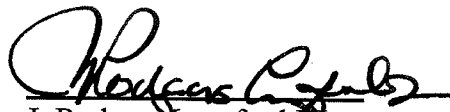
CIVIL ACTION NO.: 3:07-CV-84 (CDL)

FILED UNDER SEAL

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of August, 2007, the foregoing Plaintiff's Response to Defendants' Special Limited Appearance Motion to Vacate Temporary Restraining Order and for Return of Seized Materials ("Pleading") 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 attorney of record:

Alan E. Lubel
TROUTMAN SANDERS, LLP
600 Peachtree Street, Suite 5200
Atlanta, Georgia 30308
Attorney for Defendants



J. Rodgers Lunsford III
Ga. Bar No. 461200
Counsel for Plaintiff