

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

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CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY  DEPUTY

THE ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS, INC.,
PLAINTIFF,

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V.

CIVIL NO. A-08-CV-675-LY

THE TEXAS MEDICAL BOARD, ET AL.,
DEFENDANTS.

ORDER DENYING MOTION TO STAY DISCOVERY

Before the Court in the above styled and numbered cause are Defendants the Texas Medical Board and its members' (collectively "the Board") Defendants' Motion To Stay Discovery filed July 6, 2011 (Clerk's Document No. 139) and Plaintiff The Association of American Physicians & Surgeons, Inc.'s (the "Association") response filed July 18, 2011 (Clerk's Document No. 141). The Board seeks a stay of all discovery pending this Court's resolution of the Board members' affirmative defenses of qualified immunity and resolution of the Board's pending motion to dismiss. The Association responds that a stay is unnecessary as qualified immunity is inapplicable because the Association seeks only declaratory and injunctive relief. Further in response, the Association contends that lacking is any support for a stay of discovery based solely on the Board's pending motion to dismiss.

The Association is a not-for-profit membership organization incorporated under the laws of Indiana and headquartered in Tucson, Arizona. Its membership includes thousands of physicians across the country. Part of the Association's mission is to protect its members from arbitrary and unlawful governmental action. The Board "is an agency of the executive branch of state government with the power to regulate the practice of medicine." Tex. Occ. Code Ann. § 152.001(a) (West Supp.

2010). The Board consists of nineteen members appointed by the governor—twelve physicians and seven members of the public. *Id.* § 152.002(a) (West 2004). The Board has statutory authority to discipline physicians for misconduct. *See e.g., id.* § 164.001 (West Supp. 2010).

The Association commenced this action against the Board on behalf of its members for what it describes as the Board's pervasive and continuing violations of the Association members' constitutional rights. At the time the action was filed, Dr. Roberta Kalafut was the Board's president and Lawrence Anderson was chair of the Disciplinary Process Review Committee ("Committee"). The other named and unnamed defendants were Board members and employees. The Board moved to dismiss this action contending that the Association lacked standing to sue the Board on behalf of the Association's members. This Court agreed with the Board and dismissed the cause. On appeal, the United States Court of Appeals for the Fifth Circuit vacated this Court's decision, held that the Association had standing to assert claims on behalf of its members, and remanded the action to this Court for further proceedings. *Association Am. Phys. & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547 (5th Cir. 2010).

Following remand and by its Amended Complaint, the Association alleges that the Board violated several federal constitutional rights of the Association's members (Clerk's Document No. 141).¹ The Association alleges that the Board manipulated anonymous and confidential complaints about some Texas physicians. Specifically, the Association alleges that Kalafut targeted her competing physicians by arranging for another individual to file anonymous or confidential

¹ Upon remand, the Court rendered a new Scheduling Order, which provides the parties the opportunity to amend their pleadings, sets new discovery and dispositive-motion deadlines, and sets a final pretrial conference and jury trial (Clerk's Document No. 129).

complaints against her competitors. Then, Kalafut worked with other Board members to discipline Kalafut's competitor physicians based on the anonymous or confidential complaints.²

Additionally, the Association alleges that the former chairman of the Committee, Keith Miller, was operating with a significant conflict of interest but the Board took no corrective action and failed to disclose the conflict to the public or to the physicians subject to discipline by the Committee. Specifically, the Association alleges that Miller served as a plaintiff's expert witness in as many as fifty malpractice cases during his tenure as chair of the Committee and thus, generated business for himself as an expert by improperly disciplining physicians. The Association contends that Defendants John Does at the Board had knowledge and were complicit with Miller's actions.³ Additionally, the Association alleges that while Miller served the Board, he also served on behalf of Blue Cross Blue Shield, an insurance company that had financial interests often in conflict with the interests of patients and physicians.

Finally, the Association alleges that its members have expressed criticism of the Board in the media and on the internet. The Association also alleges that the Board closely monitors the media to see whom of the Association members are criticizing the Board. The Association alleges that the Board has retaliated with disciplinary procedures against physicians who have expressed criticism of

² The Amended Complaint also alleges that a member physician of the Association was the subject of an anonymous or confidential complaint concerning his treatment of five patients from New York City, each whom was pleased with the physician's treatment they received. The Association alleges that this complaint was orchestrated by an insurance company that did not want to reimburse the five patients for the expenses each incurred by the member's treatment.

³ The Amended Complaint also alleges that Miller falsely stated that a member physician of the Association had killed a patient. That false statement led to a malpractice case against the member, and the judge in that malpractice case ultimately held, after much harm to the physician, that the malpractice suit was frivolous.

the Board. With regard to one member physician who had been critical of the Board and had moved from Texas to another state, the Association alleges that Kalafut, on behalf of the Board, improperly declared to a newspaper that it was unsafe for that member to practice medicine.

The Association alleges three claims, each contending that the Board violated the Association members' constitutional rights, and seeks declaratory and injunctive relief. *See* 42 U.S.C. § 1983. Specifically, the Association alleges that the Board's abuse of several anonymous or confidential complaints, the Board's allowance of Miller's conflict of interest, and the Board's retaliation, which has chilled the free speech rights of Association members, has violated its members constitutional rights by impairing the liberty interests in the members' reputation, their property interests in medical licensing, and their economic well-being.

The Association seeks an injunction preventing the Board from processing anonymous complaints, compelling the Board to provide a copy of the complaint to the accused physician, without redaction, so that the physician may properly defend against it, and preventing the Board members from using anonymous or confidential complaints to harass and intimidate their physician competitors. The Association also seeks a declaratory judgment that the anonymous and confidential complaints, as used by the Board, violate the Confrontation Clause of the Sixth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. With regard to the Association's conflict-of-interest claims, the Association seeks an injunction against all conflicts of interest by Board members with respect to physicians being subjected to discipline by the Board. Further the Association seeks declaratory judgments that the conflicts of interests allowed by the Board violated the Association members' Due Process Clause rights under the Fourteenth Amendment and that the Board reopen and reconsider all matters and actions in which Miller

participated. Finally, with regard to the Association's alleged free speech violations, the Association seeks an injunction preventing the Board from retaliating against physicians for exercising their rights of free speech, and a declaratory judgment that the retaliation by the Board, based on speech by physicians, is unconstitutional.

The Board now requests this Court stay all discovery in this cause pending resolution of the individual Board members' qualified immunity. Additionally, the Board requests that in the interest of judicial economy, and as the Amended Complaint is "so lacking in factual specificity that it does not even identify the [Association] members whose individual situations purportedly give rise to [the Association's] associational standing, and the allegations are so general and nonspecific that they fail to state any legally cognizable claim", the Court stay discovery pending resolution of the Board's motion to dismiss. The Association responds that qualified immunity is inapplicable and that there is no reason to stay discovery as the disputes in this cause turn on issues of fact.

In reviewing the Amended Complaint, the Court finds that the Association seeks only declaratory and injunctive relief, no damages; therefore, qualified immunity is inapplicable. *See Mayfield v. Texas Dep't of Crim. Justice*, 529 F.3d 599, 606 (5th Cir. 2008) ("Neither sovereign nor qualified immunity prevent [the plaintiff] from pursuing declaratory and injunctive relief against the state officials."). Additionally, the Circuit by its opinion remanding this action to this Court, particularly with regard to holding that the Association has standing to bring claims on behalf of its members, the Circuit wrote that, "we accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party, but we express no opinion on whether [the Association] will ultimately be able to prove its rather dramatic claims." *Association of Am. Phys. & Surgeons v. Texas Med. Bd.*, 627 F.3d at 553 (citation and quotations omitted).

Having considered the case file, the Circuit's holding, which was based on the original Complaint and which this Court finds to be substantially similar to the now live Amended Complaint, the Court will deny the Board's request to stay discovery until resolution of the Board's motion to dismiss.

IT IS ORDERED that the Board's Defendants' Motion To Stay Discovery filed July 6, 2011 (Clerk's Document No. 139) is **DENIED**.

Signed this 27th day of July, 2011.



LEE YEAKEL
UNITED STATES DISTRICT JUDGE