

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

INSTITUTE FOR CREATION	§	
RESEARCH GRADUATE SCHOOL,	§	
Plaintiff,	§	
	§	
v.	§	CAUSE NO. A:09 CA 382
	§	
TEXAS HIGHER EDUCATION	§	
COORDINATING BOARD, a state	§	
agency; <i>et al</i>	§	

**DEFENDANTS' OBJECTION, ASSERTION OF AFFIRMATIVE DEFENSES
AND ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT**

TO THE HONORABLE SAM SPARKS, UNITED STATES DISTRICT COURT JUDGE:

Defendants Texas Higher Education Coordinating Board, Commissioner Raymund Paredes, and Board members Lyn Bracewell Phillips, Joe B. Hinton, Elaine Mendoza, Laurie Bricker, A.W. "Whit" Riter, III, Brenda Pejovich and Robert Shepard ("Defendants") file this Answer and Affirmative Defenses to Plaintiffs' Second Amended Complaint.

OBJECTION

On July 29, 2009, the Court ordered Plaintiff to amend its complaint to comply with the Federal Rules of Civil Procedure. The Plaintiffs' second amended complaint fails to comply with the Rules and the Court's order. Specifically, the complaint is replete with argument but contains very few factual allegations to which Defendants can respond. More specifically, the complaint contains no allegations regarding the use of any standards the Defendants allegedly misapplied to deny Plaintiffs a certificate of authority, no facts regarding the alleged "unbalanced panel" the Defendants allegedly,

illegally appointed, and no facts regarding how the State of Texas's accreditation system amounts to an unconstitutional monopoly. Defendants therefore object to Plaintiffs' Second Amended Complaint. Subject to this objection, Defendants assert the following affirmative defenses.

ASSERTION OF AFFIRMATIVE DEFENSES

Pleading further, Defendants hereby assert the following affirmative defenses to which they may be entitled:

1. The defense of sovereign immunity from all claims against Texas Higher Education Coordinating Board;
2. The individual Defendants assert the defense of sovereign immunity as to all of Plaintiffs' claims against them in their official capacities;
3. The applicable statute of limitations to any claim made outside the limitations period;
4. Plaintiff has failed to exhaust its administrative remedies;
5. This court lacks jurisdiction over Plaintiffs' claims; and
6. At all times relevant to this cause, Defendants' actions were reasonable and proper under the laws of the United States and the State of Texas.

Defendants reserve the right to raise additional affirmative defenses as they become apparent during the development of the case.

DEFENDANTS' ANSWER SUBJECT TO AFFIRMATIVE DEFENSES

Pursuant to Federal Rule of Civil Procedure 8(b), Defendants deny each and every allegation contained in Plaintiff's Second Amended Complaint except for those expressly admitted. In several instances, the Defendants have identified statements in the

complaint that are legal conclusions or non-factual statements rather than factual assertions. No response to these legal conclusions or non-factual statements is required. Similarly, Plaintiff has incorporated by reference its Original Petition filed in the state district court of Travis County, Texas before this action was removed to this court, as well as its pleadings in the administrative proceeding pending before the State Office of Administrative Hearings (“SOAH”). Second Amended Complaint at 2, ¶ 3 (Doc. # 26). No response to either of these documents is required. However, if responses are required, Defendants deny the legal conclusions, non-factual statements, and all assertions contained in the Original Petition and SOAH pleadings. These numbered paragraphs and titles correspond to the paragraphs and titles within the body of Plaintiff’s Second Amended Complaint.

I. INTRODUCTION, JURISDICTION, PARTIES, VENUE, etc.

1. Admit.
2. Defendants deny the assertion that they have waived their sovereign immunity to any claims stated herein. The remaining averments contained in this paragraph are argument, to which no response is required.
3. The averments in this paragraph are not factual and thus, no response is required. To the extent a response is required to any factual averments contained in either incorporated pleadings, Defendants deny those assertions.
4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments contained in this paragraph.
5. Admit.
6. Admit.

7. The averment in this paragraph is a legal conclusion to which no response is required.

II. COMMON NUCLEUS OF FACTS RELATED TO LEGAL CLAIMS

8. Admit that the controversy that serves as the basis for this lawsuit is the denial of Plaintiff's application for a certificate of authority to offer a Master of Science Education degree in Texas. Defendants deny the remaining averments in this paragraph.

9. Defendants admit that the Board voted on Plaintiff's application for a certificate of authority on April 24, 2008, but deny the remaining averments in this paragraph.

10. Deny.

11. Deny.

12. Deny.

13. Admit.

14. The averments contained in this paragraph are either argument or legal conclusions to which no response is required. In the event a response is required, Defendants deny the assertions contained in this paragraph.

15. The averments contained in this paragraph are either argument or legal conclusions to which no response is required. In the event a response is required, Defendants deny the assertions contained in this paragraph.

16. Deny.

17. Deny.

18. Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual averments regarding Plaintiff's conclusion contained in this paragraph. Defendants deny the remaining averments contained in this paragraph.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the factual averments contained in this paragraph.

20. The averments contained in this paragraph are argument to which no response is required. To the extent this paragraph contains factual averments, Defendants are without knowledge or information sufficient to form a belief as to their truth.

21. Defendants deny the factual averments contained in this paragraph. The remaining averments in this paragraph are either argument or legal conclusions to which no response is required.

22. The averments in this paragraph are argument to which no response is required. In the event this paragraph contains factual allegations, Defendants deny those allegations.

23. Deny.

24. Deny.

25. Defendants are without knowledge or information sufficient to form a belief as to the truth regarding Plaintiff's beliefs.

26. Deny.

27. Defendants admit that Plaintiff claims certain of its rights were violated and seeks declaratory relief. The remaining averments in this paragraph are argument to which no response is required. In the event the argumentative statements contain factual allegations, Defendants deny those allegations.

28. Deny.

29. Defendants admit that Plaintiff claims they "interfered with [its] institutional academic freedom" but denies that claim. The remaining averments in this paragraph are

argument to which no response is required. In the event the argumentative statements contain factual allegations, Defendants deny those allegations.

30. Defendants admit that Plaintiff makes certain claims as alleged in this paragraph, but deny those claims. The remaining averments in this paragraph are argument to which no response is required. In the event the argumentative statements contain factual allegations, Defendants deny those allegations.

31. Defendants admit that Plaintiff claims they “committed viewpoint discrimination”, but denies those claims. The remaining averments in this paragraph are argument to which no response is required. In the event the argumentative statements contain factual allegations, Defendants deny those allegations.

32. The averments in this paragraph are argument to which no response is required. In the event the argumentative statements contain factual allegations, Defendants deny those allegations.

33. Defendants admit that Plaintiff claims they violated the Texas Religious Freedom Restoration Act but deny that claim. The remaining averments in this paragraph are argument to which no response is required. In the event the argumentative statements contain factual allegations, Defendants deny those allegations.

34. Deny.

35. Deny.

36. Deny.

37. Deny.

38. Deny.

39. Deny.

III. SUBSTANTIVE FEDERAL & STATE LAW CLAIMS

40. Defendants admit Plaintiff has made claims pursuant to 42 U.S.C. § 1983. However, Defendants deny those claims as alleged in subparagraphs (a) through (c). Moreover, Defendants deny that Plaintiff is entitled to any relief under 42 U.S.C. § 1983.

41. Defendants admit that Plaintiff has made claims pursuant to the Texas Constitution, the Texas Government Code, and the Texas Civil Practices and Remedies Code. However, Defendants deny those claims as alleged in subparagraphs (a) through (f). Defendants deny that Plaintiff is entitled to any relief under the Texas Constitution or any state law.

IV. RELIEF REQUESTED

A. Defendants admit that Plaintiff seeks preliminary and permanent injunctive relief, but deny the Plaintiff's entitlement to any such relief.

B. Defendants admit that Plaintiff seeks declaratory relief under the Federal Declaratory Judgment Act, but deny the Plaintiff's entitlement to any such relief.

C. Defendants admit that Plaintiff seeks relief under the Texas Civil Practices and Remedies Code and/or the Texas Education Code, but deny Plaintiff's entitlement to any such relief.

D. Defendants admit that Plaintiff seeks costs of court, but deny Plaintiff's entitlement to any such relief.

E. Defendants admit that Plaintiff seeks other relief including attorney's fees, but deny Plaintiff's entitlement to any such relief.

DEFENDANTS' PRAYER

Defendants request that the Court enter a judgment that Plaintiff take nothing by this suit, that Plaintiff's claims be dismissed with prejudice, and that Defendants be granted such other and further relief to which it may show itself to be justly entitled.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

C. ANDREW WEBER
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

ROBERT O' KEEFE
Chief, General Litigation Division

/s/ Shelley Dahlberg
SHELLEY DAHLBERG
Texas Bar No. 24012491
Assistant Attorney General
General Litigation Division
Post Office Box 12548,
Capitol Station
Austin, Texas 78711-2548
(512) 463-2120 (Telephone)
(512) 320-0667 (Facsimile)

ATTORNEYS FOR DEFENDANTS

Certificate of Service

I certify that on the 17th day of August, 2009, I electronically filed with the Clerk of the Court using the CM/ECF system a copy of Defendants' Objection, Assertion of Affirmative Defenses and Answer to Plaintiffs' Second Amended Complaint, which will send notification of such filing to the following:

James J.S. Johnson
The Institute for Creation Research
1806 Royal Lane
Dallas, TX 75229

Notification of filing will be sent to the following via U.S. Mail Certified Return Receipt Requested first class mail:

John A. Eidsmoe
FOUNDATION FOR MORAL LAW
One Dexter Ave.
Montgomery, AL 36014

CMRRR# 7007 0710 0004 1936 2364

/s/ Shelley Dahlberg
SHELLEY DAHLBERG
Assistant Attorney General