IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

American Board of Internal Medicine *Plaintiff* **v.** **Jaime A. "Jimmy" Salas Rushford. M.D.** *Defendant*	Civil Action No. 14-cv-06428-KSH-CLW

DEFENDANT'S CONSOLIDATED REPLY TO PLAINTIFF & NONPARTY'S OPPOSITION TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS PURSUANT TO THE RULE 45 SUBPOENA (D.E. 78 & 79)

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To The Honorable Court:

COMES NOW Defendant, Counterclaim Plaintiff and Third-Party Plaintiff, Jaime A. "Jimmy" Salas Rushford, M.D. (hereinafter "Dr. Salas" and/or "Defendant"), and, through his undersigned counsel, submits his Reply on his Motion to Compel, in opposition to D.E. 78 & 79.

I. **Preliminary Statement**

The mere fact that parties to another case privately label an agreement to settle their case as confidential does not afford that settlement agreement a privilege or any other type of protection under any applicable law or public policy that could shield it from having to be produced in this subsequent case where the same Plaintiff is involved and a commonality of overlapping facts and issues is raised by said Plaintiff. Its discovery relevance in terms of Defendant's equitable defenses (e.g. *res judicata*, collateral estoppel, lack of tolling) and defenses at law (e.g. statute of limitations, innocent infringement, fair use, lack of copyrightability) is almost self-evident. Moreover, the documents sought are also clearly relevant to Defendant's counterclaims which Plaintiff has called compulsory precisely because of their overlapping facts and issues. Accordingly, the American Board of Internal Medicine's ("ABIM") and Dr. Rajender K. Arora's ("Dr. Arora") attempts to protect plainly discoverable documentation further highlight the protracted litigation strategy inexplicably implemented by the Plaintiff, ABIM. Again, let's not forget, this petition to compel the production of settlement documents and agreement is presented by the Defendant in this case.

Finally, the half-hearted opposition filed by Dr. Arora speaks for itself. It is filled with conclusory and self-serving statements, unsupported by a single citation or reference to rules or applicable case law. It seems painfully obvious that it is the product of a "joint defense" clause inserted in the same settlement agreement.

II. Statement of Pertinent Facts and Procedural History of this Reply

On March 10, 2016, Dr. Salas moved this Honorable Court to compel a nonparty deponent, Dr. Arora, to produce certain documents and records related to this case and related to another case that involved *American Board of Internal Medicine v. Rajender K. Arora*, No. 2:09-cv-05707-JCJ, in the United States District Court for the Eastern District of Pennsylvania (the "PA Case") in compliance with a subpoena *duces tecum* served upon him on October 16, 2015. See Docket Entry No. ("D.E.") 75 & 75-3. This request to compel was accompanied by the relevant evidence demonstrating the good faith efforts that Defendant attempted to obtain the requested documents, to no avail. On March 21, Dr. Arora and the plaintiff in this case ABIM, and third-party defendants Richard Baron, M.D., Christine K. Cassel, M.D., Lynn O. Langdon, Eric S. Holmboe, M.D., David L. Coleman, M.D., Joan M. Feldt, M.D., and Naomi P. O'Grady, M.D. (ABIM Individuals) (for ease of reference ABIM and the ABIM Individuals will be collectively referred to herein as "ABIM"), filed in tandem their oppositions to Defendant's motion to compel. D.E.'s 78 & 79, respectively.

Upon seeking leave to file a reply, D.E. 80, and being granted leave by the Court order entered on March 29 (D.E. 83), this Reply by Defendant promptly follows.

III. Argument

A. Standard Applicable to the Discovery of Settlement Agreements and Their Preliminary Communications

There is no need to repeat at length what it is clear by the pertinent rules to this simple controversy. The Federal Rules of Civil Procedure allow for broad discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense …." Fed.R.Civ.P. 26(b)(1) (emphasis added). Fed.R.Civ.P. 45, on the other hand, authorizes the same broad discovery from a nonparty that may be attained from a party. Discovery of documents from a nonparty may be

achieved under Rule 45. See Fed.R.Civ.P. 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection."). Despite Plaintiff's rhetorical couching of its argument on relevance, its attempt and Dr. Arora's to avoid producing the requested documents are, *per se*, clear demonstration that what Defendant pursues is relevant to his counterclaim and defenses. Otherwise, if everything pertaining to that settlement agreement is part of public records as they purport it to be, then there should be no qualms or concerns in producing it to this party.

To that effect, Fed.R.Evid. 401 establishes that evidence is relevant if: **(a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the action. And, of course, discovery relevance is necessarily much broader than trial relevance. This is why Federal Civil Rule 26(b)(1) also states that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." F.R.Civ.P. 26(b)(1).

Meanwhile, the Third Circuit does not recognize a settlement privilege to the agreement itself or to the communications related to a settlement negotiation. Settlement agreements themselves are subject to the rules applicable to any other document. In particular, with regard to the estoppel defense, as we explained in our pending 12(c) Motion to Dismiss, the preclusive effect of a settlement agreement "should be measured by the intent of the parties." 18A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* §4443 (2d ed. 2002); *Arizona v. California*, 530 U.S. 392, 414 (2000). And the fact that the parties to both litigations are not the same should not make a difference if the issues raised have been litigated or settled. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-31 (1979).

However, this District of the Third Circuit has on a very limited basis considered settlement

negotiation documents (not the agreement itself) to be irrelevant under Fed.R.Civ.P. 26(b)(2) only after careful review *in camera*. See *Ford Motor Co. v. Edgewood Properties, Inc*., 257 F.R.D. 418 (D.N.J. May 19, 2009). It is that individualized review by the Court, not a blanket determination by the party or parties refusing to comply, that may exclude some documents (not the agreement itself) if the party seeking them cannot make a heightened particularized showing of relevance. See *Lesal Interiors v. Resolution Trust Corp.*, 153 F.R.D. 552 (D.N.J.1994). In *Lesal*, Judge Rosen recognized the inherent tension between Fed.R.Evid. 408, which prohibits the use of settlement discussions to prove liability, and Rule 26, which permits liberal discovery. Judge Rosen harmonized the two competing rationales behind the rules by requiring the moving party to make a "particularized showing that the evidence sought is relevant and calculated to lead to the discovery of admissible evidence." *Id*. at 562.

B. ABIM and Dr. Arora Frivolously Protect and Refuse to Produce the Relevant and Requested Documents including the Settlement Agreement of the District of Pennsylvania Case

Plaintiff's case, as stated by ABIM, pertains to a one count claim of direct copyright infringement. (We argued in our 12(c) Motion, as held by the Supreme Court, at least for purposes of statute of limitations, but probably for all purposes, that Plaintiff's case is in fact about several separate claims of copyright infringement. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014).) Furthermore, Defendant has availed himself of several substantive affirmative defenses. Among them, ABIM's inability to pursue their otherwise invalid claim because of statute of limitations, and the copyright fair use doctrine. See D.E. 33 at p. 8-9. Meanwhile, in the Complaint, ABIM portrays what seems akin to a criminal enterprise between Dr. Arora and Defendant. For example, paragraphs 31 through 50 of the Complaint appear under the heading of "Dr. Salas Unlawful Conduct" and conclude making specific reference to the PA Case between

ABIM and Dr. Arora. In particular, at paragraph 50 ABIM states that it diligently investigated Dr. Arora's correspondence whilst it has been Dr. Salas's contention that that is not the case. Thus, the statute of limitation defense and the Motion to Dismiss filed by Dr. Salas to compel production of the settlement agreement. *See* D.E. 76.

Meanwhile, it is indisputable that the PA Case is the source of the current case filed by ABIM against Dr. Salas. That is, this case at bar would not exist if the other had never occurred. Plaintiff states that it learned of all the issues in its claims in this case from its seizure of Dr. Arora's materials in the PA Case. That reason by itself is enough to show that the evidence sought by Dr. Salas is relevant and calculated to lead to the discovery of additional admissible evidence such as, and among other important and relevant subjects, Dr. Arora's alleged infringement on ABIM's copyrights by communicating test questions to students, and if the settlement contains representations and releases with respect to ABIM's claims of infringement concerning that course.

Contrary to what was the situation in *Lesal*, Defendant's interest in the settlement documents and agreement between ABIM and Dr. Arora are not related solely to proving the liability of Plaintiff, which could create other tensions. They are relevant and discoverable for other matters.

The representations, releases, and timing of the settlement between ABIM and Dr. Arora are discoverable and ABIM's voluntary admissions are admissible, and may bar ABIM's copyright claim in this action against Dr. Salas as a student in Dr. Arora's course. ABIM does not allege here that Dr. Salas copied any questions based on his own taking of an ABIM examination, yet the opposition filings by ABIM and Dr. Arora obscure that basic point and create a misleading impression that ABIM's case against Dr. Arora was somehow unrelated to ABIM's case against Dr. Salas here. To the contrary, the case here by ABIM against Dr. Salas is directly linked to

ABIM's case against Dr. Arora, and the resolution of that case may operate as issue preclusion and collateral estoppel for the benefit of Dr. Salas here, who was in privity with Dr. Arora as his student. After all, as is alleged by ABIM in the Complaint, as a result of Plaintiff's settlement with Dr. Arora, the latter is now barred from ever offering live test-prep courses. *See* D.E. 1 at ¶ 49.

Moreover, while Dr. Arora's response tries to portray himself as though he is merely an innocent bystander, the undisputed fact is that every year he charged hundreds of dollars to hundreds of student for a course that lasted 4-5 days, and where he profited immensely from those fees and it was his conduct in teaching the course that subjected Dr. Salas, as merely a student earning no profits but preparing earnestly for his examination for certification, to this lawsuit here. If Dr. Arora is as innocent and he has always claimed publicly that he is, his refusal to produce his copy of the settlement agreement with ABIM is simply incomprehensible but the agreement could serve to help prove Defendant's defense of collateral estoppel, among others. If, on the other hand, the settlement agreement reveals that Dr. Arora admits his infringement, then it may serve to help prove several of Defendant's affirmative defenses, like innocent infringement and fair use. As for the other documents, they might help with any or all of these defenses but will probably particularly help with the defense of statute of limitations, by helping to show Plaintiff's lack of diligence in pursuing its frivolous claims against Dr. Salas.

IV. Conclusion

For the foregoing reasons, Defendant Salas respectfully renews his request that his motion to compel Dr. Arora to produce documents pursuant to the Rule 45 Subpoena be granted despite ABIM's and Dr. Arora's opposition, and that the Court order reimbursement of Defendant Salas's costs and attorneys' fees that he incurred in preparing and presenting the motion to compel and this reply.

Dated: March 30, 2016

Respectfully submitted,

s/ Andrew L. Schlafly
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CERTIFICATE OF SERVICE

I, Andrew L. Schlafly, counsel for Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff Jaime Salas Rushford, M.D., do certify that on March 30, 2016, I electronically filed the foregoing Defendant's Consolidated Reply to Plaintiff & Nonparty's Opposition to Motion to Compel Production of Documents Pursuant to the Rule 45 Subpoena (D.E. 78 & 79) using the Electronic Case Filing system, which I understand to have caused electronic service on all the parties. In addition, on this day I also sent an electronic copy of these same documents to counsel for Dr. Arora at mmiller@cozen.com, and sent a hard-copy with a commercial carrier for delivery on the next business day to his counsel at:

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