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April 4, 2016

VIA ECF

The Honorable Cathy L. Waldor
U.S. Magistrate Judge, District of N.J.
Courtroom 4C
Martin Luther King Building
& U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

**Re: *American Board of Internal Medicine v. Dr. Jaime A. Salas Rushford*,
2:14-cv-06428-KSH-CLW**

Dear Judge Waldor,

This attorney, together with *pro hac vice* counsels Guillermo L. Mena-Irizarry, Dora L. Monserrate-Penagaricano and Antonio Valiente, represents Defendant, Counterclaim Plaintiff and Third-Party Plaintiff Jaime A. Salas Rushford, M.D. (“Dr. Salas” and/or “Defendant”) in the foregoing matter. This letter is in response to the general letter dated March 28 submitted by Plaintiff, Counterclaim Defendant American Board of Internal Medicine (“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”). See Docket Entry Number (“D.E.”) 82. We recognize that the Honorable Court already has before it sufficient evidence and information so as to grant us leave to file our requested motion to compel against ABIM. Still we deem necessary to clarify various aspects erroneously stated by ABIM at D.E. 82 that require correction for the record, and will not take one sentence more than what is strictly necessary.

First, ABIM alleges that Defendant has written more than 64 pages on discovery issues while complaining that when submitting our request we failed to include their responses to those letters. If Defendant’s correspondence had such voluminous amount of pages it was due to a couple of factors. One, and very simply, Dr. Salas was forced to address the non-compliance and non-responses to applicable discovery rules by ABIM. Two, because to simplify the tasks of all involved, including ABIM, Dr. Salas invested the time and effort to include in each letter addressed to Plaintiff

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the original interrogatory, request for admission or request for production, the response given in each, and the objection to each individual response. With regards to ABIM's purported response letters, we invite them and welcome their filing by ABIM. They were not included as ABIM continuously chose to ignore Defendant's repeated requests for ABIM to comply with the applicable discovery rules. Upon ABIM filing them, as we certainly invite them to do, the Court will probably find this point to be proven.

Second, ABIM alleges to have produced over 2,400 pages. Nevertheless, about one third of said production consists of returned copies of what Dr. Salas had previously produced to ABIM. Of the remaining two thirds, over 90 percent are pages redacted in such manner that renders them untrustworthy, illegible and/or useless, which carry no indicia of authenticity, are probably inadmissible and are certainly no basis upon which to pursue any further reliable discovery. And, most of the remaining 10 percent is not identified or indexed to link it as responding meaningfully to a particular request. This is particularly true of the "Work for Hire" agreements. ABIM's entire production is but a mockery to the requested production of documents.

Third, in a fanciful way of wording, ABIM continues to assert that it is not required to produce the full and complete works (examinations) that it alleges that it has copyrighted and that it alleges Defendant infringed its copyrights over. However, the entire copyrighted works are needed for defenses relating to authenticity, fair use, merger, copyrightability in general, and authorship and ownership, among others. This bears more significance when one considers that ABIM has represented to us verbally that it will only pursue statutory damages while it has yet to amend their Complaint to that effect. It seems frankly inconceivable that any plaintiff could prove a copyright infringement claim without producing and admitting into evidence a copy of the actual copyrighted work. How else can the jury compare the original to the alleged unauthorized copies? Furthermore, Dr. Salas also has a right to a copy of the entire examination he took and approved in August 2009 in order to also prove his counterclaims and third-party complaint and give the jury the entire picture of the nature of the injury ultimately caused to him by ABIM.

Fourth, and pertaining the Arora Settlement Agreement, it has to be clarified that the fact that it is also being requested from the non-party deponent, Dr. Arora, does not in any way mean that Defendant has waived, altered or precluded his request for the same document made to Plaintiff. In fact, considering that the document is secret and that apparently only two copies exist and given the intransigence of both holders of copies to produce them, Defendant respectfully suggests and requests that the Court order the deposit of copies under seal at the Court so as to avoid any further possibility that the finally produced documents may be altered versions.

Fifth, regarding the document entitled ABIM Policies and Procedures for Certification, the edition produced by Plaintiff is not the edition that was requested by Defendant, and this pertains to the copyright defense of acquiescence or implied authorization and to the counterclaim and third-party complaint filed by Dr. Salas, in particular to the repeated and consistently objected application of the wrong rules (wrong contract) to Dr. Salas. The Court has ruled repeatedly in this case that the

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filing of a motion to dismiss does not interrupt discovery. We merely request that the Court does not countenance ABIM's obviously dilatory tactics which it clearly uses to avoid having to comply with that ruling which it had originally requested when it was to be used against us.

Sixth, Dr. Salas has a right to all the documents pertaining to the Arora Board Review and to other test-prep companies that ABIM compiled as part of its seizure and investigations because in many cases ABIM took and did not return the only existing copy of many documents and the documents are very likely to aid in the defense of educational fair use and in the counterclaims Defendant has presented, or at least to lead to other documents or discovery that may do so. These documents are varied in nature and will probably lead to evidence regarding implied authorization, acquiescence, lack of good faith in contract interpretation, educational fair use, lack of copyrightability/public domain, merger and selective discriminatory persecution, among others.

Seventh, what ABIM now claims to be irrelevant are documents that ABIM directly references in its own Complaint against Dr. Salas, such as the ABIM examinations themselves (§§ 28, 52), the Arora Settlement Agreement (§ 49), and ABIM's work-for-hire agreements with others to develop exam questions (§§ 23, 28). ABIM also alleges at length that its examinations are trustworthy assessments of the level of quality of a physician (§§ 8-11), yet ABIM withholds from discovery demographic performance data by gender that would undermine ABIM's repeated allegations of examination validity that ABIM emphasized in its own Complaint. A defendant has the right to obtain discovery that tends to disprove a plaintiff's allegations, and ABIM should not be allowed to maintain its allegations in this Court on which it withholds discovery. Relevancy is determined based on ABIM's own allegations, and Dr. Salas's discovery requests are clearly relevant to the allegations.

Eighth, and to highlight what has been ABIM's non-compliance with the discovery rules, only now, about five (5) months after being required to produce, does it say that it will finally provide copies of documents long-ago requested such as applicable insurance coverages and some transcripts or notes in its possession from when its agents attended the Arora Course. The completeness of that production remains to be seen.

Last, but not least, regarding the lack of agreement on a protective order that ABIM says has barred its compliance with certain unspecified discovery, Defendant will certainly not agree to any blanket protective order for discovery as Plaintiff proposes. Defendant has a general right to a public trial process. Secrecy is only warranted in very specific and narrowly tailored instances and should only be applicable to documents whose exact nature has been previously disclosed along with valid reasons for the requested secrecy as to each one. We realize that ABIM would rather not reveal its true nature publicly, but Defendant will not be complicit in ABIM's hoodwinking of the American public and wool-pulling over the medical profession.

Thank you for Your Honor's kind attention to these matters. Based on the reasons set forth above, Defendant respectfully requests of this Court to be permitted to file a motion to compel

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ABIM to be responsive to Defendant's interrogatory, request for admissions and to produce the requested documents and materials. We are also available at the Court's convenience should Your Honor wish to discuss these matters.

Sincerely,

/s/ Andrew L. Schlafly

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cc: Roberto Rivera-Soto, Esq. (counsel for ABIM, via ECF)